

# Texas Historical Statutes Project

VERNON'S SAYLES'  
ANNOTATED CIVIL STATUTES 1914  
VOLUME 4

Annotated Civil Statutes (Articles 5475 to End)



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VERNON'S SAYLES'

ANNOTATED CIVIL STATUTES OF  
THE STATE OF TEXAS

WITH HISTORICAL NOTES

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

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

IN FIVE VOLUMES

VOLUME 4

KANSAS CITY, MO.  
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# TABLE OF TITLES AND CHAPTERS

IN

## VOLUME 4

Title	Page	Articles
80. Landlord and Tenant.....	3628	5475 to 5491
81. Laws .....	3654	5492 to 5504
Ch. 1. Common Law.....	3654	5492, 5493
2. Special Laws.....	3655	5494 to 5501
3. Construction of Laws.....	3656	5502 to 5504
82. Legislature .....	3668	5505 to 5524
Ch. 1. Time of Meeting .....	3668	5505
2. Organization .....	3668	5506 to 5516
3. Investigating Committees—Procedure.....	3669	5517 to 5524
83. Levees, Improvement Districts and Seawalls.....	3673	5525 to 5594
Ch. 1. State Reclamation Engineer.....	3673	5525 to 5529j
2. Improvement Districts.....	3676	5530 to 5584
3. Seawalls .....	3690	5585 to 5594
84. Libel .....	3694	5595 to 5598
85. Library and Historical Commission.....	3701	5599 to 5609a
86. Liens .....	3705	5610 to 5671
Ch. 1. Judgment Liens.....	3705	5610 to 5620
2. Mechanics, Contractors, Builders and Material Men.....	3710	5621 to 5639
3. Liens of Railroad Laborers.....	3727	5640 to 5643
4. Liens of Accountants, Book-Keepers, Artisans, Craftsmen, Factory Operatives, Mill Operatives, Servants, Mechanics, Quarrymen, Common Laborers and Farm Hands.....	3729	5644 to 5649
5. Liens on Domestic Vessels .....	3732	5650, 5651
6. Lien—Live Stock.....	3732	5652, 5653
7. Chattel Mortgages.....	3733	5654 to 5662
8. Other Liens.....	3749	5663 to 5671
87. Limitations .....	3770	5672 to 5714
Ch. 1. Limitation of Actions for Lands.....	3770	5672 to 5684
2. Limitation of Personal Actions.....	3812	5685 to 5700
3. General Provisions.....	3830	5701 to 5714
88. Local Option.....	3862	5715 to 5730
89. Mandamus .....	3883	5731, 5732
90. Medicine—Practice of.....	3891	5733 to 5763
Ch. 1. Physicians and Surgeons.....	3891	5733 to 5747
2. Nurses .....	3898	5748 to 5755
3. Anatomical Board.....	3900	5756 to 5763
91. Militia .....	3904	5764 to 5893
Ch. 1. General Provisions.....	3904	5764 to 5767
2. Reserve Militia.....	3905	5768 to 5777
3. National Guard.....	3908	5778 to 5893
92. Mill Products.....	3941	5894 to 5903b
93. Mines and Mining.....	3945	5904 to 5946i
Ch. 1. Mining Claims, Permits and Leases.....	3945	5904 to 5922
2. State Mining Board and Coal Mining Regulations .....	3957	5923 to 5946i
94. Minors .....	3964	5947 to 5950
95. Name—Change of.....	3970	5951 to 5954
96. Navigation District.....	3971	5955 to 6001
97. Notaries Public.....	3983	6002 to 6016
98. Officers—Removal of.....	3987	6017 to 6077
Ch. 1. Removal of State and Certain District Officers .....	3987	6017 to 6027
2. Removal of County and Certain District Officers .....	3988	6028 to 6057
3. Removal of Certain Other Officers.....	3993	6058 to 6064
4. Removal of Mayors and Aldermen.....	3994	6065 to 6073
5. Removal of Officers Guilty of Nepotism.....	3995	6074 to 6077

Title	Page	Articles
99. Official Bonds.....	3997	6078 to 6085
Ch. 1. The Record of Official Bonds and the Relief of Sureties Thereon.....	3997	6078 to 6082
2. Of Obtaining New Sureties on Official Bonds..	3998	6083 to 6085
100. Pardon Advisers—Board of.....	3999	6086 to 6095j
Ch. 1. Powers and Duties of Board.....	3999	6086 to 6088
2. Paroles, Suspended and Indeterminate Sen- tences, Etc.....	4000	6088a to 6095j
101. Partition .....	4007	6096 to 6125
Ch. 1. Partition of Real Estate.....	4007	6096 to 6115
2. Partition of Personal Property.....	4020	6116 to 6121
3. Miscellaneous Provisions.....	4021	6122 to 6125
102. Partnerships and Joint Stock Companies.....	4024	6126 to 6154
Ch. 1. Partnerships—Limited .....	4024	6126 to 6148
2. Unincorporated Joint Stock Companies—Per- mitting Suit in Company Name.....	4042	6149 to 6154
103. Pawnbrokers .....	4045	6155 to 6171
104. Penitentiaries and Convicts.....	4048	6172 to 6256
Ch. 1. System of Prison Government.....	4048	6172 to 6200
2. Prison Regulations and Discipline.....	4055	6201 to 6231
3. Workhouses and County Convicts.....	4063	6232 to 6248
4. Hiring County Convicts.....	4065	6249 to 6256
105. Pensions .....	4068	6257 to 6285
Ch. 1. Veterans of Mexican War.....	4068	6257 to 6266
2. Confederate Soldiers and Sailors.....	4070	6267 to 6285
106. Pharmacy .....	4077	6286 to 6298
107. Pilots .....	4082	6299 to 6319
Ch. 1. Commissioners of Pilots.....	4082	6299 to 6304
2. Branch Pilots and Pilots for Mouth of Brazos River and Matagorda and Lavaca Bays... ..	4083	6305 to 6319
107a. Pool Halls.....	4087	6319a to 6319n
108. Prairie Dogs—Providing for the Extermination of.....	4091	6320 to 6328
109. Principal and Surety.....	4093	6329 to 6337
110. Printing—Public .....	4111	6338 to 6370d
111. Property—Stolen .....	4120	6371, 6372
112. Property—State's Personal—Preservation of.....	4121	6373 to 6379
113. Public Buildings, Grounds and Parks.....	4124	6380 to 6397f
Ch. 1. Public Buildings and Grounds.....	4124	6380 to 6394
2. State Inspector of Masonry, Public Buildings and Works.....	4127	6394a to 6394e
3. Contractors' Bonds to Secure Laborers and Materialmen .....	4128	6394f to 6394j
4. San Jacinto State Park.....	4130	6395 to 6397
5. Gonzales State Park.....	4131	6397a to 6397f
114. Quo Warranto.....	4133	6398 to 6404
115. Railroads .....	4137	6405 to 6753
Ch. 1. Incorporation of Railroad Companies.....	4137	6405 to 6416
2. Amending or Changing Charter.....	4140	6417 to 6422
3. Public Offices and Books.....	4141	6423 to 6437
4. Officers of Railroad Corporations.....	4146	6438 to 6449
5. By-Laws .....	4148	6450 to 6452
6. Stock and Stockholders.....	4148	6453 to 6471
7. Meetings of Directors and Stockholders.....	4151	6472 to 6480
8. Right of Way.....	4152	6481 to 6534
9. Other Rights of Railroad Corporations.....	4185	6535 to 6548
10. Restrictions Upon, Duties and Liabilities of Railroad Corporations.....	4189	6549 to 6618
11. Collection of Debts From Railroad Corporations	4263	6619 to 6632
12. Forfeiture of Charter.....	4268	6633 to 6636
13. Ticket Agents—Authority and Duty.....	4271	6637 to 6639
14. Liable for Injuries to Employés.....	4272	6640 to 6652
15. Railroad Commission of Texas.....	4343	6653 to 6716
16. Issuance of Stocks and Bonds Regulated....	4378	6717 to 6732
17. Interurban Railroad Companies.....	4383	6733 to 6741
18. Street Railroads.....	4386	6742 to 6745
18a. State Railroad.....	4390	6745a to 6745f
19. General Provisions.....	4391	6746 to 6753

TABLE OF TITLES AND CHAPTERS

v

Title	Page	Articles
116. Rangers—State .....	4394	6754 to 6766
117. Records .....	4396	6767 to 6785
Ch. 1. Transcribing Old Records.....	4396	6767 to 6777
2. Supplying Lost Records, Etc.....	4398	6778 to 6785
118. Registration .....	4401	6786 to 6858
Ch. 1. Recorders and Their Duties.....	4401	6786 to 6796
2. Acknowledgment and Proof of Deeds, Etc., for Record .....	4403	6797 to 6820
3. Instruments Authorized to be Recorded, and the Effect of Recording.....	4418	6821 to 6842
4. Registration of Separate Property of Married Women .....	4450	6843 to 6848
5. General Provisions.....	4451	6849 to 6858
119. Roads, Bridges and Ferries.....	4456	6859 to 7046
Ch. 1. Establishment of Public Roads.....	4456	6859 to 6904
2. Appointment of Overseers.....	4472	6905 to 6918
3. Persons Liable to Work on Roads, and Their Rights and Duties.....	4473	6919 to 6926
4. Powers and Duties of Overseers.....	4474	6927 to 6945
5. Road Commissioners.....	4477	6946 to 6952
6. Road Superintendents.....	4479	6953 to 6976
7. Road Law for Counties Having Forty Thou- sand Inhabitants or Over.....	4484	6977 to 6989
8. Drainage of Public Roads.....	4488	6990 to 7012
9. Bridges .....	4495	7013 to 7020
9a. Causeways Across Arms of Gulf of Mexico..	4497	7020a to 7020k
10. Ferries .....	4499	7021 to 7041
11. Special Road Tax.....	4503	7042 to 7046
119a. Rural Credit Unions.....	4505	7046a to 7046x
120. Salaries .....	4510	7047 to 7091
Ch. 1. Executive Officers.....	4510	7047 to 7054
2. Legislative Officers.....	4511	7055, 7056
3. Judicial Officers.....	4511	7057 to 7065
4. Miscellaneous Officers.....	4513	7066 to 7085
5. General Provisions.....	4515	7086 to 7091
121. Seals and Scrolls.....	4517	7092, 7093
122. Sequestration .....	4518	7094 to 7118
123. Sheriffs and Constables.....	4531	7119 to 7150
Ch. 1. Of Sheriffs.....	4531	7119 to 7136
2. Of Constables.....	4537	7137 to 7150
123a. Stevedores .....	4541	7150a to 7150f
124. Stock Laws.....	4543	7151 to 7324o
Ch. 1. Of Marks and Brands.....	4543	7151 to 7160
2. Protection of Live Stock.....	4547	7161 to 7169
3. Of the Sale, Slaughter and Shipment of Ani- mals .....	4549	7170 to 7184
4. Of Estrays.....	4553	7185 to 7208
5. Of the Mode of Preventing Hogs and Certain Other Animals from Running at Large in Counties and Subdivisions.....	4557	7209 to 7234
6. Of the Mode of Preventing Horses and Certain Other Animals Running at Large in Partic- ular Counties Named.....	4564	7235 to 7255
7. Regulations for the Protection of Stock Rais- ers in Certain Localities.....	4570	7256 to 7311
8. Live Stock Sanitary Commission.....	4580	7312 to 7324
9. Veterinary Medicine and Surgery.....	4586	7324a to 7324o
125. Supplies for Public Institutions.....	4591	7325 to 7348
Ch. 1. State Purchasing Agent for Eleemosynary In- stitutions .....	4591	7325 to 7338
2. Of the Mode of Supplying Fuel to the Execu- tive and Other Departments.....	4595	7339 to 7348
126. Taxation .....	4597	7349 to 7726
Ch. 1. Of the Levy of Taxes and Payment of Oc- cupation Taxes.....	4597	7349 to 7368
2. Taxes Based upon Gross Receipts.....	4610	7369 to 7392
3. Franchise Tax.....	4620	7393 to 7406

Title	Page	Articles
<b>126. Taxation (Cont'd).</b>		
Ch. 4. State Intangible Tax Board.....	4627	7407 to 7426
5. Tax on Liquor Dealers.....	4635	7427 to 7466
6. Tax on Sale of Intoxicating Liquors in Local Option Territory.....	4658	7467 to 7475
7. Tax on Dealers in Non-Intoxicating Malt Li- quors .....	4663	7476 to 7478
8. Tax on Persons Soliciting Orders or Operating Cold Storage for Intoxicating or Non-In- toxicating Beverages in Local Option Dis- tricts .....	4664	7479 to 7482
9. Occupation Tax on Handling Liquors C. O. D.	4665	7483 to 7486
10. Inheritance Tax.....	4666	7487 to 7502
11. Of the Property Subject to Taxation and the Mode of Rendering the Same.....	4670	7503 to 7532
12. Of the Assessment of Taxes—Election and Qualification of the Assessor.....	4685	7533 to 7604
13. Of the Collection of Taxes; Election and Qualification of the Collector.....	4705	7605 to 7662
14. Of the Assessment and Collection of Back Taxes on Unrendered Lands.....	4722	7663 to 7682
15. Delinquent Taxes.....	4726	7683 to 7700
16. Evidence of Title to Redeem Land.....	4740	7701
17. Assessment and Collection of Taxes in Cer- tain Cases.....	4741	7702 to 7715
18. Of Municipal Taxes to Pay Subsidies in Aid of Railroads and Other Internal Improve- ments .....	4745	7716 to 7721
19. New Counties.....	4746	7722 to 7726
127. Timber .....	4748	7727 to 7730
128. Trespass to Try Title.....	4751	7731 to 7768
Ch. 1. The Pleadings and Practice.....	4751	7731 to 7759
2. Claim for Improvements.....	4788	7760 to 7768
129. Trial of Right of Property.....	4796	7769 to 7795
130. Trusts—Conspiracies Against Trade.....	4808	7796 to 7818
Ch. 1. Definitions, Forfeitures and Other Provisions	4808	7796 to 7809
2. Evidence in Trust Cases.....	4816	7810 to 7818
131. Warehouses and Warehousemen.....	4821	7819 to 7827
132. Weighers—Public .....	4826	7828 to 7835
133. Weights and Measures.....	4830	7836 to 7846
134. Wells—Oil, Gas and Water.....	4832	7847 to 7854b
135. Wills .....	4838	7855 to 7878
136. Wool Growing Interests.....	4856	7878a to 7886d
137. Wrecks .....	4859	7887 to 7901
Ch. 1. Of Wreck—Masters.....	4859	7887 to 7895
2. Of Cotton Salvage.....	4860	7896 to 7901
Final Title—General Provisions.....	4862	

## APPENDIX

No.	Page
I. County Courts.....	4873
II. Local Road Laws.....	4883
III. Land Laws.....	4887
(A) List of Laws Enacted Since 1873, not Included in Revised Stat- utes or in Sayles' Early Laws.....	4887
(B) Text of Omitted and Repealed Laws Relating to Public Lands, as the Same Appeared in Sayles' Civ. St. 1897.....	4891
IV. Laws of United States Concerning Citizens.....	4926
V. Laws of United States Concerning Naturalization.....	4927
VI. Laws of United States Relating to Removal of Causes from State to Federal Courts.....	4942
VII. Laws of United States Relating to Receivers.....	4946
VIII. Boundaries of Texas.....	4947
IX. Apportionment Act Omitted from Printed Session Laws of Thirty- second Legislature.....	4951

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## TITLE 80

## LANDLORD AND TENANT

[See Forcible Entry and Detainer, Title 61.]

Art.	Art.
5475. Landlord to have preference lien.	5484. Judgment against sureties.
5476. Tenant not to remove property.	5485. Perishable property sold.
5477. When lien expires.	5486. Citation for defendant.
5478. Lien does not apply to, etc.	5487. Petition.
5478a. Removal not a waiver, etc.	5488. Rights of tenant.
5479. Distress warrant.	5489. Tenant shall not sub-let without consent, etc.
5480. Oath and bond.	5490. Owners of residences, storehouses, etc., have preference lien, etc.
5481. Distress warrant.	5491. Distress warrant, how obtained.
5482. Duty of officer.	
5483. Defendant may replevy.	

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of title.]

**Article 5475. [3235] Landlords shall have preference lien.**—All persons leasing or renting lands or tenements, at will or for a term, shall have a preference lien upon the property of the tenant hereinafter indicated, upon such premises, for any rent that may become due and for all money and the value of all animals, tools, provisions and supplies furnished by the landlord to the tenant to enable the tenant to make a crop on such premises, and to gather, secure, house and put the same in condition for market, the money, animals, tools, provisions and supplies so furnished being necessary for that purpose, whether the same is to be paid in money, agricultural products, or other property; and this lien shall apply only to animals, tools and other property furnished by the landlord to the tenant, and to the crop raised on such rented premises. [Act April 4, 1874, p. 55. P. D. 7418c.]

**Creation and existence of lien.**—A landlord has a lien on the products raised by his tenant independent of seizure under process. *Newman v. Ward* (Civ. App.) 46 S. W. 868.

The lien is created by the statute and exists independent of the distress warrant which the landlord is entitled to sue on in order to preserve his lien. *Polk v. King*, 19 C. A. 686, 48 S. W. 601.

Evidence held not to show that notes were executed with reference to the relation of landlord and tenant between the parties thereto, so as to create a lien. *Liles v. Price* (Civ. App.) 51 S. W. 526.

Proof held insufficient to establish a landlord's lien for debt of tenant. *Tucker, Zeve & Co. v. Thomas*, 35 C. A. 499, 80 S. W. 649.

Under the facts held a landlord had a lien on the tenant's crops for pasturage furnished. *Thomas v. Tucker, Zeve & Co.*, 40 C. A. 337, 89 S. W. 802.

**Lien where renting is on shares.**—A farming contract, by which the landlord reserved a specific interest in the crop, conveys a part of the very crop and not merely a lien to secure the rents. *Horseley v. Moss*, 23 S. W. 1115, 5 C. A. 341.

Whether a landlord has a mere lien or is the owner of a share of a crop raised on shares by his tenant as security for the rent depends on the construction of the rental contract. *Miles v. Dorn*, 40 C. A. 298, 90 S. W. 707.

Under a rule stated held a landlord cannot at once claim a crop lien and an interest in the crop. *Antone v. Miles*, 47 C. A. 289, 105 S. W. 39.

Whether one who lets a farm to another for a part of the crops to be grown thereon has a specified undivided interest in the crops when gathered, as distinguished from a lien, depends entirely upon the terms of the agreement. *Id.*

The landlord held to have a lien on part of the crop sold by the tenant without the landlord's consent. *Small v. Rush* (Civ. App.) 132 S. W. 874.

**Rent or advances secured.**—The lien given by the statute is limited to the rent and advances for the current year. *H. R. E., B. & B. Ass'n v. Cochran*, 60 T. 620.

C. rented a storehouse to B., and B. sublet the premises to H. H. gave his notes to B. for the rent, and B. transferred them to C. It appearing that H.'s tenancy was from month to month, and that the notes were given for the rent for months after the termination of the tenancy, they were not secured by the landlord's lien. *Couts v. Spivey*, 66 T. 267, 17 S. W. 540.

A hotel having been sublet with the owner's consent, and the sublessee having afterwards surrendered the premises to the owner who occupied them during the last two years of the term, the lessee, who had a junior lien thereon for rent, may insist that the owner foreclose his lien only for the rent actually due, not including rent for the two years during which the owner held the premises. *Kennedy v. Groves*, 50 C. A. 266, 110 S. W. 136.

A landlord has no landlord's lien on a crop raised in 1909 for advances made and supplies furnished the same tenant in 1910, nor any other lien unless one is expressly given him by the tenant. *McMullen v. Green* (Civ. App.) 149 S. W. 762.

**Subject-matter to which lien attaches.**—Furniture used in a hotel is subject to the landlord's lien for rent. *Biesenbach v. Key*, 63 T. 79; *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 259.

The landlord's lien attaches upon whatever property subject to execution the lessee or his vendee, who has bought it out of the ordinary course of business, has on the rented premises when the warrant issues and is levied, and this without reference to the time when the debt for rent accrued. *Block v. Latham*, 63 T. 414; *Lehman v. Stone*, 4 App. C. C. § 121, 16 S. W. 734.

The landlord's lien provided for in this article and Arts. 5479 and 5489, exists by force of the statute, independent of any levy of compulsory process, and attaches to any property owned by the tenant and placed in a storehouse or other building rented, so long as the tenant continues his occupancy, and for one month thereafter, except as to such property as may be relieved from the operation of such lien by the terms of the law. *Marsalis v. Pitman*, 68 T. 624, 5 S. W. 404.

Where there is no permission to sublet, produce raised on the premises by a subtenant is subject to the lien for rent. *Stokes v. Burney*, 22 S. W. 126, 3 C. A. 219. See *Menger v. Ward*, 30 S. W. 853, 87 T. 622.

A landlord has a lien on all crops raised on his rented premises, unless this be surrendered by contract, whether the premises are cultivated by the original lessee, his assignee or a subtenant. *Forrest v. Durnell*, 26 S. W. 481, 86 T. 647.

Goods in possession of a tenant on consignment are not subject to the landlord's lien. *Needham Piano & Organ Co. v. Hollingsworth* (Civ. App.) 40 S. W. 750.

A landlord has no lien on the proceeds of the crop voluntarily sold by the tenant. *Estes v. McKinney* (Civ. App.) 43 S. W. 556.

The fact that chattels were on the rented premises when the lease was made, and had been there prior to that time, will not, of itself, secure to the landlord a lien upon them for rent. *Davis v. Washington*, 18 C. A. 67, 43 S. W. 585.

A landlord has no lien upon the furniture of another used by his tenant. *Id.*

The lessor of an unimproved lot has no lien on the improvements put thereon by the tenant, for his rent. *Meyer v. O'Dell*, 18 C. A. 210, 44 S. W. 545.

A landlord's lien includes all property on the premises. *York v. Carlisle*, 19 C. A. 269, 46 S. W. 257.

A landlord's lien for supplies and advances held to extend only to the crop raised the same year. *Walker v. Patterson's Estate*, 33 C. A. 650, 77 S. W. 437.

In the absence of a waiver, a landlord has a lien on all the crops whether raised by the tenant, or by a subtenant, or assignee. *Edwards v. Anderson* (Civ. App.) 82 S. W. 659.

Neither this article nor Art. 5490, gives a lien upon any property of the tenant, except such as has been furnished by the landlord, the crops raised by the tenant on the rented premises and property of the tenant which has been placed in a building rented him by the landlord. *Allen v. Houston Ice & Brewing Co.* (Civ. App.) 97 S. W. 1064.

The landlord's lien is given by this article, for supplies furnished to the tenant to enable him to make a crop, and only attaches to the crop for the making of which such supplies were furnished. *Lasater v. Streetman* (Civ. App.) 154 S. W. 657.

Where a lessee of a theater installed fixtures and began giving shows before the building was completed, he was liable for rent, and defendant's lessors were not liable for conversion of the fixtures on their refusal to deliver the same to plaintiff from whom they had been purchased on credit on the lessee's failure to comply with the lease. *McConnell & Merchant v. Brick-Phillips Co.* (Civ. App.) 156 S. W. 1133.

**Priorities.**—See notes under Art. 5477.

**Waiver, loss or discharge of lien.**—See notes under Art. 5478a.

**Persons entitled to remedy.**—The provisions of this article do not apply where the relationship of tenancy in common exists. *T. & P. Ry. Co. v. Bayless*, 62 T. 570.

The grantee in a deed for land, which was in fact a mortgage, is not entitled to this remedy against the tenant in possession. *Campbell v. Heflin*, 4 App. C. C. § 90, 16 S. W. 539.

**Conclusiveness of judgment foreclosing lien.**—A judgment foreclosing a landlord's lien upon personal property is conclusive against a suit by the debtor to restrain its sale on the ground that it was exempt. *Hammer v. Woods*, 24 S. W. 942, 6 C. A. 179.

**Forcible entry and detainer.**—See Art. 3940.

**Rights of sublessee.**—See notes under Art. 5489.

**Conversion of property subject to lien.**—A landlord may maintain an action for damages against one who has wrongfully converted produce subject to his lien. *Taylor v. Felder*, 23 S. W. 480, 5 C. A. 417.

One who buys and converts property on which a landlord's lien rests is liable to the landlord. *Newman v. Ward* (Civ. App.) 46 S. W. 868.

Proof held insufficient to show a conversion of part of crop of tenant on which landlord claimed a lien. *Tucker, Zeve & Co. v. Thomas*, 35 C. A. 499, 80 S. W. 649.

**Assignment of lien.**—Assignment of a written obligation to pay rent carries with it the landlord's statutory lien. *Hatchett v. Miller* (Civ. App.) 53 S. W. 857.

**Art. 5476. [3236] Tenant not to remove property, subject.**—It shall not be lawful for the tenant, while the rent and such advances remain unpaid, to remove, or permit to be removed, from the premises so leased or rented any of the agricultural products produced thereon, or any of the animals, tools or property furnished as aforesaid, without the consent of the landlord. [Id.]

**Rights and liabilities in general.**—The landlord's lien for advances to make a crop attaches by virtue of the statute to the crop raised by the tenant, and is superior to any other that can be given so long as it remains in force. Until that lien is satisfied the tenant cannot remove the crop from the premises without subjecting it to attachment, nor can any lienholder affect the landlord's lien by removing it. A subsequent lienholder

who has removed the crop from the rented premises without the landlord's consent, and who has purchased it at forced sale, under proceedings foreclosing such junior lien, cannot protect himself in its appropriation by showing that the tenant still had on the premises other property subject to the landlord's lien sufficient to satisfy it. *Watson v. Cox*, 2 App. C. C. § 277. The landlord's lien attaches to the entire crop, and cannot be extinguished as to any part of it by its unauthorized removal from the rented premises. *Wilkes v. Adler*, 68 T. 689, 5 S. W. 497.

A tenant has no right prior to his payment of the rent and advances to remove or permit to be removed from the rented premises any of the agricultural products raised thereon without the consent of the landlord. *Leverett v. Meeks*, 29 C. A. 523, 68 S. W. 302.

Where a tenant removed and sold cotton the day succeeding the execution of an affidavit for a distress warrant before the levy thereof, such acts established that he was "about to so remove the property" when the affidavit was made. *Riggs v. Gray*, 81 C. A. 268, 72 S. W. 101.

Charge that landlord acquired ownership of tenant's cotton on which he had a lien held properly refused. *Burke v. Holmes & Hargis* (Civ. App.) 80 S. W. 564.

Landlord held estopped to claim a lien on cotton sold by tenant. *T. W. Johnson & Son v. Kincaid* (Civ. App.) 81 S. W. 536.

The crops of a tenant, who is indebted to his landlord for rent, supplies, or advances, are considered in possession of the landlord so long as they remain on the rented premises. *Groesbeck v. Evans* (Civ. App.) 83 S. W. 430.

If a tenant owes the landlord any sum for rents or advances to enable the tenant to raise a crop on the rented premises, the landlord has a lien on the crops to secure the same, and it is unlawful for the tenant to remove any part of the crops without the consent of the landlord. *Beckham v. Collins*, 54 C. A. 241, 117 S. W. 432, 433.

**Rights and liabilities of purchasers of property.**—A purchaser of crops on rented premises is liable to the landlord for the rent due, not exceeding the value of the crops. *Zapp v. Johnson*, 30 S. W. 861, 87 T. 641, citing *Boydston v. Morris*, 10 S. W. 331, 71 T. 697.

A purchaser held charged with knowledge of the landlord's right to distrain a chattel sold by the tenant within a month after his removal from the premises, under Arts. 5490, 5491, giving a lien thereon for rent, etc. *York v. Carlisle*, 19 C. A. 269, 46 S. W. 257.

One who purchases and converts property on which there is a landlord's lien is liable to the landlord. *Newman v. Ward* (Civ. App.) 46 S. W. 868.

Cotton raised by subtenants and subject to a landlord's lien held not relieved therefrom because purchased by a third party. *Walhoefer v. Hobgood*, 19 C. A. 629, 48 S. W. 32.

That one purchased the crop from the tenant or his renters for a valuable consideration and in good faith without intending to defraud the landlord, expressly reserving a lien on the crop for the rent, does not affect the rights of the landlord to enforce his lien. *Land v. Roby*, 56 C. A. 333, 120 S. W. 1057.

A purchaser from the tenant or of his renters of the crops raised on the premises is charged with notice of the acknowledged and recorded lease reserving a lien on the crops for the rent. *Id.*

Where a landlord's suit for rent and for foreclosure of lien has been begun in a justice's court within 30 days from the removal of personal property from the leased premises, the lien is fixed against the tenants and their vendees. *Ingraham v. Rich* (Civ. App.) 136 S. W. 549.

**Conversion.**—Where, pending the foreclosure of a landlord's lien, one who has purchased the goods makes such disposition of them that they cannot be subjected to the lien, he is liable for conversion. *Jackson v. Corley*, 30 C. A. 417, 70 S. W. 570.

It is a conversion for the tenant to send away the product of the rented premises without the landlord's consent, while the rent is unpaid, and the party receiving it, with knowledge of the lien, whether handling it as his own, or as the property of the tenant, is also guilty of conversion. *Mensing Bros. & Co. v. Cardwell*, 33 C. A. 16, 75 S. W. 348.

The receipt of a crop by a mortgagee in a mortgage executed by a tenant held a conversion of the crop as against the landlord having a lien thereon for rent. *Sexton Rice & Irrigation Co. v. Sexton*, 48 C. A. 190, 106 S. W. 728.

In an action by a landlord for conversion of a crop removed from the premises by his tenant and delivered to a third person made a party defendant, the evidence held to authorize a recovery. *Id.*

**Right to distrain.**—See notes under Art. 5479.

**Art. 5477. [3237] When lien expires.**—Such preference lien shall continue as to such agricultural products and as to the animals, tools and other property furnished to the tenant as aforesaid, so long as they remain on such rented or leased premises and for one month thereafter; and such lien, as to agricultural products and as to animals and tools furnished as aforesaid, shall be superior to all laws exempting such property from forced sales. [*Id.*]

**Expires after one month.**—Where a landlord delays for more than one month after the removal of a tenant before beginning proceedings to foreclose his lien, he waives his lien as against a purchaser of the property. *Jenkins v. Patton* (Civ. App.) 21 S. W. 693.

**Priorities.**—Where a tenant's cotton has been levied on under execution, his landlord cannot recover under his lien for rent, in the statutory proceeding of trial of right of property. While his lien is superior to all other creditors, it does not give him title to the property, but only the right to have it subjected to the payment of his debt. *Perkins v. Sterne*, 23 T. 561, 76 Am. Dec. 72; *Duty v. Graham*, 12 T. 432, 62 Am. Dec. 534; *Buchanan v. Monroe*, 22 T. 541; *Wright v. Henderson*, 12 T. 44; *Pace v. Sparks*, 1 U. C. 402; *Ewing v. Perry*, 35 T. 778; *Matthews v. Burke*, 32 T. 419.

When a tenant from month to month mortgages personal property to another, and the rent due his landlord for the month in which the mortgage is executed has been paid, and the property remains upon the premises, by permission of the mortgagee, from month to month, the lien of the landlord is subordinate to that of the mortgage. *H. R. E. B. & B. Ass'n v. Cochran*, 60 T. 620.

A claim for rent due by an insolvent firm is a lien superior to attachment liens, and must be first satisfied out of moneys arising from a sale of the attached property, on application of the landlord who has intervened in the attachment suit. *Sullivan v. Cleveland*, 62 T. 677.

The lien of the landlord upon the crop is superior to that of a mortgagee. When the crop which has been delivered to the landlord is seized under execution, he may assert his right thereto in a proceeding for the trial of the right of property. *Durham v. Flannagan*, 2 App. C. C. § 25.

Whether the produce to which the landlord's lien attaches is sold under order of court to enforce that lien, or by the landlord or tenant, the rights of a subsequent lienholder attach only to what shall remain after the landlord's lien is satisfied. If the junior lienholder, by his declarations of a purpose not to look to his lien to enforce payment of his debt, induces the landlord and tenant to disregard his lien in the sale of the crop, he is thereby estopped from setting up claim that the landlord or tenant having possession shall appropriate any part of the proceeds to the payment of his debt. *Chapman v. McLemore*, 68 T. 654, 5 S. W. 682.

A tenant from month to month, at the day of making the lease, executed a mortgage upon a soda fountain and its appurtenances. The tenant paid rent for several months. Upon a suit to foreclose a mortgage on the fountain, etc., it was held that the lien of the mortgage was superior to the landlord's lien. *Brackenridge v. Millan*, 81 T. 17, 16 S. W. 555.

A landlord's lien has priority over an unregistered chattel mortgage. *Rogers v. Grigg* (Civ. App.) 29 S. W. 654.

A landlord held not entitled to a lien, as against creditors, for sums paid by the landlord, as surety on the tenant's account, for supplies and money loaned. *Kelley v. King*, 18 C. A. 360, 44 S. W. 915; *Kelley v. King* (Civ. App.) 50 S. W. 629.

Landlord's lien on a general stock of merchandise held prior to the city's lien for taxes for various years, in the absence of identification of the particular goods seized, which were subject to the tax lien. *City of Ft. Worth v. Boulware*, 26 C. A. 76, 62 S. W. 928.

Where a suit to foreclose a landlord's lien was instituted before the tenant's property was removed from the leased premises, it was subject to the lien, where it had been sold under an execution against the tenant before the entry of the foreclosure judgment. *Irton v. Bexar County*, 26 C. A. 527, 63 S. W. 550.

The landlord's lien is superior to the mortgage lien unless the mortgage is filed "forthwith" within the meaning of Art. 5655. *Austin v. Welch*, 31 C. A. 526, 72 S. W. 833.

A lease existing at the date of a mortgage on the property is not invalidated by the mortgage, but is a paramount interest to which the mortgage is subject. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

A landlord held not to have a lien as against his tenant's creditors for supplies furnished by a third person on the landlord's security. *Ranger Mercantile Co. v. Terrett* (Civ. App.) 106 S. W. 1145.

A lessee having transferred the lease to another, agreeing to pay the lessor a certain sum and notes, which he was to receive from the sublessee, the owner having retained a superior lien on the furniture for rents, he was entitled, under the lease, to foreclose his lien for the money and notes, as well as for the rent accruing during the sublessee's tenancy. *Kennedy v. Groves*, 50 C. A. 266, 110 S. W. 136.

The title to furniture in a hotel held to be in the sublessee by virtue of the transfer of the lease to him by the original lessor. *Id.*

A landlord's lien on the crops grown held superior to that of a chattel mortgagee. *Harvey v. Geo. Wilder & Co.* (Civ. App.) 131 S. W. 851.

— **Claims for exempt property.**—The lien is superior to the claim of the widow and children of the tenant to an allowance in lieu of exempt property. *Champion v. Shumate*, 90 T. 597, 39 S. W. 128, 362.

The landlord's lien is superior to the claim of the deceased tenant's children for exemptions and for an allowance in lieu thereof. *Champion v. Shumate*, 90 T. 597, 40 S. W. 394.

The lien of a mortgage on crops which came into existence before a certain landlord's lien became operative was superior to such lien. *League v. Sanger*, 25 C. A. 347, 60 S. W. 898.

**Claims by third persons.**—Where the levy of a distress warrant was invalid, claimants of the property held entitled to have the proceeding dismissed. *Fry v. Meyer Bros. Drug Co.* (Civ. App.) 40 S. W. 620.

A claimant of property held under a distress warrant, who dismissed his bond in the county court, which had jurisdiction, is deemed to have abandoned his claim, unless he has such judgment of dismissal set aside. *Taylor v. St. Louis Type Foundry*, 21 C. A. 69, 51 S. W. 304.

Where a landlord has accepted from a subtenant a payment in satisfaction of rent due on the premises cultivated by him, he is liable for damages for seizing his crops for rents due by the tenant. *Smith v. Price*, 22 C. A. 296, 54 S. W. 254.

Where a landlord assented to an agreement by his tenant to deliver certain rice to plaintiff as part of a loan of money to make the crop, but thereafter appropriated the rice, he was liable to plaintiff therefor. *Groesbeck v. T. H. Thompson Milling Co.* (Civ. App.) 86 S. W. 346.

A tenant's parol agreement to deliver to plaintiff 400 sacks of rice, to be grown on the leased land, as a part of an advancement to enable him to raise the crop, held not to affect the property. *Id.*

Landlord held not required to apply proceeds of cotton received from tenant to payment of claim for which he held lien against property levied on by third person. *Cadenhead v. Rogers & Bro.* (Civ. App.) 96 S. W. 952.

In an action where defendant's landlord intervened and claimed a landlord's lien on property attached which was raised on his farm in 1910, and it appeared that he also held the crop raised in 1909 as security for advances made to the tenant that year, plaintiff, not having attached the 1909 crop, was not entitled to have that applied first to the satisfaction of the landlord's debt. *McMullen v. Green* (Civ. App.) 149 S. W. 762.

Liability for wrongful distress.—See notes under Art. 5479.

**Art. 5478. [3238] Does not apply to, etc.**—Such lien shall not attach to the goods, wares and merchandise of a merchant, trader or mechanic, sold and delivered in good faith in the regular course of business to the tenant. [Id.]

"To the tenant" construed.—The words "to the tenant," as written in the statute have been construed to be intended "by the tenant." *Marsalis v. Pitman*, 68 T. 627, 5 S. W. 404. It was clearly the intention of the legislature to exempt from the operation of the landlord's lien goods sold in good faith in the regular course of business "by the tenant" and not "to the tenant." *Freeman v. Collier Racket Co.*, 100 T. 475, 101 S. W. 203; *Id.*, 44 C. A. 177, 105 S. W. 1130.

"In the regular course of business" construed.—Where a firm sell a stock of goods worth about \$17,000 in various amounts and to various purchasers in about 42 days in a "closing out" sale the goods are not sold "in the regular course of business" and the landlord has a lien on said goods, and the purchasers are liable to the landlord for the amount of their respective purchases. *Freeman v. Collier Racket Co.*, 44 C. A. 177, 105 S. W. 1130.

**Art. 5478a. [3239] Removal not a waiver, etc.**—The removal of the agricultural products with the consent of the landlord for the purpose of being prepared for market shall not be considered a waiver of such lien, but such lien shall continue and attach to the products so removed the same as if they had remained on such rented or leased premises. [Id.]

Waiver, loss, or discharge of lien.—When property has been seized under a warrant the lien must be foreclosed by the judgment, otherwise it is waived and abandoned. *Wise v. Old*, 57 T. 514; *Haymes v. Gray*, 2 App. C. C. § 252.

The acceptance of a collateral promise of one who purchases the stock of goods of the tenant to pay the rent will not of itself operate as a release of the landlord's lien. *Block v. Latham*, 63 T. 414.

The lien is lost by failure to issue citation as required by article 5486. *Miles v. Sprague*, 3 App. C. C. § 199; *Randall v. Rosenthal* (Civ. App.) 27 S. W. 906.

A landlord having leased premises for a term of years, and, after the failure in business of the lessee, accepting rents that became due thereafter from another, and the obligation of another tenant for the rents to become due for the balance of the term, cannot pursue his original lessee upon the lease contract and enforce payment of rents to become due out of the assets of such original lessee upon the premises by distress proceedings. *Loustaunau v. Lambert*, 1 C. A. 434, 20 S. W. 937.

The acceptance by a landlord of another tenant as lessee, or as the party to whom the landlord should look for payment, such party being bound so to do in law or by contract, amounts to a waiver of the landlord's lien upon the property of the first tenant for future rents, although after decree enforcing such lien circumstantial evidence tending to show such waiver is not competent. *Id.*

The removal of crops from the rented premises with the consent of the landlord, to be prepared for market, is not a waiver of the lien; otherwise, where it is removed for sale in open market. *Gilliam v. Smither* (Civ. App.) 33 S. W. 984. See *Holt v. Miller* (Civ. App.) 32 S. W. 823.

A landlord's lien for rent is not impaired by his failure to accept under a deed of trust. *Missouri Glass Co. v. Marsh* (Civ. App.) 43 S. W. 546.

Where the mortgagor had permission from the landlord and the mortgagees to sell part of the mortgaged property to discharge the landlord's lien, such lien was released to the extent of the amount sold. *Walhoefer v. Hobgood*, 18 C. A. 291, 44 S. W. 566.

Where a tenant replevies property taken under a distress warrant, and gives bond for the satisfaction of the judgment, this does not release the landlord's lien on the property. *McEvoy v. Niece*, 20 C. A. 686, 50 S. W. 424.

Under a lease entitling the lessor to a lien on the crop, the lessee held not entitled to sell the same without the lessor's consent. *Zapp v. Davidson*, 21 C. A. 566, 54 S. W. 366.

Where a landlord merely gave his tenant the right to sublet, the crops raised by the subtenant were subject to the landlord's lien for rent, notwithstanding such permission. *Marrs v. Lumpkins*, 22 C. A. 448, 54 S. W. 775.

Where a landlord merely gave his tenant the right to sublet, payment of rent to the original tenant by subtenant did not release his crops from landlord's lien for rent. *Id.*

That a landlord consented to his tenant's subletting part of the property held not a waiver of the landlord's lien on the subtenant's crop for unpaid rent. *Trout v. McQueen* (Civ. App.) 62 S. W. 928.

Where a landlord levied a distress warrant on cotton raised on his land by his tenant for failure to pay the rent, and the tenant replevied the cotton, such proceedings did not discharge it of the landlord's lien. *McBride v. Puckett* (Civ. App.) 66 S. W. 242.

A landlord does not waive his lien on cotton of the tenant, as against a purchaser thereof from the tenant, because he permitted the tenant to sell other cotton to other purchasers. *Sanger v. Magee*, 29 C. A. 397, 69 S. W. 234.

A landlord's lien held waived. *Bond v. Carter* (Civ. App.) 73 S. W. 45.

A landlord held not to have waived his statutory lien on crop of tenant. *Johnston v. Kleinsmith*, 33 C. A. 345, 77 S. W. 36.

Where a tenant sells crops on which the landlord has a lien, the landlord's receipt of a part of the proceeds with knowledge of the facts tends to show a ratification. *Planters' Compress Co. v. Howard*, 35 C. A. 300, 80 S. W. 119.

Lien of a landlord on crops to secure advance to the tenant held waived as against a buyer from the tenant. *Planters' Compress Co. v. Howard*, 41 C. A. 285, 92 S. W. 44.

A landlord's lien for rent on cotton raised on leased land held not waived so as to render the cotton on the sale thereof subject to execution in favor of the tenant's creditors. *Sparks v. Ponder*, 42 C. A. 431, 94 S. W. 428.

That a landlord permits a tenant to sell a portion of crops in the market, without objection, is insufficient to authorize a conclusion that he has waived his lien on the entire crop. *Antone v. Miles*, 47 C. A. 289, 105 S. W. 39.

A crop lien for advances held not forfeited by the landlord's failure to seek foreclosure within a month from the removal of the crop. *Gaw v. Bingham* (Civ. App.) 107 S. W. 931.

A landlord's lien held abandoned as against a mortgagee of the tenant. *Watkins v. Citizens' Nat. Bank of Rockwall*, 53 C. A. 437, 115 S. W. 304.

That a landlord who expressly retained in the recorded lease a lien on the crops raised on the premises for the payment of rent consented to the tenant employing renters or subletting the premises, did not show that he released or waived the lien on the crops. *Land v. Roby*, 56 C. A. 333, 120 S. W. 1057.

A mortgagee of a tenant's crops held entitled to hold the crop freed from the lien of the landlord. *Orange County Irr. Co. v. Orange Nat. Bank* (Civ. App.) 130 S. W. 869.

Acts of a landlord held to tend to show a waiver of his lien on the crops. *Melasky v. Jarrell* (Civ. App.) 131 S. W. 856.

A landlord may so act as to waive his lien on the crops, and confer on the tenant the right to sell the same discharged from the lien, and an express waiver is not necessary. *Id.*

Under the facts, held a landlord waived his lien. *Keahey v. Bryant* (Civ. App.) 134 S. W. 409.

— **Burden as to waiver.**—See notes under Art. 3687, Rule 12.

**Art. 5479. [3240] Distress warrant.**—When any rent or advances shall become due, or the tenant shall be about to remove from such leased or rented premises, or to remove his property from such premises, it shall be lawful for the person to whom the rents or advances are payable, his agent, attorney, assigns, heirs, or legal representatives to apply to a justice of the peace of the precinct where the premises are situated, or in which the property upon which a lien for rents or advances exists, may be found, or to any justice having jurisdiction of the cause of action, for a warrant to seize the property of such tenant; provided, that when a distress warrant shall be issued by any justice, other than the justice of the peace of the precinct in which the rented premises may be situated, or in which the defendant may reside, such warrant shall be made returnable to, and the affidavit and bond upon which it is issued shall be transmitted by, the justice issuing such distress warrant to some justice of the precinct in which the rented premises may be situated, or in which the defendant may reside. [P. D. 7418d. Act to adopt and establish R. C. S., passed Feb. 21, 1879. Acts 1881, p. 98.]

**Jurisdiction.**—See notes under Art. 5481.

**Liability of purchaser.**—See notes under Art. 5476.

**Enforcement of lien in general.**—In an action against a tenant to foreclose landlord's lien, joined with an action against a junior mortgagee, an allegation that the mortgagee is asserting title to property subject to the lien is sufficient. *Cardwell v. Masterson*, 27 C. A. 591, 66 S. W. 1121.

Where a landlord sought to foreclose his lien on certain goods, and distrained some of them, the foreclosure was properly against all the goods subject to the lien, and not merely against those distrained. *Jackson v. Corley*, 30 C. A. 417, 70 S. W. 570.

**Right to distrain.**—Removal of products from rented premises without consent of landlord, when rent is unpaid, authorizes a distress warrant. Malice and want of cause must concur to authorize a finding for exemplary damages. *Gray v. Webb*, 3 App. C. C. § 331.

When property subject to the landlord's lien is wrongfully removed, a distress warrant may be sued out, although the rent is not due. *Du Bose v. Battle* (Civ. App.) 34 S. W. 148.

One must have not only an assignment of the arrears of rent, but a transfer of the reversion to distrain for the rent. *Manis v. Flood*, 19 C. A. 591, 47 S. W. 1017.

Where the only lease was an implied contract to pay reasonable rent, and a sum shown to equal reasonable rent was paid, a distress warrant was illegal. *Majors v. Goodrich* (Civ. App.) 54 S. W. 919.

The carrying of cotton to a gin to be baled, and the using of a reasonable amount of feed, held not to constitute an appropriation of the products by the tenant, justifying the issuance of a distress warrant. *Riggs v. Gray*, 31 C. A. 268, 72 S. W. 101.

This article authorizes the warrant to seize the property whether the rent is due or not. *Allen v. Brunner*, 33 C. A. 128, 75 S. W. 821.

If the tenant owes the landlord for rents and advances and is attempting to remove crops from the rented premises without the landlord's consent, the suing out of a dis-

trespass warrant under the circumstances is not illegal. *Beckham v. Collins* (Civ. App.) 117 S. W. 433.

**Property subject to distress.**—A landlord may seize all the property on which he has a lien, though it is more than sufficient to pay the lien. *McKee v. Sims*, 92 T. 51, 45 S. W. 564.

Where, on the issuance of a distress warrant by a justice, the amount in controversy is within the jurisdiction of the county court, and the warrant is issued and cotton seized in a county outside of the county where it was raised and the parties resided, the writ, under this article and Art. 5481, should be made returnable to the county court of the county where the rented premises were. *Egger v. Kimmel*, 24 C. A. 643, 60 S. W. 335.

**Attachment of lease.**—A lease that does not give the lessee the general power to sublet is not subject to attachment and sale. *Boone v. First National Bank of Waxahatchee*, 17 C. A. 375, 43 S. W. 594.

**Necessity of citation.**—A distress warrant, when citation has not been issued, is voidable, but will protect an officer acting under it. *Randall v. Rosenthal* (Civ. App.) 31 S. W. 822.

**Necessary parties to foreclosure.**—When the property subject to the lien is in the possession of a third person, he should be made a party to the suit. *Templeman v. Gresham*, 61 T. 50.

Persons holding a lien upon property subject to the landlord's lien are necessary parties to a suit to foreclose the latter. *McCollum v. Wood* (Civ. App.) 33 S. W. 1087.

**Invalid distress proceedings as precluding foreclosure.**—A landlord is entitled to have a foreclosure of his landlord's lien on property seized under a distress warrant, notwithstanding the warrant has been quashed. *Duffey v. Cagle*, 3 App. C. C. § 421; *Pruitt v. Kelley*, 4 App. C. C. § 176, 15 S. W. 119; *Dwyer v. Testard*, 65 T. 432; *Wallace v. Bogel*, 66 T. 574, 2 S. W. 96.

In distraining for rent, the plaintiff showing a cause of action is entitled to foreclosure of the landlord's lien, although the distress proceedings may be invalid. *Brown v. Collins*, 77 T. 159, 14 S. W. 173.

The landlord's lien on the crop for supplies furnished to the tenant being given by this article may be foreclosed, though the affidavit and bond for the distress warrant are defective. *Lasater v. Streeman* (Civ. App.) 154 S. W. 657.

**Distress warrant as prerequisite to foreclosure.**—The landlord's lien exists against an assignee of the goods, etc., on the leased premises for the benefit of creditors, independent of a levy of a distress warrant prior to the assignment. *Rosenberg v. Shaper*, 51 T. 134.

The landlord's lien is not acquired by a distress warrant and is not lost by a failure to sue out a warrant. The lien may be preserved by a suit to foreclose, and on a foreclosure of the lien the property can be seized and sold under final process. When the property thus remains in possession of the tenant pending suit, a general description of it is sufficient, it being alleged that it cannot be described with greater certainty. *Bourcier v. Edmondson*, 58 T. 675; *Templeman v. Gresham*, 61 T. 50.

The issue of a distress warrant is not a necessary prerequisite to a foreclosure of the landlord's lien, and it may be enforced by suit. *Randall v. Rosenthal* (Civ. App.) 27 S. W. 906.

The preference lien given a landlord by the statute exists independent of the distress warrant which may be sued out to preserve the lien. *Polk v. King*, 19 C. A. 666, 48 S. W. 601.

**Enforcement in probate court.**—On the death of the tenant the remedy by distress ceases and the landlord must resort to the probate court. *Perkins v. Traynham*, 3 App. C. C. § 76. See *Stokes v. Burney*, 22 S. W. 126, 3 C. A. 219.

**Effect of quashing distress warrant.**—When a distress warrant is quashed by a decree of the court, the property is discharged from the levy and must be returned to the defendant. *Hamilton v. Kilpatrick* (Civ. App.) 29 S. W. 819.

Quashing a distress warrant quashes the levy thereunder, and discharges the sureties on the bond of one claiming title to the property. *Fry v. Meyer Bros. Drug Co.* (Civ. App.) 40 S. W. 620.

**Variance.**—Objection by defendant on appeal of action brought by "Antonio S." for wrongfully levying distress warrant in a justice court action, that judgment of such court was for "Amelia S." will not avail, where it is shown that such names applied to the same person. *Kingsley v. Schmicker* (Civ. App.) 60 S. W. 331.

**Bond.**—A bond for distress does not secure costs. *Kelley v. King*, 18 C. A. 360, 44 S. W. 915.

**Wrongful distress.**—The defendant in the suit to enforce the landlord's lien can, under a plea in reconviction, recover damages against the plaintiff and the sureties on his bond, when the warrant has been illegally and unjustly sued out. Both causes must exist to support a recovery on the bond. If the warrant was legally sued out the defendant cannot recover on the bond, no matter how grossly unjust and utterly ruinous to the tenant the proceedings of the plaintiff might have been. *Slay v. Milton*, 64 T. 421.

Damages are not recoverable unless the warrant is issued illegally and unjustly. When the defect in the warrant was the fault of the justice by whom it was issued, damages for wrongful issuance are not recoverable. *Miles v. Sprague*, 3 App. C. C. § 200.

When a distress warrant is illegally sued out and levied, damages occasioned thereby may be recovered by the defendant, although rent was due and unpaid. *Stephens v. Bridge*, 4 App. C. C. § 82, 16 S. W. 536.

Where a landlord obtains a distress warrant for rent, in absence of proof of ratification of an illegal levy he is not liable in damages for the seizure of exempt property. *White v. Stribling*, 71 T. 108, 9 S. W. 81, 10 Am. St. Rep. 732.

The levy of a writ on real estate, the possession of which was not disturbed, is not a ground for the recovery of damages. *Conrady v. Bywaters* (Civ. App.) 24 S. W. 961.

Annoyance, vexation and expenditure of money in consequence of a distress warrant is not the basis of actual damages, but for exemplary damages. *Smith v. Jones*, 11 C. A. 18, 31 S. W. 306.

In action for wrongful levy of distress warrant, evidence of poverty and damages by the levy to plaintiff held too remote. *Burger v. Rhiney* (Civ. App.) 42 S. W. 590.

In an action for wrongful levy of distress warrant, that the affidavit and bond for distress were defective cannot be shown. *Id.*

That a distress warrant was unjustly sued out does not entitle the tenant to exemplary damages, unless it is shown that it was sued out without probable cause. *Id.*

Evidence held to justify the suing out of a distress warrant. *Id.*

In an action for damages in wrongful suing out a distress warrant, the validity of the affidavit and bond upon which it was based cannot be impeached by an instruction to the jury, there having been no motion to quash in the original suit. *Id.*

Though a distress warrant is wrongfully levied, yet if the distrained property is left in tenant's charge, he cannot recover for injury to it through his own negligence. *Thomas v. Judy* (Civ. App.) 44 S. W. 890.

An affidavit for a distress warrant held to be substantially untrue, and to constitute an abuse of process. *McKee v. Sims* (Civ. App.) 45 S. W. 37.

Whether a landlord is liable in damages for an excessive levy under a distress warrant depends on whether he authorizes the officer's acts. *Id.*

The landlord cannot, without liability, under distress warrant attach more than sufficient for his rent and costs, though he has a lien on the whole of debtor's property. *Id.*

To the extent that a distress is based on amount alleged in the affidavit in excess of what is justly and actually due, defendant is entitled to damages, under Art. 5480. *McKee v. Sims*, 92 T. 61, 45 S. W. 564.

The measure of damages for illegal seizure under distress is the value of the crop seized and converted only. *Majors v. Goodrich* (Civ. App.) 54 S. W. 919.

Codefendant, against whom plaintiff had wrongfully sued out a distress warrant, held entitled to maintain an action for damages therefor, though the action in which it had been sued out had not terminated. *Kingsley v. Schmicker* (Civ. App.) 60 S. W. 331.

A provision in a lease that the landlord shall not be liable for damages arising from any future distraint is against public policy and void. *Watson v. Boswell*, 25 C. A. 379, 61 S. W. 407.

The value of time lost and money expended in prosecuting an action of replevin to obtain possession of property wrongfully distressed is an element of damages in an action therefor. *Id.*

The failure to establish all the grounds alleged by a landlord in his application for a distress warrant will not render him liable in damages to the tenant, when he establishes one of such grounds. *Id.*

Where an application for a writ of distress alleges rent due as a cause therefor, and the evidence shows that only a part thereof is due, the tenant is not entitled to damages for the distraint of the whole crop, but only to the damages sustained for the distraint of an unnecessary amount, caused by the false allegation. *Id.*

Clause in a lease exempting landlord from any damage incident to a suit for distraint held valid. *Watson v. Mirike*, 25 C. A. 527, 61 S. W. 538.

In an action for the wrongful suing out of a distress warrant, that the tenant did not sell a part of the crop without the landlord's consent, for which reason the distress proceedings were instituted, in order to defraud the landlord, held immaterial. *Morgan v. Tims*, 44 C. A. 308, 97 S. W. 832.

In the absence of authority in a cropping contract, the landlord held entitled to distraint for the tenant's act in selling a part of the crop without the landlord's consent. *Id.*

The performance of a certain agreement on the part of a vendor of land held a condition precedent to the right of the vendor or his vendee to demand possession of the land from a lessee thereof. *Lewis v. Taylor* (Civ. App.) 101 S. W. 846.

In an action for an illegal seizure of hotel furniture under a distress warrant, the measure of damages was the loss by deprivation of use and depreciation in the value of the furniture or for the amount paid to rent other furniture and depreciation in value. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

A landlord is not liable for an illegal distress for levying on more of the tenant's goods than was necessary to secure the rent, provided the warrant is not sued out for more rent than is due or to become due. *Id.*

Evidence held insufficient to sustain an award of \$350 actual, and \$250 exemplary, damages, for wrongful distress against a farm tenant. *Michalek v. Cernock* (Civ. App.) 134 S. W. 270.

A landlord cannot justify distress by showing on appeal a valid ground for the writ under Art. 5479 not relied on in the affidavit for the writ; the ground relied on below having been found not to exist. *Id.*

Walver, loss or discharge.—See notes under Art. 5478a.

Time of accrual of rent.—See notes at end of Title.

**Art. 5480. [3241] Oath and bond.**—The plaintiff, his agent or attorney, shall make oath that the amount sued for is for rent or advances, such as are mentioned in the first article of this title, or shall produce a writing signed by such tenant to that effect, and shall further swear that such warrant is not sued out for the purpose of vexing and harassing the defendant; and the person applying for such warrant shall execute a bond with two or more good and sufficient sureties, to be approved by the justice of the peace, payable to the defendant, conditioned that the plaintiff will pay the defendant such damages as he may sustain in case such warrant has been illegally and unjustly sued



out, which bond shall be filed among the papers of the cause; and, in case the suit shall be finally decided in favor of the defendant, he may bring suit against the plaintiff and his sureties on such bond, and shall recover such damages as may be awarded to him by the proper tribunal. [Id.]

**Affidavit as to grounds.**—Affidavit for distress warrant held to state that the amount claimed was due, and that cause existed for issuing warrant. *Fulcher v. West* (Civ. App.) 51 S. W. 342.

**Error in name of defendant in affidavit for distress warrant and citation held immaterial.** *Jackson v. Corley*, 30 C. A. 417, 70 S. W. 570.

It is clear that the plaintiff when he applies for a distress warrant must show the existence of one of the grounds specified in Art. 5479 before he can obtain the writ. The statute does not provide how this may be done. The statement of the ground relied on is usually inserted in the affidavit. This precludes the idea that any other ground than that stated is relied on, and unless the ground as stated is sufficiently alleged a motion to quash will be sustained. The allegation should be made in the language of the statute and when this is not done equivalent terms must be employed. When the ground is stated in the language of the statute, but the statement is accompanied by a qualifying clause of material import, this clause cannot be treated as surplusage but must be considered as expressing the sense in which the statement alleging the ground is made. *Id.*

**Affidavit and warrant contemporaneous.**—The affidavit and issuance of warrant should be contemporaneous. *Bolton v. Sadler*, 1 App. C. C. § 1226.

**Liability for wrongful distress.**—See notes under Art. 5479.

**"Vexing" construed.**—The word "injuring" is equivalent to the word "vexing" used in the statute. *Biesenbach v. Key*, 63 T. 79.

**"Unjustly" and "illegally and unjustly" construed.**—The term "unjustly" implies an evil intent, as where the purpose of the creditor is to harass or vex his debtor and not merely to secure his debt. *Riggins v. Ford*, 1 App. C. C. § 1286.

A bond is defective when the word "wrongfully" is used in place of the words "illegally and unjustly." *Murry v. Blanchard*, 2 App. C. C. § 480.

A distress warrant is "unjustly," and not "illegally," sued out, where it is for an amount largely in excess of the sum due. *McTeer v. Young* (Civ. App.) 44 S. W. 194.

**Surplusage.**—An affidavit is not defective on account of surplusage. *Murry v. Blanchard*, 2 App. C. C. § 479.

**Bond.**—The defendant in a proceeding by distress warrant recovered judgment against the plaintiff for damages on the ground that the warrant was unlawfully sued out. On appeal to the county court judgment was also rendered against the plaintiff and the sureties on his appeal bond. Held, that the distress warrant bond was fatally defective, and no judgment could be rendered against the sureties on it. The judgment in the county court was properly rendered against the sureties on the appeal bond. *Green v. Malone*, 2 App. C. C. § 468; *Flewellen v. Pace*, 2 App. C. C. § 57.

The date of the filing of a bond in distress proceedings held to control the date of the bond, on the question when the bond was executed. *Kelley v. King*, 18 C. A. 360, 44 S. W. 915.

**Warrant for excessive amount.**—See notes under Art. 5481.

**Art. 5481. [3242] Distress warrant, issued by whom.**—Upon the filing of such oath and bond, it shall be the duty of such justice of the peace to issue his warrant to the sheriff or any constable of the county, commanding him to seize the property of the defendant, or so much thereof as will satisfy the demand, which warrant shall be, if the same is within the jurisdiction of a justice of the peace, returnable to said justice; but, if the amount in controversy exceeds two hundred dollars, exclusive of interest, and does not exceed five hundred dollars, exclusive of interest, the writ shall be made returnable to the county court. If the amount in controversy exceeds five hundred dollars, exclusive of interest, and does not exceed one thousand dollars, exclusive of interest, the writ shall be made returnable to either the county or district court of the county, as the plaintiff in such writ may direct. If the amount in controversy shall exceed one thousand dollars, exclusive of interest, the writ shall be made returnable to the district court of the county. When the writ is made returnable to the district or county court, the justice of the peace shall transmit all the papers in said cause to the court to which such writ is made returnable, on or before the first day of the next term thereof.

**Jurisdiction.**—The jurisdiction of the court is fixed by the amount of the demand. *Geiser v. Taylor* (Civ. App.) 31 S. W. 84; *Dazey v. Pennington*, 10 C. A. 326, 31 S. W. 312.

When the county court is without jurisdiction, it should dismiss the case from the docket and transfer it to the proper court. *Dazey v. Pennington*, 10 C. A. 326, 31 S. W. 312.

Where the amount in controversy was within the jurisdiction of the county court and the distress warrant was levied on property outside of the county in which the plaintiff and defendant lived and the property was raised, the warrant should be made

returnable to the court of the county in which are the premises. *Egger v. Kimmel* (Civ. App.) 60 S. W. 336.

The writ was properly returned to the county court where \$420 rent was claimed, and where at the time of the trial \$262.50 was due, although when the writ was issued less than \$200 was due. *Allen v. Brunner*, 33 C. A. 123, 75 S. W. 821.

The amount involved, as against the tenant, in a suit against a tenant to enforce a landlord's lien for rent and supplies, as given and preserved by this article, being enough to give the court jurisdiction, it has jurisdiction as against one to whom the tenant had sold part of the crop, on which a distress warrant was levied, though the value of such part was insufficient to give the court jurisdiction. *Small v. Rush* (Civ. App.) 132 S. W. 874.

**Right to distrain.**—See notes under Art. 5479.

**Warrant for excessive amount.**—A distress warrant is unjustly sued out when the writ issues for an amount in excess of that which is due. *McTeer v. Young* (Civ. App.) 44 S. W. 194.

Landlord cannot without liability attach more of the tenant's property on which he has a lien than sufficient to satisfy his demand; and a distress warrant for an amount more than is due is "illegally and unjustly sued out" and the principal and sureties are liable on their bond to the party injured. *McKee v. Sims*, 92 T. 51, 45 S. W. 564.

**Art. 5482. [3243] Duty of officer.**—It shall be the duty of the officer to whom such warrant is directed to seize the property of such tenant, or so much thereof as shall be of value sufficient to satisfy such debt and costs, and the same in his possession safely keep, unless the same is replevied as herein provided, and make due return thereof to the court to which said warrant is returnable, at the next term thereof.

See *Lea v. Hogue*, 1 App. C. C. § 607; *Knight v. Old*, 2 App. C. C. § 79.

**Responsibility for property in possession of officer.**—A seizure of personal property under a writ is for the purpose of security. If wasted, lost or destroyed by negligence while in possession of the officer, the damages caused thereby will be applied towards the satisfaction of the judgment rendered in the case. To that extent the plaintiff is responsible, but such application can only be made upon a proper showing by the defendant, on whom the burden of proof rests. *Taylor v. Felder*, 23 S. W. 480, 5 C. A. 417.

**Sub-tenant not liable to landlord.**—See notes under Art. 5489.

**Art. 5483. [3244] Defendant may replevy.**—The defendant shall have the right at any time within ten days from the date of said levy to replevy the property so seized, by giving bond payable to the plaintiff, with two or more good and sufficient sureties in double the amount of the debt, or, at his election, for the value of the property so seized, conditioned that if the defendant be cast in the action he shall satisfy the judgment that may be rendered against him or pay the estimated value of the property, with lawful interest thereon from the date of the bond.

See *Jacobs v. Daugherty*, 78 T. 682, 15 S. W. 160; *Bemis v. Wells*, 10 C. A. 626, 31 S. W. 827.

**Replevy bond.**—A replevy bond is an unconditional obligation to pay the judgment, etc., which obligation is in no way dependent upon the validity of the distress warrant proceeding. *Watson v. Cox*, 2 App. C. C. § 278; *Sexton v. Hindman*, 2 App. C. C. § 462; *Corley v. Rountree* (Civ. App.) 37 S. W. 475.

When a bond is not in conformity with the statute, judgment cannot be rendered under this article against the sureties, but an action may be maintained upon the bond for the value of the property. *Jacobs v. Dougherty*, 78 T. 682, 15 S. W. 160; *Jones v. Hays*, 27 T. 1; *City of Marshall v. Bailey*, 27 T. 686; *Dignan v. Shields*, 51 T. 322. See *L. I. M. & C. Co. v. Roberts*, 62 T. 615.

Where a tenant replevies property taken under a distress warrant, and gives bond for the satisfaction of the judgment, this does not release the lien of the distress warrant. *McEvoy v. Niece*, 20 C. A. 686, 50 S. W. 424.

Where, in an action by a landlord against his tenant to recover for advances and rent, the crop is taken on a distress warrant and replevied by defendant, and the conditions of the replevy bond are more onerous on the sureties than required by the statute, the bond is not good as a statutory bond, and a verdict in favor of the sureties should be directed. *Leverett v. Meeks*, 29 C. A. 523, 68 S. W. 302.

In an action to foreclose a landlord's lien, the giving of a redelivery bond by a claimant of the property seized held not a defense to an action against him for converting the property. *Martin Co. v. Cottrell* (Civ. App.) 142 S. W. 48.

**Art. 5484. [3245] Judgment against sureties.**—When the property levied on has been replevied as provided in the preceding article, and final judgment shall be rendered against the defendant, such judgment shall be also against him and his sureties on his replevy bond for the amount of the judgment, interest and costs, or for the value of the property replevied and interest, according to the terms of such bond.

**Art. 5485. [3246] Perishable property sold.**—If the property is of a perishable or wasting kind, and the defendant fails to replevy as herein provided, the officer making the levy, or the plaintiff, or the defendant, may apply to the court, or judge thereof, to which the warrant is returnable, either in term time or vacation, for an order to sell such property; and, if any person other than the defendant apply for such order of sale, the court shall not grant such order, unless the person applying shall file with such court an obligation, payable to the defendant, with two or more good and sufficient sureties, to be approved by said court, that they will be responsible to the defendant for such damages as he may sustain in case such sale be illegally and unjustly applied for, or be illegally and unjustly made, which sale shall be conducted as sales under execution. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

**Art. 5486. [3247] Citation for defendant.**—It shall be the duty of the justice of the peace at the time he issues the warrant to issue a citation to the defendant requiring him to answer before such justice, if he has jurisdiction to finally try the cause, and, upon its being returned served, to proceed to judgment as in ordinary cases; and, if he has not such jurisdiction, the citation shall require the defendant to answer before the court to which the warrant was made returnable, and shall be returned with the other papers to such court; provided, that, if the defendant has removed from the county without service, the proper officer shall state this fact in his return on the citation; and the court shall proceed to try the case *ex parte*, and may enter the proper judgment. [P. D. 7418f.]

See *Martin Co. v. Cottrell* (Civ. App.) 142 S. W. 48.

**Requisites of citation.**—A citation issued by a justice of the peace need not state the number of the case. *Biesenbach v. Key*, 63 T. 79. It must be issued at the same time as the distress warrant. *Jones v. Stone*, 2 App. C. C. § 358.

**Waiver, loss or discharge of lien.**—See notes under Art. 5478a.

**Art. 5487. [3248] Petition.**—When the warrant is made returnable to the district or county court, the plaintiff shall not be obliged to file his petition before suing out said warrant, but may file the same on or before the appearance day of the term of the court to which said papers are returnable. [Id.]

**Requisites of petition.**—A landlord suing his tenant to enforce his lien must allege that the premises are leased to the tenant. *Constantine v. Fresche Brewing Co.*, 17 C. A. 444, 43 S. W. 1045.

**Filing of petition.**—If the petition is not filed as required the defendant may move the dismissal of the case. But if the petition is filed before the case is dismissed the cause should not be dismissed. *Maynard v. Lockett*, 1 U. C. 527; *Bateman v. Maddox*, 26 S. W. 51, 86 T. 546; *Bruner v. Dubard*, 1 App. C. C. § 391; *Braley v. Bailey*, 1 App. C. C. § 790; *Jones v. Stone*, 2 App. C. C. § 359; *Taylor v. Felder*, 23 S. W. 480, 5 C. A. 417.

Where a distress warrant is sued out the plaintiff can file his petition on appearance day notwithstanding the fact that an answer had already been filed. *Scoggins v. Thompson* (Civ. App.) 45 S. W. 216.

One instituting action by distress warrant may recover unliquidated damages on petition afterwards filed. *Fulcher v. West* (Civ. App.) 51 S. W. 342.

**Institution of suits.**—See Title 37, Chapter 1.

**Art. 5488. [3249] Rights of tenant.**—Nothing in this title shall be so construed as to prevent landlords and tenants from entering into such stipulations or contracts in regard to rents and advances as they may think proper; and, should the landlord, without any default on the part of the tenant or lessee, fail to comply in any respect with his part of the contract, he shall be responsible to said tenant or lessee for whatever damages may be sustained thereby; and, to secure such damages to such tenant or lessee, he shall have a lien on all the property in his possession not exempt from forced sale, as well as upon all rents due to said landlord under said contract. [Act Aug. 14, 1876, p. 137.]

**Removal of fixtures.**—See notes at end of title.

**Termination of lease.**—See notes at end of title.

**Art. 5489. [3250] Tenants shall not sub-let without consent, etc.**—If lands or tenements are rented by the landlord to any person or persons, such person or persons renting said lands or tenements shall not rent or lease said lands or tenements during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney. [Id.]

**Application as to public lands.**—It may perhaps be well doubted whether this article applies to leases of public lands by the land commissioner. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 705.

This statute applies to state's tenants. *Adkinson v. Porter* (Civ. App.) 73 S. W. 44.

**Right to assign or sublet in general.**—This article prohibits the assignment of a lease without the consent of the landlord. *Matthews v. Whitaker* (Civ. App.) 23 S. W. 538; *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 705; *Adkinson v. Porter* (Civ. App.) 73 S. W. 44; *Tandy v. Fowler*, 150 S. W. 481.

**Privilege of subletting held, under the terms of the lease, a personal trust, and not a general power to sublet.** *Boone v. First Nat. Bank*, 17 C. A. 365, 43 S. W. 594.

A creditor, attaching crops growing on the homestead, cannot defend by raising issue whether the debtor, who is a sublessee, occupies with the owner's consent. *Moore v. Graham*, 29 C. A. 235, 69 S. W. 200.

Where, after a sublessee enters and cultivates a crop, the owner claims a part of the gathered crop as rent, there is a sufficient ratification of the subletting. *Id.*

The lessor may waive the provision as to assignment and where he does so the assignment is valid and the assignee becomes the lawful tenant of the assignor for the term of the lease and his rights as tenant cannot thereafter be avoided or questioned. Acquiescence in assignment for 15 or 20 years is indicative of assent and ratification. Consent can be inferred from acceptance of rent from assignee. *Willey Lodge No. 21, I. O. O. F., v. City of Paris*, 31 C. A. 632, 73 S. W. 70.

When the consent of the landlord is given to sublet the premises whether in the written lease or afterwards, and agrees to accept the assignee as his tenant—and proof of accepting rent from the assignee will be deemed evidence of such—he no longer has any right of action against the original lessee. *Ascarete v. Peaff* (Civ. App.) 78 S. W. 975.

In action to set aside contract for sale of land, and to recover same, a defense that defendant was entitled to possession of the land under a certain lease held untenable. *Slaughter v. Coke County*, 34 C. A. 598, 79 S. W. 863.

Under this article a tenant can neither assign the lease nor sublet the premises without the consent of the landlord. The consent to the subletting cannot be carried further and made to include a consent to the assignment. *Morrow v. Camp* (Civ. App.) 101 S. W. 821.

A leasehold cannot be sold without the consent of the landlord, and it has no market value. *Steger v. Barrett* (Civ. App.) 124 S. W. 174.

A provision in a lease against subletting without the consent of the lessor may be waived by the lessor. *Fred v. Moseley* (Civ. App.) 146 S. W. 343.

Where a lease provided that the premises should be used for mercantile purposes and not otherwise, and that the lessee should not assign or underlet the premises or any part thereof, without the consent of the lessor in writing, the lessee had no right without the consent of the lessor to permit a third person to place signboards on the roof, especially in view of this article; and the landlord will not be estopped by acceptance of rent from compelling removal of such signboards. *Clayton D. Brown Co. v. O'Connor* (Civ. App.) 151 S. W. 339.

**"Subtenant" and "subletting" defined.**—A "subtenant" is one who leases all or a part of the rented premises from the original lessee for a term less than that held by the latter; and "subletting" is where the lessee demises the whole or a part of the premises for a portion of the unexpired term. *Hudgins v. Bowes* (Civ. App.) 110 S. W. 178.

**Effect of unauthorized subletting.**—A person holding premises under illegal subletting is a trespasser. *Rose v. Riddle*, 3 App. C. C. § 299. See *Sansing v. Risinger*, 2 App. C. C. § 713.

The lease by the tenant to a third party without the consent of the landlord is void and the legal status of the tenant is the same as if he had not attempted to sublease, and having abandoned the lease and the landlord having continued the cultivation of the leased premises the tenant cannot turn loose stock within the inclosure without violating article 1240 of the Penal Code. *Gartrell v. State* (Cr. App.) 61 S. W. 489.

One who is in possession under a subcontract with the tenant without the consent of the landlord occupies the attitude of a stranger to the landlord and to the contract of lease and in assuming to cut and remove timber, commits a tort. *Brown v. Pope*, 27 C. A. 225, 65 S. W. 43.

Although the lease does not contain a provision against subletting, the omission is supplied by the statute, and if the premises are sublet without the consent of the landlord he has the right to forfeit the lease by force of the statute. *Markowitz v. Greenwall Theatrical Circuit Co.* (Civ. App.) 75 S. W. 76.

The assignment of a lease by a tenant without the consent of the landlord is not void, but voidable, at the option of the landlord, who may either claim or waive the forfeiture. *Scott v. Slaughter*, 35 C. A. 524, 80 S. W. 643.

Where a lessee has sublet without the owner's consent, the latter is authorized to resume possession of his lands. *Waggoner v. Snody*, 36 C. A. 514, 82 S. W. 358.

Where a lessee of an eight-room house subrents two rooms to a tenant without the consent of the landlord, he forfeits his lease under this article. *Hudgins v. Bowes* (Civ. App.) 110 S. W. 178.

**Assignment or sublease and construction and operation.**—In an action for the consideration of an assignment of a lease for a term of years, an eviction by the landlord for nonpayment of rent would in no way operate as a defense. It is not a recovery under a title different and paramount from that held by the tenant. *Howard v. Britton*, 71 T. 286, 9 S. W. 73.

A sublease held an assignment of the original lease, making the subtenant liable for performance of the covenants. *Campbell v. Cates* (Civ. App.) 51 S. W. 268.

A contract between lessee of opera house and third person held not to have amounted to a subletting of the premises by the lessee. *Markowitz v. Greenwall Theatrical Circuit Co.* (Civ. App.) 75 S. W. 74, 317.

A subtenant is chargeable with knowledge of the term of the lessee's lease. *Missouri, K. & T. Ry. Co. of Texas v. Keahy*, 37 C. A. 330, 83 S. W. 1102.

A subtenant is not liable to the landlord on covenants contained in the lease between the landlord and lessee, where he has not so contracted. *Id.*

Owner of land held not entitled to recover damages for the pasturing of cattle thereon without his consent. *Wright v. Henderson* (Civ. App.) 86 S. W. 799.

Facts held to authorize a finding that an occupant of a part of a railroad right of way was a subtenant, and not an assignee, of the company's lessee. *J. C. Wooldridge & Son v. Ft. Worth & D. C. Ry. Co.*, 38 C. A. 551, 86 S. W. 942.

An agreement whereby the lessee of a pasture sold the same was properly construed as between the lessor and lessee as an assignment of the lease. *Waggoner v. Wyatt*, 43 C. A. 75, 94 S. W. 1076.

A lessee, having performed the conditions of his lease, notwithstanding a void assignment of his lease, held to be entitled to recover of the landlord for expenditures after the assignment. *Morrow v. Camp* (Civ. App.) 101 S. W. 819; *Allen v. Same*, *Id.*

A subtenant is not liable on the contract between the landlord and the original lessee. *Ft. Worth Fair Ass'n v. Ft. Worth Driving Club*, 56 C. A. 167, 121 S. W. 213.

In an action to enforce a contract and mortgage concerning leased land which had been assigned, held no defense that assignee was indebted to owner of land for rent. *Crockett & Sons v. Anselin* (Civ. App.) 132 S. W. 99.

A contract between a lessee and a third person held not to operate as a sublease or as an assignment. *Cockrell v. Houston Packing Co.* (Civ. App.) 133 S. W. 697.

Where a lease authorized the lessee to sublet, that the lessee sublet for an illegal purpose, without lessor's consent, held not to prevent the lessor from recovering rent under the original lease. *Davis v. Vidal* (Civ. App.) 133 S. W. 1074.

Defendant held a sublessee and not an assignee of an original lease. *Id.*

A subtenant of a lessee held not entitled on the termination of the lease to assert any rights against the lessor. *Doyle v. Scott* (Civ. App.) 134 S. W. 828.

A lessor may for any breach of conditions of the lease evict both the lessee and his subtenant. *Id.*

A subtenant is chargeable with knowledge of the terms of the lessee's lease. *Id.*

A contract between a lessee, covenanting not to sublet or assign without the lessor's consent, and a third person, held an assignment of the lease. *Cockrell v. Houston Packing Co.* (Sup.) 147 S. W. 1145.

Any disclaimer in such a contract must be disregarded. *Id.*

A party to whom a tenant has transferred his rights in a stalk field cannot pasture his cattle in such field, to the damage of the owner after the expiration of the lease. *Tandy v. Fowler* (Civ. App.) 150 S. W. 481.

An instrument executed by a lessee whereby he conveys the entire term and parts with all reversionary interest in the premises is an assignment, while, if he retains any reversionary interest, the instrument is a sublease. *Davis v. Vidal*, 105 T. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084.

Where a tenant reserves, in the instrument, giving possession to his transferee, the right of re-entry on failure to pay rent, he retains an interest in the premises and the instrument is a subletting, though stated to be an assignment. *Id.*

The word "term," in the rule that a tenant who parts with the entire term embraced in his lease is an assignor of the lease, defined. *Id.*

**Lessee who sublets as proprietor.**—The lessee of a building, who sublets part of it, is a proprietor within the purview of the gambling statutes. *De Los Santos v. State* (Cr. App.) 146 S. W. 919.

**Persons liable for rent.**—See notes at end of chapter.

**Subject-matter to which lien attaches.**—See notes under Art. 5475.

**Admissibility of evidence of sublease in criminal action.**—In a prosecution for murder, wherein it appeared accused killed deceased when endeavoring to gain possession of a house on land which he had recently bought, occupied by deceased as a subtenant, the evidence clearly raised the issue whether deceased was in possession with the acquiescence of accused and under authority of his vendor. Held, that in such case testimony as to any lease, rent, or permission to occupy subsequent to the deed to accused was admissible, and there was no error in refusing to exclude it from the jury on motion before argument, based on the ground that subsequent to the deed there could be no sublease of the premises to deceased without consent of accused, because of this article, prohibiting subleases without consent of the landlord. *Gay v. State*, 58 Cr. R. 472, 125 S. W. 896.

**Art. 5490. [3251] Owners of buildings to have preference lien, etc.**  
—All persons leasing or renting any residence, storehouse or other building, shall have a preference lien upon all the property of the tenant in such residence, storehouse or other building, for the payment of the rents due and that may become due; provided, the lien for rents to become due shall not continue or be enforced for a longer period than the current contract year, it being intended by the term, "current contract year," to embrace a period of twelve months, reckoning from the beginning of the lease or rental contract, whether the same be in the first or any other year of such lease or rental contract. Such lien shall continue and be in force so long as the tenant shall occupy the rented premises, and for one month thereafter; but this article shall not be

construed as in any manner repealing or affecting any act exempting property from forced sale. [Acts 1889, p. 11.]

**Duration of lien.**—The lien given by statute is limited to the year. When the occupation of the premises continues beyond the term limited by the statute, the preference lien is only for the rent due and to become due within the term of one year. If by the contract the rent becomes due and payable monthly on the first day of each subsequent month, the lien exists only for the rent already accrued and to accrue during the current month. *H. R. E., B. & B. Ass'n v. Cochran*, 60 T. 620.

Where a lease of a store was made for the period of eight months, commencing on the 1st of January, 1885, at the rental of \$30 per month, payable monthly, and the tenant abandoned the premises on the 1st of February, 1885, the landlord had a lien upon the goods on the premises for the rent of the entire term, superior to the right of the tenant's vendee. *Marsalis v. Pitman*, 5 S. W. 404, 68 T. 624.

The effect of this article is to prevent the landlord from ever asserting a claim for more than one year's rent to become due in the future; that is, no matter how many years may be covered by the contract, the lien can only be enforced for a period up to the end of the current contract year. It does not prevent the making of a lease for more than one year, but it divides such contract as far as the lease is concerned into a series of yearly contracts, and when the tenant has occupied the premises for any part of any of said series of years, the landlord has a lien for the balance of such year. *Allen v. Brunner*, 33 C. A. 128, 75 S. W. 821.

**Failure to claim exemption.**—The failure of a purchaser of the tenant to claim that property is exempt precludes such purchaser from claiming exemption to invalidate a judgment for foreclosing a lien. *York v. Carlisle*, 19 C. A. 269, 46 S. W. 257.

**Subject-matter to which lien attaches.**—See notes under Art. 5475.

**Rent secured.**—See notes under Art. 5475.

**Priorities.**—See notes under Art. 5477.

**Remedy of landlord after attachment.**—The tenant whose goods are seized by process of attachment, and which remain on the rental premises until their sale under such process, is liable for rent during the entire period of occupancy. The goods, while in custody of the law, are not subject to seizure for rent under a distress warrant; but immediately upon a sale of them being made by the officer having them in custody, the landlord's lien can be enforced by their seizure in the store and sale for all rents due. If the landlord sells the premises after the goods are attached, he has the like remedy for the collection of rents which were due before his sale, which he may enforce against the goods in the hands of the purchaser remaining in the store after their sale under attachment. *Meyer v. Oliver*, 61 T. 584.

**Persons as against whom lien may be enforced.**—See notes under Art. 5475.

**Rent and advances.**—See notes at end of title.

**Waiver, loss or discharge of lien.**—See notes under Art. 5478a.

**Distress warrant as prerequisite to foreclosure.**—See notes under Art. 5479.

**Art. 5491. [3252] Distress warrant, how obtained.**—When any rent shall become due, or the tenant about to remove from such leased or rented buildings, or remove his property therefrom, it shall be lawful for the person to whom the rent is payable, his agent, attorney or assignee, to apply to a justice of the peace of the precinct where the building is situated for a distress warrant, which shall be issued on an affidavit and bond; and the same proceedings shall be had on the issuance, trial and return of such warrant as is now provided by law in this chapter; the object of this and the preceding article being to extend the operation of such law so as to include and protect liens on residences and store-houses and other buildings occupied or used by tenants, and conferring on the owners thereof the same rights and privileges as are now conferred by law on other landlords. [Acts 1879, ch. 119, p. 128.]

**Notice to purchaser.**—This article and Art. 5490 charge a purchaser from a tenant within one month after removal from the premises with notice of the landlord's lien. *York v. Carlisle*, 19 C. A. 269, 46 S. W. 257.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

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|---------------------------------------------------------------|---------------------------------------------------------------|
| 1. Creation and existence of relation of landlord and tenant. | 16. Cross-action against landlord in action between tenants.  |
| 2. Tenancy at will.                                           | 17. Indemnity against breach of contract with tenant.         |
| 3. Implied tenancy.                                           | 18. Extending time for payment of rent.                       |
| 4. Evidence as to relation.                                   | 19. Wrongful receipt of rent as creating trust.               |
| 5. Use of property before lease takes effect.                 | 20. Recovery by tenant for services after breach of contract. |
| 6. Requisites and validity of leases.                         | 21. Rights of action against third persons.                   |
| 7. Parties to lease.                                          | 22. Delivery of possession.                                   |
| 8. Liability for breach of contract.                          | 23. Damages for failure to deliver possession.                |
| 9. Estoppel of tenant.                                        | 24. Disturbance of possession of tenant.                      |
| 10. Warranty that building is adapted to lessee's purpose.    | 25. Mode and purposes of use of premises in general.          |
| 11. Commencement of term.                                     | 26. Rights as to crops.                                       |
| 12. Right of mortgagor to rent.                               | 27. Rights of landlord and tenant after eviction.             |
| 13. Property included in lease.                               |                                                               |
| 14. Conversion by landlord.                                   |                                                               |
| 15. Liability of landlord for debts incurred by tenant.       |                                                               |

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|------------------------------------------------------------------------|------------------------------------------------------|
| 28. Liability for rent.                                                | 50. Duty to make repairs in general.                 |
| 29. — Failure of landlord to repair.                                   | 51. Injuries from defective condition of premises.   |
| 30. — Injury to premises.                                              | 52. — Nuisances.                                     |
| 31. — Surrender or abandonment.                                        | 53. Injuries to premises.                            |
| 32. — Amount.                                                          | 54. Incumbrances on leasehold in general.            |
| 33. — Time of accrual.                                                 | 55. Condition of premises at termination of tenancy. |
| 34. — Persons entitled.                                                | 56. Accounting for personal property.                |
| 35. — Persons liable.                                                  | 57. Renewal of lease in general.                     |
| 36. — Defenses.                                                        | 58. Extension or renewal by holding over.            |
| 37. — Evidence.                                                        | 59. Option to purchase premises.                     |
| 38. — Amount of recovery.                                              | 60. Duration and termination of lease.               |
| 39. Estoppel to sue for second installment of rent.                    | 61. Recovery of possession.                          |
| 40. Conclusiveness of judgment in action on lease.                     | 62. Renting on shares.                               |
| 41. Possession of tenant as possession of landlord.                    | 63. — Mode of cultivation of land.                   |
| 42. Validity of bond by lessee for improvements.                       | 64. — Rights and liabilities as to land.             |
| 43. Transfer of reversion.                                             | 65. — Rights and liabilities as to crops.            |
| 44. Illegality of distress warrant as affecting right to collect rent. | 66. — Lien.                                          |
| 45. Waste.                                                             | 67. — Mode of division of crops.                     |
| 46. Improvements by tenant.                                            | 68. — Breach of contract by landlord in general.     |
| 47. — Removal.                                                         | 69. — Eviction.                                      |
| 48. Improvements by landlord.                                          | 70. — Conversion.                                    |
| 49. Damages for failure to make improvements.                          | 71. — Breach of contract to deliver share.           |
|                                                                        | 72. — Liabilities of third persons.                  |

**1. Creation and existence of relation of landlord and tenant.**—The relation of landlord and tenant cannot exist upon public lands, and a contract of lease does not bind the tenant to hold for the landlord. *Turner v. Ferguson*, 39 T. 505.

A tenant may prove the true relationship between him and his landlord. Thus, he may show that his deed conveying land to his landlord and a rent contract between them were intended to operate as a mortgage or that they were made upon a specific trust. *Smith v. Smith*, 81 T. 45, 16 S. W. 637.

When one tenant in common, by express contract, rents his interest to his co-tenant, the relation of landlord and tenant exists between them. *Grabfelder v. Gazetti* (Civ. App.) 26 S. W. 436.

Where the relation of landlord and tenant is once established, it attaches to all who succeed the tenant immediately or remotely holding the possession originally derived. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

"Tenant" defined. *Francis v. Holmes*, 54 C. A. 608, 118 S. W. 881.

**2. Tenancy at will.**—A tenant at will owns the premises until properly notified to vacate, and landlord's entry for any other purpose while tenancy exists is unauthorized. *Elliott v. State*, 39 Cr. R. 242, 45 S. W. 711.

A lease held to create a tenancy at will of either party. *Beauchamp v. Runnels*, 35 C. A. 212, 79 S. W. 1105.

Plaintiffs held tenants at will of defendants, and not bound by a provision of a former lease of the premises absolving defendant from liability for loss by fire. *Ft. Worth & D. C. Ry. Co. v. J. C. Woolridge & Son*, 101 T. 471, 103 S. W. 1159.

**3. Implied tenancy.**—One tenant in common occupying the premises is not liable to his cotenant for use and occupation, unless he has excluded him therefrom, or by express agreement has promised to pay for the use. *Neil v. Shackelford*, 45 T. 119.

E. sold E. a tract of land; afterwards the trade was canceled and E. took back the land and brought suit to recover rent for the time it was occupied by B. Held, that the relation of landlord and tenant never existed between the parties, and E. could not maintain the suit for rent. *Engel v. Brown*, 1 App. C. C. § 803.

Where a party has gone into possession of realty under a contract of sale, he cannot be liable to vendee on an implied contract to pay rent. *Brown v. Randolph*, 26 C. A. 66, 62 S. W. 981.

A tenant in common who does not deny the right of his cotenant to use the land, held not liable for rent. *Morris v. Morris*, 47 C. A. 244, 105 S. W. 242; *Autry v. Reasor*, 102 T. 123, 108 S. W. 1162.

When a person enters into possession of and by express permission of the owner at will, such possession creates the relation of landlord and tenant; the tenant during said tenancy holding the land in subordination to the title of the owner. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

Defendant's possession of the premises under all the circumstances held to be under a constructive tenancy. *Id.*

Claimants of certain land, part of a larger tract, held vendees, and not tenants, of the holder of the legal title. *Emporia Lumber Co. v. Tucker* (Civ. App.) 120 S. W. 1082. The relation under certain facts held that of landlord and tenant. *Emporia Lumber Co. v. Tucker*, 103 T. 547, 131 S. W. 408.

**4. Evidence as to relation.**—Facts held evidence of assumption of lease. *Dulin v. Knechtel* (Civ. App.) 51 S. W. 350.

Facts held to show that no contract for a lease, either to defendant or his wife, was entered into. *Stevens v. Stoner* (Civ. App.) 54 S. W. 934.

Evidence held insufficient to show the execution of a valid contract for the lease of land. *Scottish-American Mortg. Co. v. Taylor* (Civ. App.) 74 S. W. 564.

In trespass to try title, evidence held insufficient to show that defendant occupied the land other than as plaintiff's tenant. *Berry v. Jagoe*, 45 C. A. 6, 100 S. W. 815.

Evidence held sufficient to show that the parties made a mutual and final agreement for a lease of lands at a particular rental. *T. A. Robertson & Co. v. Russell*, 51 C. A. 257, 111 S. W. 205.

The relation of landlord and tenant may be shown by the tenant's acknowledgment of the tenancy. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

Evidence held to sustain a finding that hotel property was leased to defendants for one year. *Orange Hotel Co. v. Townsend* (Civ. App.) 130 S. W. 701.

Evidence in a suit by the lessee of a creamery plant for eviction held to raise an issue whether a verbal lease existed. *Dickinson Creamery Co. v. Lyle* (Civ. App.) 130 S. W. 904.

**5. Use of property before lease takes effect.**—Herding cattle on land of another held not justified by permission of one having a lease not going into effect till after the herding. *Tucson Land & Live Stock Co. v. Everett*, 34 C. A. 340, 78 S. W. 535.

**6. Requisites and validity of leases.**—A lease containing a promise to pay rent involved in the usual mutual covenants is not a negotiable instrument. *Maxwell v. Urban*, 22 C. A. 565, 55 S. W. 1124.

In an action to recover on a lease of lands, proof that a letter accepting a proposal was received held not essential to the establishment of the lease. *T. A. Robertson & Co. v. Russell*, 51 C. A. 257, 111 S. W. 205.

Promise in contract of leasing held void for fraud. *Schroeter v. Bowdon*, 53 C. A. 135, 115 S. W. 331.

If defendant signed a lease at the solicitation of the landlord's agents only to facilitate its transfer to another, he would not be liable thereon. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

Representations of lessor, who was lessee's attorney, that premises could be used as a meat market, held ground for a rescission, where such use of the premises was prohibited by a city ordinance, though lessee agreed in the lease to use the premises for legitimate purposes only. *Altgelt v. Gerbic* (Civ. App.) 149 S. W. 233.

**7. Parties to lease.**—Lease held to bind plaintiffs personally as lessors and agents of undisclosed principal. *Hunter v. Adoue & Lobit*, 38 C. A. 542, 86 S. W. 622.

**8. Liability for breach of contract.**—In a contract on a lease, a provision to pay a specified sum as damages for breach of obligation held a stipulation for liquidated damages. *Engelhardt v. Batla* (Civ. App.) 40 S. W. 150.

Liability determined of lessee who failed to perform. *Dulin v. Knechtel* (Civ. App.) 51 S. W. 350.

Where the consideration for a lease was the lessee's agreement to maintain a certain kind of school on the premises, and an assignee of the lease maintained a school for several years to the character of which the lessor did not object until some 17 years after it was instituted, the lessor was not then entitled to object. *Wilkey Lodge No. 21, I. O. O. F., v. City of Paris*, 31 C. A. 632, 73 S. W. 69.

The measure of damages for breach of a rental contract is the difference between the contract price and the market rental of the land. *Scottish-American Mortg. Co. v. Taylor* (Civ. App.) 74 S. W. 564.

In an action for breach of a contract for the rental of farm land, an allowance of damages, based on what the plaintiff could have earned from his share of the crops which he might reasonably have raised on the land, held not objectionable as speculative and uncertain. *Rogers v. McGuffey*, 96 T. 565, 74 S. W. 753.

A stipulation in a lease held not to furnish a measure of damages for a certain breach of the lease by the lessor. *Raywood Rice Canal & Milling Co. v. Langford Bros.*, 32 C. A. 401, 74 S. W. 926.

The value of crops which might probably have been made on leased land during the term is a proper element of damages for breach by the lessor of his contract to lease the land. *King v. Griffin*, 39 C. A. 497, 87 S. W. 844.

The rule for computation of damages for breach of a contract to lease stated. *Graves v. Brownson* (Civ. App.) 120 S. W. 560.

If defendant rented land to plaintiff agreeing to furnish seed and water, it would be liable for damages for breach of its agreement, whether the land leased belonged to it or not. *Kincheloe Irrigating Co. v. Hahn Bros. & Co.* (Civ. App.) 132 S. W. 78.

The lessee's measure of damages for the lessor's breach of a valid lease held to be what the lease would have been worth to him for the entire term. *Garrett v. Danner* (Civ. App.) 146 S. W. 678.

**9. Estoppel of tenant.**—A tenant is estopped from disputing the validity of the title under which he enters on land, but in an action by the landlord to recover possession he may show that he has acquired the plaintiff's title, as by judgment against him, execution and sale. *Camley v. Stanfield*, 10 T. 546, 60 Am. Dec. 219; *Andrews v. Richardson*, 21 T. 287; *Texas Land Co. v. Turman*, 53 T. 619.

A. leased a lot to B. for a term of twelve years. B. paid rent for five years, when C., claiming to be the owner of the lot, demanded possession of the lot and threatened suit and eviction. A. being insolvent and unable to indemnify B., the latter purchased the lot. In a suit by A. for rents and possession, B. was permitted to defend as holding the superior title. *Gallagher v. Bennett*, 38 T. 291.

The entry upon land under or by consent of the legal owner or of one of several tenants in common is, as to such entry, a tenancy, and cannot be repudiated by the tenant in a suit by the holder of the title under which such entry was made, unless such tenancy has been terminated by some express disclaimer brought home to the landlord, so as to put in operation the statutes of limitation. *Word v. Drouthett*, 44 T. 365; *Towery v. Henderson*, 60 T. 291; *Camley v. Stanfield*, 10 T. 546, 60 Am. Dec. 219; *Flanagan v. Pearson*, 61 T. 302; *Tyler v. Davis*, 61 T. 674.

A tenant may lawfully attorn to a third party, who after the lease purchased the landlord's title at execution sale. *Texas Land Co. v. Turman*, 53 T. 619.

A tenant cannot deny the title of his landlord. The fact that he originally entered without recognizing his tenancy, and afterwards attorns to the landlord, does not vary the rule; he is estopped by his recognition of his tenancy, no matter how he first went into possession, except in a case of mistake, or of fraud or misrepresentation on the part of the landlord. *Tyler v. Davis*, 61 T. 674; *Camley v. Stanfield*, 10 T. 546, 60 Am. Dec. 219; *Moffatt v. Sydnor*, 13 T. 628; *Lyles v. Murphy*, 38 T. 75; *Gallagher v. Bennett*, 38 T. 291; *Allen v. Thompson*, 2 App. C. C. § 106.



Tenants or their privies in blood or estate are, as a general rule, estopped from contesting the title of their landlord as long as they hold the possession originally derived from him. *Smith v. Reddin*, 1 U. C. 360; *Whitsett v. Miller*, 1 U. C. 303. "The tenant may, however, show that the landlord's title has expired, or that some change has taken place in it since the lease; that he himself has purchased a title not inconsistent with his duty as tenant; or that he was induced to accept the lease or possession by fraud or mistake." *Casey v. Hanrick*, 69 T. 44, 6 S. W. 405; *McShan v. Myers*, 1 U. C. 100.

When a tenant ceased to exercise control over the rented premises for a short time after the expiration of his lease, but without notifying his landlord, and then rented from a third party, it was held that he was estopped from denying the title of him under whom he first entered. *Juneman v. Franklin*, 67 T. 411, 3 S. W. 562.

A tenant after termination of his lease may assert a superior title without surrendering the possession. *Dodge v. Phelan*, 21 S. W. 309, 2 C. A. 441.

Where a lessee and his heirs held over without giving notice that they claimed the land as their own, held, that their possession was the possession of the lessor, as against a subsequent purchaser of the land. *Mattfeld v. Huntington*, 17 C. A. 716, 43 S. W. 53.

A tenant cannot hold possession derived from his landlord, and contest his title to the land. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

Under a contract to purchase land if the title is good, or pay rent for its use if the title fails, the tenant is not liable for rent until the failure of title is shown. *Cross v. Freeman*, 19 C. A. 428, 47 S. W. 473.

After the title of a purchaser of public land has been forfeited for the nonpayment of interest due the state, a tenant of the purchaser may acquire title. *Lang v. Crothers*, 21 C. A. 118, 51 S. W. 271.

Where a hotel is conducted by the agent of the owner, a servant employed by the agent is not estopped from showing the relations of the parties by a lease between them. *Oriental Inv. Co. v. Barclay*, 25 C. A. 543, 64 S. W. 80.

There is no duty resting on a tenant to protect the land from judicial sales which will prevent him bidding it in for himself at a tax sale, and he may set up the title so acquired against his landlord, without coming within the rule prohibiting a tenant from denying his landlord's title. *Crosby v. Bonnowsky*, 29 C. A. 455, 69 S. W. 212.

Any one holding possession by permission or at sufferance under another is estopped to deny the other's title. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 122 Am. St. Rep. 609.

Lessees claiming protection under a lease held estopped to question validity of its provisions. *Tips Foundry & Machine Co. v. State*, 47 C. A. 21, 103 S. W. 686.

A tenant cannot dispute the title of his landlord and attorn to another without surrendering the possession to him. *Huelett v. Platt*, 49 C. A. 377, 109 S. W. 207.

Certain statements by a tenant held not to affect the tenancy; and the tenant's continued possession inured to the benefit of his landlord. *Id.*

A tenant held authorized without surrender of possession to resist a suit of his landlord by interposing an acquired superior title. *Hyman v. Grant*, 50 C. A. 37, 114 S. W. 853.

A lessee held not estopped from disputing the lessor's title to a tract not within the boundaries of the land leased. *Rogers v. Stevenson* (Civ. App.) 117 S. W. 472.

In an action by a lessor to recover possession and to establish plaintiff's title where-by defendant's title would be destroyed, the latter may defend by showing a superior title in himself. *Stevenson v. Rogers*, 103 T. 169, 125 S. W. 1, 29 L. R. A. (N. S.) 85, Ann. Cas. 1912D, 99.

The attornment by a tenant of a landlord claiming the premises to another tenant held void as against the landlord and not to affect his possession. *Wiener v. Zweib* (Civ. App.) 128 S. W. 699.

A tenant having repudiated the contract of tenancy and restored the premises to the landlord may sue therefor and show that he has the superior title thereto. *Lumpkin v. Woods* (Civ. App.) 135 S. W. 1139.

**10. Warranty that building is adapted to lessee's purpose.**—There is no implied warranty on the part of a landlord that a building is adapted to the purposes for which it is leased. *Lynch v. Ortleib*, 70 T. 727, 8 S. W. 515.

**11. Commencement of term.**—In an action to recover rent under a lease, where plaintiff had failed to complete a building within the contract time, defendant held to have accepted the building. *Berry v. Burnett*, 23 C. A. 558, 56 S. W. 769.

**12. Right of mortgagor to rent.**—Where a mortgagor was entitled to possession at the time rents accrued, he or his assigns were entitled to all of such rents as against the mortgagee. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

**13. Property included in lease.**—A lease by its description held to give an interest in the south half of a section. *Santa Rosa Irr. Co. v. Pecos River Irr. Co.* (Civ. App.) 92 S. W. 1014.

Evidence held to support a finding that a lease of a described dwelling in a city and the yards and outhouses belonging thereto included a barn. *Goodhue v. Hawkins* (Civ. App.) 133 S. W. 288.

Where an owner of a one-story building containing several rooms leases them to different tenants, each lessee has merely an easement in the roof and has no control over it. *Clayton D. Brown Co. v. O'Connor* (Civ. App.) 151 S. W. 339.

**14. Conversion by landlord.**—Where tenant has left property on premises to secure payment of rent due, landlord, while not guilty of conversion for refusal to deliver property without tender of rent, should then resort to legal proceedings to collect his claim. *Schwulst v. Neely* (Civ. App.) 50 S. W. 608.

Conversion will not lie against landlord for disposing of property left by tenant on premises to secure payment of rent due, in absence of refusal to deliver it on demand, and tender of rent due. *Id.*

Landlord held liable for conversion where he disposes of property left by tenant on premises, but not for purpose of securing payment of rent, without foreclosing his landlord's lien. *Id.*

Evidence held to show a conversion by landlord of tenant's hay. *Gaw v. Bingham* (Civ. App.) 107 S. W. 931.

A wrongful conversion of the property of an evicted tenant held not shown by the evidence. *Wilson v. Moore*, 57 C. A. 418, 122 S. W. 577.

**15. Liability of landlord for debts incurred by tenant.**—A landlord held not liable to a thrasher for threshing grain on the premises under a contract made by the tenant, though custom required landlords to pay a part of the expense of harvesting crops, nor on the theory that he accepted the work. *Martin v. Slimp* (Civ. App.) 138 S. W. 451.

**16. Cross-action against landlord in action between tenants.**—In an action by one tenant against another, where defendant brought in the owners, his allegations as to their duty held not to entitle him to judgment over against the owners. *Burkett & Barnes v. Dillon* (Civ. App.) 117 S. W. 917.

**17. Indemnity against breach of contract with tenant.**—Where plaintiffs recovered against their landlords for breach of contract to furnish water to irrigate their crops, the landlords were not thereby entitled to recover over against an irrigation company which had agreed to furnish the water to the landlords the amount of plaintiffs' recovery. *Stockton v. Brown* (Civ. App.) 106 S. W. 423.

**18. Extending time for payment of rent.**—An agreement, without consideration, to extend, without interest, an installment of rent due on a lease, is invalid. *Randolph v. Mitchell* (Civ. App.) 51 S. W. 297.

**19. Wrongful receipt of rent as creating trust.**—Where one forges a lease and receives rents thereunder, it does not create a constructive trust in favor of the landowner. *Brown v. Hooks*, 33 C. A. 243, 76 S. W. 606.

**20. Recovery by tenant for services after breach of contract.**—Renter who failed to comply with contract held entitled to recover the reasonable value of his services, not to exceed the contract price, less the owner's damages. *Dyer v. McWhirter*, 51 C. A. 200, 111 S. W. 1053.

**21. Rights of action against third persons.**—Landlord held entitled to sue third person for injuries to a building in the possession of a tenant. *Vance v. San Antonio Gas Co.* (Civ. App.) 60 S. W. 317.

Landlord held not entitled to recover damages for trespass in entering house while in possession of tenant. *Peck v. Cain*, 27 C. A. 38, 63 S. W. 177.

In an action for the destruction by fire of the property of a lessee, the court held to properly confine the jury in determining the damages to fair, actual value. *Steger v. Barrett* (Civ. App.) 124 S. W. 174.

**22. Delivery of possession.**—A tenant having knowledge of the refusal of a third person to vacate a part of the land, who takes possession of the remainder without notifying the landlord of the facts, held bound by his acts. *Northcutt v. Allen* (Civ. App.) 148 S. W. 607.

**23. Damages for failure to deliver possession.**—Measure of damages for failure of a landlord to furnish a part of the ground to the tenant which he has leased to him, stated. *Pressler v. Warren*, 57 C. A. 635, 122 S. W. 909.

A lessee paying the stipulated rent held not precluded from recovering from the lessor the rental value of property wrongfully withheld by him. *Goodhue v. Hawkins* (Civ. App.) 133 S. W. 288.

A showing, in an action for damages for withholding possession of leased premises, that the lessee had conducted a similar business in the city, and that its old customers had promised to renew their patronage in defendants' building which was as well located as the other building, held not sufficient to authorize damages for profits lost by being deprived of the use of the building; such item being too uncertain and speculative. *Walter Box Co. v. Blackburn* (Civ. App.) 157 S. W. 220.

In an action for damages for withholding possession of leased premises, plaintiff could recover the amount paid its manager while kept from using the storeroom, where it employed him immediately after making the lease with defendants, and his services were reasonable and necessary, and defendants knew when the building was rented that the business would be conducted by employes. *Id.*

**24. Disturbance of possession of tenant.**—Landlord removing doors and windows, in consequence of which the tenant becomes sick, held guilty of trespass. *Jenner v. Carpenter* (Civ. App.) 48 S. W. 46.

A tenant held not entitled to recover for the loss of the use of water and improvements, in the absence of evidence of damage thereby. *Riggs v. Gray*, 31 C. A. 263, 72 S. W. 101.

A tenant held entitled to recover damages occasioned by a railroad company wrongfully obstructing the entrance to his place of business, and the question whether he was a lessee for a year or from month to month held immaterial. *International & G. N. R. Co. v. Capers*, 33 C. A. 283, 77 S. W. 39.

The provision of a lease considered, and held that the lessor did not warrant the use and possession of the leased premises against the acts of a stranger. *Thomas v. Brin*, 38 C. A. 180, 85 S. W. 842.

In an action for injury to cattle and grass in a pasture, plaintiff held not entitled, under the evidence, to recover for the destruction of winter pasture. *Baldwin v. Richardson*, 39 C. A. 406, 87 S. W. 746.

A hotel lessee's measure of damage for wrongful dispossession stated. *Orange Hotel Co. v. Townsend* (Civ. App.) 130 S. W. 701.

The owner of a leasehold of land for a term of years has an interest in the land for his term and a remedy for its recovery, if deprived of its possession, and not merely a right of action for breach of contract, as has a cropper. *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

**25. Mode and purposes of use of premises in general.**—Lease of premises for saloon construed, and held not to authorize the lessee to abandon the same on the passage of a law making it unlawful to use the property for a saloon. *San Antonio Brewing Ass'n v. Brents*, 39 C. A. 443, 83 S. W. 368.

A lessor held entitled to restrain use of the premises for a moving picture show or any other unauthorized purpose. *Dycus v. Traders' Bank & Trust Co.*, 52 C. A. 175, 113 S. W. 329.

A tenant may use the premises for any business not prohibited by law, and for which the premises are adapted, where the lease is silent thereon. *Fred v. Moseley* (Civ. App.) 146 S. W. 343.

A landlord cannot enjoin a tenant from making small changes in the premises to adapt the same to his business. *Id.*

**26. Rights as to crops.**—Where a tenant abandoned a crop, his landlord could market it and apply the proceeds to the tenant's debt. *Cunningham v. Skinner* (Civ. App.) 97 S. W. 509.

A tenant who refused to surrender possession at the end of his term, and who unlawfully withheld possession, and planted a crop was properly deprived of the crop, on the owner sequestering the land and taking possession thereof before the crop had been severed from the land. *Duncan v. Jouett* (Civ. App.) 111 S. W. 981.

A tenant may, notwithstanding the expiration of the tenancy, gather the remnant of his crop, but he must act promptly, and where he abandons the crop he cannot sue the landlord for a conversion thereof. *Huggins v. Reynolds*, 51 C. A. 504, 112 S. W. 116.

Certain facts held to show that a landlord and tenant contracted with reference to a custom, giving the tenant the right to harvest a crop planted before the expiration of the term. *Bowles v. Driver* (Civ. App.) 112 S. W. 440.

**27. Rights of landlord and tenant after eviction.**—A landlord after evicting tenant is not entitled to recover rent for unexpired term. *Nolan v. Stauffacher*, 3 App. C. C. § 372.

Where plaintiff was in possession under a lease, and another lessee, with notice of his possession, drove his cattle from the land, the lessors were not liable. And other lessees who drove the cattle off were not liable in damages if they did not know of his lease, but were liable if they knew of his lease and possession, though they had the right to possession. *McAllister v. Sanders* (Civ. App.) 41 S. W. 388.

Where a lease was violated by the lessor refusing to pay a certain sum specified therein, and by dispossessing the lessee of the premises, no demand for a performance of the lease was necessary to complete lessee's cause of action. *Brincefield v. Allen*, 25 C. A. 258, 60 S. W. 1010.

One claiming possession of land under a lease, and evicted on forcible entry and detainer, held not entitled, in a subsequent action against the landlord, to recover the value of the use of the premises for that part of the term remaining after the judgment in forcible entry and detainer. *Rankin v. Hooks* (Civ. App.) 81 S. W. 1005.

Where a lessee was ejected from the leased premises by the lessor, the latter was liable to the lessee for the reasonable rental value of the land for the unexpired period of the lease. *Campbell v. Howerton* (Civ. App.) 87 S. W. 370.

Where, in a suit for wrongful eviction, the undisputed testimony showed the value of the use of the premises did not exceed the amount of rent to be paid, plaintiff failed to show damage. *Wilson v. Moore*, 57 C. A. 418, 122 S. W. 577.

In a suit for wrongful eviction and conversion of a tenant's property, evidence held insufficient to justify the direction of a verdict for plaintiff. *Id.*

A tenant from month to month held not entitled to possession and to recover damages for an eviction after termination of his lease by default in rent. *Id.*

As damages for eviction from such premises as a creamery plant, the lessee can recover for loss of prospective profits where they are reasonably certain. *Dickinson Creamery Co. v. Lyle* (Civ. App.) 130 S. W. 904.

**28. Liability for rent.**—Attornment of tenant to third person under threatened eviction held not to release tenant from liability to landlord for rent. *Alford v. Carver*, 31 C. A. 607, 72 S. W. 869.

Conveyance by landlord of such title to demised premises as he had acquired under purchase at a foreclosure sale held not to release tenant from liability for rent, whether landlord's remaining title was valid or not. *Id.*

Where a lessee of a theater installed fixtures and began giving shows before the building was completed, he was liable for rent. *McConnell & Merchant v. Brick-Phillips Co.* (Civ. App.) 156 S. W. 1133.

**29. — Failure of landlord to repair.**—Where a tenant under a lease in which the landlord covenants to make certain necessary repairs remains in possession at the request of the landlord after the latter has failed to make such repairs, he does not waive any right under the lease. *Vincent v. Central City & Loan Investment Co.*, 45 C. A. 36, 99 S. W. 428.

Failure of a landlord to make repairs provided for in a lease is a defense to an action for the rent. *Id.*

The obligation to repair does not depend on employment of competent workmen; and, in an action for rent of premises abandoned for alleged failure to repair, it was not error to refuse a charge conveying the idea that plaintiff would do his duty if he employed such workmen. *Central City Loan & Investment Co. v. Vincent* (Civ. App.) 117 S. W. 912.

**30. — Injury to premises.**—Where a lease of a store did not require the landlord to make repairs, or relieve the tenant from liability for rent on account of damage by fire, the tenant held liable for rent while the landlord was voluntarily repairing such damage except for so much of the time consumed as exceeded a reasonable time to make the repairs. *Chambers v. Mattingly*, 47 C. A. 129, 103 S. W. 663.

**31. — Surrender or abandonment.**—A landlord is not obliged to endeavor to let premises for the benefit of a tenant who refuses to continue in occupancy under a lease. *Racke v. Anheuser-Busch Brewing Ass'n*, 17 C. A. 167, 42 S. W. 774.

On a tenant wrongfully vacating the premises before expiration of his term, the landlord need not relet for the tenant's benefit. *Goldman v. Broyles* (Civ. App.) 141 S. W. 283.

Where a term for years was terminated by order of the landlord acted upon by the tenant who paid the rent to that time, the tenant was entitled to a cancellation of his previously executed notes for each month's rent during the term. *Davidson v. Harris* (Civ. App.) 154 S. W. 639.

Where defendant gave notes for rent under a lease, the fact that he did not occupy the premises for the whole term was immaterial. *Pressler v. Barreda* (Civ. App.) 157 S. W. 435.

**32. — Amount.**—A tenant held not required to pay additional rent for land that he had made suitable for cultivation. *Hazlewood v. Pennybacker* (Civ. App.) 50 S. W. 199.

Where there was no express rental contract, defendant was liable for the reasonable rental value of the land. *Robbins v. Voss* (Civ. App.) 64 S. W. 313.

A landlord held entitled by virtue of the agreement with his tenant to rent of the entire premises, including a house built thereon by the tenant. *Mentz v. Haight* (Civ. App.) 97 S. W. 1076.

A tenant by the month holding over is liable for the whole month's rent, though he has no lease. *Johnson v. Hulett*, 56 C. A. 11, 120 S. W. 257.

A tenant held entitled to rely on the lease, fixing the amount of the rent. *Sanborn v. E. R. Roach Drug Co.* (Civ. App.) 137 S. W. 132.

Tenants held liable for rent at same rate as stated in lease for months during which they held possession of premises. *Sheppard's Home v. Wood* (Civ. App.) 143 S. W. 988.

Tenants retaining possession and attorning to another landlord held liable for reasonable rent, but not as tenants. *Id.*

**33. — Time of accrual.**—At common law, rent payable in money, in the absence of a stipulation as to the time of payment, is not due until the end of the year. *Neinast v. Doeckle*, 1 App. C. C. § 219.

Liability of lessee and guarantors, where the lease provides a gross sum as rent, all to be due on default in any payment, determined. *Hart v. Wynne* (Civ. App.) 40 S. W. 848.

In an action to recover rent and to terminate a lease, the court held to have properly determined that the lease was legally canceled for nonpayment of rent on December 11, 1903, and properly refused a charge that the rent was not due and payable until January 1st of each year. *Felkner v. Hyman* (Civ. App.) 135 S. W. 1128.

**34. — Persons entitled.**—A person may, in the absence of fraud, bind himself to pay rent for the use of property to which the lessor has no title. *Cross v. Freeman*, 22 C. A. 299, 54 S. W. 246.

After notice of an assignment of rent due under a lease, the lessee can do no act which may affect assignee's rights. *Maxwell v. Urban*, 22 C. A. 565, 55 S. W. 1124.

An assignee of rent without the reversion reserved in a lease for years may maintain an action of debt for the rent accrued against the lessee. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

The general rule is that even an apportionment of rent is never made under the common law in reference to length of time of occupation, but, when the rent falls due, the owner of the reversion at that time is entitled to the entire sum. *Lester v. Zink* (Civ. App.) 154 S. W. 1161.

**35. — Persons liable.**—The assignees of a leasehold interest are liable for rent accruing according to the terms of the lease. Where a leasehold interest was sold at sheriff's sale, the purchaser became liable to the landlord for rent subsequently accruing, although the owner of the property had prosecuted suit for rents (under which nothing had been collected) against the original lessee. *Le Gierse v. Green*, 61 T. 128, citing *Harvey v. McGrew*, 44 T. 412.

When a tenant, with the consent of the landlord, sublets land to another for a part of the crop, the relation of landlord and tenant exists between these parties (*T. & P. Ry. Co. v. Bayliss*, 62 T. 570), and the subtenant is not liable to the landlord for the rent due from the tenant (*Gibson v. Mullican*, 58 T. 430, citing *Harvey v. McGrew*, 44 T. 412).

A subtenant, in the absence of a stipulation to the contrary, is not liable to the landlord for rent unless he becomes assignee of the term, in which event he becomes liable on all the covenants of the original lease. *Giddings v. Felker*, 70 T. 176, 7 S. W. 694.

See *Reed v. McGothirk* (Civ. App.) 35 S. W. 527, as to the rights of a subtenant of a life tenancy, and the administrator of the life tenant.

An acceptance by the landlord of a payment from a subtenant for rent due by him is a satisfaction of all claims against him, whether or not there was an agreement of renting by the landlord to the subtenant of the premises cultivated by him. *Smith v. Price*, 22 C. A. 296, 54 S. W. 254.

Where subtenants have converted crops on which the landlord has a lien for rent, he may sue either of them for his damages. *Marrs v. Lumpkins*, 22 C. A. 448, 54 S. W. 775.

In an action by a purchaser of leased premises against a sublessee for rent, the fact that the contract between the original owner and the lessee had not been settled held no defense. *Robbins v. Voss* (Civ. App.) 64 S. W. 313.

One who occupies premises is liable for rent during the period of his occupancy, irrespective of the validity of the lease under which he purports to hold. *Ascarete v. Pfaff*, 34 C. A. 375, 78 S. W. 974.

A subtenant is not liable on the contract between the landlord and the original lessee, though a lien exists in favor of the landlord for rent as against property of the subtenant. *Ft. Worth Fair Ass'n v. Ft. Worth Driving Club*, 56 C. A. 167, 121 S. W. 213.

Original lessor held not entitled to sue for rent due from a sublessee under a contract with the original lessee. *Davis v. Vidal* (Civ. App.) 133 S. W. 1074.

A mortgagee of a lease, who takes possession of the leased premises, is, in effect, an assignee of the lease, and is liable to the landlord for the rent; but a mortgagee of a lease, not in possession, is not an assignee. *Cockrell v. Houston Packing Co.* (Sup.) 147 S. W. 1145.

A landlord may not recover the rent due from a subtenant. *Davis v. Vidal*, 105 T. 444, 151 S. W. 290, 42 L. R. A. (N. S.) 1084.

A tenant who makes a sublease is not released from his obligation, where the landlord did not consent to the sublease, or where the landlord did not agree that the tenant should be released. *McGaff v. Scrimshire* (Civ. App.) 155 S. W. 976.

A provision in a lease, authorizing a tenant to sublet, but providing that the subletting should not affect his liability for rent, and that the subtenant should also become liable therefor, held to bind the tenant for the payment of the rent, whether he sublet the premises or not. *Pressler v. Barreda* (Civ. App.) 157 S. W. 435.

Where a lease authorized a tenant to sublet, and made the subtenants liable to the landlord for rent, it was the duty of the tenant, and not of the landlord, to collect the rents from the subtenants. *Id.*

In an action on notes by a tenant for rent to accrue, the contract between defendant and his subtenants, to which the landlord was not a party, was immaterial. *Id.*

**36. — Defenses.**—A lessee may avail himself, as against an assignee of his lessor, of any equity existing between himself and his lessor at the date of an assignment by the lessor. *Maxwell v. Urban*, 22 C. A. 565, 55 S. W. 1124.

An assignee of a lessor is chargeable with notice of the covenant expressed or implied in the lease assigned. *Id.*

Statement made by lessee to assignee of lessor, before assignment, held not to be waiver of lessee's rights under the lease. *Id.*

Though a general grant of the reversion passes all the leases to which the property is subject, including the rents, the grantee's right to the rents is subject to equities of the tenants and other incumbrances of which the grantee had notice. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

A tenant assuming the burden of taking up a vendor's lien note may not refuse to perform his lease because of the failure of the landlord to take up such note. *Autrey v. Linn* (Civ. App.) 138 S. W. 197.

In an action for the rental value of certain real property, evidence of improvements made by the tenant and of his purchase of a house with a view to placing it on the premises held inadmissible. *Brooks v. Wynn* (Civ. App.) 139 S. W. 1055.

**37. — Evidence.**—Evidence held sufficient to allow of the judgment for rent, without special testimony as to the value of the corn that was to be given as part of the rent. *Mensing Bros. & Co. v. Cardwell*, 33 C. A. 16, 75 S. W. 347.

The grantee of certain land held liable to a prior grantor for reserved rents in case such grantee acquired possession from the grantor's tenant with notice of a reservation of such rents. *Applegate v. Kilgore* (Civ. App.) 91 S. W. 238.

Evidence, in an action on a contract for rent, held to sustain a finding that plaintiff did not release defendant from his contract and accept another as lessee. *Demetri v. McCoy* (Civ. App.) 145 S. W. 293.

In an action on rent notes, evidence held insufficient to show a release of the tenant's liability for rent on subletting the premises. *Pressler v. Barreda* (Civ. App.) 157 S. W. 435.

**38. — Amount of recovery.**—Where defendants claimed damages for failure to complete a stable, in an action for rent, a judgment held not reversible on appeal for inadequacy in the amount of such damages allowed. *Berry v. Burnett*, 23 C. A. 558, 56 S. W. 769.

Measure of recovery of rent under a lease where tenant refused to continue in occupancy held not lessened by amount for which landlord might have rented to others. *Davidson v. Hirsh*, 45 C. A. 631, 101 S. W. 269.

Where one, suing for the reasonable rent for land, testified that the reasonable rent was \$50 a year, a verdict for \$45 rent per year was not excessive. *Houston Land & Irrigation Co. v. Bradford* (Civ. App.) 118 S. W. 158.

Judgment for plaintiff for the rental value of grazing land held excessive. *Felker v. Hyman* (Civ. App.) 135 S. W. 1128.

**39. Estoppel to sue for second installment of rent.**—One bringing action for an installment of rent is not estopped from subsequently suing for subsequent installments. *Racke v. Anheuser-Busch Brewing Ass'n*, 17 C. A. 167, 42 S. W. 774.

**40. Conclusiveness of judgment in action on lease.**—In an action for rent on the ground that the tenant had held over, and thereby became liable for an additional time equal to the term, held, that a decree was conclusive as to the question of holding over. *Racke v. Anheuser-Busch Brewing Ass'n*, 17 C. A. 167, 42 S. W. 774.

A judgment in favor of the landlord in an action based on the lease held not res judicata in a subsequent action by the tenant against the landlord for breach of the lease. *Dixon v. Watson*, 52 C. A. 412, 115 S. W. 100.

A judgment in favor of the landlord bringing an action on the lease held to bar an action against the tenant for damages for breach of a covenant of the lease. *Id.*

**41. Possession of tenant as possession of landlord.**—A judgment rendered against the tenants of another in trespass to try title does not of itself make the possession of the tenants that of the judgment plaintiffs. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 122 Am. St. Rep. 609, judgment affirmed on rehearing, 99 T. 138, 87 S. W. 1148, 122 Am. St. Rep. 609.

**42. Validity of bond by lessee for improvements.**—A bond given by a lessee conditioned on his placing certain improvements on the leased premises held not unenforceable as imposing a penalty. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

**43. Transfer of reversion.**—Purchaser of a reversion, without notice, other than the tenant's possession, of a parol lien by which the tenant might apply the rent to reimburse himself for money paid on an indorsement of a note for the landlord, held entitled to the rents payable out of the produce of the land and accruing after the conveyance. *Lester v. Zink* (Civ. App.) 154 S. W. 1161.

**44. Illegality of distress warrant as affecting right to collect rent.**—The right of the landlord to recover rent does not depend upon the legality of the distress warrant. If a rental contract existed, the landlord is entitled to recover upon it regardless of the existence of the ground alleged in the affidavit for the distress warrant. *Dwyer v. Testard*, 65 T. 432; *Wallace v. Bogel*, 66 T. 574, 2 S. W. 96; *Pruitt v. Kelley*, 4 App. C. C. § 176, 15 S. W. 119.

**45. Waste.**—That a hole made in party wall by tenant could be repaired at trifling expense held not to prevent its constituting waste. *Hamburger & Dreyling v. Settegast* (Civ. App.) 131 S. W. 639.

To constitute waste, it is not necessary that an alteration by a tenant should diminish the value of the property, but it may even enhance its value. *Id.*

Facts held not to present change of conditions which would render inapplicable common law making acts of tenant waste. *Id.*

46. **Improvements by tenant.**—Death of landlord held not to revoke the tenant's right, under the lease, to make improvements and receive pay therefor. *Hazlewood v. Pennybacker* (Civ. App.) 50 S. W. 199.

A tenant held entitled to pay for new fences, though he was required to keep fences in repair without pay. *Id.*

A tenant authorized to make improvements to be designated by the landlord, in lieu of rent, is not entitled to credit for improvements made without request. *Randolph v. Mitchell* (Civ. App.) 51 S. W. 297.

A bond given by a lessee to put machinery into the leased building held not satisfied, unless substantially all of the machinery was put in. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

47. — **Removal.**—A tenant cannot remove fixtures attached to the premises by him, except trade fixtures, etc., agricultural fixtures and fixtures for ornament or convenience or for domestic use. *Bovet v. Holzgraft*, 23 S. W. 1014, 5 C. A. 141.

If a tenant having the right to remove fixtures placed by him on the demised premises accepts a new lease without reservation of fixtures and enters on a new term, the right to remove is lost. *Wright v. Macdonell* (Civ. App.) 27 S. W. 1024.

Pumps, houses and machinery erected on land for the use and convenience of the lessee are movable fixtures and may be removed by the tenant. *Railway Co. v. Dunman* (Civ. App.) 33 S. W. 1024.

Improvements of lessee held not forfeited because not removed within the time required by the lease. *Bermea Land & Lumber Co. v. Adoue*, 20 C. A. 655, 50 S. W. 131.

A tenant held entitled to remove his buildings, where the demised premises were sold during his term, subject to his right to remove them, although his subsequent lease from the purchaser did not mention the buildings or the right to remove them. *Hertzberg v. Witte*, 22 C. A. 320, 54 S. W. 921.

Assignee of lease held not entitled to remove storehouse erected by his assignor on the leased property. *Miller v. Gray*, 29 C. A. 183, 68 S. W. 517.

48. **Improvements by landlord.**—Fact that agent of landlord had matter of making improvements requested by tenants under consideration held insufficient to raise implication that request would be complied with. *Abeel v. McDonnell*, 39 C. A. 453, 87 S. W. 1066.

49. **Damages for failure to make improvements.**—In an action for rent and damages, evidence of the enhanced value of the land for improvements made by the tenant held inadmissible on an issue as to damages for failure to exterminate a noxious grass. *Hazlewood v. Pennybacker* (Civ. App.) 50 S. W. 199.

Where a landlord failed to fence a tract leased for peanut culture as agreed in time to enable the crop to be planted, the tenant's measure of damages was the market value of the peanuts that would have been raised, less the cost of cultivating and marketing the crop. *Cockrell v. Ellison* (Civ. App.) 137 S. W. 150.

50. **Duty to make repairs in general.**—A landlord is not bound to repair in the absence of a covenant or agreement on his part to do so. *Weinsteine v. Harrison*, 66 T. 546, 1 S. W. 626.

A tenant is bound to keep in repair leased premises, unless otherwise expressly agreed or when the premises are let with a nuisance upon them. When a building containing a number of apartments is divided among seven tenants, each is responsible for only so much as his lease includes. In the absence of any contract upon the subject of repairs, the tenant and not the landlord is responsible for damages for want of repairs. *O'Conner v. Andrews*, 81 T. 28, 16 S. W. 628.

At common law the tenant, and not the owner, is bound, as to the public, to keep the premises in such repairs that they may be safely visited by the public. *Tays v. Ecker*, 24 S. W. 954, 6 C. A. 188. The occupant is prima facie liable to third persons for damages accruing to them from defects in the leased premises, unless, perhaps, when it is shown that such defects existed at the time the premises were leased. *Marshall v. Heard*, 59 T. 266.

In the absence of a promise by a landlord to reimburse a tenant for repairs, the amount expended therefor cannot be recovered. *Riggs v. Gray*, 31 C. A. 268, 72 S. W. 101.

In an action for the wrongful suing out of a distress warrant, an instruction that in the absence of an agreement to the contrary it was the tenant's duty to repair fences held improperly refused. *Morgan v. Tims*, 44 C. A. 308, 97 S. W. 832.

A landlord is not bound to make any repairs on the rented premises unless he agrees to do so at the time of the making of the lease. *Blackwell v. Speer* (Civ. App.) 98 S. W. 903.

51. **Injuries from defective condition of premises.**—Liability of the lessor for injuries resulting from the falling of a defective elevator in the leased premises determined. *Oriental Inv. Co. v. Sline*, 17 C. A. 692, 41 S. W. 130.

A lessor held not negligent by leaving a door on an upper floor of a hotel building, which opened out on space, unprovided with guards. *Texas Loan Agency v. Fleming*, 92 T. 458, 49 S. W. 1039, 44 L. R. A. 279.

Where in a lease the landlord contracted to keep the roof in repair, the fact that when the lease was made the roof was defective did not relieve him from liability for damages to the tenant from such defect. *Lovejoy v. Townsend*, 25 C. A. 385, 61 S. W. 331.

Under the facts, held a landlord was not liable to a tenant for fall of the building. *American Exch. Nat. Bank of Dallas v. Swope & Mangold*, 46 C. A. 61, 101 S. W. 872.

Where a landlord voluntarily undertook to put a new roof on the rented premises, he was responsible for damages to the tenant's goods by the negligence. *Dalkowitz Bros. v. Schreiner* (Civ. App.) 110 S. W. 564.

A tenant on an upper room held liable for injuries to the goods of a tenant below. *Burkett & Barnes v. Dillon* (Civ. App.) 117 S. W. 917.

A tenant must exercise ordinary care to prevent injury by failure of the landlord to keep a covenant to repair. *Sanger v. Smith* (Civ. App.) 135 S. W. 189.

Measure of damages for breach of covenant to repair stated. *Id.*

A landlord's failure to repair defects in an irrigation lateral held not to excuse the tenant's duty to avoid resulting damage. *Poutra v. Martin* (Civ. App.) 135 S. W. 725.

A railroad company maintaining an amusement pavilion is not relieved from liability for injuries to a patron, on the theory that it had leased the premises to a third person, where the evidence showed that neither the second story of the pavilion nor the boats of the company could be reached without using part of the first floor. *Wichita Falls Traction Co. v. Adams* (Civ. App.) 146 S. W. 271.

That a railroad, owning and maintaining an amusement pavilion, had granted certain exclusive privileges therein to third person, who was to keep the floor free from obstructions, the agreement contemplating a joint use of a part of the first floor, did not relieve the company from liability for injuries to a patron, caused by an obstruction on the floor, merely because there was no express reservation by the company of the use of that part of the premises where the injury occurred. *Id.*

Where, in an action against a railroad maintaining an amusement pavilion for injuries to a patron from an obstruction on the floor, there was evidence that certain exclusive privileges therein had been granted to a third person, who agreed to keep the floor free from obstructions, an instruction to find for the company if the jury did not find that the placing or the leaving of the obstruction was negligence on the part of the company, its agents, or employes was properly refused as relieving the company from liability, because it or its agents or employes would not have discovered the obstruction, though other employes would have done so by the use of ordinary care. *Id.*

52. — **Nuisances.**—To make the landlord liable for the maintenance of a nuisance on the premises, it must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and the landlord is not responsible for a nuisance caused by the negligent use of the premises by the tenant. *Kennedy v. Garrard* (Civ. App.) 156 S. W. 570.

53. **Injuries to premises.**—In an action on contract of rent for damages to the property rented, held, plaintiff could not recover against one not party to the contract. *Daugherty v. Glass* (Civ. App.) 53 S. W. 705.

A landlord held liable for damages to the tenant's growing crop by cattle trespassing thereon. *L. M. Gloor & Co. v. West* (Civ. App.) 89 S. W. 783.

54. **Incumbrances on leasehold in general.**—A lessee held to take with notice of a prior recorded release of damages to the land from overflow. *Gulf, C. & S. F. Ry. Co. v. Thornton* (Civ. App.) 109 S. W. 220.

Statement of who can assert failure of consideration of a release. *Id.*

55. **Condition of premises at termination of tenancy.**—In an action by a landlord for damages from removal of improvements from the land, plaintiff held not precluded from recovering, though neither the land nor the improvements had any market value. *Sydney Webb & Co. v. Daggett*, 39 C. A. 390, 87 S. W. 743.

Where a tenant obligated to return the property, in as good condition as he received it, ordinary wear and tear alone excepted, received the possession of an engine worth \$400, and the engine, when returned by him, was worth \$300 less, the landlord was damaged in the amount of the depreciated value. *McGaff v. Scrimshire* (Civ. App.) 155 S. W. 976.

56. **Accounting for personal property.**—The fact that the lessee delivered all personal property on the premises to the sheriff, taking possession under a writ of sequestration running against the real property only, did not excuse the lessee from accounting to the lessor for its value. *Cammack v. Rogers*, 32 C. A. 125, 74 S. W. 945.

57. **Renewal of lease in general.**—Where a landlord refuses to allow a tenant to exercise his option to renew a lease, it was proper to charge that the landlord was liable for the difference between the rental value of the land for the renewal term and the amount which the tenant had agreed to pay. *Walcott v. McNew* (Civ. App.) 62 S. W. 815.

Lessee held not entitled to renewal of lease until completion of agreement provided for in renewal clause of lease. *Cammack v. Rogers*, 32 C. A. 125, 74 S. W. 945.

A renewal clause in a lease binding only the parties to it, and not their heirs does not create a perpetuity. *Hudgins v. Bowes* (Civ. App.) 110 S. W. 178.

Where a lease provided for renewal on written notice to the lessor, a parol notice accepted by the lessors is sufficient to renew without further writing. *Dockery v. Thorne* (Civ. App.) 135 S. W. 593.

Facts held to show a mere extension of a former lease rendering the tenant liable for the rent for the extended term notwithstanding occupancy of the premises by others. *Id.*

An agreement by a lessor with a lessee in possession and paying a fixed annual rent that the lessee might have the premises as long as he paid the rent is without consideration. *Hill v. Hunter* (Civ. App.) 157 S. W. 247.

58. **Extension or renewal by holding over.**—A tenant holding over leased premises after the expiration of his written lease, which fixed the amount of rent, is only bound to pay reasonable value for the premises for the time he holds over, without regard to the rent fixed in the lease contract. *Maynard v. Lockett*, 1 U. C. 527.

When a tenant holds over there is an implied contract that he would pay rent as agreed in the written contract. *Minor v. Kilgore* (Civ. App.) 38 S. W. 539.

A tenant by holding over held not to have exercised an option to renew for a term of years, but to have become liable only for a time equal to the term of the lease. *Racke v. Anheuser-Busch Brewing Ass'n*, 17 C. A. 167, 42 S. W. 774.

A holding over after the expiration of a written lease, without the execution of a new one, is under the terms of the expired lease. *Woodward v. Ft. Worth & D. C. Ry. Co.*, 35 C. A. 14, 79 S. W. 896.

Where the tenants under a lease of a storehouse for three years hold over after the term expires, such holding over is a lease for a year in the absence of agreement, express or implied. *Abeel v. McDonnell*, 39 C. A. 453, 87 S. W. 1066.

Where notice to landlord that tenants would only keep the premises if improvements were made held insufficient to relieve tenants from liability for rent. *Id.*

Acceptance of rent by agent of landlord for month succeeding expiration of lease, with notice that tenants would only hold premises from month to month, held to raise implied assent by agent to tenants' proposed terms. *Id.*

Where the tenants under a lease of a storehouse for three years after the expiration of the term induced the lessor to believe that they desired to keep or would keep the premises for another year, they became liable for the rent for the year. *Id.*

A tenant by the year holding over after the expiration of the term held to presumptively hold for a year on the terms of the expired lease, unless rebutted by proof of a contract on different terms. *Puckett v. Scott*, 45 C. A. 392, 100 S. W. 969.

A landlord, refusing to accept the proposition of his tenant holding over after the expiration of his lease, held entitled to retake the premises. *Id.*

A tenant, holding over two months on the strength of the landlord's promise to make repairs, held not to have exercised his option to renew his lease for another year. *Williams v. Houston Cornice Works*, 46 C. A. 70, 101 S. W. 839.

Where an owner refused to lease for a year, but told the tenant he could have the house until she needed it for her own use, which would not be till the next spring or summer, the lease was merely from month to month. *Patterson v. Ellis (Civ. App.)* 149 S. W. 300.

Where a lessee held over after a yearly tenancy under an agreement that he might have the premises as long as he paid the rent, the tenancy is from year to year and not a perpetual tenancy. *Hill v. Hunter (Civ. App.)* 157 S. W. 247.

59. **Option to purchase premises.**—A lease reserving the right to the lessor to sell and terminate the lease on six months' notice, and providing the lessee shall have the option of buying, held not to give the lessee an unconditional option. *De Vitt v. Kaufman*, 27 C. A. 332, 66 S. W. 224.

60. **Duration and termination of lease.**—An ordinary contract of lease of a storehouse is not annulled by the death of the lessee. *Wilcox v. Alexander (Civ. App.)* 32 S. W. 561.

A failure to pay rent does not work a forfeiture of a lease in the absence of a stipulation to that effect. *Ewing v. Miles*, 12 C. A. 19, 33 S. W. 235.

When a lease contract contains a proviso that on nonpayment of rent the term shall cease, the lessor, and not the lessee, has the elective right of determining it upon breach made. *Morris v. De Wolf*, 11 C. A. 701, 33 S. W. 556.

A landlord held not to have canceled the lease, and resumed possession, by collecting rents from the subtenants, and making repairs. *Texas Loan Agency v. Fleming*, 92 T. 458, 49 S. W. 1039, 44 L. R. A. 279.

A lease authorizing a forfeiture for nonpayment of rent does not require a willful nonpayment. *Randolph v. Mitchell (Civ. App.)* 51 S. W. 297.

In garnishment, on the issue as to whether the garnishee was indebted for rent of the debtor's farm, evidence that the lessee turned over the premises to the debtor, held inadmissible. *Faseler v. Kothman (Civ. App.)* 70 S. W. 321.

A denial of the lessor's title by an assignee of the lease, and an assertion of title in itself, terminates the assignee's rights under the lease. *Willey Lodge No. 21, I. O. O. F., v. City of Paris*, 31 C. A. 632, 73 S. W. 69.

Where rent for a year in advance was accepted conditionally, held, the lease was terminable on a sale of the property. *Thomason v. Oates*, 46 C. A. 383, 103 S. W. 1114.

A tenancy at will may be determined at any time by either the landlord or tenant upon notice to the opposite party. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

A lease to a certain date, containing a covenant that breach of any of the covenants or conditions shall terminate it and authorize a re-entry without notice or demand, is a letting for the time stated, unless sooner terminated by the landlord for violation by the tenant of the covenants or conditions. *Walther v. Anderson*, 52 C. A. 360, 114 S. W. 414.

A lease being for a certain term with power to sublet with the lessor's consent, and providing that any breach of condition should terminate it and authorize re-entry without notice or demand, subletting without the lessor's consent terminated the lease *ipso facto*. *Id.*

A lessee could not waive, in favor of a sublessee, a stipulation in the original lease against the selling of intoxicating liquors on the premises and providing for a forfeiture for violation of such stipulation. *Ft. Worth Driving Club v. Ft. Worth Fair Ass'n*, 103 T. 24, 122 S. W. 254, *Ann. Cas.* 1912D, 67.

A notice to a sublessee to vacate "by" or "on or before" a fixed date held not to relieve him from liability for rent to that day on his removing earlier. *Goldman v. Broyles (Civ. App.)* 141 S. W. 283.

To constitute a surrender of a lease, there must be a mutual agreement between the lessor and the lessee. *Id.*

A stipulation in a lease providing for forfeiture if lessee permits sale of liquors, construed. *Johnson v. Ft. Worth Driving Club (Civ. App.)* 144 S. W. 1041.

A landlord's acceptance of rent held not a waiver of a stipulation giving him the right to declare lease forfeited. *Id.*

Where a tenant for years under a written lease was ordered during the term to vacate and did so, paying the rent to that date, it was a termination of the lease. *Davidson v. Harris (Civ. App.)* 154 S. W. 689.

61. **Recovery of possession.**—Elements of damage for wrongful dispossession of tenant determined. *Wilkinson v. Stanley (Civ. App.)* 43 S. W. 606.

One may recover of his tenant without the necessity of showing a proper title. *Mak-ey v. Dryden (Civ. App.)* 128 S. W. 633.

62. **Renting on shares.**—A contract relating to the raising of a crop held not to create the relation of landlord and tenant, but is a letting on shares making the parties tenants in common of the crop. *Rogers v. Frazier Bros. & Co. (Civ. App.)* 108 S. W. 727.

A contract by which plaintiff agreed to work land for another held to make him a tenant, and not a mere cropper. *McCullough Hardware Co. v. Call (Civ. App.)* 155 S. W. 718.



63. — **Mode of cultivation of land.**—In a contract for rent, where the landlord is to receive part of the crop, there is an implied covenant that ordinary care should be exercised by the tenant to cultivate the premises in a farmerlike manner. *Cammack v. Rogers*, 32 C. A. 125, 74 S. W. 945.

64. — **Rights and liabilities as to land.**—A cropper held entitled to ingress to the rented premises to gather his crop, though it had not matured when his lease expired. *Crow v. Ball* (Civ. App.) 99 S. W. 583.

65. — **Rights and liabilities as to crops.**—A lessor of land who is to receive a portion of the crop as rent for the land may sue for damages to the crop occasioned by the overflow of waters of a creek resulting from an embankment being erected thereon. *Gulf, C. & S. F. Ry. Co. v. Caldwell* (Civ. App.) 102 S. W. 461.

Where land is rented on shares, and the tenant abandons the crop, the landlord has the right to enter to save them, even though the tenant has not abandoned the premises, nor is it necessary that the tenant give notice in person of his intention to abandon the crop, if the intention to abandon is manifest. *Bettis v. Key* (Civ. App.) 128 S. W. 1160.

A tenant held entitled to possession of crops grown, so that the landlord's taking possession thereof would be a trespass. *Curllee v. Rogan* (Civ. App.) 136 S. W. 1126.

A landlord on shares of a crop does not become the owner of any part of the crop until it is matured and divided. *Trinity & B. V. Ry. Co. v. Doke* (Civ. App.) 152 S. W. 1174.

66. — **Lien.**—See notes under Art. 5475.

67. — **Mode of division of crops.**—Where a crop of cotton is raised on land rented on condition that the landlord shall receive one-half the crop, he is entitled to one-half the cotton seed as well as to one-half the lint. *McBride v. Puckett* (Civ. App.) 66 S. W. 242.

In an action by a tenant against his landlord to recover the value of crops wrongfully seized by the latter, landlord held not entitled to recover the cost of gathering the crop. *Fagan v. Vogt*, 36 C. A. 528, 80 S. W. 664.

Where one tenant in common of a crop abandons it, his cotenant may take possession, but, after payment of necessary expenses, the balance of the share of the tenant is subject to a mortgage given by him, and does not become the property of the cotenant. *Rogers v. Frazier Bros. & Co.* (Civ. App.) 108 S. W. 727.

68. — **Breach of contract by landlord in general.**—Measure of damages for breach of contract whereby defendant was to furnish land and plaintiff was to receive half the crops raised by him determined. *Rogers v. McGuffey* (Civ. App.) 75 S. W. 817.

The measure of damages for breach of a rental contract, whereby plaintiff was to raise crops on defendant's land, held not to include value of labor performed by plaintiff. *Id.*

On a breach by a landlord of a contract of rental on shares, only such sums as the tenant, and those to whose services he was entitled, might by reasonable diligence subsequently earn, can be deducted from the value of the tenant's share of crop. *Crews v. Cortez*, 102 T. 111, 113 S. W. 523, 38 L. R. A. (N. S.) 713.

A tenant on shares not permitted to make a crop is entitled to recover the reasonable cash market value of his share of the crop that he could and would have reasonably raised, less any sum which he may have or might have earned otherwise during the period of the contract; but, where there is evidence that the expenditure of money or the hiring of help would have been necessary in making the crop, the expenses of producing his share must be deducted. *Brooks v. Davis* (Civ. App.) 148 S. W. 1107.

A contract for renting on shares provided that the landlord, in consideration of assistance from the tenant and his family in gathering crops, rented to the tenant a tract of land with dwelling for a specified period on shares. The tenant in part performed the consideration to the benefit of the landlord. Held, that the landlord could not defeat a recovery by the tenant for damages sustained by being prevented from making a crop by showing only part performance of the condition. *Id.*

69. — **Eviction.**—The measure of recovery by a tenant of a farm on shares for the landlord wrongfully evicting him determined. *Crews v. Cortez*, 102 T. 111, 113 S. W. 523, 38 L. R. A. (N. S.) 713.

Measure of damages for wrongfully dispossessing a tenant renting for a share of the crops defined. *Springer v. Riley* (Civ. App.) 136 S. W. 577.

A tenant of an owner on shares, wrongfully ousted by the landlord, held entitled to recover the value of his share, less specified deductions. *Smith v. Milam* (Civ. App.) 143 S. W. 293.

A tenant who claimed damages for his wrongful dispossession held to tender the issue whether he would have incurred expenses in marketing the crops, as bearing on the issue of damages. *Id.*

70. — **Conversion.**—Tenant leasing on shares held entitled to maintain an action against the landlord for conversion of the crops before the term of the lease expired. *Fagan v. Vogt*, 36 C. A. 528, 80 S. W. 664.

In an action by a tenant to recover for landlord's wrongful act in taking possession of the crops, plaintiff's refusal of defendant's offer to pay the value of the crops and allow plaintiff to re-enter held not to defeat recovery. *Id.*

Where a landlord seized the crops and dispossessed the tenant before expiration of the lease, the tenant's failure to sue to recover possession did not defeat his right to recover the value of the crops. *Id.*

The rule requiring plaintiff in a suit for breach of a contract of hire to show that he has not been able to obtain other employment held not to apply to an action by a tenant against the landlord for conversion of crops. *Id.*

In an action for the wrongful conversion of a bale of cotton, the issue of exemplary damages held properly submitted. *Curllee v. Rogan* (Civ. App.) 136 S. W. 1126.

71. — **Breach of contract to deliver share.**—Upon defendant's breach of his agreement to harvest and thresh a wheat crop and pay plaintiff one-third thereof as rent, held, that plaintiff could recover the market value of one-third of the wheat threshed

at the place it was threshed, with interest from threshing time. *Cook v. Seay* (Civ. App.) 146 S. W. 575.

72. — Liabilities of third persons.—A tenant on shares held entitled to maintain suit for damages to crop by wrongful levy thereon. *Parker v. Hale* (Civ. App.) 78 S. W. 555.

Where one farms land under an agreement to give part of the crop as rental to the owner, the latter has an interest in the crop which entitles him to sue for damages thereto by a third party. *Doke v. Trinity & B. V. Ry. Co.* (Civ. App.) 126 S. W. 1195.

In an action in which the defendant's landlord intervened and claimed a landlord's lien on property attached, evidence held to show that his lien was in full force and effect when the writ of attachment was levied. *McMullen v. Green* (Civ. App.) 149 S. W. 762.

## TITLE 81

## LAWS

Chap.

1. Common Law.
2. Special Laws.

Chap.

3. Construction of Laws.

## CHAPTER ONE

## COMMON LAW

Art.

5492. Common law of England adopted.

Art.

5493. Executors, etc., governed by, when.

**Article 5492. [3258] Common law of England adopted.**—The common law of England, so far as it is not inconsistent with the constitution and laws of this state, shall, together with such constitution and laws, be the rule of decision, and shall continue in force until altered or repealed by the legislature. [Act Jan. 20, 1840, p. 3. P. D. 978.]

See *Robertson v. State*, 63 Cr. R. 216, 142 S. W. 533, Ann. Cas. 1913C, 440 (dissenting opinion); *Vance v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 152 S. W. 743.

**Construction and operation.**—The act of congress of the republic of Texas of 1840 (Laws 1840, p. 3; this article) means the common law declared by the courts of the several states, and not the common law in force in England in 1840. *Grigsby v. Reib*, 105 T. 597, 153 S. W. 1124.

The act of congress of the republic of Texas in 1840 (Laws 1840, p. 3; this article) was intended to effectuate the provisions of the common law so far as not inconsistent with the conditions and circumstances of the people of the state. *Id.*

**Powers of courts.**—Whatever may be the powers of courts of other states, there can be no doubt that the courts of Texas must look to the constitution of this state, the enactments of the legislature and the common law for their authority to act in a given case. And if the authority did not exist at common law, and has not been conferred by the constitution, nor by the statutes of this state, then no court in Texas has the power to force any citizen to submit to a physical examination in an action for damages for personal injuries. *Austin & N. W. Ry. Co. v. Cluck*, 97 T. 172, 77 S. W. 405, 64 L. R. A. 494, 104 Am. St. Rep. 863, 1 Ann. Cas. 261.

**Exclusiveness of statutory remedies.**—A statute giving a remedy in a case in which the common law gives a remedy, without negating the existence of the common-law remedy, is not exclusive, but merely cumulative. *Luder's Adm'r v. State* (Civ. App.) 152 S. W. 220.

The remedy provided by a statute imposing new duties and creating a new right is exclusive. *Vance v. Southern Kansas Ry. of Texas* (Civ. App.) 152 S. W. 743.

**Exclusiveness of mode prescribed for enforcing constitutional power.**—A prescribed mode for the exercise of a power expressly conferred by the constitution is exclusive. *Crabb v. Celeste Independent School Dist.*, 105 T. 194, 146 S. W. 528, 39 L. R. A. (N. S.) 601.

**Criminal procedure.**—The rules of procedure at common law apply also in criminal cases, where the Code fails to provide a rule; but no person can be punished for any act or omission not made penal by the written law. P. C. arts. 3, 4; C. C. P. art. 25.

**Personal injuries.**—The common law does not impose upon the owner of property the duty to keep it in such condition that a trespassing child may not be injured thereon. *Dobbins v. Missouri, K. & T. Ry. Co. of Texas*, 91 T. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856.

Where without his father's consent an infant is employed in a dangerous service, his father's right to recover for injuries is based on the common law. *Texas & P. Ry. Co. v. Hervey* (Civ. App.) 89 S. W. 1095.

**Carriers.**—See Art. 707.

**Evidence.**—See Art. 3687.

— Printed statutes as evidence.—See Arts. 3692, 3693.

**General provisions relating to Revised Statutes.**—See Final Title.

**Art. 5493. [3259] Executors, etc., governed by, when.**—The rights, powers and duties of executors and administrators shall be governed by the common law, when not otherwise provided by statute. [Act Aug. 9, 1876, p. 130, sec. 141.]

See Art. 3233.

## CHAPTER TWO

## SPECIAL LAWS

<p><b>Art. 5494.</b> Notice of intention to apply for special law, etc.</p> <p><b>5495.</b> Where no newspaper is published, notice, how.</p> <p><b>5496.</b> Notice in more than one county, when.</p>	<p><b>Art. 5497.</b> Affecting persons, where published.</p> <p><b>5498.</b> Where applicant is a non-resident.</p> <p><b>5499.</b> Details need not be embraced in notice.</p> <p><b>5500.</b> Proof of publication in newspaper.</p> <p><b>5501.</b> Proof of posting.</p>
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**Article 5494. [3260] Notice of intention to apply for special law, etc.**—Any person intending to apply for the passage of any local or special law shall give notice of such intention by having a statement of the substance of such law published in some newspaper published in the county embracing the locality to be affected by said law, at least once a week for the period of thirty days prior to the introduction into the legislature of such contemplated law. [Const. art. 3, sec. 57. Act May 23, 1876, p. 7, sec. 1.]

**Local or special law defined.**—Local or special law defined. *Wallis v. Williams*, 101 T. 395, 108 S. W. 153; *Hall v. Bell County* (Civ. App.) 138 S. W. 178.

A statute relating to particular persons or things of a class is special. *Smith v. State*, 54 Cr. R. 298, 113 S. W. 289.

**Presumptions.**—The court, in the absence of proof to the contrary, must presume that the legislature, in adopting a local or special law, complied with Const. art. 3, § 57, and this article; and this is true, though the act purports on its face to be a general law. *Cravens v. State*, 57 Cr. R. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

**Passage of act conclusive of notice.**—The passage of the act is conclusive evidence that the required notice was given. *Moller v. City of Galveston*, 23 C. A. 693, 57 S. W. 1120.

**Constitutionality of act.**—Where a statute may be sustained as a local or special law, the court will not inquire whether the statute, if treated as a general law, is unconstitutional. *Cravens v. State*, 57 Cr. R. 135, 122 S. W. 29, 136 Am. St. Rep. 977.

**Art. 5495. [3261] Where no newspaper is published, notice, how.**—Where there is no newspaper published in said county, a written copy of such statement shall be posted on the court house door and in five other public places in the immediate locality to be affected thereby in said county, for said thirty days, and such notice shall accurately define the locality to be affected by said law. [Id.]

**Art. 5496. [3262] Notice in more than one county, when.**—Where the locality to be affected by said law shall extend beyond the limits of any one county, such notice shall be given for each county to be affected.

**Art. 5497. [3263] Affecting persons, where published.**—Whenever any person intends applying for the passage of a special law which shall affect persons chiefly, and not directly affect any particular locality more than others, such persons, if residing within this state, shall make publication of notice of such intention in the county of the residence of such person in the same manner as if the said law was to affect such locality. [Id. sec. 2.]

**Art. 5498. [3264] Where applicant is a non-resident.**—If residing without the limits of this state, said publication need only be made in a newspaper published at the capital, in like manner as if such person resided at the seat of government. [Id.]

**Art. 5499. [3265] Details need not be embraced in notice.**—It shall not be necessary to embrace in said notice the particular form and terms of such contemplated law, but a statement only of the general purposes and nature of the same shall be sufficient. [Id. sec. 3.]

**Art. 5500. [3266] Proof of publication in newspaper.**—The publication in a newspaper at the county of the locality, or at the residence, or at the state capital, as the case may be, may be shown by the affidavit of the publisher, or one of the several publishers of such newspapers, accompanied with the printed copy of the notice as published. [Id. sec. 4.]

**Art. 5501. [3267] Proof of posting.**—The posting on the court house door, and at five other public places of the county, provided for in this chapter, may be shown by the return of the sheriff or constable, or by the affidavit of any credible person made on a written copy of the notice so posted, showing the fact of such posting, and such proof or other competent proof of the giving of said notice shall accompany the introduction of every local or special law. [Id. sec. 4.]

## CHAPTER THREE

### CONSTRUCTION OF LAWS

Art.  
5502. General rules of construction.  
5503. What shall not vitiate.

Art.  
5504. Meaning of certain words.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 5502. [3268] General rules of construction.**—The following rules shall govern in the construction of all civil statutory enactments:

1. The ordinary signification shall be applied to words, except words of art or words connected with a particular trade or subject matter, when they shall have the signification attached to them by experts in such art or trade, or with reference to such subject matter.

2. The present or past tense shall include the future.

3. The masculine gender shall include the feminine and neuter.

4. The singular and plural number shall each include the other, unless otherwise expressly provided.

5. A joint authority given to any number of persons or officers may be executed by a majority of them, unless it is otherwise declared.

6. In all interpretations, the court shall look diligently for the intention of the legislature, keeping in view at all times the old law, the evil and the remedy.

7. Whenever one law which shall have repealed another shall itself be repealed, the former law shall not be thereby revived without express words to that effect. [Act Jan. 16, 1840. P. D. 4577.]

See, also, Final Title.

See *Underwood v. Childress Independent School Dist.* (Civ. App.) 149 S. W. 773.

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|---------------------------------------------|-----------------------------------------------------------------------------------------------------|
| 1. Construction of statutes in general.     | 27. Executive construction.                                                                         |
| 2. — Constitution.                          | 28. Presumptions to aid construction.                                                               |
| 3. Intention of legislature.                | 29. Statutes relating to same subject.                                                              |
| 4. — Intent in construing constitution.     | 30. Statutes adopted at same session.                                                               |
| 5. Spirit or letter.                        | 31. General and special statutes.                                                                   |
| 6. Policy and purpose.                      | 32. Re-enactment of or reference to former statute and adoption of provisions previously construed. |
| 7. — Terms of constitution.                 | 33. — Constitutional provisions.                                                                    |
| 8. Implications.                            | 34. Laws of other states.                                                                           |
| 9. — In constitution.                       | 35. Statutes adopted from another state or country.                                                 |
| 10. Meaning of language—In general.         | 36. Mandatory or directory.                                                                         |
| 11. — Language of constitution.             | 37. Provisos, exceptions and saving clauses.                                                        |
| 12. Plain and unambiguous language.         | 38. Repealing acts.                                                                                 |
| 13. — Words of constitution.                | 39. Remedial statutes.                                                                              |
| 14. General and specific words.             | 40. Statutes in derogation of sovereignty.                                                          |
| 15. — In constitution.                      | 41. Legislative grants.                                                                             |
| 16. Singular and plural number.             | 42. Penal statutes.                                                                                 |
| 17. Express mention and implied exclusions. | 43. Revenue laws.                                                                                   |
| 18. Statute as a whole.                     | 44. Time of taking effect.                                                                          |
| 19. Conflicting provisions.                 | 45. Retroactive operation.                                                                          |
| 20. — Constitutional provisions.            | 46. — Constitution.                                                                                 |
| 21. Context.                                | 47. Construction in favor of constitutionality.                                                     |
| 22. Preamble.                               | 48. Construction of governor's veto message.                                                        |
| 23. Title and caption.                      |                                                                                                     |
| 24. History and surrounding circumstances.  |                                                                                                     |
| 25. — Terms of constitution.                |                                                                                                     |
| 26. Contemporaneous construction.           |                                                                                                     |

1. Construction of statutes in general.—Statutes and ordinances must be reasonably construed. *Von Diest v. San Antonio Traction Co.*, 33 C. A. 577, 77 S. W. 632.

Rules of construction of statutes held intended to aid courts in arriving at proper conclusion, but not to be followed to exclusion of other rules when to do so leads to illogical deductions. *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

Statutes should be so construed as to prevent mischievous consequences. *Oliver v. State* (Cr. App.) 144 S. W. 604.

2. — **Constitution.**—Rule governing interpretation of constitutional provisions announced. *Kemper v. State*, 63 Cr. R. 1, 138 S. W. 1025.

The meaning of a constitution is fixed when it is adopted, and is not different at any subsequent time. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

3. **Intention of legislature.**—The legislative intention constitutes the law. *McInery v. City of Galveston*, 58 T. 334; *Russell v. Farquhar*, 55 T. 355; *Pool v. Wedemeyer*, 56 T. 287; *Dodson v. Bunton*, 81 T. 655, 17 S. W. 507; Art. 5502, § 6.

The legislative intent in passing a law may be shown in the body of the act. *Snyder v. Compton*, 28 S. W. 1061, 87 T. 374.

A case omitted from the operation of a statute held to have been intentionally omitted, even though no reason appears for the legislature's action in making the omission. *Evans v. Terrell*, 101 T. 167, 105 S. W. 490.

In construing written laws, courts are not bound by rules of grammar, and may disregard them to give effect to manifest legislative intent. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 918.

The fundamental rule in the construction of a statute is to give effect to the intention of the legislature. *Bradshaw v. Lyles*, 55 C. A. 384, 119 S. W. 918; *Kirk v. Morley Bros.* (Civ. App.) 127 S. W. 1109; *Clary v. Hurst*, 104 T. 423, 138 S. W. 566; *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575; *Parshall v. State*, 62 Cr. R. 177, 138 S. W. 759; *Tone v. City of Denison* (Civ. App.) 140 S. W. 1189; *Oliver v. State* (Cr. App.) 144 S. W. 604; *Lee v. State* (Cr. App.) 148 S. W. 567, 40 L. R. A. (N. S.) 1132.

To interpret the meaning of a statute, it is to be ascertained what was the fair, natural, and probable intent of the legislature, taking into consideration contemporaneous history, and the habits and activities of the people. *Ex parte Roquemore*, 60 Cr. R. 322, 131 S. W. 1101, 32 L. R. A. (N. S.) 1186.

Art. 1949 provides that the parties may submit the matter in controversy between them to the court upon an agreed statement of facts made out and signed by counsel and filed with the clerk, and in such case the statement so agreed to and assigned and certified by the "court" to be correct, and the judgment rendered thereon, shall constitute the record of the case. Held, construing the section in view of the prior statutes on the subject (Acts 7th Leg. c. 92, § 12, Rev. St. 1879, arts. 1293, 1379, and Rev. St. 1895, art. 1381), and in view of Art. 5502, requiring the court to look for the legislative intention, keeping in view the old law, the evil and the remedy, that Art. 1949 did not authorize a statement of facts to be authenticated by the "judge," the term "court" as used therein not being equivalent to "judge," so that a certificate, by the trial judge attached to a purported agreed statement of facts long after the term and after the "court" had ceased by the expiration of the term, was not a compliance with the statute. *Chickasha Milling Co. v. Crutcher* (Civ. App.) 141 S. W. 355.

4. — **Intent in construing constitution.**—The fundamental rule in construing a constitution is to give effect to the intent of the people who adopted it. *Keller v. State* (Cr. App.) 87 S. W. 669, 1 L. R. A. (N. S.) 489; *Nona Mills Co. v. Wingate*, 51 C. A. 609, 113 S. W. 182; *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

5. **Spirit or letter.**—The reason and intent of the legislature will control the strict letter of the law, when the letter would lead to palpable injustice, contradiction and absurdity. *Cannon v. Vaughan*, 12 T. 399.

The intention of a statute, when plainly discernible from its provisions, is as obligatory as the letter, and will even prevail over the strict letter. *Brooks v. Hicks*, 20 T. 666; *Simpson v. Brotherton*, 62 T. 170.

The intention of the law-maker will prevail over the literal sense of the terms of the statute. If the expression of the statute be special or particular, but the reason is general, the expression shall be deemed general. *Campbell v. Cook* (Civ. App.) 24 S. W. 977.

The intention of the legislature in enacting a law must be enforced, when ascertained, though not consistent with the strict letter of the statute. *Edwards v. Morton*, 92 T. 152, 46 S. W. 792.

It is a rule of statutory construction that a thing within the intention is within the statute though not within the letter, and a thing without the letter is not within the statute unless within the intention. *Kirk v. Morley Bros.* (Civ. App.) 127 S. W. 1109.

Courts, in the construction of statutes, are not confined to the literal meaning of the words employed, but the intention may be collected from the cause or necessity of the act. *Oliver v. State* (Cr. App.) 144 S. W. 604.

When the intention of a statute is plainly discernible from its provisions, it is as obligatory as the letter of the statute, and will even prevail over the strict letter. *Id.*

Verbiage of a statute must be literally construed, unless a change is necessary to effect the legislative intent. *McCouston v. Fenet* (Civ. App.) 144 S. W. 1155.

6. **Policy and purpose.**—When the words are not explicit, the intention is collected from the occasion and necessity of the law and from the mischief and objects and remedy in view, and the intention is to be presumed according to what is consonant to reason and good discretion. *Cannon v. Vaughan*, 12 T. 399.

It is competent for the court in interpreting a statute to take into consideration the existing facts to which it is intended to be applied, whether they consist of the ordinary acts of a person or of the habits of business relating to the subject-matter and embraced within the law. *Higgins v. Rinker*, 47 T. 393.

With the policy of a law the courts have but little concern. *Pool v. Wedemeyer*, 56 T. 287.

When the words of a statute are not explicit, the intention is to be collected from the context, the occasion and necessity of the law, the mischief felt, and the remedy in view. *Croomes v. State*, 40 Cr. R. 672, 51 S. W. 924.

The legislative policy may be looked to as persuasive in a matter of doubtful statutory construction. *City of Austin v. Cahill*, 99 T. 172, 88 S. W. 542.

In determining the sense in which language was used in a statute, the court will look to the context and purpose of the legislature in enacting it. *Hidalgo County Drainage Dist. No. 1 v. Davidson*, 102 T. 539, 120 S. W. 849.

The court in determining the scope of a statute must consider the evil intended to be remedied. *Hamner v. Garrett* (Civ. App.) 132 S. W. 951.

The court in construing a statute held required, if possible, to ascertain the legislative purpose. *Padgett v. Ft. Worth & R. G. Ry. Co.*, 104 T. 249, 136 S. W. 442.

A construction of a statute designed to effect a public purpose which will carry out the purpose held required to be adopted. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

In construing an ambiguous statute, held, that the law on the subject before its enactment and the evil sought to be remedied should be ascertained, if possible. *Pecos & N. T. Ry. Co. v. Rosenbloom* (Civ. App.) 141 S. W. 175.

A construction tending to effectuate the purpose of a statute is to prevail over one which would have a contrary tendency. *Oliver v. State* (Cr. App.) 144 S. W. 604.

In determining the scope of a law, the court should limit its operation to the purposes of the legislature in enacting it, giving effect if possible to every clause and word, and avoiding any construction which implies that the legislature was ignorant of the meaning of the language employed. *Missouri, K. & T. Ry. Co. of Texas v. Mahaffey*, 106 T. 394, 150 S. W. 881.

7. — **Terms of constitution.**—Where the terms of a constitution are ambiguous, the purpose sought to be accomplished may be considered, in order to discover their true meaning. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

8. **Implications.**—Whenever a power is given or duty imposed by statute, everything necessary to make that power effectual or essential to the performance of the duty is conferred by implication. *Callaghan v. McGowan* (Civ. App.) 90 S. W. 319.

The grant of a specific power or the imposition of a definite duty by a statute confers by implication authority to do whatever is necessary to execute the power or perform the duty. *Brown v. Clark*, 102 T. 323, 116 S. W. 360, 24 L. R. A. (N. S.) 670.

Wherever a power is given by statute, everything necessary to make it effectual or necessary to attain the end is implied. *Terrell v. Sparks*, 104 T. 191, 135 S. W. 519.

9. — **In constitution.**—A power clearly legislative, and not expressly denied, will not be deemed denied by implication. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

The meaning and the purpose of a constitutional provision as necessarily implied from its language should be effectuated. *Simmons v. Lightfoot*, 105 T. 212, 146 S. W. 871.

10. **Meaning of language—in general.**—Words employed by the legislature shall be taken in their ordinary and popular acceptance, unless technical terms are used, or unless it clearly appears from the context that the words used were not intended to be understood in their ordinary and popular signification. *Engelking v. Von Wamel*, 26 T. 469.

As to the meaning of words used in a statute, see *Bear Bros. v. Marx*, 63 T. 298; *Burgess v. Hargrave*, 64 T. 110.

The legislature is presumed to have used words in the sense in which they are ordinarily understood. *Turner v. Cross*, 83 T. 218, 18 S. W. 578, 15 L. R. A. 262.

It is the duty of a court to give the language of a statute the meaning with which it was used by the legislature if this can be ascertained; and to do this, if the words used be not such as have a peculiar meaning when applied to a given art or trade with reference to which they are used in the statute, the only safe rule is to apply to them their ordinary meaning. Courts are not authorized to give words used in the statute a forced construction for the purpose of mitigating a seeming hardship, or conferring a right which the legislature has not thought proper to give. *Michael v. Michael*, 34 C. A. 630, 79 S. W. 74.

A construction should not be employed that would render the law absurd or meaningless, when a rational, expressive, and wholesome meaning may be ascertained. *Texas & P. Ry. Co. v. Taylor*, 54 C. A. 419, 118 S. W. 1097.

If a statute is not ambiguous, its meaning and legislative intent must be determined from the language used. *Gross v. Colonial Ins. Co.*, 56 C. A. 627, 121 S. W. 517.

Under this article words in a statute must be taken in their ordinary and popular acceptance, unless technical terms are used, or unless it appears from the context that the words used are not intended to be understood in their ordinary signification. *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.

Words in common use, when used by the legislature in a statute, are to be understood as intended to express the sense in which they are ordinarily used. *Texas & P. Ry. Co. v. Railroad Commission of Texas*, 105 T. 386, 150 S. W. 878.

11. — **Language of constitution.**—The meaning of the words of a constitution at the time they were placed therein cannot be altered or amended by any legislation at a subsequent time. *Snodgass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144.

Words used in a constitution must be given their popular meaning, unless it is clear that they were used in their technical sense. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

In construing constitutions it will be presumed that the language used was carefully selected. *Id.*

12. **Plain and unambiguous language.**—Where language in a statute is plain and unambiguous, there is no room for judicial construction. *Harrington v. Galveston County*, 1 App. C. C. § 793; *Thompson v. Buckley*, 1 T. 33; *Sutherland v. De Leon*, 1 T. 250, 46 Am. Dec. 100; *Runnels v. Belden*, 51 T. 48; *Fire Ass'n of Philadelphia v. Love*, 101 T. 376, 108 S. W. 158, 810; *Blanks v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 116 S. W. 377; *State v. W. C. Ward & Sons*, 135 S. W. 182; *Clarey v. Hurst*, 136 S. W. 840.

If a statute is not ambiguous, its meaning and legislative intent must be determined from the language used. *Gross v. Colonial Assur. Co.*, 56 C. A. 627, 121 S. W. 517.

13. — **Words of constitution.**—Plain and definite words of the constitution are to be taken in their ordinary meaning. *Keller v. State* (Cr. App.) 87 S. W. 669, 1 L. R. A. (N. S.) 489.

14. **General and specific words.**—When there are words in a statute expressive of a particular intent, and other words indicating a general intent inconsistent therewith, the

particular intent must be taken as an exception to the general rule, so that all the parts of the law may stand. *Howard Oil Co. v. Davis*, 76 T. 630, 13 S. W. 665.

Where general words follow particular and specific words in a statute, the former must be confined to things of the same kind. *Ex parte Muckenfuss*, 52 Cr. R. 467, 107 S. W. 1131.

General words in a statute following a designation of particular subjects or classes of persons held restricted in meaning by the particular designation. *Farmers' & Mechanics' Nat. Bank v. Hanks*, 104 T. 320, 137 S. W. 1120.

15. — **In constitution.**—Particular intention expressed in constitution compatible with general intention expressed in another provision is to be considered in the nature of an exception to latter. *Smith v. Grayson County*, 18 C. A. 153, 44 S. W. 921.

16. **Singular and plural number.**—Art. 271, subd. 2, must, in view of this article, subd. 4, be strictly construed, and a garnishment writ in an action against several defendants jointly and severally liable may not issue on an affidavit that a defendant named does not have property in the state subject to execution sufficient to satisfy the debt sued on, and where the bond is made payable to such defendant alone, but the affidavit must show that neither of defendants has property subject to execution, and the bond must be made payable to defendants. *Smith v. City Nat. Bank of Wichita Falls (Civ. App.)* 140 S. W. 1145.

17. **Express mention and implied exclusions.**—Where the legislature has prescribed a general rule with special disabilities or privileges, these cannot be enlarged or extended to objects not embraced within the exception by mere implication or from parity of reason. *Tyson v. Britton*, 6 T. 222; *Roberts v. Yarboro*, 41 T. 449.

Affirmations in statutes that introduce a new rule imply a negative of all that is not within the purview. *Etter v. M. P. Ry. Co.*, 2 App. C. C. § 58.

Where a statute limits the thing to be done in a particular form, it implies that it shall not be done otherwise. *Id.*

18. **Statute as a whole.**—A statute should be construed so as to give effect, if possible, to each and all of its provisions. *Aldridge v. Mardoff*, 32 T. 204; *Hudson v. Jurnigan*, 39 T. 579.

The whole law must be considered together. *Lufkin v. City of Galveston*, 63 T. 437. Statutes held to be construed as a whole. *Kirk v. Morley Bros. (Civ. App.)* 127 S. W. 1109.

Every word in a statute is presumed to have been intentionally used. *Gulf, C. & S. F. Ry. Co. v. Blum Independent School Dist. (Civ. App.)* 143 S. W. 353.

19. **Conflicting provisions.**—If there be an apparent conflict between the enactments, the general intention is limited and controlled by the special intention. *Scoby v. Sweatt*, 23 T. 713.

Where there is a conflict between a general and special provision of a statute, the special provision must prevail. *Callaghan v. McGown (Civ. App.)* 90 S. W. 319; *Shock v. Colorado County*, 52 C. A. 473, 115 S. W. 61.

Where there is an apparent conflict between two provisions of a statute, the court must give to the statute such a construction as will reconcile the apparent conflict. *Hill v. State*, 54 Cr. R. 646, 114 S. W. 117.

Where the decision of a case does not under the facts require the court to determine that the statutes are conflicting, it will not decide which of the statutes control under a state of facts which would make them conflicting. *Gulf, C. & S. F. Ry. Co. v. Louis Werner Stave Co. (Civ. App.)* 131 S. W. 653.

Rule governing construction of conflicting statutes stated. *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

20. — **Constitutional provisions.**—The court, in construing two constitutional provisions, must so construe them as to give effect to both if possible, and, where they are in conflict, the special provision will prevail over the general provision. *City of San Antonio v. Toepperwein*, 104 T. 43, 133 S. W. 416.

Rule for construing general constitutional provisions with another, apparently conflicting, as to particular matter. *Ex parte Cooks (Cr. App.)* 135 S. W. 139.

21. **Context.**—In determining the sense in which language was used in a statute, the court will look to the context. *City of Houston v. Potter*, 41 C. A. 381, 91 S. W. 389; *Hidalgo County Drainage Dist. No. 1 v. Davidson*, 102 T. 539, 120 S. W. 849.

22. **Preamble.**—The preamble to a legislative act may be considered. *Railway Co. v. Jarvis*, 69 T. 527, 7 S. W. 210.

23. **Title and caption.**—The caption of an act of the legislature will be looked to in aid of its proper construction. *Hodge v. Donald*, 55 T. 344.

In construing a law, the title must be considered the same as though it were in the body of the law. *Missouri, K. & T. Ry. Co. of Texas v. Mahaffey*, 105 T. 394, 150 S. W. 881.

24. **History and surrounding circumstances.**—In construing the legislative intent in the adoption of a statute, the courts may take into consideration contemporaneous legislative history. *Ex parte Keith*, 47 Cr. R. 283, 83 S. W. 683; *Williams v. State*, 52 Cr. R. 371, 107 S. W. 1121; *State v. Duke*, 104 T. 355, 137 S. W. 654.

The court in searching for the intent of the legislature in enacting a statute may consider the surrounding circumstances and legislation on similar subjects. *Clary v. Hurst*, 104 T. 423, 138 S. W. 566.

25. — **Terms of constitution.**—Where the terms of a constitution are ambiguous, the prior state of the law, the purpose sought to be accomplished, as well as the proceedings of the convention, may be considered, in order to discover their true meaning. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

26. **Contemporaneous construction.**—The contemporaneous construction of Paris city charter by the city council held entitled to persuasive force. *McCuiston v. Fenet (Civ. App.)* 144 S. W. 1155.

The contemporary construction of a special act, directing the commissioner of the land office to issue a certificate to the original holder of an unconditional certificate, as



shown by the action of the governor and of the commissioner thereunder, is entitled to great weight in the construction of the act. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

**27. Executive construction.**—In cases of doubtful construction of a statute, that adopted by the executive department is entitled to much weight; yet where the meaning is clear, a construction contrary to its clear intent will not be followed. *Railway Co. v. State*, 81 T. 572, 17 S. W. 67.

The construction by the attorney general of the anti-trust statutes regarding attorney's fees in actions for violation of the statute will be adhered to by the courts. *State v. Brady* (Civ. App.) 114 S. W. 895.

**28. Presumptions to aid construction.**—In construing a statute, the legislature must be presumed to have known, when it passed the statute, the constitutional limits of its legislative power. *City of Austin v. Cahill*, 99 T. 172, 88 S. W. 542.

Where the language of a statute is plain, executive construction of another statute, in different language, should have no weight; but the unambiguous language of the statute should be given effect to arrive at the legislative intent. *Fire Ass'n of Philadelphia v. Love*, 101 T. 376, 108 S. W. 810.

The court, in construing a statute, must assume that the legislature, in enacting it, was familiar with the decisions of the supreme court and of the court of criminal appeals. *State v. Duke*, 104 T. 355, 137 S. W. 654.

**29. Statutes relating to same subject.**—In construing a revised penal code, the court may look to the provisions of a revised civil code on the same subject. *Braun v. State* (Cr. App.) 49 S. W. 620.

Two statutes relating to the same subject should be harmonized, if possible, so as to effectuate each; it being presumed that an implied repeal was not intended. *Houston v. Koonce* (Civ. App.) 136 S. W. 1159.

Statutes which are in pari materia should be construed together so as to give effect to each, if possible. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

The supreme court must construe two statutes so that both may stand if they are fairly susceptible of such construction. *Conley v. Daughters of the Republic* (Sup.) 157 S. W. 937.

**30. Statutes adopted at same session.**—Laws relating to the same subject, and enacted during the same session of the legislature, are to be construed together, and are ordinarily to be taken as parts of the same act. *Austin v. G., C. & S. F. R. R. Co.*, 45 T. 234; *Laughter v. Seela*, 59 T. 177; *Lovett v. Casey*, 17 T. 594; *Neill v. Keese*, 5 T. 33, 51 Am. Dec. 746; *Scoby v. Sweatt*, 28 T. 713; *Cannon v. Vaughan*, 12 T. 399.

Two laws passed at the same session of the legislature should be construed as if embraced in one act, and should be so construed that both may stand. *McGrady v. Terrell*, 98 T. 427, 84 S. W. 641.

Where two acts are passed at the same session of the legislature, they should be construed as one act, and, if possible, so that both may stand. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

**31. General and special statutes.**—A special provision in a law as to a particular class will prevail against the apparent general intent. *Perez v. Perez*, 59 T. 322; *Howard Oil Co. v. Davis*, 76 T. 630, 13 S. W. 665.

A general provision of a statute must yield to a special one, so far as is necessary to give effect to the particular subject of the special provision. *City of Austin v. Cahill*, 99 T. 172, 88 S. W. 542.

A general statute yields to a special statute. *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.

**32. Re-enactment of or reference to former statute and adoption of provisions previously construed.**—The mere change of phraseology in the revision of a statute before in force will not work a change in the law previously declared, unless it indisputably appear that such was the intention of the legislature. *Ennis v. Crump*, 6 T. 34; *Tucker v. Anderson*, 25 T. Sup. 155.

When an old law is superseded by a new one, whose provisions are vague and indefinite, the former law may be resorted to for purposes of construction. *Steadman v. Bank*, 69 T. 50, 6 S. W. 675.

The legislature, using words contained in a prior statute on the same subject which have received a judicial construction, is presumed to use them in the same sense. *Cooper v. Yoakum*, 91 T. 391, 43 S. W. 871.

In construing a chapter of a revision of statutes, held, that the court might look to the different laws composing the chapter as they formerly existed. *Braun v. State* (Cr. App.) 49 S. W. 620.

Where the legislature re-enacts a statute formerly in force, it will be presumed that the legislature intended it to have the construction formerly placed on the statute by the court of last resort. *Supreme Council A. L. H. v. Anderson*, 36 C. A. 615, 83 S. W. 207.

In re-enacting a statute with amendments, omissions of material words indicate an intent to change the law. *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011.

In construing a term in a statute, it will be presumed the legislature used it with reference to previous constructions of the appellate courts. *Cohen v. State*, 53 Cr. R. 422, 110 S. W. 66; *Scott v. Same* (Cr. App.) 110 S. W. 69.

Art. 1949 construed in view of the prior statutes on the subject (Acts 7th Leg. c. 92, § 12, Rev. St. 1879, arts. 1293, 1379, and Rev. St. 1896, art. 1381), and in view of subdivision 6 of this article, did not authorize a statement of facts to be authenticated by the "judge," the term "court" as used therein not being equivalent to "judge," so that a certificate, by the trial judge attached to a purported agreed statement of facts long after the term and after the "court" had ceased by the expiration of the term, was not a compliance with the statute. *Chickasha Milling Co. v. Crutcher* (Civ. App.) 141 S. W. 355.

Re-enactment of a statute held to give it the meaning given by the courts in construing the preceding statute. *Adams v. State* (Civ. App.) 145 S. W. 940.

33. — **Constitutional provisions.**—In construing a section of an article of the constitution the court will look to the former constitutions to determine its meaning. *Milam County v. Bateman*, 54 T. 153.

Where a statute or constitution, after having been construed, is re-enacted without material change, such construction becomes a part thereof. *Pittman v. Byars*, 51 C. A. 83, 112 S. W. 102.

Where language similar to that in a present constitution is found in former constitutions, it is presumed that it was intended to use such language in the sense previously given to it by the courts. *Id.*

Where a constitution re-enacts in the same words provisions which it supersedes, it is presumed that no change of law was intended. *Id.*

The re-adoption in a constitution of a provision of the constitution thereby superseded is presumed to be with a purpose not to change the law, and the use of the same language in the new constitution is presumed to be with the same intent. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

While not binding on the courts, an unchallenged construction of a constitutional provision by the legislative department for more than a quarter of a century should be given effect, unless manifestly wrong. *Id.*

34. **Laws of other states.**—Where a suit in Texas on a life policy which provides that it shall be governed by the laws of New York involves the construction of a statute of the latter state, it will be construed as a domestic statute; the New York decisions being considered for such light as they may throw on the question. *New York Life Ins. Co. v. English*, 95 T. 391, 67 S. W. 884.

Supreme court, construing statute of foreign state in light of opinions of courts of that state, held to give full faith and credit to its public acts and judicial proceedings. *New York Life Ins. Co. v. English (Civ. App.)* 79 S. W. 616.

35. **Statutes adopted from another state or country.**—When a statute adopted by this state from England or one of the older American states has, previous to our enactment of it, received a settled and uniform construction in the courts of the country from which we have taken it, our courts will give to it a similar construction. *Munson v. Hallowell*, 26 T. 475, 84 Am. Dec. 582. But if there is something incorporated in the statute, or omitted therefrom, showing a legislative purpose not to adopt the former construction, then the construction given by the courts of the government from which it was borrowed cannot prevail. *Morgan v. Davenport*, 60 T. 230.

It may be presumed that the legislature in enacting a law copied from the law of another country intended that it should receive the same construction as had been placed upon it by the courts of that country. *City of Tyler v. St. Louis, Southwestern Ry. Co. of Texas*, 99 T. 491, 91 S. W. 1.

The legislature adopting a statute of a sister state, after it has been construed by her courts, presumptively adopts the statute with such construction. *Ollre v. State*, 57 Cr. R. 520, 123 S. W. 1116.

The known and settled construction of English statutes embodied in our own constitution or statutes was impliedly adopted along with the statutes. *Robertson v. State*, 63 Cr. R. 216, 142 S. W. 533, Ann. Cas. 1913C, 440.

36. **Mandatory or directory.**—When a statute relates to matters of convenience rather than of substance, or its provisions are only for the purpose of requiring orderly procedure, they may generally be regarded as merely directory. *Ferris Press Brick Co. v. Hawkins*, 53 C. A. 578, 116 S. W. 80.

A clause in a statute is directory where it contains mere matters of direction, and is not followed by words of positive prohibition. *Gomez v. Timon (Civ. App.)* 123 S. W. 666.

A departure from statutory provisions as to the time or mode of doing a thing required or permitted by law will not usually invalidate the proceedings thereunder. *City of Uvalde v. Burney (Civ. App.)* 145 S. W. 311.

A statute in the affirmative, relating to the time or manner of doing acts which constitute the chief purpose of the statute, or those incidental thereto, by an official, is usually considered as directory. *Id.*

37. **Provisos, exceptions, and saving clauses.**—A proviso in a statute, general in its terms and object, is construed strictly. *Roberts v. Yarboro*, 41 T. 449.

A proviso in a statute is generally intended to except something which would otherwise have been within it. *Campbell v. Wiggins*, 85 T. 424, 21 S. W. 599.

A provision in a chapter of a revised code that "this law" should not apply in certain counties held to create an exemption only as to a portion of the chapter which formerly was a separate law. *Braun v. State*, 40 Cr. R. 236, 49 S. W. 620.

Where a statute repealing a pre-existing penal law contains a clause saving the rights of the state, the right of action only is preserved, and it must be prosecuted under the new law or under some law other than that repealed. *State v. Brady*, 102 T. 408, 118 S. W. 128.

The saving clause or proviso of a repealing statute, which preserves some right, must be strictly construed so as not to include anything not fairly within its terms. *Id.*

A proviso held to be given a restricted construction, in the absence of a contrary intention shown. *McCouston v. Fenet (Civ. App.)* 144 S. W. 1155.

Provisos in a statute held not to be construed as referring to matter immediately preceding, where grammatical construction is inconsistent. *Id.*

A proviso in a statute is limited to the next preceding attached clause, unless the language indicates otherwise. *Fenet v. McCouston*, 105 T. 299, 147 S. W. 867.

Exceptions to a statute of general terms cannot be enlarged to include cases not embraced within the exceptions by mere implications or parity of reason. *Holmes v. Coalson (Civ. App.)* 154 S. W. 661.

While a proviso usually qualifies the language preceding it, it may apply to provisions of succeeding sections of the same statute, if from the context of the statute such clearly appears to have been the intention. *Galveston & W. Ry. Co. v. City of Galveston (Civ. App.)* 155 S. W. 273.

38. **Repealing acts.**—The rule in construing acts or clauses purporting to repeal other statutes is to give effect to the intention of the legislature; the same rules applying

to such a clause or statute as apply to ordinary statutes. *Parshall v. State*, 62 Cr. R. 177, 138 S. W. 759.

39. **Remedial statutes.**—When a statute gives a new remedy not repugnant to or inconsistent with the old one, the latter is not taken away, but parties have their election between the two. *Etter v. M. P. Ry. Co.*, 2 App. C. C. § 58.

A remedial statute is to be construed liberally. *O'Connor v. State* (Civ. App.) 71 S. W. 409; *Sheppard's Home v. Wood*, 140 S. W. 394.

40. **Statutes in derogation of sovereignty.**—As a rule where a statute delegating a power directs the manner of its exercise, that manner is exclusive. *Wichita Electric Co. v. Hinckley* (Civ. App.) 131 S. W. 1192.

41. **Legislative grants.**—Statutory grants of property, franchises, or privileges in which the government is interested must be strictly construed in favor of the public and against the grantee. *Jayne v. Imperial Irr. Co.* (Civ. App.) 127 S. W. 1137.

A statutory grant of an express power carries with it by necessary implication every other power necessary and proper to the execution of the power expressly granted. *Imperial Irr. Co. v. Jayne*, 104 T. 395, 138 S. W. 575.

42. **Penal statutes.**—The rule of strict construction of penal statutes does not prevent courts from inquiring into the evil sought to be remedied and the legislative intention obvious from the terms of a statute. *International & G. N. R. Co. v. Voss*, 49 C. A. 566, 109 S. W. 984.

The rule of strict construction as to penal statutes does not consist in giving words the narrowest meaning susceptible, nor consist in adopting a strained construction obviously contrary to, or destructive of, the lawmakers' intention. *Texas & P. Ry. Co. v. Taylor*, 54 C. A. 419, 118 S. W. 1097.

The intention of the legislature, even in penal statutes, when it can fairly be discovered, must in all cases control. *Id.*

The rule of strict construction as to penal statutes is, properly speaking, a requirement that plaintiffs' case must be brought strictly within the spirit and letter thereof. *Id.*

The courts cannot, and ought not to, deal with an act as a crime, unless plainly within the language used by the legislature; but, when determining whether or not it is within it, a common-sense method to ascertain its real meaning should always be employed. *Id.*

A penal statute must be strictly construed. *State v. Duke*, 104 T. 355, 137 S. W. 654. Penal laws are not to be construed so strictly as to defeat the obvious intention of the legislature, as collected from the words employed. *Oliver v. State* (Cr. App.) 144 S. W. 604.

The court will construe the Penal Code so that all its provisions may be upheld if consistent with the intent of the legislature. *Talley v. State* (Cr. App.) 147 S. W. 255.

43. **Revenue laws.**—Rule of construction of revenue laws stated. *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

Doubt or uncertainty in a taxing statute are to be resolved in favor of the taxpayer as against the government. *Underwood v. Childress Independent School Dist.* (Civ. App.) 149 S. W. 773.

44. **Time of taking effect.**—For rules on the computation of time, see 1 Tex. Civ. Prac. ch. 54.

An act repealing another, and not providing when it shall take effect, does not effect the repeal until the expiration of the time under this article. *Austin v. G., C. & S. F. R. R. Co.*, 45 T. 234.

As a general rule a statute speaks from the time it becomes a law, and that which occurs between the date of its passage and the time it took effect is deemed, with respect to the statute, a past transaction, unless a different rule is expressed. *Railway Co. v. State*, 81 T. 572, 17 S. W. 67.

Ninety days must elapse after the adjournment of the legislature before a law takes effect. *Halbert v. San Saba Springs L. & L. S. Co.*, 89 T. 230, 34 S. W. 639, 49 L. R. A. 193.

Act approved March 3, 1897, not having an emergency clause putting it into effect at once, held to take effect August 21, 1897, 90 days after the legislature adjourned, and not to apply to an appeal from a conviction on June 1, 1897. *Belcher v. State*, 39 Cr. R. 121, 44 S. W. 1106.

Where the word "passage" is employed in an act which is finally passed at one time to take effect at a later time, it may, by reason of a somewhat common usage, be taken as referring to the latter date, unless such a construction is contrary to the intention appearing from the whole statute. The language of statutes which thus take effect at times subsequent to those of their adoption is usually taken as speaking only when they begin to operate as laws. The rule under consideration is one of construction merely and does not control the expressed intention of the Legislature. The mere use of such words as "before the passage," "after the passage," "heretofore," "hereafter," or "already," does not so plainly show an intention to fix a date differing from that of the taking effect of a statute as to control. *Scales v. Marshall*, 96 T. 140, 70 S. W. 946, 947.

House Bill No. 25, enacted in 1911, held to become effective June 9, 1911, notwithstanding the emergency clause. *Keator v. Whittaker*, 104 T. 628, 143 S. W. 607.

45. **Retroactive operation.**—See notes under Final Title, § 5.

46. **Constitution.**—While the state constitution should, as a general rule, be interpreted to operate prospectively, its retrospective operation will be enforced, when such was clearly the purpose of its framers provided no right already vested would be disturbed thereby. *Grigsby v. Peak*, 57 T. 142.

Effect of amendment to state constitution stated. *Gillespie v. Lightfoot*, 103 T. 359, 127 S. W. 799.

As a general rule, constitutions operate prospectively; but they may operate retrospectively when it is apparent that such was the intention, provided no impairment of vested rights results. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

**47. Construction in favor of constitutionality.**—The presumption is in favor of the constitutionality of a law. *Stone v. Stumper*, 1 App. C. C. § 325.

The courts may not, in order to preserve a statute against constitutional objection, ascribe to it a meaning at variance with its plain import. *City of Austin v. Cahill*, 99 T. 172, 88 S. W. 542.

A construction of a statute that renders it unconstitutional will not be adopted where a constitutional purpose can fairly be derived from its terms. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 71.

Courts will not declare an act unconstitutional, unless such infirmity clearly appears. *Missouri, K. & T. Ry. Co. of Texas v. State* (Civ. App.) 109 S. W. 867; *Solon v. Same*, 54 Cr. R. 261, 114 S. W. 349; *Long v. Same*, 58 Cr. R. 209, 127 S. W. 208, 21 Ann. Cas. 405; *Lemons v. Same*, 59 Cr. R. 299, 128 S. W. 416; *Ashford v. Goodwin*, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699; *Bodenheim v. Lightfoot*, 103 T. 639, 132 S. W. 468; *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163; *Hughes v. State* (Cr. App.) 149 S. W. 173.

A court must resolve all doubt as to the constitutionality of a statute in favor thereof. *Logan v. State*, 54 Cr. R. 74, 111 S. W. 1028; *Gardenhire v. Same* (Cr. App.) 111 S. W. 1031.

The court in construing a statute held not authorized to strain the language thereof, from its obvious meaning, imputing to it one contrary to that which it plainly expresses, to harmonize it with the constitution. *Dupree v. State*, 102 T. 455, 119 S. W. 301.

The duty of the courts to construe statutes as valid, stated. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1028.

An act should be construed in favor of its validity. *Camp v. State*, 61 Cr. R. 229, 135 S. W. 146.

The legislature may exercise all legislative power which is not forbidden expressly or by implication by the constitution, and, where there is any doubt as to the validity of a statute, it must be upheld. *Bonner v. Belsterling* (Civ. App.) 137 S. W. 1154.

The court will construe a statute so as to uphold it rather than to nullify it. *Tone v. City of Denison* (Civ. App.) 140 S. W. 1189.

If a statute is susceptible of two constructions, one placing it in opposition and another in harmony with the constitution, the latter should prevail. *Ennis Waterworks v. City of Ennis*, 105 T. 63, 144 S. W. 930.

In determining the validity of a law, the court should ascertain the intention of the legislature and sustain the law if it can be done by fair construction. *Missouri, K. & T. Ry. Co. of Texas v. Mahaffey*, 105 T. 394, 150 S. W. 881.

**48. Construction of governor's veto message.**—A governor's veto message must be construed by an application of the same rules that are applied to statutes. *Fulmore v. Lane*, 104 T. 499, 140 S. W. 405.

**Art. 5503. [3269] Grammatical errors, etc., shall not vitiate.**—Grammatical errors shall not vitiate a law, and a transposition of words and clauses may be resorted to when the sentence or clause is without meaning as it stands; and in no case shall the punctuation of a law control or affect the intention of the legislature in the enactment thereof.

**Errors in punctuation.**—Errors in punctuation will be disregarded when the meaning is obvious. *Bradstreet Co. v. Gill*, 72 T. 115, 9 S. W. 753, 2 L. R. A. 405, 13 Am. St. Rep. 768. See Art. 5503.

**Art. 5504. [3270] Meaning of certain words.**—The following meaning shall be given to each of the following words, unless a different meaning is apparent from the context:

1. "Property" includes real and personal property.
2. "Person" includes a corporation.
3. "Written" or "in writing" includes any representation of words, letters or figures, whether by writing, printing or otherwise.
4. "Oath" includes affirmation.
5. "Swear" or "sworn" includes affirm.
6. "Signature" or "subscribe" includes the mark of a person unable to write.
7. "Justice," when applied to a magistrate, means justice of the peace.
8. "Preceding," when used by way of reference to title, chapter or article, means the next preceding.
9. "Succeeding," in like manner, means the next succeeding.
10. "Month" means a calendar month.
11. "Year" means a calendar year.
12. "Effects" includes all personal property and all interest therein.

**Words judicially defined.**—"Movable fixtures" defined. *Railway Co. v. Hays*, 3 App. C. C. § 58; *Preston v. Railway Co.*, 70 T. 375, 7 S. W. 825; *Hutchins v. Masterton*, 46 T. 554, 26 Am. Rep. 286; *Keating Imp. Co. v. Marshall E. L. & P. Co.*, 74 T. 605, 12 S. W. 489; *Jones v. Bull*, 85 T. 136, 19 S. W. 1031; *Railway Co. v. Dunman* (Civ. App.) 33 S. W. 1024.

"Fixtures" defined. *Meyer v. Orynski* (Civ. App.) 25 S. W. 655.

"Clerk" defined. *McLennan County v. Boggess*, 104 T. 311, 137 S. W. 346.

Sale and mortgage of growing crops constitutes constructive severance, rendering the crop "personal property." *Kreisle v. Wilson* (Civ. App.) 143 S. W. 1132.

Ungathered crops, when matured are "personal property." *Ellis v. Bingham* (Civ. App.) 150 S. W. 602.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Enactment in general.**—The courts will not disregard an act of the legislature because the journals of one or both houses of the legislature fail to show its passage in strict conformity to all the directions in the constitution, it being in other respects perfect and unobjectionable. *Blessing v. City of Galveston*, 42 T. 641.

An issue of fact whether a particular bill has been passed by the legislature in conformity with the constitutional provisions is to be determined by the court, and will not be submitted to a jury. *Id.*

Query, as to the authority of the chief clerk of the house and secretary of the senate, after the adjournment of the legislature, to certify the final passage of an act over the veto of the governor. *H. & T. C. R. R. Co. v. Odum*, 53 T. 343.

The published journals of the legislature are evidence of the passage of an act in the proper time. *H. & T. C. R. R. Co. v. Odum*, 53 T. 343; *Ewing v. Duncan*, 81 T. 230, 16 S. W. 1000. As to the manner of proving laws, see ante, Arts. 3692, 3693, and notes.

There is a wide distinction between the authority of a court to declare an act void for want of power to pass the law, and the jurisdiction to avoid it on the ground that it was irregularly passed. A court will not look to the journals to invalidate an act signed and approved by the proper officers. *Williams v. Taylor*, 83 T. 667, 19 S. W. 156.

For the purpose of informing itself of the existence and terms of a law, the court cannot look beyond the enrolled act. *McLane v. Paschal*, 28 S. W. 711, 8 C. A. 398.

Law passed at special session cannot be invalidated by showing by proclamation and journals of legislature, that it did not relate to any subject mentioned in the proclamation or any message. *Presidio County v. City Nat. Bank*, 20 C. A. 511, 44 S. W. 1069.

The journals of the legislature cannot be looked to in order to invalidate a statute signed by the president of the senate and speaker of the house. *El Paso & S. W. R. Co. v. Foth*, 101 T. 133, 100 S. W. 171.

**Subjects and titles of acts.**—See *Ball v. Presidio County* (Civ. App.) 27 S. W. 702.

Mere limitations and restrictions by proviso on the general scope, as indicated by the body of the act, ordinarily relate and are germane to the general object, and are of general and universal use, though no references are made to them in the title of the act. *Austin v. G. C. & S. F. R. R. Co.*, 45 T. 234.

When the object expressed in the title of an act is to amend a former act, it is not necessary that the nature and character of the proposed amendment should also be indicated in the title. *Id.*

As to the subject of the act being expressed in the title, see *Peck v. San Antonio*, 51 T. 490; *H. & T. C. R. R. Co. v. Odum*, 53 T. 343; *Battle v. Howard*, 13 T. 347; *Tadlock v. Eccles*, 20 T. 783, 73 Am. Dec. 213.

The constitutional provision in regard to the caption of a law is mandatory. It is sufficient if there is a substantial compliance. *Gunter v. T. L. & M. Co.*, 82 T. 496, 17 S. W. 840.

**Amendment.**—Amendment of laws, how made. *Womack v. Gardner*, 10 C. A. 367, 30 S. W. 589.

An amendment of a statute, which was passed after plaintiff's rights accrued, but did not affect plaintiff's rights and furnished him an efficient remedy, held applicable to plaintiff's case. *Maynard v. Freeman* (Civ. App.) 60 S. W. 334.

A statute which adds a provision to a section of an existing statute is an "amendment." *Henderson v. City of Galveston*, 102 T. 163, 114 S. W. 108.

**Repeal.**—See, also, Final Title.

The primary meaning of "repeal," as used in speaking of the repeal of a statute, stated. *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011.

The right to maintain an action for statutory liquidated damages is a statutory privilege to the aggrieved party, and the legislature may at any time repeal the law creating the right and giving the remedy. *Id.*

A provision in a charter to a railroad company granted by the legislature of Louisiana, relieving the company from liability for injuries resulting in the death of its train operatives, held not irrepealable. *Texas & N. O. R. Co. v. Miller* (Civ. App.) 128 S. W. 1165.

**Express repeal.**—When a general revising act expressly repeals all inconsistent acts and parts of acts, this implies that if there are parts of former acts (as in this case) not embraced in the new act, and not inconsistent therewith, they are not repealed. *Buse v. Bartlett*, 1 C. A. 335, 21 S. W. 52.

The courts held required to find a repugnancy between a prior law and an act repealing conflicting laws before they can find that the act repeals the prior law. *Gaddes v. Terrell*, 101 T. 574, 110 S. W. 429.

A recital in the title of an act that its purpose is to repeal a previous act is not of itself sufficient for that purpose, in the absence of a repealing clause in the body of the statute the title not being an operative part of the act. *Berry v. State* (Cr. App.) 156 S. W. 626.

An express repeal of a statute may be accomplished only by positive enactment; but, the question of repeal being one of legislative intent, an express declaration that a particular statute is repealed will not be given effect, where it was apparent that the legislature did not so intend. *Id.*

A general clause, repealing all acts or parts of acts inconsistent therewith, while effective in repealing inconsistent enactments, extends only to those acts on the same subject, or parts of such acts clearly inconsistent and irreconcilable with the repealing act, and only to the extent of the conflicting provisions. *Id.*

**Implied repeal in general.**—In the absence of the express repeal of an act, or where the intention and purpose of a repeal is not plainly made manifest from the

terms used, the two acts will be construed together. *Laughter v. Seela*, 59 T. 177; *H. & T. C. R. R. Co. v. Ford*, 53 T. 364; *Cain v. State*, 20 T. 361; *Austin v. G., C. & S. F. R. R. Co.*, 45 T. 234.

Repeals by implication are not favored. *Herndon v. Reed*, 82 T. 647, 18 S. W. 665; *Spence v. Brown* (Civ. App.) 24 S. W. 309; *Schley v. Hale*, 1 App. C. C. § 933.

Pen. Code 1911, art. 557, prohibiting betting at any tenpin alley, was impliedly repealed by Gen. Laws 1897 (Called Sess.) p. 51, subd. 19, which levies an occupation tax on bowling alleys. *Rutherford v. State*, 39 Cr. R. 137, 45 S. W. 579.

Repeals by implication are not favored, and contradictions between two laws must be irreconcilable before one will be held to impliedly repeal the other. *Ex parte Kimbrell*, 47 Cr. R. 333, 83 S. W. 382.

Repeals by implication are not favored. *Ex parte Keith*, 47 Cr. R. 283, 83 S. W. 683; *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011; *Williams v. State*, 52 Cr. R. 371, 107 S. W. 1121; *Snead v. Same*, 55 Cr. R. 583, 117 S. W. 983; *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

A repeal by implication must be by necessary implication, and there must be a positive repugnance between the provisions of the old and new laws, and the old law is then repealed only to the extent of the repugnance. *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011.

The test of determining repeals by implication from legislative intent does not conflict with the rule that a retrospective effect will not be given to a statute unless the legislature says that such was its intention, nor does it force a retrospective effect by construction. *Id.*

Where two acts are irreconcilable, the one approved last repeals the other to the extent of the repugnancy, even though both acts go into effect on the same day. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

In the construction of acts of the same session of the legislature, the whole must be taken and construed as one act; and to make a later provision repeal a former there must be an express repeal or an irreconcilable repugnancy between them. *Johiff v. State* (Cr. App.) 109 S. W. 176; *Webber v. Same* (Cr. App.) 109 S. W. 182.

The repugnancy essential to the repeal of an old statute by a new one is that which exists between the continuance of the old in force in opposition to the obvious intent that the new should supplant it, and that is sufficient to operate a repeal, though there be no inconsistency in language. *Texas & P. R. Co. v. Mosley*, 103 T. 79, 124 S. W. 90.

Implied repeals are not favored, and there must be a positive repugnancy between the provisions of the new law and those of the old in order to effect such result. *Sayles v. Robison*, 103 T. 430, 129 S. W. 346.

A later statute on the same subject does not repeal an earlier one, if the two are not conflicting. *Austin v. State*, 61 Cr. R. 573, 135 S. W. 1167.

The rule as to repeals by implication stated. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

The law does not favor repeals by implication, and they will not be adjudged to occur, save where inevitable. *Parshall v. State*, 62 Cr. R. 177, 138 S. W. 759.

A later statute repeals an earlier statute on the same subject so far as they conflict. *Goodwin v. State* (Cr. App.) 143 S. W. 939.

Repeals by implication are not favored, and a statute will not repeal an existing one unless there is irreconcilable repugnancy, or unless there is an evident design to supersede all prior legislation in connection with the subject-matter and to enact a complete law in regard to it. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

A legislature may repeal by implication; but, to justify the finding of the intention to repeal one statute by another, either the two statutes must be irreconcilable or the intent to effect a repeal must be otherwise clearly expressed, and where the intention not to repeal is manifest there is no room for repeal by implication. *Berry v. State* (Cr. App.) 156 S. W. 626.

A statute is repealed by implication whenever it appears that the legislature does not intend it to remain in force; and, conversely, no statute will operate as an implied repeal if it appears that it was not intended to so operate, and repeals by implication are not favored. *Id.*

In so far as two statutes irreconcilably conflict, the latest enactment must prevail. *Conley v. Daughters of the Republic* (Sup.) 157 S. W. 937.

— **By act relating to same subject.**—Where a subsequent statute, although not repugnant in all its provisions to a prior one, is clearly intended to prescribe the only rule which should govern; or where it revises the subject of a former one and is evidently intended as a substitute for it; or where it is framed from another, some parts being omitted, the subsequent statute must be held to repeal the prior one. *Bryan v. Sundberg*, 5 T. 418; *Rogers v. Watrous*, 8 T. 62, 58 Am. Dec. 100; *Holden v. State*, 1 App. 226; *Stirman v. State*, 21 T. 734; *Harrick v. Harrick*, 61 T. 596; *Elter v. M. P. Ry. Co.*, 2 App. C. C. § 58. See, also, *Tunstall v. Wormley*, 54 T. 476. If a new statute creates a new and independent system, express words of repeal are not necessary to repeal inconsistent provisions in a prior statute. *State v. I. & G. N. Ry. Co.*, 57 T. 334.

An affirmative statute does not repeal an affirmative statute, and if both may stand together they should have a concurrent efficacy; but if the latter be contrary to the former, it amounts to a repeal. *Brown v. Chancellor*, 61 T. 437.

When statutes are repealed by acts which substantially retain the provisions of old laws, the latter are not destroyed or interrupted in their binding force. *Railway Co. v. Keller*, 11 C. A. 569, 32 S. W. 847.

It will not be presumed that the legislature, in passing an act within four days from the passage of a prior act on the same subject, intended to nullify absolutely the previous act, unless there is an irreconcilable conflict between the two. *McGrady v. Terrell*, 98 T. 427, 84 S. W. 641.

A repeal by implication is effected when it is obvious that a subsequent statute revising the particular provisions of a former one was intended as a substitute there-

for, though it contains no express words to that effect. *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011.

Conditions under which provisions of an old statute are re-enacted or repealed in a new statute covering the same subject stated. *Id.*

Courts will not apply the rule of repeal by implication unless it distinctly appears that it was the legislative intent to continue an entire system upon the subject and to supersede all former systems on the same subject. *Id.*

The general rule, that where a new law comprehends the subject-matter of an old one it operates as a repeal by implication of such prior laws, held subject to the limitation that the old provisions in the new act cannot be treated as new enactments, but as a continuation of the former law. *Id.*

Where a general intention is expressed by the legislature, and also a particular intention incompatible with the general one, the particular intention will be considered an exception, and the two acts can stand together. *Paul v. State*, 48 C. A. 25, 106 S. W. 448.

A new act which extends and enlarges a right before existing impliedly repeals the law by which the former was created or given. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

Where two statutes can be given a construction to uphold both, it must be done. *Williams v. State*, 52 Cr. R. 371, 107 S. W. 1121.

A statute containing no repealing clause will be construed in harmony with former laws if susceptible to such construction. *Williams v. Keith* (Civ. App.) 111 S. W. 1056.

A statute may impliedly repeal an earlier one by entirely superseding it, though the provisions of both, if inserted in one act, might stand together. *Dallas Consol. Electric St. Ry. Co. v. State*, 102 T. 570, 120 S. W. 997.

Two statutes relating to the same subject should be harmonized, if possible, so as to effectuate each; it being presumed that an implied repeal was not intended. *Houston v. Koonce* (Civ. App.) 136 S. W. 1159.

Where two statutes on the same subject are inconsistent, no repeal will be implied, where they can be construed so that both will stand. *Parshall v. State*, 62 Cr. R. 177, 138 S. W. 759.

Statutes which relate to the same subject should be considered as if incorporated in one act and construed together, if possible, so as to give effect to each, in which case one does not impliedly repeal the other. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

— **Of special by general act.**—A general law does not repeal a special law by implication, though both relate to the same subject. *City of Laredo v. Martin*, 52 T. 548.

A special law is not affected or repealed by the provisions of a general law, unless specially mentioned in the general law, or unless it was manifestly the intention of the legislature to repeal the special law. *Ex parte Kimbrell*, 47 Cr. R. 333, 83 S. W. 382.

Special laws, to be made operative by the voters of a particular locality, are not repealed by general laws, unless specially mentioned in the general law, or such purpose is apparent. *Ex parte Neal*, 47 Cr. R. 441, 83 S. W. 831.

Special legislation or local laws are not repealed by a later general act unless specially mentioned in the general law, or the purpose to repeal is manifest. *Paul v. State*, 48 C. A. 25, 106 S. W. 448.

— **Of general by special act.**—Where a general statute is followed by a special one, effect will be given to both by construing one as an exception from the general terms of the other. *City of Marshall v. State Bank of Marshall* (Civ. App.) 127 S. W. 1083.

— **By amendatory act.**—Act 1893, amending article 430, exempting N. county from certain provisions of the game law, repealed such articles of the subsequent statutes revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect. *Dickinson v. State*, 38 Cr. R. 472, 41 S. W. 759.

**Suspension of act.**—A statute and an ordinance enacted thereunder, prohibiting the sale of liquors in certain parts of a city, and requiring all places for its sale to be located in a certain limited district, did not violate Const. Art. 1, § 28, prohibiting the suspending of laws except by the legislature. *Henderson v. City of Galveston*, 102 T. 163, 114 S. W. 108.

**Constitution as limitation of power.**—The state constitution is a limitation, and not a grant of power. *Solon v. State*, 54 Cr. R. 261, 114 S. W. 349.

**Laws violating state or federal constitution in general.**—An act of the legislature in violation of the provisions of the constitution of this state or the United States is unconstitutional and void. *Higgins v. Rinker*, 47 T. 331; *Williams v. Taylor*, 83 T. 667, 19 S. W. 156.

When the jurisdiction of a court is defined by the constitution it cannot be changed in any manner by the legislature, except where the power is expressly conferred by the constitution. *Ex parte Towles*, 48 T. 413.

An act of the legislature virtually reversing and setting aside the decision of the supreme court upon the unconstitutionality of a law is unconstitutional and void. *Milam Co. v. Bateman*, 54 T. 153.

An unconstitutional statute affords no protection to a ministerial officer acting in pursuance thereof. *Worsham v. Votgsberger* (Civ. App.) 129 S. W. 157.

**Effect of partial invalidity.**—If part of a statute is unconstitutional, and another part which is constitutional is separate and distinct therefrom, the latter will be operative and in force. *W. U. T. Co. v. State*, 62 T. 630.

When the several parts of a statute are so blended and dependent one upon the other that it cannot be presumed the legislature would have passed any part thereof without intending that all should be enforced, and a part is unconstitutional, then the entire statute will be disregarded. *Stone v. Stumper*, 1 App. C. C. § 325.

Though part of a law is unconstitutional, the rest will be given effect where the two parts are independent, but not so where the two parts are dependent on each other. *Texas & P. Ry. Co. v. Mahaffey*, 93 T. 392, 84 S. W. 646.

Where a statute is enacted to accomplish a single object, the whole will not fall be-

cause of the invalidity of some of its provisions, if sufficient remains to effect the object without the aid of the invalid portions. *Oates v. State*, 56 Cr. R. 571, 121 S. W. 370.

**Determination of constitutional questions.**—The court is not justified in annulling the action of the legislature except in case of clear and unquestioned violation of the provision of the state and federal constitution. *Wharton County Drainage Dist. No. 1 v. Higbee* (Civ. App.) 149 S. W. 381.

**Delegation of legislative powers.**—The legislature cannot confer upon merely administrative or ministerial officers the power to make rules for taxation. *Stratton v. Commissioners' Court of Kinney County* (Civ. App.) 137 S. W. 1170.

**Judicial powers and functions—Political questions.**—What shall be included in an improvement district in a city being a political question, the court may not revise the action of the council in creating several districts, and hold the effect thereof to be but the creation of one district. *City of Marshall v. Elgin* (Civ. App.) 143 S. W. 670.

The courts cannot enjoin a canvass of an election in a city on an ordinance fixing street railway fares under the power of the initiative on the ground of want of power in the electorate to adopt the ordinance; the canvass of elections being a political power beyond judicial control. *City of Dallas v. Dallas Consolidated Electric St. Ry. Co.*, 105 T. 337, 148 S. W. 292.

— **Encroachment on legislature.**—The policy of a statute is a question for the legislature alone, and the court cannot consider it. *Glens Falls Ins. Co. v. Hawkins*, 103 T. 327, 126 S. W. 1114; *Pistole v. State* (Cr. App.) 150 S. W. 618.

The court should not by construction take away the power of the legislature to enact a statute, if it is not inhibited by the constitution. *Dozier v. State*, 62 Cr. R. 258, 137 S. W. 679.

The court may not review the action of the legislature; but, when called on to administer a statute, it must determine whether it is in conflict with the constitution. *Bonner v. Beisterling* (Civ. App.) 137 S. W. 1154.

In proceedings by a railroad corporation to condemn land for a right of way, the court will not consider matters involving the expediency of the granting by the state of a franchise to the corporation. *Chapman v. Trinity Valley & N. Ry. Co.* (Civ. App.) 138 S. W. 440.

The wisdom of legislative enactments is of no concern to the courts. *Chance v. State*, 63 Cr. R. 602, 141 S. W. 113.

The question of the good faith of legislative acts held not a matter for cognizance by the courts. *Ex parte Wolters*, 64 Cr. R. 238, 144 S. W. 531.

The courts held not entitled to determine whether the proviso in Paris City Charter, § 11, lodged a dangerous discretion in the city council. *McCulstion v. Fenet* (Civ. App.) 144 S. W. 1155.

The court will not pass on the expediency or wisdom of a constitutional statute. *Baldacchi v. Goodlet* (Civ. App.) 145 S. W. 325.

The courts may not inquire into the wisdom of the framers of the constitution in delegating certain functions to the different departments of government, but may only determine whether or not such a delegation has been made. *Snodgrass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144.

The legislature having the right to provide against minors entering and remaining in saloons, it is not for the courts to attach a qualification to such prohibition which the language of the law does not warrant or the rule of reason dictate. *Haynes v. Haberzette* (Civ. App.) 152 S. W. 717.

The wisdom or folly of a statute is no concern of the courts but is for the legislature only. *Danner v. Walker-Smith Co.* (Civ. App.) 154 S. W. 295.

It is the court's duty to administer the law as written by the legislature, and not to make the law. *Wilson v. Brown* (Civ. App.) 154 S. W. 322.

— **Encroachment on executive.**—When the constitution confers power upon one department of the government, it must be exercised in the manner pointed out, to the exclusion of all other means or manner of exercising it. *Snodgrass v. State* (Cr. App.) 150 S. W. 178.



## TITLE 82

## LEGISLATURE

[For Compensation of Legislators, see Salaries.]

Chap.

1. Time of Meeting.
2. Organization.

Chap.

3. Investigating Committees — Procedure.

## CHAPTER ONE

## TIME OF MEETING

**Article 5505.** [3271] **Time of meeting.**—The thirty-third legislature shall assemble to hold its biennial session on the second Tuesday in January, A. D. 1912 [1913] at 12 o'clock m., and shall meet biennially thereafter on the same day and hour until otherwise provided by law.

See Const. art. 3, § 5.

## CHAPTER TWO

## ORGANIZATION

Art.

5506. Who may organize the legislature.  
 5507. Secretary of state to preside for purpose of organization.  
 5508. Secretary of state to attend meeting and appoint clerk.  
 5509. The clerk to call counties in alphabetical order.  
 5510. Clerk to administer oath.  
 5511. All counties to be called whether election returns are made or not.

Art.

5512. Parties sworn in on any proper evidence.  
 5513. When quorum not present day of meeting.  
 5514. Election of speaker.  
 5515. Election of other necessary officers.  
 5516. In absence of secretary of state, attorney general to preside.

**Article 5506.** [3272] **Who may organize the legislature.**—Those persons receiving certificates of election to the senate and house of representatives of the legislature, and those senators whose terms of office shall not have terminated, and none others, shall be competent to organize the senate and house of representatives. [Act Aug. 23, 1876, p. 311, sec. 29.]

**Art. 5507.** [3273] **Secretary of state to preside for purpose of organization.**—For the purpose of organization, as provided for in the preceding article, it shall be the duty of the secretary of state to preside at each recurring session of the legislature. [P. D. 5437.]

**Art. 5508.** [3274] **Secretary of state to attend meeting and appoint clerk.**—He shall attend at the time and place designated for the meeting of the legislature, and shall appoint a clerk, who shall have been chief clerk of the house the preceding session, if he be present, to take a minute of the proceedings. [Id.]

**Art. 5509.** [3275] **The clerk to call counties in alphabetical order.**—The clerk, under direction of the secretary of state, shall call all the counties in alphabetical order. [Id.]

**Art. 5510.** [3276] **Clerk to administer oath.**—When the counties are called and the members elect appear and present their credentials, it shall be the duty of the clerk, under the order and direction of the secretary of state, to administer to each the oath prescribed by the constitution. [Id.]

**Art. 5511. [3277] All counties to be called whether election returns are made or not.**—Should returns of election in any county for members of the legislature not be made to the office of secretary of state, the clerk shall nevertheless call such county. [Id. P. D. 5438.]

**Art. 5512. [3278] Parties sworn in on any proper evidence.**—Any person appearing at said call and presenting the proper evidence of his election shall be admitted or qualified in the same manner as though the return of his election had been made to the office of secretary of state. [P. D. 5438.]

**Art. 5513. [3279] When quorum not present on day for meeting.**—Should there not be a quorum in attendance on the day appointed for the meeting of the legislature, it shall be the duty of the secretary of state and clerk to attend from day to day until a quorum shall appear and be qualified as above. [P. D. 5439.]

**Art. 5514. [3280] Election of speaker.**—When a quorum shall have appeared and been qualified, the house shall proceed to the election of a speaker, unless a majority of the members present shall think proper to defer said election. [P. D. 5440.]

**Art. 5515. [3281] Election of necessary officers.**—When an election for speaker shall have been had, the speaker elect shall immediately take the chair, and the house proceed to its further organization by electing the necessary officers, to whom the speaker shall administer the oath of office. [P. D. 5441.]

**Art. 5516. [3282] In absence of secretary of state, attorney general to preside.**—Should there be no secretary of state, or in case he be absent or unable to attend from any cause, the attorney general shall attend and perform the duties prescribed in this title. [P. D. 5442.]

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## CHAPTER THREE

### INVESTIGATING COMMITTEES—PROCEDURE

<b>Art.</b>	<b>Art.</b>
5517. May administer oaths, etc.	5521. Authority of special committee to issue process, etc.
5518. Sergeant-at-arms may serve process.	5522. Judges and other officers may take testimony, when.
5519. Special committee to take certain testimony.	5523. Process, by whom served.
5520. Notice of taking special testimony to be given.	5524. Testimony to be written, etc.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 5517. May administer oaths, etc.**—In the investigation of any public officer elected by the legislature, or the qualified voters of the state of Texas, or of any nominee of any political party in said state for election by the legislature, or qualified voters thereof, to any public office in respect to matters or charges that reflect upon the personal or official integrity of such public officer or nominee, or that disqualifies, or tends to disqualify, such public officer to hold the office to which he has been elected or nominated by any political party, or any investigation of any other matter, or for any other purpose that may be ordered by the legislature of this state, or either house of such legislature, before any committee heretofore appointed by the legislature of this state, or by either house of said legislature, and now pending, or before any committee that may hereafter be appointed by the legislature of this state, or either house thereof, at this or any subsequent session, such investigating committee, and each member thereof, shall have full power and authority to administer oaths to officers, clerks and stenographers that it may em-

ploy in connection with the performance of its duties, and to any witnesses and parties called to testify before it; and said investigating committee shall have full power and authority to issue any and all process that may be necessary to compel the attendance of witnesses and the production of any books, papers and other written documents it may designate, and to compel any witness to testify in respect to any matter or charge by it being investigated, in answer to all pertinent questions propounded by it, or under its direction, and to fine or imprison any witness for his failure or refusal to obey the process served on him by such committee, or to answer any such pertinent questions propounded; provided, that such fine shall not exceed one hundred dollars, nor shall imprisonment extend beyond the date of adjournment of the legislature then in session; and provided, further, that the testimony given by a witness before such investigating committee shall not be used against him in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him, except for perjury committed before such committee. [Acts 1907, p. 6, sec. 1.]

**Appointment of committees.**—A branch of the legislature held entitled, at special session, to appoint a committee to investigate a recent election. *Ex parte* Wolters, 64 Cr. R. 238, 144 S. W. 531.

**Powers of committees.**—Powers of investigating committee of legislature held as broad as the resolution appointing it. *Ex parte* Wolters, 64 Cr. R. 238, 144 S. W. 531.

**Examination of witnesses.**—Certain questions by a legislative investigating committee to a witness ruled on as proper or improper. *Ex parte* Wolters, 64 Cr. R. 238, 144 S. W. 531.

— **Refusal to answer as contempt.**—Refusal to answer certain questions by a legislative investigating committee to a witness held not to constitute contempt. *Ex parte* Wolters, 64 Cr. R. 238, 144 S. W. 531.

Refusal of a witness to answer questions put by legislative committee held a criminal contempt. *Id.*

— **Punishment for contempt.**—The power to punish for contempt held not to be inherent in the legislature, but to exist only as expressly given by the constitution. *Ex parte* Wolters, 64 Cr. R. 238, 144 S. W. 531.

Courts held not entitled to prevent enforcement of sentence to imprisonment for contempt by legislature on specified grounds. *Id.*

**Art. 5518. Sergeant-at-arms may serve process.**—The sergeant-at-arms, or assistant sergeant-at-arms, of either house of the legislature of this state, or any sheriff or constable of this state, may serve any process that may be issued by said investigating committee, or by any commission by them appointed, for the attendance of witnesses who reside within this state; and, if such service is made by any sheriff or constable, he shall be allowed the same fees and mileage allowed for similar process by the district courts of this state in civil cases. Should said investigating committee so direct, any witness visiting or being within the state may be summoned before such committee by having a brief statement of the process issued for such witness transmitted by telegram to any sheriff or constable of the county within which such witness may reside, or is supposed to be, at the time such process may be issued. [Id. sec. 2.]

**Art. 5519. Special committee to take certain testimony.**—Whenever such investigating committee before which any investigation, such as herein above defined, is pending, shall deem it necessary or advisable to procure the testimony of any witness or witnesses residing or being at a great distance from the city of Austin, within this state, or residing or being without this state, or procure the evidence contained, or supposed to be contained, in any books, papers or written documents without this state, such investigating committee may name, appoint and delegate any two of its members as a special commission to go to any such distant point or points within this state, or beyond the confines of this state, where such witness resides, or is supposed to be, or where such evidence may probably be had, for the purpose of procuring the testimony of such witness or witnesses, or of such evidence, and shall seek to procure the same as hereinafter provided. [Id. sec. 3.]

**Art. 5520. Notice of taking same to be given.**—When such special commission as hereinabove defined shall be appointed and delegated by said investigating committee, notice thereof shall be forthwith given to the party under investigation, or his attorneys of record, and the point or points to which such special commission is directed to go, as far as may then be known, shall be stated in such notice, and the order in which such points are to be visited as far as may then be known; provided, that such special commission may visit any other point or points than those named by such investigating committee, if in the judgment of such commission necessary to procure such testimony or any other material testimony. [Id. sec. 4.]

**Art. 5521. Authority to issue process, etc.**—Such special commission shall have authority to issue any and all process that may be necessary to compel the attendance of witnesses before them, administer oaths to witnesses, compel authority to administer oaths to officers, clerks and stenographers that it may employ in connection with the performance of its duties, and to any witnesses and parties called to testify before it; and said investigating committee shall have full power and authority to issue any and all process that may be necessary to compel the attendance of witnesses and the production of any books, papers and other written documents it may designate, and to compel any witness to testify in respect to any matter or charge by it being investigated, in answer to all pertinent questions propounded by it, or under its direction, and to fine or imprison any witness for his failure or refusal to obey the process served on him by such committee, or to answer any such pertinent questions propounded; provided, that such fine shall not exceed one hundred dollars, nor shall imprisonment extend beyond the date of adjournment of the legislature then in session; and provided, further, that the testimony given by a witness before such investigating committee shall not be used against him in any criminal action or proceeding, nor shall any criminal action or proceeding be brought against such witness on account of any testimony so given by him, except for perjury committed before such committee. [Acts 1907, p. 6, sec. 1.]

**Art. 5522. Judges and other officers may take testimony, when.**—Said commissioners, if they elect so to do, may file with any judge of any court of record, justice of the peace, commissioner of deeds for the state of Texas, or notary public of the county and state where any witness whose testimony is desired may reside or be found, a brief statement of the matters or charges under investigation by the legislature of the state of Texas, or either house of such legislature, in respect to which the testimony of such witness is sought, the name of the witness and where he can probably be found, the reasons why such witness is believed to possess the information sought, and, when books, papers and other documents are accessible to such witness are desired, such a description thereof as will enable the witness to produce the same, and thereupon ask that such judge, justice of the peace, or commissioner of deeds, or notary public, shall summon such witness to appear before him with any books, papers, and other written documents that may be so designated, and testify in answer to any and all pertinent questions that may be propounded to him by said commissioners, or under their direction, in respect to said matters and charges. Any subpoena or other process issued by said judge, justice of the peace, commissioner of deeds, or notary public, shall state the time and place of holding such examination, and otherwise conform to the laws of the state in which the same is issued; and the examination of such witness shall be in the same manner and subject to the same rules of procedure as provided by law for taking the deposition of witnesses in answer to oral interrogatories and cross interrogatories under a commission issued upon agreements of the parties litigant by the district courts of the state of Texas to take

the deposition of non-resident witnesses, except, that no notice shall be required to be given to any one other than the witness and the party being investigated by the legislature of the state of Texas, or either house of said legislature. Any process that may be issued by any officer without this state hereinabove named may be served by any sheriff, constable or policeman of the county and state in which such witness may reside or be found, and for such service shall receive the same fees and mileage as may be provided by the law of said state for service of process in the district or circuit courts of such state in civil cases. [Id. sec. 6.]

**Art. 5523. Process, by whom served.**—Any process issued by said commissioners, or by any of the officers named in article 5522, when the same is to be served without this state, shall be served by any of the officers named in article 5522, by delivering a true copy of such process to the witness therein named; and such officer shall make his return on such service showing how and when the same has been served and service of process in this state shall be the same as service of similar process in civil cases in the district courts of this state. [Id. sec. 7.]

**Art. 5524. Testimony to be written, etc.**—When any witness appears to testify either before said commissioners or any of the officers named in article 5522, the questions propounded and answers thereto shall be taken down by a competent stenographer and thereafter transcribed, together with all objections thereto, and shall be returned to the investigating committee to be incorporated in the record as a part of the evidence in such investigation, subject to the ruling of said investigating committee as to the admissibility of any evidence therein contained. Any officer named in article 5522 shall have power and authority to compel any witness appearing before him to testify in answer to any and all pertinent questions propounded; and upon the failure or refusal of such witness to testify such officer may fine or imprison such witness for contempt to the extent and as may be provided by the laws of the state in which such witness is examined. The commission provided for by this act shall have the authority to employ and have to accompany them not more than one attorney who is not a member of such committee and who is a citizen of the state of Texas, at the expense of the state, but shall not have the authority to employ attorneys who are not citizens of this state at the expense thereof. [Id. sec. 8.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Special session—Submission of subjects by governor.**—Courts will not investigate the question whether an act passed at a called session was legislation to which the governor had by message called attention. *State v. Larkin*, 41 C. A. 253, 90 S. W. 912.

A message from the governor to the legislature in special session held not sufficient, as a submission of certain matters, to warrant their consideration by the Legislature. *Ex parte Wolters*, 64 Cr. R. 233, 144 S. W. 531.

Governor's response to request by legislature at special session for submission of further subjects construed as a promise to consider the request, so that the legislature by a committee could seek information to impress on him the necessity for a submission of such matters. *Id.*

Governor's response to request by legislature at special session for submission of further subjects construed. *Id.*

## TITLE 83

# LEVEES, IMPROVEMENT DISTRICTS AND SEAWALLS

Chap.  
1. State Reclamation Engineer.  
2. Improvement Districts.

Chap.  
3. Seawalls.

### CHAPTER ONE

#### STATE RECLAMATION ENGINEER

Art.  
5525-5529. [Superseded.]  
5529a. Primary object of act; work authorized, etc.  
5529b. State reclamation engineer; qualifications.  
5529c. Duties and powers of engineer.  
5529d. Engineer, how appointed; compensation.

Art.  
5529e. Further powers and duties of engineer.  
5529f. Record of expenditures; districts to reimburse state, etc.; bonds.  
5529g. Districts to file record, etc., with engineer.  
5529h. Engineer to maintain office, etc.  
5529i. Appropriations.  
5529j. Laws repealed.

Articles 5525-5529. Superseded. See note under Art. 5529a.

**Art. 5529a. Primary object of act; work authorized, etc.**—That the primary object of this Act shall be to devise and plan and mark out upon the ground all the improvements necessary to reclaim or cause to become suitable for agricultural uses, the overflowed and swamp lands and overflowed areas in the costal plain, and other lands within this state, which, by reason of the temporary or permanent excessive accumulation of water thereon, or contiguous thereto, are not suitable for such uses, and, to accomplish the said primary purpose, it is hereby authorized and ordered that the necessary investigations, examinations, measurements, computations, estimates, surveys, maps, reports and publications shall be made, and any other necessary work incident thereto shall be done, which may be required in the process of designing, planning or marking out upon the ground the most effective, practical, permanent, economical, feasible and equitable improvements or systems of improvements such as levees, dikes, dams, canals, drains, water-ways, reservoirs or any or all of them, and other improvements incidental thereto, and that in so far as possible the said improvements shall be designed, planned or marked out upon the ground with primary consideration to the topographic and hydrographic conditions, and in such manner that each division of the said improvements shall be a complete, united project, forming a co-ordinate part of an ultimately finished series of projects, so constituted that the successful operation of the improvements in each united project existing within the same hydraulic influence; and the said improvements and system of improvements shall be discussed in reports, shown on maps, drawings or diagrams, or otherwise recorded, reproduced, delineated or published; and all such final results of the work herein authorized, which are or may be of value to the state of Texas, shall be filed for public reference as hereinafter provided. And provided, that no part of the money herein appropriated shall be used in the actual construction of any of the improvements herein authorized to be devised, planned or marked out upon the ground. [Acts 1909, p. 136. Amended Acts 1911, p. 160. Acts 1913, p. 292, sec. 2.]

**Explanatory.**—By Acts 1911, ch. 88 (p. 160), sec. 1, Acts 1909, ch. 81 (p. 136), was amended so as to read as set forth in sections 2-10 of the amendatory act. By Acts 1913, p. 292, sec. 1, Acts 1911 ch. 88, was amended so as to read as set forth in the articles here designated as Arts. 5529a-5529j. The provisions of Acts 1909, p. 136, were contained in Rev. Civ. Stat. 1911, Arts. 5525-5529, which are superseded by said Arts. 5529a-5529j.

**Art. 5529b. State reclamation engineer; qualifications.**—For the purpose of carrying out the provisions of this Act there is hereby created and established the office of state reclamation engineer. The said state reclamation engineer shall himself be a thoroughly experienced and skilled topographer and hydrographer and draftsman and reclamation engineer; and he shall have had not less than five years actual experience in the organizing and supervising of geodetic and topographic surveying and mapping of large areas, and in the general direction of field and office engineering corps. He shall be thoroughly experienced in making and passing upon reclamation plans and estimates, and in the preparation and writing of technical reports and publications, and in the reproduction of maps. [Id. sec. 3.]

**Art. 5529c. Duties and powers of engineer.**—The said engineer shall have general supervision of all work authorized by this Act, and shall have power to determine at what points, within the territory herein prescribed, the said work shall be done, and, when not in conflict with the provisions of this Act, shall make such division and allotment of the money herein appropriated as to properly carry out the provisions of this Act; and shall determine the manner and the season that the results of said work shall be made public. The said engineer shall have the further power, if in his judgment it will subserve the best interests of the state of Texas, to accomplish the objects herein provided for, to make and approve agreements or contracts for co-operation with any branch or branches of the federal, state, county or city governments for the doing of all or any part of the work herein authorized; provided, that said engineer shall also have the power to cancel the said co-operative agreements or contracts upon ten days' written notice to the branch or branches of the federal, state, county or city governments concerned; and provided, that if said engineer shall deem the said co-operation not to be to the best interests of the state of Texas, then it is hereby made the duty of said engineer to cause to be accomplished the objects of this Act independent of the co-operation of federal, state, county or city governments. [Id. sec. 4.]

**Art. 5529d. Engineer, how appointed; compensation.**—The said state reclamation engineer shall be appointed by the governor with the advise and consent of the senate, and shall serve for a term of two years and until his successor is appointed and qualified. The said state reclamation engineer shall receive as compensation for his services the sum of thirty-six hundred dollars (\$3600.00) per annum payable monthly; and in addition to his salary he shall be reimbursed for his necessary traveling and station expenses, or shall be reimbursed therefor by an equivalent per diem allowance in lieu thereof, while engaged upon his official duties in the field. [Id. sec. 5.]

**Art. 5529e. Further powers and duties of engineer.**—The said engineer shall have power to employ such assistants, to make or authorize to be made such purchases, to incur or authorize to be incurred such other expenses, and to formulate and enforce such reasonable and proper rules and regulations governing his official work, and the work of his assistants, both in the office and in the field, as may be necessary to perform with correct dispatch and economy the work herein authorized to be done. And the said engineer is further empowered to confer with any branch of the federal, state, county or city governments with a view to obtaining authority, assistance or advice in connection with his official work, whenever necessary or desirable, and he shall solicit the co-operation of any other branch of the federal, state, county or city governments whenever such co-operation may be to the best interests of the state of Texas. It shall be the duty of the said engineer to perform, conduct or supervise the work herein authorized, and to execute such

additional or supplemental orders and instructions not incompatible with his prescribed duties, as may be necessary to properly carry out the provisions of this Act. It shall further be the duty of the said engineer to confer in a technical capacity with communities or districts within this state that have requested his technical advice with a view to the adequate execution of proposed levee, drainage and irrigation reclamation improvements contemplated in such communities or districts, for which technical advice the said engineer shall receive no extra compensation. [Id. sec. 6.]

**Art. 5529f. Record of expenditures; districts to reimburse state, etc.; bonds.**—That hereafter the said state reclamation engineer shall keep an accurate record of all moneys spent by the state in the making of the authorized surveys of each individual district, and upon the completion of such surveys shall certify what the pro rata cost of making the survey has been within the district in question. That hereafter any improvement district, drainage district or levee district organized under the provisions of the law authorizing the organization and conducting such improvement districts, drainage districts, or levee districts which takes advantage of the information furnished by the hydrographic and topographic survey provided for in this Act, shall, when such improvement district, drainage district, or levee district is organized and issues bonds, pay to the state reclamation engineer such sum as the said engineer may direct, provided, that the said engineer shall not require the district in question to reimburse the state in a greater amount than the pro rata cost of making the survey as certified by the said engineer as above specified; and, that all funds reimbursed to the state in this manner shall be placed in the state treasury to the credit of said engineer to be used again for the purpose of further carrying out the provisions of this Act. It is further provided that such improvement districts, drainage districts, or levee districts are hereby authorized to issue bonds in amounts equal to that charged by the said engineer for the cost of making the said survey with which to reimburse the state as hereinbefore provided. [Id. sec. 7.]

**Art. 5529g. Districts to file record, etc., with engineer.**—Hereafter all improvement districts, drainage districts, or levee districts shall, immediately prior to the approval of their bonds by the attorney general, as authorized by law, file with the said state reclamation engineer a complete record showing all the steps in their legal organizations, and showing the boundaries, area, and amount of bonds to be issued, to be given upon forms furnished by said engineer, together with the plans of improvements, maps, profiles, the estimates and the engineer's report of the said district. [Id. sec. 8.]

**Note.**—Section 9 makes it a misdemeanor to destroy or deface any corner, line, mark, etc., made in the work authorized by the act.

**Art. 5529h. Engineer to maintain office, etc.**—The said engineer shall have and maintain in the state capitol an office suitable for the proper performance of his technical and general office work, and in which it shall be his duty to safely file for public reference all final results of the work herein authorized, and provided in section 2 [Art. 5529a] of this Act. [Id. sec. 10.]

**Art. 5529i. Appropriations.**—For the purpose of carrying out the provisions of this Act, there is hereby re-appropriated all of the unexpended balance in the appropriation made by chapter 88, of the General Laws of the state of Texas passed at the regular session of the thirty-second legislature, entitled "An Act to amend Chapter 81, of the General Laws of the State of Texas passed at the Regular Session of the Thirty-First Legislature of the state of Texas." Provided, further, that in addition to the foregoing reappropriation of the said unexpended balance as hereby appropriated out of any money in the state treasury not other-



wise appropriated, the sum of forty thousand (\$40,000) dollars to be expended in carrying out the provisions of this Act, and to be paid upon vouchers approved by the said state reclamation engineer. [Id. sec. 11.]

Art. 5529j. **Laws repealed.**—That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby expressly repealed. [Id. sec. 12.]

## CHAPTER TWO

### IMPROVEMENT DISTRICTS

Art. 5530. Commissioners' courts to establish improvement districts.	Art. 5556. Bonds, how sold; proceeds, how applied.
5531. Improvement districts may control levees, etc.	5557. County judge to give bond before selling bonds.
5532. Petition to establish district and issue bonds.	5558. Expenses after filing petition, how paid.
5533. Objection to creation of district, how made.	5559. Deposit to accompany petition.
5534. Duty of court on hearing.	5560. Tax to be levied.
5535. Engineer appointed, compensation, assistants.	5561. County assessor to assess property, removal for failure.
5536. Engineer to give bond.	5562. County collector to give special bond.
5537. Duty of engineer.	5563. Delinquent taxes to be collected as other taxes.
5538. Report of engineer.	5564. County treasurer to keep account.
5539. Hearing on report.	5565. Tax a lien on property assessed.
5540. Proceedings on approval of report.	5566. Treasurer to give additional bond.
5541. Election, form of ballot.	5567. Condemnation proceedings; acquisition of right of way.
5542. Notice of election; election, how conducted.	5568. Commissioners and employes may enter lands, etc.
5543. Oath of voters.	5569. Commissioners to repair and improve levees.
5544. Returns of election, result disclosed, form of certificate.	5570. Contracts let to lowest bidder.
5545. Commissioners appointed, term of office, compensation.	5571. Bids, how submitted.
5546. Oath of commissioners.	5572. Contracts approved and filed.
5547. Bond of commissioners.	5573. Contractor's bond.
5548. Commission to organize.	5574. Construction under supervision of engineer and commissioners.
5549. Appointment of engineer, compensation, duties.	5575. Right of way across railroads, etc.
5550. Map and profile of levees.	5576. Payment of warrants.
5551. Bonds to be issued, limitation upon.	5577. Partial payments.
5552. Form and terms of improvement bonds.	5578. Annual report of commissioners.
5553. Bonds to be submitted to attorney general.	5579. May employ attorneys.
5554. To be registered by comptroller, not to be impeached.	5580. May acquire property, sue and be sued.
5555. Book of bonds to be kept; sinking fund provided.	5581. Lease or rent land.
	5582. May let use of levees, etc.
	5583. May dispose of surplus material.
	5584. Land to be sold, form of conveyance.

Article 5530. **Commissioners' court to establish improvement districts.**—The commissioners' court of the several counties of this state may hereafter create, establish and define one or more improvement districts in their respective counties in the manner hereinafter provided, and may, or may not include within the boundaries and limits of such districts, villages, towns and municipal corporations, or any portion thereof; but no land at the same time shall be included within the boundaries of more than one improvement district created under the provisions of this chapter. [Acts 1909, p. 140, sec. 1.]

Art. 5531. **Improvement districts may control levees, etc.**—Such improvement districts, when so created, established and defined, may build and construct, or cause to be built and constructed and maintained, levees or other improvements on all rivers, creeks and streams within such districts, or which may border on the same, to prevent overflows thereof, and issue bonds in payment therefor, and the maintenance thereof, and levy and collect taxes for the payment of said bonds and interest thereon, as hereinafter provided, and may acquire, by grant, condemna-

tion or otherwise, such levees or other improvements as may have been already constructed in such district. [Id.]

**Art. 5532. Petition to establish district and issue bonds.**—Upon the presentation to the commissioners' court of any county in the state of a petition signed by twenty-five of the resident property taxpayers in the proposed district, or in the event there are less than seventy-five resident property taxpayers in the proposed district, then by one-third of such resident property taxpayers of such district, praying for the establishment of an improvement district, the issuance of bonds and levy of a tax in payment thereof, and setting forth the necessity and feasibility and proposed boundaries thereof, and designating the name for such, the name to include the name of the county, the said commissioners' court shall, if in session when said petition is presented at said session of the court, set said petition down for a hearing at some regular or special session of the court called for that purpose, not less than thirty nor more than sixty days from the date of the presentation of said petition, and shall order the clerk of said court to give notice of the filing of the said petition, and of the date and place of hearing, by posting written or printed notices thereof in five public places in said county, one of which shall be at the court house door of the said county, and four of which shall be within the limits of the proposed improvement district. Such notices shall be posted for twenty days prior to the time set for such hearing. Said clerk may deputize some other person to perform such service, and the affidavit of such clerk or his deputy that such notices have been so posted shall be held conclusive thereof. Said clerk shall receive as compensation for such services one dollar for each of such notices and five cents per mile for each mile necessary to be traveled in posting same. Should said commissioners' court not be in session, at the time of the filing of said petition, it may be filed with the county judge of the county, who shall thereupon make and enter an order upon the minutes of said commissioners' court, setting said petition for hearing at some regular or special term of said commissioners' court, called for that purpose not less than thirty nor more than sixty days from the filing of said petition, and shall order the clerk of the said commissioners' court to give said notice as is herein provided for in this article, and which notice shall be posted for the time and as is provided for in this article. [Id. sec. 2.]

**Art. 5533. Objection to creation of district, how made.**—At the time set down for the hearing of said petition, any person who would be affected by the creation of said district may appear before the said court and contest or contend for the creation of said district, and may offer testimony to show that the said district is or is not necessary and would or would not be of public utility, and the creation of said district would or would not be feasible or practicable. Said commissioners' court shall have exclusive or final jurisdiction to hear and determine all contests and objections to the creation of such districts, and all matters pertaining to the same; and said court shall have exclusive jurisdiction over all subsequent proceedings of said district, when organized, except as herein provided, and may adjourn hearings on any matter connected therewith from day to day; and all judgments, orders or decrees rendered by said court in relation thereto shall be final, except as hereinafter provided. [Id. sec. 3.]

**Art. 5534. Duty of court on hearing.**—If, upon the hearing of said petition, it shall appear to the court that the improvement of said river or rivers, creek or creeks or streams within such district, or which may border on the same, to prevent overflows, is feasible and practicable, and that it is needed and would be a public benefit, then the court shall so find, and shall render judgment reciting such findings, and create and establish such improvement districts, and cause such judgment to be

entered of record. But, if the court should find that the improvement of such river or rivers, creek or creeks and streams is not feasible or practicable, or that it is not needed and would not be a public benefit, then the court shall enter such findings of record and dismiss such petition at the cost of the petitioners. [Id. sec. 4.]

**Art. 5535. Engineer appointed, compensation, assistants.**—Should the court render judgment establishing such improvement district according to the boundaries set out in such petition, then the court shall appoint a competent engineer, who shall receive a sum of not more than ten dollars per day for his services for the time he is actually engaged in the work for which he is appointed; and said engineer may, with the consent of the commissioners' court, or the county judge, employ such assistants as may be necessary, at such compensation as may be fixed by the commissioners' court, or the county judge. [Id. sec. 5.]

**Art. 5536. Engineer to give bond.**—Before entering upon his official duties, the civil engineer shall enter into a bond in the sum of five hundred dollars, with two or more sureties, to be approved by and payable to the county judge for the use and benefit of the improvement district, conditioned for the faithful discharge of his duties under this chapter. [Id. sec. 6.]

**Art. 5537. Duty of engineer.**—Said civil engineer shall, as soon as practicable, go upon the lands and rivers, creeks and streams embraced in said district, or bordering thereon, and examine such river, creek or stream proposed to be improved by levee or otherwise, and make an estimate of the probable cost of making and completing such levee or other improvement, and shall also designate the river or rivers, creek or creeks or streams necessary to be improved and the estimated cost of each, and also the estimated probable cost of maintaining same per year and make a detailed report of his work to the commissioners' court. [Id. sec. 7.]

**Art. 5538. Report of engineer.**—Such report shall be accompanied by maps showing the initial or beginning point of such improvement, and the nature and character and location of same, with the estimated cost thereof, together with the location and size of all levees, and the number of cubic yards of earth necessary to construct the same. [Id. sec. 8.]

**Art. 5539. Hearing on report.**—When the said report is filed with the clerk of the commissioners' court, it shall be the duty of the said court, if then in session, to make and enter of record an order setting said report down for a hearing at some subsequent regular or special term of not less than thirty nor more than forty days from said filing, and to require the clerk to give notice of such hearing by posting written or printed notices in the manner and places and for the length of time and for the same compensation as is provided for in article 5532 of this chapter in regard to original notices of the filing of the petition. Should said court not be in session at the time of the filing of such report, then the county judge shall make the orders and cause written or printed notices to be given and posted as provided for in this chapter; and, if there should be no regular session of the said court within thirty days after such filing, he shall call a special session of the commissioners' court to act on such report, not less than thirty nor more than forty days from such filing. At the hearing of the said report, any taxpayer of said district, whether he resides in said district or not, may appear and object to any and all of such improvements and levees for the reason that they are located at the place or places, or that they are not sufficient in capacity to prevent an overflow. [Id. sec. 9.]

**Art. 5540. Proceedings on approval of report.**—If there should be no objection to said report, or if there should be objections thereto

and the court shall find that the objections are not well taken, the report shall be approved, and the said report and the fact of such approval entered of record in the minutes of said commissioners' court, but the commissioners' court shall not be confined to the nature and character of the improvements or to the initial point, course and end of such improvements as shown by the report of the engineer, but may change the location and add to or reduce the size, length and height of the levees and order the engineer to locate any additional levees and improvements as may be ordered by the commissioners' court, and the commissioners' court, if it is deemed necessary, may refer the entire report back to the engineer for a compliance with the order of said court; provided, that if the said commissioners' court shall not adopt, in whole or in part, the original report of the said engineer, as provided herein, they shall require, and it shall be the duty of the said engineer, to make and file with the said commissioners' court a further report in writing of the probable cost of said improvements, as said improvements may be modified or changed by said commissioners' court, as provided for in this chapter. Before the said commissioners' court shall make any change or alterations in such improvements, as reported by such engineer and as provided for in this article, such proposed action of the court shall be set down for hearing, and notice thereof shall be given by posting written or printed notices, for the same length of time and in the same manner as provided for in article 5539 of this chapter, in regard to the hearing of the said original report of said engineer. [Id. sec. 10.]

**Art. 5541. Election, form of ballot.**—After the approval of the engineer's report or reports, as provided for in the preceding articles of this chapter, and at the same session of the said commissioners' court, the said court shall order an election to be held within such improvement district at the earliest possible time, at which time there shall be submitted the following proposition, and none other: "For the improvement district and the issuance of bonds and levies of tax in payment therefor," "Against the improvement district and the issuance of bonds and levies of tax in payment therefor." [Id. sec. 11.]

**Art. 5542. Notice of election; election, how conducted.**—Notice of said election, stating the time and place or places of holding the same, shall be given by the clerk of the county commissioners' court by posting written or printed notices thereof in five public places in such proposed improvement district, and one at the court house door of the county in which such district is situated. Such notices shall contain the propositions to be voted upon as set forth in article 5541 of this chapter, and shall also state the estimated cost of such improvement as reported by the engineer, and approved by the commissioners' court, and also the amount of bonds proposed to be issued, together with the rate of interest the same shall bear, and when the said bonds shall be due, and for a tax to be levied and collected to pay said bonds and interest thereon. The manner of conducting said election shall be governed by the election law of the state of Texas, except as herein otherwise provided. None but resident property taxpayers, who are qualified voters of the said proposed improvement district, shall be entitled to vote at any election on any question submitted to the voters thereof by the county commissioners' court at such election. The commissioners' court shall name the polling place or places for such election within the proposed improvement district, and shall also select and appoint judges and other necessary officers of the election, and shall provide one and one-half times as many ballots for said election as there are qualified resident taxpaying voters within such district as shown by the tax rolls of the county. Such ballots shall have printed thereon these words, and none others: "For the improvement district and issuance of bonds

and levy of taxes in payment therefor," "Against the improvement district and issuance of bonds and levy of taxes in payment therefor." [Id. secs. 12 and 13.]

**Art. 5543. Oath of voters.**—Every person who offers to vote in any election held under the provisions of this chapter, shall first take the following oath before the presiding judge of the polling place where he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of.....county, and that I am a resident property taxpayer of the proposed improvement district voted on in this election, and I have not voted before at this election." [Id. sec. 14.]

**Art. 5544. Returns of election; result disclosed; form of certificate.**—Immediately after the election, the presiding judge at each polling place shall make returns of the result in the same manner as provided for in elections for state and county officers and return the ballot boxes to the county clerk, who shall keep the same in a safe place, and deliver them, together with the returns from the several polling places, to the commissioners' court at its next regular session, or special session called for the purpose of canvassing the votes; and the county commissioners' court shall at such session canvass the vote; and, if it be found that a two-thirds of all of the resident property taxpayers voting thereon shall have been cast in favor of the improvements and the issuance of bonds and levy of taxes, then the court shall declare the result of the election to be in favor of the said improvement district, and bonds and taxes, and shall enter the same in the minutes of the said court as follows:

"The county commissioners' court of..... county, Texas,.....term, A. D....., in the matter of the petition of.....and others, praying for the establishment of an improvement district, the issuance of bonds and the levy of a tax in payment thereof, in said petition fully described and designated by the name of.....Improvement District....." Be it known that at an election held for said purposes in said district on the.....day of..... A. D.....a two-thirds of all of the resident property taxpayers voting at said election, voted in favor of the creation of said improvement district and the issuance of bonds and the levy of taxes. Now, therefore, it is considered and ordered by the court that said improvement district be and the same is hereby established by the name of.....Improvement District within the following named metes and bounds, to wit: (Giving boundaries of the district). [Id. sec. 15.]

**Art. 5545. Commissioners appointed; term of office; compensation.**—After the establishment of this district, as herein provided, the commissioners' court shall appoint three improvement commissioners, by a majority vote of said court, whose duty shall be as hereinafter provided, who shall each receive for his services a sum of not more than three dollars per day for the time actually engaged in the work of said district; provided, that the compensation, if any, shall have been definitely fixed in the order of the court making said appointment; and, before any amount shall be paid to said commissioners, or either of them, they shall make a detailed report to the commissioners' court of the time actually engaged in the work for said district, and of the work done; and such report shall be audited and approved by the commissioners' court. Said improvement commissioners shall hold office for a term of two years and until their successors shall be qualified, unless removed by a majority vote of the commissioners' court for malfeasance, or for non-feasance, in office; upon the expiration of the term of office of the said improvement commissioners, or in case of the resignation, death or

refusal to act of any such improvement commissioners, the commissioners' court shall appoint their successors by a majority vote of said court. [Id. sec. 16.]

**Art. 5546. Oath of commissioners.**—Before entering upon their duties, all improvement commissioners shall take and subscribe before the county judge an oath to faithfully discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court by which they are appointed, whenever required to do so, which oath shall be filed by the clerk of the said commissioners' court and preserved as a part of the records of said improvement district. [Id. sec. 17.]

**Art. 5547. Bond of commissioners.**—Before entering upon their duties, each of the said improvement commissioners shall make and enter into a good and sufficient bond in the sum of one thousand dollars payable to the county judge for the use and benefit of said improvement district, conditioned upon the faithful performance of their duty. [Id. sec. 18.]

**Art. 5548. Commission to organize.**—The improvement commissioners shall organize by electing one of their number chairman and one secretary, and two of whom shall constitute a quorum, and the concurrence of two shall be sufficient in all matters pertaining to the business of said district. [Id. sec. 19.]

**Art. 5549. Appointment of engineer; compensation and duties.**—After the establishment of said district, the improvement commissioners shall employ a competent civil engineer, upon a salary not to exceed the sum of ten dollars per day, for the time actually engaged in the work, whose term of office shall be at the will of said commissioners, which civil engineer shall proceed to make a map of such improvement district, showing the boundary lines thereof, with the original surveys therein, and also make maps and profiles of the several levees, or such other improvements located in such district; but a copy of the land map of the county, as it applies to such district, showing the name and number of surveys and showing the area or number of acres contained in such district, shall be a sufficient compliance with such order, in so far as making a map of the district is required; and any recognized map of any city or town which may be embraced within the boundaries of the district shall be sufficient as to such site of the town; provided, however, that where boundary lines of such improvements, or any of them, cornered at original surveys, the map shall show how many acres of such original survey are included within such improvement district. [Id. sec. 20.]

**Art. 5550. Maps and profiles of levees.**—The map and profile of such levees and other improvements required by the provisions of this chapter to be made shall show the relations that each levee or other improvement bears to each tract of land through which it passes, and the shape in which it divides each tract; and, where the levee or other improvements cut off any tract of land less than twenty acres, then the map shall show the number of acres so divided therefrom, and the number of acres in the whole tracts, and its relation to such levees or other improvements; and such profile map shall also show the number of cubic yards of earth necessary to be excavated to make each levee or other improvement located in such district, and give the estimated cost of each; and when said maps, profiles and estimates shall have been completed by the said engineer, he shall sign the same in his official capacity and file them with the clerk of the said commissioners' court. It is hereby further made the duty of such engineer to supervise and control the construction of any levee or other improvements made in said district as hereinafter provided. [Id. sec. 21.]

**Art. 5551. Bonds to be issued; limitations upon.**—After the establishment of any such improvement district, and after the making and filing of such maps and profiles and estimates, as herein provided for, and after said election authorizing the issuance of bonds and levy of tax, the commissioners' court shall make an order directing the issuance of improvement bonds for such districts sufficient to pay for such proposed improvements, and the maintenance thereof for a period of not exceeding two years; provided, however, that said bonds shall not exceed in the amount one-fourth of the assessed value of the real property of such district, as shown by the last annual assessment thereof made for the state and county taxation, and shall not exceed the estimate made by such engineer made before the election, and voted on at the election in this chapter provided for; provided, however, that, if after an election has been held establishing the district, levying a tax and issuance of bonds it should become necessary for said improvement district to make further improvements, or alterations in the improvements already constituted, or to repair or maintain the improvements so created, and there shall be no sufficient funds in the construction and maintenance funds with which such improvements, alterations, repairs and maintenance may be made, then the improvement commissioners may apply to the commissioners' court for an election to be ordered by said court to issue additional bonds, stating the necessity therefor and the amount of bonds necessary, and the character of such improvements, repairs and maintenance, and the estimated cost therefor as made by such engineer, which shall accompany said application; and, upon the filing of such application, the commissioners' court shall set same down for hearing at some future regular or special session, and cause the county clerk to give notice of such hearing, which notice shall state the character of such improvements, etc., together with the estimated cost therefor and the amount of such bonds and the rate of interest thereon, and the date when due. Said written or printed notices shall be posted in the same manner and places and for the same length of time as required by this chapter for the original petition for the creation of such district. If, upon said hearing, the court should find that the necessity for the issuance of such additional bonds, and that the taxable values of the real property of the said district as shown by the last annual assessment rolls for state and county taxes will admit of an additional bond issue, then the court shall order an election within said district for the purpose of voting on said proposed bond issue and the levy of taxes to pay said bonds and the interest thereon. The manner of holding such election and making returns, and the notices for said election, manner and time of giving notice thereof, and the qualifications of the persons entitled to vote therein, shall be the same as, and in all things governed by, the provisions of this chapter for the election held for the issuance of bonds and levy of tax in the first instance; and the commissioners' court shall meet and canvass the returns of such election as in the said first election; and, if it be found that two-thirds of the resident property taxpayers voting at said election vote in favor of the issuance of said additional bonds and the levy of said tax, then the said commissioners' court shall enter an order reciting the result of said election, and ordering the issuance of said additional bonds and issuance and sale and registration of such additional bonds and levy of said tax; and the issuance and sale and registration of such additional bonds shall in all things be governed by the provisions of this chapter in regard to the bonds first issued. [Id. sec. 22.]

**Art. 5552. Form and terms of improvement bonds.**—All bonds issued under the provisions of this chapter shall be issued in the name of the improvement district, and shall be signed by the county judge and attested by the clerk of the county court with the seal of the county

court affixed thereto; and such bonds shall be issued in denominations of not less than one hundred dollars nor more than one thousand dollars each, and shall bear interest at a rate of interest not to exceed five per cent per annum, payable semiannually at such times as may be specified therein. Such bonds and interest shall be made payable at the county treasurer's office of the county in which such improvement district is located, or in the city of Austin, and no bond shall be made payable for more than forty years after its date. [Id. sec. 23.]

**Art. 5553. Bonds to be submitted to attorney general.**—Any improvement district in the state of Texas, desiring to issue bonds in accordance with this chapter, shall, before such bonds are offered for sale, forward to the attorney general of this state a copy of the bond to be issued, a certified copy of the order of the commissioners' court levying the tax to pay interest and providing a sinking fund for the payment of such bonds, and a statement of the total bonded indebtedness of such improvement district as such, including the series of bonds proposed and the assessed value of the property for the purpose of taxation, as shown by the last official estimate by the county, together with such other information as the attorney general may require. Whereupon, it shall be the duty of the attorney general to carefully examine the said bonds in connection with the facts and the constitution and laws of the state of Texas governing and controlling the execution of said bonds; and, if as a result of the examination, the attorney general shall find that such bonds were issued in conformity with the constitution and laws and that they are valid and binding obligations upon said improvement district in which they are issued, he shall officially so certify. [Id. sec. 24.]

**Attorney general to examine bonds.**—The attorney general cannot be compelled to certify to the validity of the bonds until they have been properly executed, and printed or lithographed ready for sale. To prepare a form in which the bonds are intended to be executed and present the same to the attorney general for his inspection and opinion is not sufficient. He must have before him one of the bonds just as it will be offered for sale. *Hidalgo Co. Drainage Dist. 1 v. Davidson*, 102 T. 539, 120 S. W. 850.

**Art. 5554. To be registered by comptroller; not to be impeached.**—When such bonds have been examined by the attorney general, and his certificate attached thereto, they shall be registered by the state comptroller in a book to be kept for that purpose; and the certificate of the attorney general as to the validity of such bonds shall be preserved of record for use in event of litigation. Such bonds, after receiving the certificate of the attorney general, and having been registered in the comptroller's office, as herein provided, shall thereafter be held in every action, suit or proceeding in which their validity is, or may be brought into question, a prima facie, valid and complete obligation; and in every action brought to enforce the collection of such bonds, the certificate of the attorney general, or a duly certified copy thereof, shall be admitted and received in evidence on the validity of such bonds, together with the interest coupons thereto attached; provided, that the only defense that can be offered against the validity of such bonds shall be forgery or fraud. But this article shall not be construed to give validity to any such bonds as may be issued in excess of the limits fixed by the constitution, or contrary to its provisions, but all such bonds shall, to the extent of such excess levy, be void. [Id. sec. 25.]

**Art. 5555. Books of bonds to be kept; sinking fund provided.**—Before issuing any bonds under the provisions of this chapter, the county commissioners' court shall first provide a well-bound book in which a record shall be kept by the clerk of said court of all bonds issued, with their number, amount, rate of interest and date of issuance, when due, where payable, and amount received for the same, and the tax estimate to pay the interest on said bonds; and said commissioners' court shall



provide for a sinking fund for their payment, which shall be set forth in said book; and said book shall at all times be open to the inspection of all parties interested in said district, either as taxpayers or bondholders; and, upon the payment of any bond, an entry thereof shall be made in said book. The county clerk shall receive for his services in recording all bonds and other instruments of the improvement district, the same fees as provided for other like records. [Id. sec. 26.]

**Art. 5556. Bonds, how sold; proceeds, how applied.**—When such bonds have been registered as provided for in the preceding articles of this chapter, the county commissioners' court may appoint the county judge, or some other suitable persons, to sell said bonds on the best terms and for the best price possible; provided, that none of said bonds shall be sold for less than the face par value thereof and accrued interest thereon; and, as fast as said bonds are sold, all money received therefrom shall be paid into the county treasury and shall by him be placed to the credit of such improvement district. [Id. sec. 27.]

**Art. 5557. County judge to give bond before selling bonds.**—Before the county judge, or such other person as may be appointed by the commissioners' court, shall be authorized to sell any of said improvement bonds, the county judge, or other person so appointed, shall execute a good and sufficient bond payable to the commissioners of such improvement district, to be approved by the commissioners' court of said county, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duty, which bonds shall be subject to the approval of said improvement commissioners; and the person selling said bonds shall be allowed one-half of one per cent of the amount received for sale of the bonds sold by him in full payment for his services in their behalf. [Id. sec. 28.]

**Art. 5558. Expenses after filing petition, how paid.**—All expenses of any kind, after the filing of the original petition, necessarily incurred in connection with the creation, establishment and maintenance of any improvement district under the provisions of this chapter, shall be paid out of the construction and maintenance funds of such improvement district; which funds shall consist of all moneys received from the sale of bonds and all other moneys or property received by such district whatsoever the source, except tax collections applied to the sinking funds and the payment of interest on the improvement bonds; provided, that should the proposition for the creation of such improvement district and the issuance of bonds be defeated at the election called to vote upon the same, then all expense up to and including said election shall be paid for as provided in this chapter. [Id. sec. 29.]

**Art. 5559. Deposit to accompany petition.**—When the petition praying for the establishment of an improvement district is filed with the county commissioners' court, it shall be accompanied by two hundred dollars in cash, which shall be deposited with the clerk of the said county commissioners' court, and by him held until after the result of the election for the creation of said improvement district has been declared and entered of record by the commissioners' court, as hereinbefore provided; and, should the result of said election be in favor of the establishment of such district, then the said two hundred dollars shall be by the said clerk returned to the signers of the said original petition, or their treasurer or attorney; but, should the result of said election be against the establishment of said improvement district, then the said clerk shall pay out of the said sum of two hundred dollars, upon vouchers signed by the county judge, all costs and expenses pertaining to the said proposed improvement district up to and including the said election, and shall return the balance, if any, to the signers of said original petition, or their agent or attorney. [Id. sec. 30.]

**Art. 5560. Tax to be levied.**—Whenever any such improvement bonds shall have been voted, the commissioners' court shall levy, and cause to be assessed and collected, improvement taxes upon all property within said improvement district, whether real, personal or mixed, or otherwise, and sufficient in amount to pay the interest on such bonds as it shall fall due, together with an additional amount to be annually placed in the sinking funds sufficient to discharge and redeem said bonds at their maturity. If advisable, the sinking fund shall from time to time, be invested in such county, municipal, district or other bonds as shall be approved by the attorney general of the state. If any of said bonds shall be offered for payment and redemption before the date of their maturity, it shall be the duty of the county judge of the county, and the county treasurer, to pay and redeem same upon request of the improvement commissioners, if there be at the time a sufficient amount of money in said sinking fund for that purpose. [Id. sec. 31.]

**Art. 5561. County assessor to assess property; removal for failure.**—The county commissioners' court shall provide all necessary additional books for the use of the assessor and collector of taxes and the county clerk for such improvement district, and charge the cost of same to the said district. It shall be the duty of the county tax assessor, when ordered to do so by the commissioners' court, to assess all property within such improvement district and list the same for taxation in the books or rolls furnished by the said commissioners' court for that purpose and return said books or rolls at the same time when he returns the other books or rolls of the state and county taxes for correction and approval; if the said commissioners' court shall find said books or rolls correct, they shall approve the same and order the county clerk to issue a warrant against the county treasurer in favor of said tax assessor, to be paid from the funds of said improvement district. The tax assessor shall receive for his services such compensation as the said county commissioners' court shall deem proper to compensate him for the amount of work done; provided, that the said county assessor shall in no event be allowed less than what he is now allowed by law for like services. Should the tax assessor fail or refuse to comply with the orders of the commissioners' court requiring him to assess and list for taxation all property in such improvement district as herein provided, he shall be suspended from the further discharge of his duty by the commissioners' court of his county, and he shall be removed from office in the mode prescribed by law for the removal of county officers. [Id. sec. 32.]

**Art. 5562. Tax collector to give special bond.**—The tax collector of the county shall be charged by the county commissioners' court with the assessment rolls of the improvement district, and he shall be allowed such compensation for the collection of such taxes as he is now allowed for the collection of other taxes. The county commissioners' court shall require the tax collector of the county to give an additional bond of security, in such sum as they may deem proper and safe, to secure the collection of said taxes; and, should any collector of taxes fail or refuse to give such additional bond or surety as herein provided when required by the commissioners' court, within the time prescribed by law for such purposes, he shall be suspended from office by the commissioners' court of his county, and immediately thereafter be removed from office in the mode prescribed by law. [Id. sec. 33.]

**Art. 5563. Delinquent taxes to be collected as other taxes.**—It shall be the duty of the tax collector to make a certified list of all delinquent property, upon which the improvement taxes have not been paid, and return the same to the county commissioners' court, and said court shall proceed to have said taxes collected by the sale, by the collector, or by suit, in the same manner as now provided for the collection of delinquent state and county taxes; and at any sale of such property for such delin-

quent improvement taxes, the improvement commissioners may become the purchasers of the same for the benefit of the improvement district. [Id. sec. 34.]

**Art. 5564. County treasurer to keep account.**—It shall be the duty of the county treasurer to open an account with the improvement district and to keep an accurate account of all moneys received by him belonging to such district, and all moneys paid out by him. He shall pay out no money, except upon a voucher signed by two of the improvement commissioners and countersigned by the county judge, and he shall carefully preserve all orders for the payment of money; and, as often as required by the said improvement commissioners or the commissioners' court, he shall render a correct account to them on all matters pertaining to the financial condition of such district. [Id. sec. 35.]

**Art. 5565. Tax a lien on property assessed.**—All taxes levied, or authorized to be levied by this chapter shall be payable and shall mature and become delinquent as is provided by the laws of this state for state and county taxes, and, upon the failure to pay such taxes when due, the same penalties shall accrue and be collected as provided by the laws of the state of Texas for the non-payment of state and county taxes. All taxes shall be a lien upon the property for which said property is assessed. In the assessment and collection of the taxes levied, or authorized to be levied, by this chapter, the assessor and collector of taxes shall, respectively, have the same powers and shall be governed by the same rules and regulations as provided by the laws of the state of Texas for the assessment and collection of state and county taxes, unless herein otherwise provided. [Id. sec. 36.]

**Art. 5566. Treasurer to give additional bond.**—The county treasurer shall execute a good and sufficient bond, payable to the improvement commissioners and their successors in office of such district, and in the county where said district is located, in a sum equal to one and one-fourth the amount of the bonds issued, conditioned for the faithful performance of his duty as treasurer of such district, which bond shall be approved by said improvement commissioners; and the treasurer shall be allowed as compensation for his services as such treasurer, one-half of one per cent. Such treasurer may make said bond with any guaranty or surety company as may be approved by such improvement commissioners; and the premiums due such guaranty or surety company making said bond shall be paid out of the maintenance fund of the improvement district, and shall not be a charge against the county treasurer. [Id. sec. 37.]

**Art. 5567. Condemnation proceedings; acquisition of right of way.**—The right of eminent domain is hereby expressly conferred upon all improvement districts established under the provisions of this chapter for the purpose of acquiring the fee-simple title, easement or right of way to and over and through any and all lands, waters, or lands under waters, private or public (except land and property used for cemetery purposes) within or bordering on such districts, necessary for making, constructing and maintaining all levees and all other improvements for the improvement of a river or rivers, creek or creeks or streams within or bordering on such districts, to prevent overflows thereof. All condemnation proceedings or suits in the exercise of eminent domain under this chapter shall be instituted under the direction of the improvement commissioners and in the name of the improvement district, and all suits or other proceedings for such purposes and for the assessing of damages shall be in conformity to the statutes of the state of Texas for condemning and acquiring land or the right of way thereon, by eminent domain, by railroad corporations; provided, that no appeal from the judgment or order of condemnation of the commissioners assessing damages to any one

whose land is sought to be condemned shall have the effect of preventing the said improvement district from going upon and using the land so sought to be condemned during the pendency of said appeal; provided, however, that the said improvement district shall deposit with the county clerk of the county, in which such proceedings are pending, a sum equal to double the amount of money adjudged by them to be paid for said land, or the right of way thereon, and all costs thereon accrued.

The improvement commissioners of any district are hereby empowered to acquire the necessary right of way for all levees and other necessary improvements contemplated by this chapter, by gift, grant, purchase or condemnation proceedings, and may by the same method acquire any levees or other improvements already constructed within the territory in any such improvement district, and, if acquired by grant or purchase, such purchase shall be subject to the approval of the county commissioners' court. [Id. secs. 38-39.]

**Art. 5568. Commissioners and employés may enter upon lands, when.**—The improvement commissioners of any district and the civil engineer, from time of their appointment, are hereby authorized to go upon any lands or water courses lying within said districts, or bordering thereon, for the purpose of examining the same, and locating all levees and other improvements, making plans, surveys, maps and profiles, together with all necessary teams, help and instruments, without subjecting themselves to an act of trespass. [Id. sec. 41.]

**Art. 5569. Commissioners to repair and improve levees.**—It shall be the duty of such improvement commissioners to keep the levees and other improvements made under the provisions of this chapter in repair, and they shall be given authority to supervise and control the construction and maintenance of same; and no county or improvement district, nor the taxpayers therein, shall be held for damages occasioned by the construction, maintenance or repair of levees or other improvements under the provisions of this chapter. [Id. sec. 42.]

**Art. 5570. Contracts let to lowest bidder.**—Contracts for making and constructing levees and other improvements, and all necessary work in connection with any improvement district, shall be let by the improvement commissioners to the lowest bidder, after giving notice by advertising the same in one or more newspapers of general circulation in the state of Texas once a week for four consecutive weeks, and by posting notices for at least thirty days in five public places in the county, one of which shall be at the court house door, and at least two of which shall be within said improvement district; and the contract for such levee and other improvement may be let in separate sections or parcels, or all together; provided, that all the improvements included in the report of improvement engineer and approved by the court as provided for in this chapter, shall be constructed. [Id. sec. 43.]

**Art. 5571. Bids, how submitted.**—Any person, or corporation, or firm desiring to bid on the construction of any work, advertised as provided for in this chapter, shall, upon application to the improvement commissioners, be furnished a copy of the engineer's report, showing location, profile and estimate of such as is provided for in this chapter; provided, such person shall pay the county clerk for making same, and all bids or offers to do any work shall be in writing and sealed and delivered to the chairman of the improvement commissioners, together with a certified check for at least five per cent of the total amount bid, which shall be forfeited to the district in case the bidder refuses to enter into the proper contract, if his bid is accepted, and any and all bids may be rejected by the said commissioners. [Id. sec. 44.]

**Art. 5572. Contracts approved and filed.**—All contracts made by the improvement commissioners shall be reduced to writing and signed by

the contractor and the commissioners, and approved by the county judge, and a copy of same shall be filed with the county clerk for reference. [Id. sec. 45.]

**Art. 5573. Contractor's bond.**—The party, firm, or corporation, to whom any such contract is let, shall give bond payable to the improvement commissioners for said district, and in the county where said district is located, in double the amount of the contract price, conditioned that he, they or it, will faithfully perform the obligations, agreements and covenants of their contracts, and in default thereof will pay to said district all damages sustained by reason thereof. Said bond shall be approved by such commissioners and the county judge. [Id. sec. 46.]

**Art. 5574. Construction under supervision of engineer and commissioners.**—The improvement engineer shall furnish the contractor with a sectionized profile of the work contracted for, showing the height, width and slope, brim and location of all levees and the number of cubic yards of earth to be removed and other work to be done by the contractor, together with drawn plans and specifications for such work; and such work shall be done by the contractor under the management and control and supervision of said improvement engineer and improvement commissioners, who shall indicate to the said contractor the beginning point and termination of all levees and other improvements called for by said contract; and, when such work is completed according to the contract, the engineer shall make a detailed report of the same to the improvement commissioners, showing whether the contract has been fully complied with according to its terms, and, if not, in what particular it has not been complied with. [Id. sec. 47.]

**Art. 5575. Right of way across railroads, etc.**—The said improvement commissioners are hereby authorized and empowered to make all necessary levees, bridges and culverts to, across, and under any railroad tracks and right of way of any such railroads to enable them to construct and maintain any levees or other improvements necessary to be constructed as a part of the levee system of such district, such levees, bridges, or culverts to be paid for by such improvement district; provided, however, that notice shall first be given by such improvement commissioners to the railroad authorities to build or construct levees, bridges or culverts; and the railway company shall be allowed thirty days in which to build or construct the same at its own expense, if it should so desire according to its own plans; provided, that such levees, bridges, or culverts shall be constructed so as not to interfere with the purpose of said levee or other improvement, nor with the operation of said railway. [Id. sec. 48.]

**Art. 5576. Payment of warrants.**—The said improvement commissioners shall have the right, and it is hereby made their duty, at all times during the progress of the work being done under contract, to inspect the same; and upon the completion of any contract to their satisfaction, and when they have accepted the improvements as completed according to contract, they shall draw a warrant on the county treasurer for the amount of the contract price, or so much thereof as remains unpaid at that time, in favor of the contractor, or his assigns, which warrant shall, when approved by the county judge, be paid out of the improvement funds of said district. [Id. sec. 49.]

**Art. 5577. Partial payments.**—If the said improvement commissioners shall deem it advisable in order to obtain more favorable contracts, they may advertise and contract for work to be paid in partial payments as the work progresses; but such partial payments shall not exceed in the aggregate seventy-five per cent of the amount to be paid under the contract, the amount of work completed to be shown by cer-

tified report of the engineer, and no payment to be made for work not completed. [Id. sec. 50.]

**Art. 5578. Annual report of commissioners.**—The improvement commissioners shall make an annual report of their acts and doings as such commissioners, and file the same with the clerk of the county court on or before the first day of January of each year, which report shall show in detail the kind, character and amount of work done in the district, the cost of the same, and other data necessary to show the conditions of improvements under the provisions of this chapter. [Id. sec. 51.]

**Art. 5579. May employ attorneys.**—The improvement commissioners are hereby empowered and authorized to employ counsel to represent such districts in the preparation of any contracts, or the conducting of any proceedings in or out of court, and to be the legal adviser of such improvement commissioners upon such terms and for such fees as may be agreed upon by them, and approved by the county judge; and such commissioners may draw a warrant in payment of such legal services, to be paid out of the fund of said district upon approval by the county judge. [Id. sec. 52.]

**Art. 5580. May acquire property; sue and be sued.**—The improvement districts established under this chapter may acquire property, and, through the improvement commissioners, sue and be sued in all the courts of this state in the name of such improvement district; and all courts of this state shall take judicial notice of such said districts. [Id. sec. 54.]

**Art. 5581. May lease or rent land.**—The improvement commissioners, for the purpose of protecting any levees or other improvement constructed under the authority of this chapter, shall be authorized to keep the space between any levees or other improvement, and the stream or streams the overflow of which is intended to be prevented, free and clear from all obstructions; and, if any district should by gift, purchase, or condemnation become the owner of any such land, or any other land not needed and used for the purpose of drainage, the said improvement commissioners shall have authority to lease any such land for any purpose which shall not interfere with the work or use of such district, on such terms and for such rental as said improvement commissioners may see fit; and all moneys received therefrom shall be paid to the county treasurer for the use of said district. [Id. sec. 55.]

**Art. 5582. May let use of levees, etc.**—The improvement commissioners shall have the authority, with the consent of the county judge, to let the use of any levee for a public highway, or street, or railway, or street railway, or interurban railway right of way, or for telegraph, telephone, or electric poles upon such terms as such improvement commissioners and the county judge shall deem proper; but provisions shall be made in any such contract for the payment by the levy of an equitable portion of the cost and expense of thereafter maintaining such levee in good condition for the purposes for which such levee was constructed; and any money received for such rental use shall be paid to the county treasurer for the use of such district. [Id. sec. 56.]

**Art. 5583. May dispose of surplus material.**—The improvement commissioners shall have authority to dispose of, by sale, any and all earth or any material acquired by the district and not needed for the construction or maintenance of the improvements being constructed under the provisions of this chapter pertaining to this district; and any money received from same shall be paid to the county treasurer for the use and benefit of the district. [Id. sec. 57.]

**Art. 5584. Land to be sold; form of conveyance.**—The improvement commissioners, with the consent of the commissioners' court, shall have

authority to sell and convey any land, the fee of which has been acquired by such district by purchase, gift, or condemnation, and not needed at the time, or likely to be thereafter needed, for the use of the district, upon such terms as said improvement commissioners and the county judge may deem best for the district; and the money received from any such sale shall be paid to the county treasurer for the use of the district. The deed of conveyance of such lands shall be executed by the chairman of such improvement district commissioners, in the name of the improvement district. [Id. sec. 58.]

## CHAPTER THREE

### SEAWALLS

<p>Art. 5585. Construction and maintenance of seawalls; powers of counties and cities; levy of tax.</p> <p>5586. Burdens on streets and highways for seawalls.</p> <p>5587. To take land for, exercise of right of eminent domain.</p> <p>5588. Issue of bonds, election, qualification of voters.</p> <p>5589. Election, how conducted; board of inquiry, duties of.</p>	<p>Art. 5590. Election returns, canvass, two-thirds vote required.</p> <p>5591. Interest, sinking fund, levy of taxes for.</p> <p>5592. Cession of state lands for benefit of.</p> <p>5593. City and county treasurer custodian of funds, exclusive use of.</p> <p>5594. Bonds to be issued as in case of counties, cities and towns.</p>
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[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 5585. Construction and maintenance of seawalls; powers of counties and cities; levy of tax.**—The county commissioners' court of all counties, and the municipal authorities of all cities, bordering on the coast of the gulf of Mexico, shall have the power and are authorized from time to time to establish, locate, erect, construct, extend, protect, strengthen, maintain, and keep in repair and otherwise improve any sea wall or breakwater, and to improve, maintain and beautify any boulevard erected in connection with such sea wall or breakwater, and to incur indebtedness therefor, the payment of which may be provided for either with or without the issuance of bond. And said commissioners' courts and municipal authorities shall also have power and are hereby authorized to levy taxes not to exceed in any one year fifty cents on the one hundred dollars of taxable values of said county or city for the payment of said indebtedness, provided that when the taxes are levied as herein provided for, will not pay off said indebtedness within five years; then the payment of said indebtedness shall be provided for by the issuance of bonds as hereinafter provided. [Acts 1901, 1 S. S., p. 23, sec. 1. Acts 1913, S. S., p. 3, sec. 1, amending Art. 5585, Rev. St. 1911.]

**Construction in cities.**—This act gives counties authority to construct seawalls or breakwaters in cities in the county, as well as outside of such cities. *Johnston v. Galveston County* (Civ. App.) 85 S. W. 511.

**Acquisition of funds for work.**—If funds can be obtained in any other way, the county can undertake the work without issuing bonds or levying a tax therefor. *Johnston v. Galveston County* (Civ. App.) 85 S. W. 511.

**Art. 5586. Burdens on streets and highways for seawalls.**—Said county commissioners' court, and municipal authorities, shall have the power to impose such additional uses and burdens upon all streets, alleys, public highways and other public grounds as they may deem necessary for the location, erection, construction and maintenance of seawalls and breakwaters, and to license, regulate or grant such additional uses of said seawalls or breakwaters as will not impair their efficiency. [Acts 1901, 1 S. S., p. 23, sec. 2.]

**Art. 5587. To take land for; exercise right of eminent domain.**—Said counties and cities shall have the power to take and appropriate such land and other property as may be deemed necessary for the establishment, location, construction and maintenance of said seawalls and breakwaters, and to define the area of land needed, and to acquire, take, hold and enjoy the same for the purposes aforesaid, and to that end shall have the right to exercise the right of eminent domain and to condemn lands for the uses and purposes aforesaid, in the manner and under the conditions provided by law in case of railroad corporations; provided, nevertheless, that said county commissioners' court, or said municipal authorities, shall be empowered to take the fee simple estate to the land condemned or acquired hereunder, whenever deemed necessary for the purposes of this act; and, provided, further, that before exercising the power of eminent domain hereunder said county commissioners' court, or said municipal authorities, shall, by order, ordinance, or resolution duly entered on the minutes of the county commissioners' court, or the city council, define and describe lands needed, and determine whether an easement or fee-simple estate in said land shall be taken. [Id. sec. 3.]

**Conditions giving right to condemn.**—The only conditions necessary to give county right to condemn land for purposes stated in this act are that the owner of the land shall fail to agree with the county for its purchase, and that the commissioners' court shall by order entered upon its minutes, define and describe the lands needed and determine whether an easement or fee-simple estate in said land shall be taken. *Johnston v. Galveston County (Civ. App.) 85 S. W. 511.*

**Jurisdiction.**—In a suit brought under this act to condemn land, the jurisdiction of the county court, while not *eo nomine*, appellate, is such in effect. The proceeding cannot be commenced in the county court, but must be commenced by a petition to the county judge stating facts which show that the petitioner is entitled to condemn the property. The county judge has authority to appoint three commissioners to determine the amount of damages to which the owner of the land is entitled for the taking of his land for public use. It is only when one of the parties is dissatisfied with the award of damages, that the county court acquires jurisdiction to try the issues involved in the proceedings. It follows that unless the original petition states facts sufficient to authorize the county judge to appoint commissioners, his action in making such appointment is void, and the commissioners are without jurisdiction to assess damages. There being no jurisdiction in the court *a quo*, the appellate (county) court could acquire none, and no amendment of the petition in the county court could avail to cure omission of necessary jurisdictional allegations in the original petition. *Johnston v. Galveston County (Civ. App.) 85 S. W. 511.*

**Procedure.**—The manner of condemning land is the same as that provided in Art. 6506, regulating the condemnation of land by railroad corporations. *Johnston v. Galveston County (Civ. App.) 85 S. W. 511.*

**Injunction.**—When the county has complied with the statute authorizing it to condemn land for purpose of making seawall, and it and its agents or contractors are in lawful possession of the premises pending an appeal in the condemnation proceedings, an injunction will not lie to prevent acting under the proceedings of condemnation, because there is an adequate remedy at law. *Johnston v. O'Rourke & Co. (Civ. App.) 85 S. W. 503.*

**Art. 5588. Issuing bonds; election.**—Before issuing the bonds of the county, or city, for the purposes authorized by this chapter, said county commissioners' court or municipal authorities, shall prescribe the amount of the bonds to be issued, the rate of interest thereon, and provide for an election at which all tax payers who are qualified voters entitled to vote in said county or city, shall be allowed to vote for or against the proposed taxation for the payment of said bonds and interest thereon. [Acts 1901, 1 S. S., p. 23, sec. 1. Acts 1913, S. S., p. 3, sec. 2, amending Art. 5588, Rev. St. 1911.]

**Art. 5589. Election, how conducted; board of inquiry, duties of.**—For the purpose of ascertaining whether two-thirds of the taxpayers of said county, or city, have voted in favor of the proposed taxation, the county judge, the county assessor and the county collector, or three members of their own body selected by the municipal authorities, as the case may be, are hereby constituted and appointed a board of inquiry. Whenever an election is ordered hereunder, said board shall make out from the latest completed assessment rolls of said county, or city, a list of all taxpayers of said county, or city, who are qualified voters and taxpayers entitled to vote hereunder; and from the date of the notice of said election until five days before the day thereof, said board shall



sit daily for the purpose of making additions to and corrections of said list, and all taxpayers being qualified voters shall, during said period, have the right to apply to said board and to have their names entered on said list. During the period of five days before said election, said board shall make out under certificate and file with the county or city clerk, as the case may be, a complete alphabetical list of all taxpayers who are qualified voters at said election, and shall furnish printed copies of said list to the officers at each poll at said election. Said printed list furnished by said board, and the returns and poll lists of said election, shall be returned to the county, or city clerk, as the case may be. The ballots at said election shall be printed or written on white paper, without any outward mark or device to distinguish the same, and shall contain the words, in substance, "In favor of the proposed tax," or, "Against the proposed tax." Said election shall, except as herein otherwise provided, be ordered and conducted in the same manner in all respects as are general state and county, or municipal, elections, so far as the same are applicable, not including, however, registration, and provisions incidental thereto, and the returns thereof shall be made in like manner, as far as may be; provided, nevertheless, that said election may be held on thirty days' notice thereof at any time fixed by the county commissioners' court, or municipal authorities. And the proposition to levy a tax hereunder may be renewed until the power to tax hereunder shall have been exhausted. [Acts 1901, 1 S. S., p. 23, sec. 5.]

**Art. 5590. Election returns; canvass; two-thirds vote required.**—The county commissioners' court, or municipal authorities, shall, as soon as practicable after said election, meet and canvass the returns thereof, and with the aid of the returns and lists herein provided for, together with such other evidence as may be required, ascertain and record in the minutes of the commissioners' court, or of the municipal authorities, the total number of taxpayers of said county or city who are qualified voters on the day of said election, the number of said taxpayers voting in favor of the proposed taxation, and the number of said taxpayers voting against the same. In the event that two-thirds of the taxpayers of said county or city, who are qualified voters therein, shall have voted in favor of the proposed tax, the said county or city shall thereupon have power to issue its bonds for the construction and maintenance of seawalls and breakwaters. [Id. sec. 6.]

**Art. 5591. Interest, sinking fund; levy of taxes for.**—Whenever bonds are issued under the preceding article, the county commissioners' court, or municipal authorities, shall annually levy, assess and collect, in the mode prescribed by law for other county or municipal taxes, a tax on the real estate and personal or mixed property in said county, or city, sufficient to pay the interest and provide a sinking fund of not less than two per cent of the principal of all of said bonds; and all taxes collected by virtue hereof shall be held in trust by said county, or city, as a special and inviolable fund for the payment of interest and principal of said bonds; provided, however, that any surplus above the amount required to meet the annual interest may be invested for the benefit of the sinking fund in the bonds issued hereunder, or in bonds of the state of Texas, or of the United States. [Id. sec. 7.]

**Art. 5592. Cession of state lands for the benefit of.**—The better to enable said counties and cities to secure the protection herein provided for, and to aid in the construction of said works, the right to the use and control for the purposes prescribed by this chapter, of so much of the land or sea bottom below high tide as may be deemed necessary by said county commissioners' court, or municipal authorities, is hereby ceded by the state of Texas to counties and cities availing themselves of the provisions of this chapter. [Id. sec. 8.]

**Art. 5593. City and county treasurers custodian of funds, exclusive use of.**—All funds, revenues and moneys derived from the sale of the bonds herein authorized, and from the sale or rent of reclaimed or other lands acquired under this chapter and from additional uses of said works as herein authorized, shall be deposited with the county or city treasurer, as the case may be, and shall be held in trust exclusively for the construction and maintenance of seawalls and breakwaters, including the purchase of the right of way therefor; and all moneys derived from the assessment and levy of taxes as aforesaid are declared to be a trust fund for the payment of interest and principal of bonds to be issued under this chapter; and the use or diversion of such moneys for any other purposes whatsoever is hereby prohibited, and a violation of this article shall constitute a misapplication of public money, and the person or persons so offending shall be punished as provided in article 96 of the Penal Code of the state of Texas. [Id. sec. 9.]

**Art. 5594. Bonds to be issued in cases of counties, cities and towns.**—All bonds issued hereunder shall be issued under and subject to the provisions of articles 616–620, 622–625, inclusive, of the Revised Statutes of this state now in force, in so far as said articles do not conflict with the provisions of this chapter, and this chapter shall apply to all cities bordering on the coast of the gulf of Mexico, whether said cities are incorporated by general or special laws; and all laws and parts of laws in conflict herewith are hereby repealed. [Id. sec. 10.]

*Note.*—For local statute as to Galveston seawall, see Acts 1905, p. 54, as amended by Acts 1911, S. S. p. 99.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Rights and liabilities of adjoining landowners.**—If one dams up water on his land and it backs up and overflows and damages another he is liable for the damage caused. *Gembler v. Echterhoff* (Civ. App.) 57 S. W. 313.

Equity will enjoin an owner of land bordering on a stream from filling in the low places on his land, and constructing a levee along the stream on his side, so as to cause the stream to unnaturally overflow the lands of another bordering on the opposite side of the stream. *Sullivan v. Dooley*, 31 C. A. 589, 73 S. W. 82.

An owner of land bounded on a stream held entitled to erect levees on his own land, provided he does not materially injure the adjacent owner. *Knight v. Durham* (Civ. App.) 136 S. W. 591.

A landowner cannot lawfully construct an embankment that turns the overflow of a stream upon the land of another. *Way v. Roddy* (Civ. App.) 140 S. W. 1148.

In an action to enjoin the construction of a levee, evidence held insufficient to show injury to plaintiff by a wrongful diversion of the overflow of a stream. *Id.*

## TITLE 84

## LIBEL

Art.  
5595. Definition.  
5596. Mitigation of damages.

Art.  
5597. What matters deemed privileged.  
5598. To be construed, how.

**Article 5595. Definition.**—A libel is a defamation expressed in printing or writing, or by signs and pictures, or drawings, tending to blacken the memory of the dead, or tending to injure the reputation of one who is alive, and thereby expose him to public hatred, contempt or ridicule, or financial injury, or to impeach the honesty, integrity, or virtue, or reputation of any one, or to publish the natural defects of any one and thereby expose such person to public hatred, ridicule, or financial injury. [Acts 1901, p. 30, sec. 1.]

See *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302; *Fessinger v. El Paso Times Co.*, 154 S. W. 1171.

**What constitutes libel in general.**—An unsealed dunning letter sent through the mail is a libel, when. *Burton v. O'Niell*, 25 S. W. 1013, 6 C. A. 613.

The statutory definition of libel is broad enough to include within its terms any case which in the absence of the statute would be held to be within the common definition of a libel. At common law to publish in writing that one is mendacious or that he uttered a falsehood is libelous per se. *Fleming v. Mattinson*, 52 C. A. 504, 114 S. W. 652.

Though a person suffer injury from a publication, it is not libelous under the statute, unless the reasonable conclusion to be drawn from it is that it was intended to injure such person's reputation by exposing him to public contempt or financial injury. *Galveston Tribune v. Guisti* (Civ. App.) 134 S. W. 239.

A certain newspaper publication held not libelous. *Id.*

**Malice.**—Where the words spoken are actionable per se, it was not necessary for plaintiff to prove express malice. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

Where words spoken are slanderous per se, it is presumed that they were spoken maliciously, in the absence of evidence tending to show the contrary. *Mayo v. Goldman*, 57 C. A. 475, 122 S. W. 449.

This article changed the common-law rule with respect to proof of malice, where a publication is not libelous per se, and recovery may be had under the statute for a publication not libelous per se where the publication has the effect contemplated by the statute, though there is no proof of malice. *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874.

Malice authorizing an award of exemplary damages in a libel case may be shown by evidence of the personal ill will of defendant, or may be inferred where the libelous article was recklessly or carelessly published. *Fessinger v. El Paso Times Co.* (Civ. App.) 154 S. W. 1171.

**Exposing person to hatred, contempt or ridicule.**—Any publication tending to injure the reputation of one who is alive and thereby expose him to either public hatred, contempt or ridicule, or financial injury, is a libel. *Walker v. San Antonio Light Pub. Co.* (Civ. App.) 70 S. W. 558.

When the tendency of the publication is to injure reputation by exposure to public hatred, contempt or ridicule, it is not necessary that financial injury should be shown in order to render the publication libelous. *Id.*

Unless the natural and reasonable conclusion to be drawn from an alleged libelous publication considered in connection with the circumstances alleged is that it was intended thereby to make a charge against or a statement concerning the person mentioned therein which would tend to injure his reputation and expose him to public hatred, contempt, ridicule, or financial injury, the publication is not libelous under this article, though the person mentioned may have suffered injury by reason thereof. *Galveston Tribune v. Guisti* (Civ. App.) 134 S. W. 239.

Where a defamatory publication was such that it necessarily must, or as a natural and probable result would, tend to injure plaintiff's reputation, and expose him to public hatred, contempt, or ridicule, or impeach his reputation, and was libelous per se within this article, it was proper for the court to instruct the jury that the publication was libelous per se. *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

In view of this article, words libelous per se and from the publication of which damages are implied as a matter of law are such words as tend to expose one to public hatred or disgrace or vilify him or injure his character. *Allen v. Earnest* (Civ. App.) 145 S. W. 1101.

"Public hatred" signified a public or general dislike or antipathy and "hatred" means to have little regard for or to despise. *McDavid v. Houston Chronicle Printing Co.* (Civ. App.) 146 S. W. 252.

A publication that plaintiff's daughter, who was suing her husband for divorce, attempted to become the master of her household, and that this quality was inherited from plaintiff, who kept her husband in abject subjection, tended to expose plaintiff to public hatred, which is public or general dislike or antipathy, or the holding of one in small regard, and hence was actionable under the statute. *Id.*

A newspaper article reciting that a barroom in a grocery store near a medical school was in operation; that a young woman, the daughter of the proprietor and his assistant, was found behind the bar, and stated that sales had been made to students in violation of law, but that the sales were made without knowledge that the buyers were students and that the place had been complained of, and that it was understood that students inclined to patronize such places were attracted there for some reason, was libelous, under the statute, as tending to subject her to public contempt or impeach her integrity, virtue, or reputation. *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874.

This article modifies the common-law rule as to libel and slander, and a publication is libelous whether it is libelous per se or not; it being sufficient if it can be shown by innuendo that the matter imputed had the tendency described in the statute and had reference to the plaintiff. *Id.*

**Conspiracy to publish.**—Where a conspiracy to publish a libel is shown, all the conspirators are responsible for all of the publications, though no one of them was concerned in all. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

**Actionable words in general.**—See this case for notification held not to be libelous. *Youngblood v. Godair* (Civ. App.) 46 S. W. 913.

One is liable for damages resulting from his speaking words that would convey a slanderous meaning to the ordinary hearer, though he intended a different meaning. *King v. Sassaman* (Civ. App.) 54 S. W. 304.

A letter reflecting on plaintiff's honesty held libelous per se. *Sanders v. Hall*, 22 C. A. 282, 55 S. W. 594.

Article held libelous per se in charging plaintiff with being a liar. *Mitchell v. Spradley*, 23 C. A. 43, 56 S. W. 134.

Certain statements made by defendant regarding a husband and wife held to be slanderous per se. *Hitzfelder v. Koppelman*, 30 C. A. 162, 70 S. W. 353.

A railway company which makes an agreement whereby a third party is to solicit advertising, and which thereafter denounces him as a swindler, held guilty of libel. *St. Louis S. W. Ry. Co. of Texas v. McArthur*, 31 C. A. 205, 72 S. W. 76.

**Imputation of crime and immorality.**—It is libelous per se to charge that a note was "obtained from me under false pretenses." *Young v. Sheppard* (Civ. App.) 40 S. W. 62.

A publication that plaintiff had been arrested on a warrant sworn out held libelous per se. *A. H. Belo & Co. v. Smith* (Civ. App.) 40 S. W. 856.

Where a publication was calculated to induce belief that plaintiff had committed crime, it was libelous, though it did not accuse him in terms. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

A certain publication held to be libelous per se, as it charged plaintiff with having fraudulently obtained or misapplied money. *A. H. Belo & Co. v. Smith*, 91 T. 221, 42 S. W. 850.

The words, "You stole a hundred dollars of his money," held actionable per se. *Ledgerwood v. Elliott* (Civ. App.) 51 S. W. 872.

A statement that, if a certain woman has a certain disease, she caught it by illicit intercourse, is slanderous per se, if she is afflicted with such disease. *King v. Sassaman* (Civ. App.) 54 S. W. 304.

Under this article words spoken or written which falsely and maliciously or falsely and wantonly impute to a female want of chastity are actionable without showing special damage arising therefrom. See Pen Code, art. 750 (645). *Hatcher v. Range*, 98 T. 85, 81 S. W. 289.

Language imputing unchastity to a female is actionable per se. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

It is not slanderous for a man speaking of a woman to say that he has "had a big time with her." *Gooing v. State* (Cr. App.) 98 S. W. 857.

An article which in effect charged plaintiff with smuggling goods into the country without paying the customs duties thereon held libelous. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

A statement held slanderous, as imputing to an unmarried female a want of chastity. *Kyle v. State*, 55 Cr. R. 360, 116 S. W. 598.

Where a newspaper publishes an article concerning one man having been arrested for murder, and prints the picture of another in connection with said article who is in no way connected with the murder and who is not charged therewith, the offense is libelous per se. *James v. Ft. Worth Telegram Co.* (Civ. App.) 117 S. W. 1029.

Statements made by railroad auditor to a ticket agent that he would have to make good the shortage of another employe which he had failed to report held not to charge a ticket agent with embezzlement. *Missouri, K. & T. Ry. Co. of Texas v. Moses* (Civ. App.) 144 S. W. 1037.

Liability may arise under the statutes though the matter imputed by the publication does not constitute the commission of a crime in the sense of violating the penal laws of the state; it being sufficient that the publication has the effect described in the statute. *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874.

A false publication to the effect that a female acted as barmaid at a saloon during the absence of the proprietor, and that for some reason or other students resorted to such place, and that the female stated that "they were there to do business," imputed unchastity to such female and was libelous. *Id.*

A newspaper article charging that plaintiff was arrested for assault, "forfeited a \$25 bond," and failed to answer the charge against him, which is said to have been a mix-up in the red light district, was libelous per se. *Fessinger v. El Paso Times Co.* (Civ. App.) 154 S. W. 1171.

**Tendency to injure in profession or business.**—Challenge to right of preacher to sit as member of a church convention held libelous per se. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

A letter to the general manager of a railroad, concerning plaintiff, a general freight agent, stating that plaintiff told the writer one thing and wired an agent another, and concluding with a separate paragraph saying that plaintiff was not a reliable man in any

respect, and that his word was not good, was actionable without allegation of special damage. *Allen v. Earnest* (Civ. App.) 145 S. W. 1101.

**Imputation of unfitness or misconduct in office or employment.**—A publication held libelous per se, as accusing an officer of the crime of false imprisonment and of misconduct in office. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

A publication accusing an "officer" of crime held a libel on a sheriff, though it did not by name refer to him or his office. *Id.*

A newspaper article, charging that a person is unlawfully received and held a prisoner in the county jail, held libelous per se. *Boone v. Herald News Co.*, 27 C. A. 546, 66 S. W. 313.

To falsely impute to a clerk that he has been bribed to betray the confidence of his employer is per se slanderous. *Mayo v. Goldman*, 57 C. A. 476, 122 S. W. 449.

**Causing special damage.**—If matters published are libelous per se, the plaintiff need not offer any evidence of special damage except to increase the amount of recovery. *Bailey v. Chapman*, 15 C. A. 240, 38 S. W. 544.

Where an article is libelous per se, plaintiff need not prove damage. *A. H. Belo & Co. v. Smith* (Civ. App.) 40 S. W. 856.

Where a publication was libelous per se, held, that plaintiff could recover for injuries naturally resulting, including injury to feelings, without showing specific pecuniary loss. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

In actions for libel having a natural tendency to do injury, no special damages need be shown. *Brown v. Durham* (Civ. App.) 42 S. W. 331.

A statement that another uses morphine is not slanderous per se. *King v. Sassa-man* (Civ. App.) 54 S. W. 304.

A letter to plaintiff's creditor that plaintiff was unable to pay his debt and was preparing to leave the country was not libelous per se. *Sanders v. Edmonson* (Civ. App.) 56 S. W. 611.

Where no special damages were proved, plaintiff was not entitled to recover for an alleged libel, not libelous per se. *Id.*

Words spoken or written which falsely and maliciously, or falsely and wantonly, impute to a female want of chastity are, since the passage of article 1180, Penal Code, actionable without showing special damage arising therefrom. *Hatcher v. Range* (Sup.) 81 S. W. 292.

A derogatory publication concerning plaintiff is not actionable, in the absence of special damages, unless the publication is libelous per se. *Fleming v. Mattinson*, 52 C. A. 476, 114 S. W. 650.

This article does not require that special damage shall have been incurred from the libel in order to render it actionable. *McDavid v. Houston Chronicle Printing Co.* (Civ. App.) 146 S. W. 252.

Under this article it is not necessary to prove special damages from a publication having the effect contemplated by the statute, though the publication is not libelous per se. *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874.

Under this article recovery may be had for mental anguish resulting from a publication not libelous per se without proof of other injury or damage. *Id.*

**Construction of language.**—In determining the meaning of an alleged defamatory publication, the question is as to the effect of the publication on the mind of the ordinary reader. *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874.

A false publication to the effect that a female acted as barmaid at a saloon during the absence of the proprietor, and that for some reason or other students resorted to such place, and that the female stated that "they were there to do business," imputed unchastity to such female and was libelous. *Id.*

In an action for slander, the jury must consider the actual language used in the light of what it meant to the ordinary hearer. *Lehmann v. Medack* (Civ. App.) 152 S. W. 438.

**Certainty.**—A communication may be libelous without naming the person or directly charging the crime if it is fairly susceptible of a defamatory meaning and is calculated to cause those who read it to understand who is intended. *G., C. & S. F. Ry. Co. v. Floore* (Civ. App.) 42 S. W. 607.

Where a newspaper published an account of a homicide, and included as a part of the publication a picture of a person other than the one accused of the killing, referring to it as that of the person who did the killing by placing his name under it, the publication imputed the act to the person whose picture was published. *James v. Ft. Worth Telegram Co.* (Civ. App.) 117 S. W. 1028.

A newspaper account of a divorce proceeding contained matter derogatory to plaintiff in the divorce case, and stated that she derived her bad characteristics from her mother, and, while the report did not give the names of any of the parties, it described the occupation of the defendant in the divorce case, and made other identifying statements which would indicate to persons acquainted with the parties the persons referred to. A second article on the same subject mentioned the name of plaintiff in the divorce suit. Held, that the mother of the plaintiff in the divorce suit was sufficiently referred to to support an action by her against the owner of the newspaper for libel. *McDavid v. Houston Chronicle Printing Co.* (Civ. App.) 146 S. W. 252.

To justify a recovery for libel, it is not necessary that all the world should understand who the person defamed was, if those knowing plaintiff can discern that she was meant. *Express Pub. Co. v. Orsborn* (Civ. App.) 151 S. W. 574.

**Repetition.**—A slanderer is not liable for reports circulated by others. *King v. Sassa-man* (Civ. App.) 54 S. W. 304.

Evidence held not to sustain a plea of accord and satisfaction of an action for libel. *Sanders v. Hall*, 22 C. A. 282, 55 S. W. 594.

Where a publication by an agent was not libelous, a ratification by the principal did not make it so. *Harris v. Santa Fé Townsite Co.* (Civ. App.) 125 S. W. 77.

Where defendant published a libelous article against plaintiff, it was no defense that another newspaper published a similar article at the same time. *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

A correction article stating plaintiff's claim, followed by the clause "and there you are," was not libelous, where every fact stated therein was admitted to be true and was plaintiff's version of the incident. *Fessinger v. El Paso Times Co.* (Civ. App.) 154 S. W. 1171.

**Injury from defamation.**—Defendant held not liable for a misstatement in the citation to a suit brought against a firm of which plaintiff was a member, where he recovered in the suit. *Towery v. McDougle-Craig Co.* (Civ. App.) 125 S. W. 621.

**Damages in general.**—Where a libel accused plaintiff of crime and of misconduct in office, held, that the jury might consider in assessing damages his previous character as a man and an officer, and the injury thereto and to his feelings. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

Though defendant, in publishing a libel, intended to injure plaintiff merely in his business, yet plaintiff was not confined, in respect to damages, to the effect of the libel on his business. *Brown v. Durham* (Civ. App.) 42 S. W. 331.

Plaintiff is entitled to more than nominal damages in an action for libel, where defendant wrote a letter stating that plaintiff was dishonest, and intended to evade payment of his debts, though no special damages are proven. *Sanders v. Hall*, 22 C. A. 282, 55 S. W. 594.

Damages to plaintiff's character as a minister and editor, resulting from libelous publications, held to constitute such general damages as need not be specifically alleged or proven. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

Loss of or injury to reputation may be considered in estimating damages for slander, though there is no specific proof of such loss or injury. *Rosenbaum v. Roche*, 46 C. A. 237, 101 S. W. 1164.

The law presuming injury from the publication of matter libelous per se, the libeled person is entitled to at least nominal damages from the publisher. *James v. Ft. Worth Telegram Co.* (Civ. App.) 117 S. W. 1028.

When words spoken are slanderous per se because imputing a crime or tending to injuriously affect complainant in his business, trade, or calling, he is entitled to at least nominal damages, if the speaking is not privileged, and the imputation conveyed is false. *Mayo v. Goldman*, 57 C. A. 475, 122 S. W. 449.

In an action for slander, plaintiff held not entitled to damages because of his loss of employment in the company of which defendant was manager. *Id.*

In an action for libel on a member of a legislative committee with reference to alleged official misconduct, injuries to his political career and opportunities to secure office held proper elements of special damage. *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

**Mental suffering.**—Mental anguish is an element of damage from libel. *Young v. Sheppard* (Civ. App.) 40 S. W. 62.

One to whom cause of action for libel survives may recover for mental anguish of deceased. *Houston Printing Co. v. Dement*, 18 C. A. 30, 44 S. W. 558.

One concerning whom slanderous words have been spoken may recover for mental anguish occasioned thereby, where actual damages have been sustained by reason of injury to the reputation of the person slandered. *McCarthy v. Miller* (Civ. App.) 57 S. W. 973.

In libel for charging plaintiff with smuggling, the measure of damages stated. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

Mental anguish is a proper element of damages for a libel. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 157 S. W. 224.

**Exemplary damages.**—A slanderer may be liable for exemplary damages, where he was moved to utter the slander through implied malice, as well as express malice. *King v. Sassaman* (Civ. App.) 54 S. W. 304.

That slanderous words were spoken maliciously is admissible in aggravation of damages. *Id.*

In libel for charging plaintiff with smuggling, exemplary damages held not recoverable. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

Exemplary damages for slander are not recoverable unless the defamatory words were spoken maliciously or wantonly. *Day v. Becker* (Civ. App.) 145 S. W. 1197.

Exemplary damages are not recoverable in a libel case unless the libelous language was instigated by malice, even though the language be libelous per se. *Fessinger v. El Paso Times Co.* (Civ. App.) 154 S. W. 1171.

**Pleading.**—See notes under Art. 1827, § 172.

**Evidence.**—See notes under Art. 3687.

**Art. 5596. Mitigation of damages.**—In any action for libel, the defendant may give in evidence, if specially pleaded, in mitigation of exemplary or punitive damages, the circumstances and intentions under which the libelous publication was made, and any public apology, correction or retraction made and published by him of the libel complained of. The truth of the statement or statements in such publication shall be a defense to such action. [Id. sec. 2.]

**Justification and mitigation in general.**—That a libel was published in other newspapers is no defense. *A. H. Belo & Co. v. Smith* (Civ. App.) 40 S. W. 856.

The fact that the alleged slander was spoken under provocation by misconduct of the plaintiff may be shown in mitigation of damages. *Ledgerwood v. Elliott* (Civ. App.) 51 S. W. 872.

The fact that defendant believed a current rumor concerning plaintiff, of the same tenor as the slander, is properly submitted in mitigation of damages. *Id.*

The fact that a slanderous statement was a rumor repeated by defendant was no justification. *Patterson & Wallace v. Frazer* (Civ. App.) 93 S. W. 146.

Though the existence of probable cause for believing matters contained in a libelous article to be true may mitigate the damage, it will not justify the publication. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

If a notice in a newspaper that it would correct any erroneous reflection upon any one upon due notice of same being given, if admissible at all in evidence, it would only be so on an issue as to exemplary damages in a libel suit; and when specially pleaded in mitigation of such damages. *James v. Ft. Worth Telegram Co.*, 54 C. A. 526, 117 S. W. 1030.

While, in an action by F. for the publication of a libel, a second article published by defendant and headed, "F.'s Correction," and commencing, "F. says," followed by his statements, was not admissible under this article, since it was a correction made by plaintiff, it was still admissible independent of the statute as a circumstance tending to rebut any inference of malice. *Fessinger v. El Paso Times Co.* (Civ. App.) 154 S. W. 1171.

**Truth as justification.**—The truth of an alleged libel may be proven and is a complete defense. *Nettles v. Somervell*, 6 C. A. 627, 25 S. W. 658, citing *Patten v. Belo*, 79 T. 46, 14 S. W. 1037; *Cotulla v. Kerr*, 74 T. 90, 11 S. W. 1058, 15 Am. St. Rep. 819. See *Kuhn v. Young*, 78 T. 346, 14 S. W. 706.

A notice to consignees of cattle that defendants held a mortgage thereon, and demanding the net proceeds thereof, held not libelous, where defendants held a mortgage on a portion of the cattle. *Youngblood v. Godair* (Civ. App.) 46 S. W. 913.

The truth of the defamatory matter is a complete defense in libel. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

Under this article the defense of truth pleaded and proved is a complete one, though the statements were libelous per se. *Wheless v. W. Y. Davis & Son* (Civ. App.) 122 S. W. 929.

Where, in libel, the truth of the statements complained of was established without dispute as a defense, as authorized by this article, so that the only proper judgment that could be rendered was the one rendered for defendant, errors committed by the trial court were not ground for reversal. *Id.*

A party exhibiting to others an account against a firm held not liable for damages to a member of the firm for a misstatement therein as to the persons owning the business. *Towery v. McDougle-Craig Co.* (Civ. App.) 125 S. W. 621.

**Bad character of defamed person.**—The defendant can show plaintiff's general reputation in the respect in which it is assailed in mitigation of damages for libel. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

**Art. 5597. What matters deemed privileged.**—The publication of the following matters by any newspaper or periodical, as defined in article 5595, shall be deemed privileged, and shall not be made the basis of any action for libel without proof of actual malice:

1. A fair, true and impartial account of the proceedings in a court of justice, unless the court prohibits the publication of the same, when in the judgment of the court the ends of justice demand that the same should not be published, and the court so orders; or any other official proceedings authorized by law in the administration of the law.

2. A fair, true and impartial account of all executive and legislative proceedings that are made a matter of record, including reports of legislative committees, and of any debate in the legislature and in its committees.

3. A fair, true and impartial account of public meetings, organized and conducted for public purposes only.

4. A reasonable and fair comment or criticism of the official acts of public officials and of other matters of public concern published for general information. [Id. sec. 3.]

**Privileged communications in general.**—Communications relating to a business matter held privileged. *Gulf, C. & S. F. Ry. Co. v. Floore* (Civ. App.) 42 S. W. 607.

Whether a communication is privileged is a question of law. *Gulf, C. & S. F. Ry. Co. v. Floore* (Civ. App.) 42 S. W. 607; *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

The defense of privileged communication is a perfect defense to an action for libel, and not a plea in mitigation of damages. Proof of every essential element of privileged communication is admissible. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

**Judicial proceedings.**—The publication in a newspaper of a pleading containing defamatory matter is not privileged. *Sutton v. A. H. Belo & Co.* (Civ. App.) 64 S. W. 686.

The principle upon which privileged publications respecting judicial proceedings, etc., rests, stated. *A. H. Belo & Co. v. Lacy* (Civ. App.) 111 S. W. 215.

Privacy of official records required by law to be kept, as well as of official proceedings made public by authority of law held inconsistent with public policy. *Id.*

A newspaper reporter, in copying for publication a court record of the filing of a suit to recover a "penalty for keeping a disorderly house," held not required to verify the entry, in the absence of actual knowledge that it was erroneous. *Id.*

The clerk's file docket is an official record book of a court of justice required by law to be kept (Arts. 1812-1814, 1694), and the "entries so made are official proceedings with the meaning of this act as to privileged publication by a newspaper and their publication is therefore not libelous. *Id.*

Any allegation in a pleading in a suit is privileged, and will not sustain an action for libel. *Harris v. Santa Fé Townsite Co.* (Civ. App.) 125 S. W. 77.

The opinions of judges are absolutely privileged. *Allen v. Earnest* (Civ. App.) 145 S. W. 1101.

Questions asked by an attorney of a party while testifying as a witness are absolutely privileged, and cannot be made the basis of an action for slander, though otherwise actionable. *Kruegel v. Cockrell & Gray* (Civ. App.) 151 S. W. 352.

**Reports of official proceedings.**—Published proceedings of a convention excluding one of its members held privileged communications. *Cranfill v. Hayden*, 22 C. A. 656, 55 S. W. 805.

**Discharge of duty to others.**—A schedule of buildings furnished by an agent to his principal in the course of his duties is a privileged communication. *Schulze v. Jalonick*, 18 C. A. 296, 44 S. W. 580.

A letter to a business house, stating that plaintiff was selling goods under false representations, that the work thereon was done by the business house, held not privileged. *Davis v. Wells*, 25 C. A. 155, 60 S. W. 566.

Statements concerning character of unmarried daughter made to her mother in response to the mother's inquiries held privileged. *Lehmann v. Medack* (Civ. App.) 152 S. W. 438.

**Self-defense.**—It is not essential to privilege that the very words used must have been necessary to protect defendant. *Gulf, C. & S. F. Ry. Co. v. Floore* (Civ. App.) 42 S. W. 607.

Publications made to protect the rights of the one publishing are qualifiedly privileged. *Allen v. Earnest* (Civ. App.) 145 S. W. 1101.

**Request or provocation by person injured.**—Plaintiff, having by her persistence caused slanderous words to be used, held to have no cause of action therefor. *Patterson & Wallace v. Frazer* (Civ. App.) 79 S. W. 1077.

Where a discharged employé asked her employer the reason why he discharged her, or requested him to repeat the statement made to another as to the reason, and in answer thereto he gave the reason, or repeated the statement, it would not support an action for slander. *Rosenbaum v. Roche*, 46 C. A. 237, 101 S. W. 1164.

A statement of an employer to the father of a discharged employé as to the reason of the discharge, in response to inquiry made by the father, is privileged, but a voluntary statement made by the employer is not privileged. *Id.*

Where plaintiff, in company with a friend, went to defendant and inquired why he desired her to vacate his house, the statement of defendant's reason, in the presence of the three only, in which defendant charged plaintiff with keeping a disorderly house, was conditionally privileged and not actionable in the absence of malice. *Laughlin v. Schnitzer* (Civ. App.) 106 S. W. 908.

Slanderous words uttered by one concerning another on the occasion of the latter seeking a retraction of a prior slander are not privileged. *Wharton v. Chunn*, 53 C. A. 124, 115 S. W. 887.

**Criticism and comment on public matters.**—Unless newspaper comments on official proceedings are fair and impartial they are not privileged, and, if untrue, the fact that such proceedings are matters of public concern will not render the comments privileged. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

In libel, a publication charging plaintiff with smuggling goods into the country without paying duties, held not a criticism of the acts of public officials so as to make it privileged as to plaintiff. *Id.*

This relates solely to comment or criticism of official acts and matters of public concern. "Probable cause" for making the comment or criticism is not even a factor to be considered in determining whether it is privileged or not. If comment or criticism is libelous, the statute affords no immunity from the consequences unless it is reasonable and fair. *Id.*

While this article provides that a reasonable or fair comment on or criticism of the official acts of public officials and of other matters of public concern published for general information shall be privileged, other statements, if statements of fact as distinguished from the mere opinion of the writer, in order to be privileged, must be "fair, true, and impartial." *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

**Existence and effect of malice.**—That a communication was privileged does not exempt the party from liability, if it was made with express malice or want of good faith. *Davis v. Wells*, 25 C. A. 155, 60 S. W. 566.

Whether or not a certain communication was privileged held to depend on whether it was actuated by malice. *St. Louis S. W. Ry. Co. of Texas v. McArthur*, 31 C. A. 205, 72 S. W. 76.

If malice enters to any degree as a motive in the publication of libelous matter on a privileged occasion, the defense of privilege is lost. *Cranfill v. Hayden* (Civ. App.) 75 S. W. 573.

It is sufficient to justify a recovery for a libel conditionally privileged, if there is any degree of actual malice in the motives inspiring it, though there may also be a lawful motive. *Cranfill v. Hayden*, 97 T. 544, 80 S. W. 609.

Malice necessary to sustain a recovery for slander consisting of statements conditionally privileged cannot be found merely from the falsity of the statement. *Laughlin v. Schnitzer* (Civ. App.) 106 S. W. 908.

Proof of actual malice on the part of a publisher of a libelous article prevents it from being privileged. *San Antonio Light Pub. Co. v. Lewy*, 52 C. A. 22, 113 S. W. 574.

Slanderous words spoken in malice are not privileged, even if the occasion would otherwise make them so. *Wharton v. Chunn*, 53 C. A. 124, 115 S. W. 887.

Actual or express malice must be proved to authorize a recovery for a defamatory article which is privileged. *Houston Chronicle Pub. Co. v. McDavid* (Civ. App.) 167 S. W. 224.



**Art. 5598. To be construed, how.**—Nothing in this chapter shall be construed to amend or repeal any penal law on the subject of libel. [Id. sec. 4.]

**Qualification of preceding article.**—This article did not so qualify the definition of privileged matter given in Art. 5597 as to retain the defense of conditional or qualified privilege so as to make a fair and impartial account of such matters as are privileged under the statute, privileged in fact, though untrue, in case they are published without actual malice. *Galveston Tribune v. Johnson* (Civ. App.) 141 S. W. 302.

## TITLE 85

## LIBRARY AND HISTORICAL COMMISSION

Art.	Art.
5599. Object and purposes of commission.	5606. Duties of state librarian.
5600. Commission, how constituted.	5607. Books, pictures, papers, etc., transferred from other departments.
5601. Meetings; salary and duties of state librarian.	5607a. Distribution of reports.
5602. Powers and duties of the commission.	5607b. Sale and distribution of copies of archives.
5603. Commission may receive gifts of money, etc.	5608. Assistant librarian for legislature; duties, etc.
5604. State library, all books, pictures, etc., belong to.	5609. Biennial report of commission shall contain what.
5605. Books, pictures, papers, etc., transferred from department of insurance and banking.	5609a. Penalty for detaining books, etc.

**Article 5599. Object and purposes of commission.**—The Texas library and historical commission shall consist of five members, which commission shall be assigned suitable offices at the capitol, and whose object and purposes shall be to control and administer the state library, and to adopt and to enforce reasonable rules and regulations governing its administration and control, to aid and encourage libraries, to collect materials relating to the history of Texas and the adjoining states, to preserve, classify and publish the manuscript archives and such other matters as it may deem proper, to diffuse knowledge in regard to the history of Texas, to encourage historical work and research, to mark historic sites and houses and secure their preservation, to aid those who are studying the problems to be dealt with by legislation, and to perform such other duties as may be enjoined by law. [Acts 1909, p. 122, sec. 1.]

**Art. 5600. Commission how constituted.**—The governor shall, by and with the advice and consent of the senate, appoint three persons who, together with the superintendent of public instruction and the head of the school of history of the state university, shall constitute the Texas library and historical commission. Appointments shall be made for the term of two years, except appointments to fill vacancies, which shall be made by the governor for the unexpired term. [Id. sec. 2.]

**Art. 5601. Meetings; state librarian; bond, duties, expenses, etc.**—The commission shall hold at the state capitol at least one regular meeting annually, and as many special meetings as may be necessary. The state librarian, hereinafter provided for, shall be secretary of the library and historical commission. No member of the commission shall receive any salary or per diem or other compensation for his services, as such commissioner, but the actual expenses incurred in attending the meetings of the commission, or by any member thereof in visiting and establishing libraries, shall be paid for by the state. The commission shall elect a state librarian, who shall not be of their number, and who shall be an experienced librarian. Said state librarian shall serve at the will of the commission and shall give to the governor an acceptable bond in the sum of five thousand dollars for the proper care of the state library and its equipment. He shall record the proceedings of the commission, keep an accurate account of its financial transactions, and perform such other duties as may be assigned him by said commission. In addition to his salary, the state librarian shall be allowed his actual expenses when traveling in the service of the commission. Such expenses shall be certified to under oath and approved by the chairman or acting chairman of the commission. [Acts 1909, p. 122, sec. 2. Acts 1913, p. 281, sec. 1, amending Art. 5601, Rev. St. 1911.]

**Art. 5602. Powers and duties of the commission.**—The commission is authorized and empowered to purchase, within the limits of the annual appropriation allowed by act of the legislature from time to time, suitable books, pictures, etc., the same to be the property of the state. The commission shall give advice to such persons as contemplate the establishment of public libraries, in regard to such matters as the maintenance of public libraries, selection of books, cataloguing, and library management. The commission shall have conducted library institutes and encourage library associations. The state librarian shall ascertain the condition of all public libraries in this state and report the results to the commission. [Acts 1909, p. 122, sec. 3.]

**Art. 5603. Commission may receive gifts.**—The commission shall have power and authority to receive donations or gifts of money or property upon such terms and conditions as it may deem proper; provided, no financial liability is thereby entailed upon the state. [Id. sec. 4.]

**Art. 5604. State library, all books, etc., belong to.**—All books, pictures, documents, publications and manuscripts received through gift, purchase or exchange, or on deposit, from any source, for the use of the state, shall constitute a part of the state library, and shall be placed therein for the use of the public. [Id. sec. 5.]

**Art. 5605. Books, pictures, etc., transferred from department of insurance and banking.**—So much of the law relating to the department of insurance and banking as places under the jurisdiction of that department the custody and control of books, documents, newspapers, manuscripts, archives, relics, mementoes, flags, works of art, etc., now in said department, and places upon said department the duty of collecting and preserving historical data, is hereby repealed. The custody and control of books, documents, newspapers, manuscripts, archives, relics, mementoes, flags, works of art, etc., and the duty of collecting and preserving historical data, is transferred to the Texas library and historical commission. To avoid all misunderstanding, it is hereby expressly declared that the gallery of the portraits of the presidents of the republic and of the governors of the state of Texas constitutes a part of the state library. The commission shall adopt such rules and regulations for the government of the state library as will insure the careful preservation of the books, documents, newspapers, manuscripts, archives, relics, mementoes, flags, works of art, etc., deposited therein and particularly shall all materials relating to the history of Texas be carefully safeguarded. [Id. sec. 7.]

**Art. 5606. Duties of state librarian.**—The duties of the state librarian, acting under the direction of the Texas library and historical commission, shall be as follows:

First. He shall have charge of the state library, and all books, pictures, documents, newspapers, manuscripts, archives, relics, mementoes, flags, etc., therein contained.

Second. He shall endeavor to collect all manuscript records, relating to the history of Texas, in the hands of private individuals, and, where the originals can not be obtained, he shall endeavor to procure authenticated copies. He shall be authorized to expend the money appropriated for the purchase of books relating to Texas, and he shall seek diligently to procure a copy of every book, pamphlet, map or other printed matter giving valuable information concerning this state. He shall collect portraits or photographs of as many of the prominent men of Texas as possible. He shall endeavor to complete the files of the early Texas newspapers in the state library, and he shall cause to be bound the current files of not less than ten of the leading newspapers of the state, and the current files of not less than four leading news-

papers of other states, and of as many of the county papers, professional journals, denominational papers, agricultural papers, trade journals and other publications of this state as seem necessary to preserve in the state library an accurate record of the history of Texas.

Third. He shall demand and receive from the officers of state departments, having them in charge, all books, maps, papers, manuscripts, documents, memoranda and data not connected with or necessary to the current duties of said officers relating to the history of Texas, and carefully classify, catalogue and preserve the same. The attorney general shall decide as to the proper custody of such books, etc., whenever there is any disagreement as to the same.

Fourth. Any state, county or other official is hereby authorized and empowered in his discretion to turn over to the state library for permanent preservation therein any official books, records, documents, original papers, maps, charts, newspaper files and printed books not in current use in his offices, and the state librarian shall receipt for the same.

Fifth. The state librarian shall endeavor to procure from Mexico the original archives which have been removed from Texas and relate to the history and settlement thereof; and, in case he can not procure the originals, he shall endeavor to procure authentic copies thereof. In like manner, he shall procure the originals or authentic copies of manuscripts preserved in other archives beyond the limits of this state, in so far as said manuscripts relate to the history of Texas.

Sixth. He shall preserve all historical relics, mementoes, antiquities, and works of art connected with, and relating to, the history of Texas, which may in any way come into his possession as state librarian. He shall constantly endeavor to build up an historical museum worthy of the interesting and important history of this state.

Seventh. He shall make and certify to copies of papers or documents in the state library, upon application of any person interested, and shall charge the same fees as are allowed the secretary of state for similar services. And such certified copies of papers and documents shall be received in evidence by the courts the same as like papers and documents of other state departments. He shall collect all such fees in advance and turn them over to the state treasurer quarterly, and shall be authorized to approve the vouchers for all expenditures made in connection with the state library.

Eighth. He shall give careful attention to the proper classification, indexing, and preservation of the official archives that are now or may hereafter come into his custody.

Ninth. He shall make a biennial report to the Texas library and historical commissioners to be by them transmitted to the governor, to be accompanied by such historical papers and documents as he may deem of sufficient importance. [Id. sec. 9.]

**Art. 5607. Books, pictures, etc., transferred from other departments.**—All books, pictures, papers, maps, documents, manuscripts, memoranda and data which relate to the history of Texas as a province, colony, republic, or state, which have been, or may hereafter be, delivered to the state librarian by the secretary of state, comptroller, commissioner of the general land office, or by any of the heads of the departments, or by any persons or officers in pursuance of law, shall be deemed books and papers of said state library, and shall constitute a part of the archives of said state library; and copies therefrom shall be made and certified by the said state librarian upon application of any person interested; which certificate shall have the same force and effect as if made by the officer originally in custody of them, and for which the same fees shall be charged, to be collected in advance and turned over to the state treasurer quarterly. [Id. sec. 10.]

**Art. 5607a. Distribution of reports.**—That one hundred and fifty copies of each annual or biennial report, printed by the secretary of state in accordance with the laws regulating public printing, shall be delivered by the secretary of state to the library and historical commission for distribution to the free public libraries of Texas and to libraries elsewhere in exchange for publications received from them. [Acts 1913, p. 281, sec. 1.]

**Art. 5607b. Sale and distribution of copies of archives.**—That the library and historical commission is authorized to sell copies of the Texas Archives, printed with funds appropriated for that purpose, at a price not to exceed twenty-five per cent above cost of publishing, provided that any money realized in excess of the costs attending such sale shall be placed to the account of the general revenue in the state treasury; provided further that one copy of each volume of the Texas Archives may be distributed free to the governor, the members of the legislature and to the libraries indicated in article 5607a above. [Id.]

**Art. 5608. Assistant librarian for legislature; duties, etc.**—The said library and historical commission is authorized and directed to maintain for the use and information of the members of the legislature, the heads of the several state departments, and such other citizens as may desire to consult the same, a section of the state library for legislative reference and information. The commission shall appoint an assistant librarian competent to conduct the work of said legislative reference section. Said assistant librarian shall have available for use explanatory check lists and catalogues of the current legislation of this and other states, catalogues of the bills and resolutions presented in either branch of the legislature, check lists of the public documents of the several states, including all reports issued by the various departments, boards and commissions of this state, digests of such public laws of this and other states as may best be made available for legislative use. Said assistant librarian shall give the members of the legislature such aid and assistance in the drafting of bills and resolutions as may be asked. [Acts 1909, p. 122, sec. 11.]

**Art. 5609. Biennial report of commission shall contain what.**—The commission shall make a biennial report to the governor, which shall include the biennial report of the state librarian. Said report shall present a comprehensive view of the operation of the said commission in the discharge of the duties imposed by this chapter, shall present a review of the library conditions in this state, present an itemized statement of the expenditures of the commission, make such recommendations as their experience shall suggest, and present careful estimates of the sum or sums of money necessary for the carrying out of the provisions of this chapter. Said report shall be made and printed, and by the governor be laid before the legislature as are other department reports. [Id. sec. 12.]

**Art. 5609a. Penalty for detaining books, etc.**—That whoever wilfully detains any book, newspaper, magazine, pamphlet, manuscript, or other property belonging to any public or incorporated library, reading room, museum, or other educational institution for thirty days after notice in writing to return the same, given after the expiration of the time which by the rules of such institution such articles or other property may be kept, shall be punished by a fine of not less than \$1.00 nor more than \$25.00, and the said notice shall bear on its face a copy of this section. [Acts 1913, p. 281, sec. 1.]

## TITLE 86

## LIENS

[For Lis Pendens and Levies, see Articles 6837 to 6840. For Attachment Liens, see Article 6858 and Article 267.]

## Chap.

1. Judgment Liens.
2. Mechanics, Contractors, Builders and Material Men.
3. Liens of Railroad Laborers.
4. Liens of Accountants, Bookkeepers, Artisans, Craftsmen, Factory Operatives, Mill Operatives, Servants,

## Chap.

- Mechanics, Quarrymen, Common Laborers and Farm Hands.
5. Liens on Domestic Vessels.
6. Liens--Live Stock.
7. Chattel Mortgages.
8. Other Liens.

## CHAPTER ONE

## JUDGMENT LIENS

## Art.

5610. Clerk of county court shall keep judgment record.
5611. Clerks of courts shall make and deliver abstracts of judgments.
5612. Abstract shall show what.
5613. Justice of peace shall deliver abstracts.
5614. Clerks of county courts shall record and index abstracts.

## Art.

5615. Index shall show, what.
5616. Lien of judgments, when.
5617. Lien exists, how long.
5618. Satisfaction of, shown how.
5619. Satisfaction of to be entered on judgment record.
5620. Abstracts from United States courts may be recorded, etc.

**Article 5610. [3283] Clerk of county court shall keep a judgment record.**—Each clerk of the county court shall keep in his office a well-bound book, to be called the “Judgment record,” in which he shall record all abstracts of judgments filed in his office for record, which are authenticated in the manner hereinafter required.

See Art. 6832 et seq.

Judgment record separate from deed record.—See Art. 6796.

**Art. 5611. [3284] Clerks of courts shall make and deliver abstracts of judgments.**—It shall be the duty of each clerk of a court, when the person in whose favor the judgment was rendered, his agent, attorney or assignee, applies therefor, to make out and deliver to such applicant, upon the payment of the fee allowed therefor by law, an abstract of such judgment, and certify thereto under his hand and official seal.

**Rule of construction.**—The statutory proceeding governing the making of abstracts of judgment held a special statutory proceeding, and the statute must be substantially complied with. *Wicker v. Jenkins*, 49 C. A. 366, 108 S. W. 188.

**Art. 5612. [3285] Abstract shall show what.**—The abstract provided for in the preceding article shall show:

1. The names of the plaintiff and of the defendant in such judgment.
2. The number of the suit in which the judgment was rendered.
3. The date when such judgment was rendered.
4. The amount for which the same was rendered and the amount still due upon the same.
5. The rate of interest, if any is specified in the judgment.

**Abstract, requisites and sufficiency—In general.**—A description of real estate in a judgment held to be sufficient to establish a lien thereon. *Glasscock v. Price* (Civ. App.) 45 S. W. 415.

A judgment held insufficient to create a lien by reason of defects in the abstract, and in the record and indexing thereof. *Schneider v. Dorsey* (Civ. App.) 72 S. W. 1029.

The abstract of a judgment recorded in another county held sufficient under the statute. *Wicker v. Jenkins*, 49 C. A. 366, 108 S. W. 188.

Under this article an abstract, sufficient to create a lien, must correctly show the names of the parties, the amount of the judgment, and its true date. *Blankenship & Buchanan v. Herring* (Civ. App.) 132 S. W. 882.

An abstract of a judgment is sufficient if it can be rendered certain by the construction of its own terms and within its terms supplies the information required by law without looking elsewhere. *Kingman Texas Implement Co. v. Borders* (Civ. App.) 156 S. W. 614.

An abstract of a judgment which shows the amount and date of the original judgment, rate of interest, the amount of costs, and the credits, if any, is sufficient without expressly stating the balance then due. *Id.*

— **Names of parties.**—The abstract must substantially describe the judgment. An abstract giving the name of Burkhead as plaintiff will not give a lien for a judgment in favor of Bankead as plaintiff. *Anthony v. Taylor*, 68 T. 403, 4 S. W. 531.

The fact that in an abstract of judgment the defendants' names were given in full, while in the county clerk's certificate, attached thereto, they were described as "B. W. Lee et al.," both the abstract and the certificate being recorded together, did not constitute a variance. *James v. Midland Grocery & Dry Goods Co.* (Civ. App.) 146 S. W. 1073.

— **Number of suit.**—The number of the judgment is one of the requisites in an abstract to be recorded, in order to fix the lien. *Bonner v. Grigsby*, 84 T. 330, 19 S. W. 511, 31 Am. St. Rep. 48.

An abstract of judgment, though not containing the number of the cause, was sufficient to create a lien where the number appeared in the certificate of the county clerk, attached to the abstract, which was also recorded. *James v. Midland Grocery & Dry Goods Co.* (Civ. App.) 146 S. W. 1073.

— **Date of judgment.**—Error in date of judgment invalidates the abstract. *Rushing v. Willis* (Civ. App.) 28 S. W. 921.

Where the certificate to an abstract of judgment shows a year different from the true time the judgment was rendered the recording of the abstract would not create a lien. *Atteridge v. Maxey*, 18 C. A. 134, 45 S. W. 606.

— **Amount and credits.**—An omission to give credit for money collected on execution renders the abstract void. *Evans v. Frisbie*, 84 T. 341, 19 S. W. 510.

It is sufficient if the abstract shows the amount for which the judgment was rendered, exclusive of costs, the rate of interest which it bears, and states that the total amount is due and unpaid. *First Nat. Bank of Decatur v. Cloud*, 21 S. W. 770, 2 C. A. 627.

An abstract of judgment not showing the amount still due creates no lien. *Willis v. Sanger*, 15 C. A. 655, 40 S. W. 229.

The abstract must show a credit for an amount recovered on execution, otherwise it will not create a lien. *Id.*

In abstract of judgment, held, that double column headed "Amount of Judgment," and containing three figures in one and two in the other, sufficiently indicated dollars and cents. *New England Loan & Trust Co. v. Avery* (Civ. App.) 41 S. W. 673.

Where the record of a judgment erroneously stated the date of a credit thereon, it was insufficient to create a lien. *Noble v. Barner*, 22 C. A. 357, 55 S. W. 382.

An abstract of a judgment which shows the amount and date of the original judgment, rate of interest, the amount of costs, and the credits, if any, is sufficient without expressly stating the balance then due. *Kingman, etc., v. Borders* (Civ. App.) 156 S. W. 614.

Abstract of judgment, showing that \$475 was realized from a sale, held not insufficient because it stated that \$38 was applied to the costs of the sale and suit, and \$473 applied on the judgment; the "\$473" clearly being a clerical error for "\$437." *Id.*

**Art. 5613. [3286] Justice of the peace shall deliver abstracts.**—It shall also be the duty of each justice of the peace to make out and deliver an abstract of any judgment rendered in his court in the manner provided in the two preceding articles, certified to under his hand.

**Art. 5614. [3287] Clerk of county court shall record and index abstracts.**—When any such abstract, as is provided for in the three preceding articles, is presented to the clerk of the county court for record, he shall file and immediately record the same in the judgment record, noting in such record the day and hour of such record, and shall also at the same time enter it upon the index.

**Record of judgments in general.**—See Art. 6832 et seq.

**Rule of construction.**—The statutory proceeding governing the recording of abstracts of judgment held a special statutory proceeding and the statute must be substantially complied with. *Wicker v. Jenkins*, 49 C. A. 366, 108 S. W. 188.

"Record" construed.—To "record" an abstract in the "judgment record" means to transcribe it upon the book required to be kept for that purpose and when the abstract was transcribed the act of recording was complete. *Vidor v. Rawlins*, 93 T. 259, 54 S. W. 1026.

**Necessity for actual record.**—Abstracts of judgments will not for any purpose be regarded as recorded until they are recorded in fact, and no judgment lien attaches by virtue thereof before such actual registration. *Belbaze v. Ratto*, 69 T. 636, 7 S. W. 501; *First Nat. Bank v. Cloud*, 21 S. W. 771, 2 C. A. 627.

**Time for filing and recording.**—A lien will not be given by registering the abstract of a judgment after the lien became dormant by failure to issue an execution within twelve months after its rendition. *Anthony v. Taylor*, 68 T. 408, 4 S. W. 531; *Central C. & C. Co. v. Southern Nat. Bank*, 12 C. A. 334, 34 S. W. 383; *Clements v. Ewing*, 71 T. 370, 9 S. W. 312.

The record and index must be made before the judgment becomes dormant. *Evans v. Frisbie*, 84 T. 341, 19 S. W. 510. It is not necessary that the time of filing should be indorsed on the abstract. *Gin Co. v. Oliver*, 14 S. W. 451, 78 T. 182; *Gunter v. Buckler* (Civ. App.) 32 S. W. 229.

**Noting day and hour.**—When the abstract is transcribed as required by Art. 5610, and indexed according to Art. 5615, the statute is fully complied with and the judgment lien becomes operative although the clerk failed to note upon his record the day and hour when he recorded the abstract. *Vidor v. Rawlins*, 93 T. 259, 54 S. W. 1026.

**Sufficiency of record in general.**—Record of a judgment abstract and index held sufficient. *Willis v. Downes* (Civ. App.) 46 S. W. 920.

**Record of certificate.**—It is not necessary to record the clerk's certificate. *Spence v. Brown*, 25 S. W. 413, 86 T. 430.

The certificate of the clerk of the district court of a county attesting the correctness of the abstract of a judgment recorded in another county need not be recorded. *Wicker v. Jenkins*, 49 C. A. 366, 108 S. W. 188.

An abstract of judgment cannot be recorded without a certificate of the clerk, but the certificate need not be recorded, though, if the certificate is recorded, it may itself be treated as the abstract, and, if it contains the essential elements, the record of the certificate is sufficient as the recording of an abstract of judgment. *James v. Midland Grocery & Dry Goods Co.* (Civ. App.) 146 S. W. 1073.

**Necessity for proper indexing.**—Proper indexing is essential. *Nye v. Moody*, 70 T. 434, 8 S. W. 606; *Same v. Gribble*, 70 T. 458, 8 S. W. 608; *Gin Co. v. Oliver*, 78 T. 182, 14 S. W. 451; *Pierce v. Wimberly*, 78 T. 187, 14 S. W. 454; *Evans v. Frisbie*, 84 T. 341, 19 S. W. 510; *Bonner v. Grigsby*, 84 T. 330, 19 S. W. 511, 31 Am. St. Rep. 48; *Von Stein v. Trexler*, 23 S. W. 1047, 5 C. A. 299; *Willis v. Nichols*, 23 S. W. 1025, 5 C. A. 154; *Corbett v. Redwood* (Civ. App.) 58 S. W. 550.

An abstract of a judgment is not admissible in evidence to show a lien claimed under it, unless the proper indexing of the abstract affirmatively appears. *Corbett v. Redwood* (Civ. App.) 58 S. W. 550.

**Sufficiency of index.**—See notes under Art. 5615.

**Presumption as to indexing.**—See notes under Art. 3687, Rule 14.

**Art. 5615. [3288] Index shall show what.**—The index to such judgment record shall be alphabetical, and shall show the name of each plaintiff and of each defendant in the judgment, and the number of the page of the book upon which the abstract is recorded.

**Necessity for indexing.**—See notes under Art. 5614.

**Requisites of index.**—See Art. 6792 et seq.

The indexing of a judgment held substantially correct, and sufficient to impose a lien on property of the judgment debtor. *Bradley v. Janssen* (Civ. App.) 93 S. W. 506.

— **Names of parties.**—What a sufficient compliance with the statute requiring the names of the parties to be indexed alphabetically. *Burnett v. Cockshatt*, 21 S. W. 950, 2 C. A. 304.

An abstract of a judgment not giving the names of all of the parties, but stating merely the firm name, does not create a lien. *Willis v. Nichols*, 23 S. W. 1025, 5 C. A. 154; *Hamilton v. Beard* (Civ. App.) 33 S. W. 252. And so where the true date of the judgment is not stated. *Rushing v. Willis* (Civ. App.) 28 S. W. 921. See *Anthony v. Taylor*, 68 T. 405, 4 S. W. 531; *Gullett Gin Co. v. Oliver*, 78 T. 184, 14 S. W. 451; *Hamilton v. Beard* (Civ. App.) 33 S. W. 252; *Glasscock v. Stringer* (Civ. App.) 32 S. W. 920.

*D. & A. Oppenheimer* as plaintiffs in the index is sufficient. *Oppenheimer v. Robinson*, 27 S. W. 95, 37 T. 174.

Where the name of one only of two joint defendants is indexed, a lien is created on his property. *Blum v. Keyser*, 28 S. W. 561, 8 C. A. 675. See *Gin Co. v. Oliver*, 78 T. 186, 14 S. W. 451; *Von Stein v. Trexler*, 23 S. W. 1049, 5 C. A. 299.

It seems that there should be a direct index and also a reverse or cross index. *Central Coal & Coke Co. v. Southern Nat. Bank of New York*, 12 C. A. 334, 34 S. W. 333; *Gin Co. v. Oliver*, 78 T. 182, 14 S. W. 451.

Index of registration held sufficient to show names of plaintiff and defendants, and to create liens. *Kanz v. P. J. Willis & Bro.*, 16 C. A. 12, 40 S. W. 171.

Ditto marks in index of judgment record held to sufficiently show the names of the parties. *New England Loan & Trust Co. v. Avery* (Civ. App.) 41 S. W. 673.

In an index of an abstract of judgment, if defendant's name is under the right letter, although plaintiff's is not, it is sufficient to fix a lien on defendant's property. *Franke v. Lone Star Brewing Co.*, 17 C. A. 9, 42 S. W. 861.

A failure to index a judgment against all the members of a partnership destroys its lien. *Glasscock v. Price* (Civ. App.) 45 S. W. 415.

A judgment in favor of *P. J. Willis & Bro.* was correctly indexed under the letter "W." instead of "P." *Willis v. Downes* (Civ. App.) 46 S. W. 920.

The giving of the firm name held unnecessary to the validity of the index of an abstract of a judgment in its favor. *Id.*

Where the name of one of the parties to a judgment was erroneously indexed in the judgment record, the record was insufficient to create a lien. *Noble v. Barner*, 22 C. A. 357, 55 S. W. 382.

An abstract of a judgment in favor of "B. F. Avery & Sons," a corporation, should index under "A" and under "B." *B. F. Avery & Sons v. Texas Loan Agency* (Civ. App.) 62 S. W. 793.

A judgment indexed in favor of a mercantile company held not fatally defective for failure to indicate whether such company was a corporation, joint-stock company, or a partnership, and, if the latter, to disclose the names of the partners. *Bradley v. Janssen* (Civ. App.) 93 S. W. 506.

Under this article the index of the judgment must contain the names of the plaintiffs and defendants alphabetically, in order to create a lien upon the judgment debtor's property. *McLary v. Studebaker Bros. Co. of Texas* (Civ. App.) 146 S. W. 676.

Where a judgment was recovered by the *Studebaker Bros. Company of Texas*, and in the index of an abstract of the judgment it only appeared as the *Studebaker Bros. Company*, and did not appear under the letter "S," such index was insufficient, under Art. 5614 and this article, to create a judgment lien on the property of the judgment debtor. *Id.*



**Art. 5616. [3289] Lien of judgment, when.**—When any judgment has been recorded and indexed, as provided in the preceding articles, it shall, from the date of such record and index, operate as a lien upon all of the real estate of the defendant situated in the county where such record and index are made, and upon all real estate which the defendant may thereafter acquire situated in said county.

**Rule of construction.**—While statutes fixing judgment liens on real property must be construed strictly, they must be given the full meaning that the language employed reasonably imports, and it is sufficient if they are substantially complied with. *Kingman Texas Implement Co. v. Borders* (Civ. App.) 156 S. W. 614.

**Recording abstract as condition precedent to lien.**—See notes under Art. 5614.

**Indexing as condition precedent to lien.**—See notes under Art. 5614.

**Recording dormant judgment.**—See notes under Art. 5614.

**Action to restore lien.**—See notes under Art. 5617.

**Not vacated by appeal.**—A lien acquired by the registration of a judgment is not vacated by an appeal and supersedeas which suspends the enforcement of the judgment. *Thulemeyer v. Jones*, 37 T. 560; *Smith v. Kale*, 32 T. 290.

**Land to which lien attaches—Estate or interest of judgment debtor.**—A judgment lien on land is subject to every equity existing at the time of the judgment and the lien will be restricted to the actual interest of the judgment debtor, without reference to registration. *Ilse v. Seinsheimer*, 76 T. 459, 13 S. W. 329; *Allday v. Whitaker*, 66 T. 673, 1 S. W. 794; *Michael v. Knapp*, 23 S. W. 280, 4 C. A. 464.

On the death of a judgment debtor's ancestor, the judgment creditor has a lien on the debtor's interest in decedent's estate. *Franke v. Lone Star Brewing Co.*, 17 C. A. 9, 42 S. W. 861.

The lien of a judgment creditor on the interest of a debtor in his ancestor's real estate is not affected by the purchase of the property by other heirs from the debtor. *Id.*

A plaintiff has no lien under a judgment on money tendered into court by defendant to rescind the contract for breach of warranty not proven. *Sanders v. Britton* (Civ. App.) 45 S. W. 209.

A judgment against a widow, administratrix, individually, rendered after partition proceedings, held to have created no lien on land set off to one of the children though the decree in partition was not recorded until after the recording of the abstract of the judgment. *Corbett v. Redwood* (Civ. App.) 58 S. W. 550.

Facts under which held that a judgment creditor acquired no interest in land fraudulently conveyed, as against plaintiff who held a deed of trust of the land from the debtor and his transferee. *White v. Provident Nat. Bank*, 27 C. A. 487, 65 S. W. 498.

— **Homestead.**—A judgment lien takes precedence of a subsequently acquired homestead right. *Wright v. Straub*, 64 T. 64.

A lien invalid at the time of registration because of homestead rights does not become valid by subsequent abandonment of the homestead. *Wills v. Mike*, 76 T. 84, 13 S. W. 58; *Glasscock v. Stringer* (Civ. App.) 32 S. W. 920.

Where a defendant with his family was actually residing on the premises when he bought, buying with intent that the property should be his homestead, the homestead exemption attached to the property when purchased, to the exclusion of any lien sought to be enforced by the registry and indexing of a judgment prior to his purchase. *Friberg v. Walzem*, 85 T. 264, 20 S. W. 60, 34 Am. St. Rep. 808. A judgment duly filed and registered becomes a lien upon a homestead when abandoned as such. *Glasscock v. Stringer* (Civ. App.) 33 S. W. 677.

Where a judgment rendered by a county court has, by abstract duly filed, become a lien on the real estate of the debtor, the judgment creditor may, without first resorting to execution and levy, maintain an action in the district court to cancel a claim of homestead set up by the debtor and to enforce the judgment lien against the real estate so claimed as exempt. *Hull v. Naumberg*, 1 C. A. 132, 20 S. W. 1125.

The judgment lien cannot be extended to the homestead. *Wallis v. Wendler*, 27 C. A. 235, 65 S. W. 44.

Where a husband and wife occupied premises as a homestead when they sold the same to a purchaser holding under an unrecorded deed, no lien against the land was fixed by the subsequent abstracting of the judgment against the husband. *Garth v. Stuart* (Cr. App.) 125 S. W. 611.

— **After-acquired property.**—A judgment lien attaches to land subsequently acquired. *Barron v. Thompson*, 54 T. 235.

Judgment liens of different dates attach simultaneously to after-acquired lands. *Willis v. Downes* (Civ. App.) 46 S. W. 920; *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

**Priorities.**—In the absence of actual or constructive notice, a judgment lien is not defeated by an unrecorded deed. *Blankenship v. Douglas*, 26 T. 228, 82 Am. Dec. 608; *McKeen v. Sultenfuss*, 61 T. 325; *Grace v. Wade*, 45 T. 532; *Von Stein v. Trexler*, 23 S. W. 1047, 5 C. A. 299.

The statutory lien given by the record of a judgment does not defeat a resulting trust of which the creditor has notice before purchase under an execution sale. *Ross v. Kornrumpf*, 64 T. 390, citing *McKamey v. Thorp*, 61 T. 648; *Parker v. Coop*, 60 T. 111.

A creditor claiming a mere statutory lien by the record of a judgment or the levy of an execution against the husband, in whom the apparent title is vested, cannot be protected by reason of such lien against a resulting trust in favor of the wife, though he have no notice of such a trust; and the purchaser of such property at a subsequent execution sale will take nothing as against the wife's equity, if he had notice of the same before making the purchase. *Yoe v. Montgomery*, 68 T. 338, 4 S. W. 622.

A lien acquired by the registration of an abstract of a judgment is superior to the title of a grantee in a prior unrecorded deed of which the creditor had no notice. *Russell v. Nall*, 20 S. W. 1006, 23 S. W. 901, 2 C. A. 60. See 2 Tex. Civ. Prac. § 1273; also No. 135 of Practical Forms.

The due record and indexing of a judgment will not affect a prior levy made under a valid judgment, the levy being followed by sale. Nor is the purchaser at said sale required to place his sheriff's deed upon record as against the rights of the original parties to the recorded judgment. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034. Right of claimant under a trust deed as against a purchaser of the land under execution against the owner. See *Miller v. Boone* (Civ. App.) 22 S. W. 102.

Notice to judgment creditor of unrecorded deed, either actual or constructive, held fatal to his right as against the holder of the unrecorded deed. *Barnett v. Squyres* (Civ. App.) 52 S. W. 612.

Rule preferring the diligent creditor who unearths property fraudulently conveyed has no application where ostensible legal title remained in debtor, notwithstanding an attempt to dispose of it. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

A judgment against a husband for a community debt of husband and wife, recorded and indexed in the judgment records one day before decree of divorce of such wife and judgment foreclosing a lien in her favor on community property, held to create a prior lien to that created by the divorce judgment and decree. *Boyd v. Ghent*, 93 T. 543, 57 S. W. 25.

A purchaser of land, executing a mortgage thereon to the vendor, as part of the same transaction, to secure the price, takes the land burdened with the lien, and the mortgage, though unregistered, is prior to an existing judgment lien against the purchaser, except as to bona fide purchasers. *Masterson v. Burnett*, 27 C. A. 370, 66 S. W. 90.

The possession of a party, claiming under an unrecorded deed, of one of several tracts of land, is not sufficient to charge a judgment creditor of his grantor with notice of his rights therein. *Brooks v. Hibbard, Spencer, Bartlett & Co.*, 44 C. A. 610, 99 S. W. 718.

The lien of the judgment creditor, based on execution sale, is superior to an unrecorded deed of a vendee of the defendant in execution. *Id.*

Unrecorded deeds held void as to the grantor's creditors acquiring a lien upon the land under legal process in the absence of notice. *Whitaker v. Farris*, 45 C. A. 378, 101 S. W. 456.

A judgment creditor held not a lienholder for value, without notice of a third person's ownership of property. *Leon Mercantile Co. v. Anderson*, 56 C. A. 481, 121 S. W. 868.

Where the purchaser of land under a parol contract had paid part of the purchase price, taken possession, and made permanent improvements prior to the recording of the abstract of a judgment against the vendor, his rights were superior to those of the judgment creditor under this article; the land not being the land of the judgment debtor when the abstract was recorded. *Dixon v. McNeese* (Civ. App.) 152 S. W. 675.

— **Burden of proof of notice of unrecorded deed.**—See notes under Art. 3687, Rule 12.

— **Action to determine priorities.**—A judgment creditor having acquired a lien upon land by the record of his judgment may either institute suit to have a prior conveyance of land by the debtor declared fraudulent and the land subjected to his execution, or he may cause an execution to be levied upon the land fraudulently conveyed by the debtor, and after purchasing at execution sale he may then bring his suit to have the fraudulent conveyance set aside and recover the land. *Lynn v. Le Gierse*, 48 T. 138; *Gaines v. National Exchange Bank*, 64 T. 18; *Cassaday v. Anderson*, 53 T. 527; *Donnebaum v. Tinsley*, 54 T. 362.

**Foreclosure of lien.**—A judgment foreclosing a judgment lien on land held proper. *McDowell v. M. T. Jones Lumber Co.*, 42 C. A. 260, 93 S. W. 476.

**Effect of registration.**—See Art. 6832 et seq.

**Judgment liens against receivers.**—See Title 37, Chapter 21, Art. 2138.

**Art. 5617. [3290] Lien exists, how long.**—When a lien has been acquired, as provided in this chapter, it shall continue for ten years from the date of such record and index, unless the plaintiff shall fail to have execution issued upon his judgment within twelve months after the rendition thereof, in which case said lien shall cease to exist.

**Duration of lien—In general.**—Since this article fixes the period during which the lien shall continue a party who asserts it in an action must show that it has not ceased to exist at the time he brings suit. *Boyd v. Ghent*, 95 T. 46, 64 S. W. 930.

A party can acquire a good title to land under the three, five, or ten years statutes of limitation, by taking and holding possession under the conditions specified in the statutes, even though a judgment has been properly recorded and indexed in the county where the land lies. *White v. Pingnot*, 49 C. A. 641, 90 S. W. 673, 674.

— **Issuance of executions.**—Under the act of November 9, 1866, the judgment lien was lost unless executions were regularly issued, and a break of over 12 months between executions abated the lien. *Barron v. Thompson*, 54 T. 243; *Ficklin v. McCarty*, *Id.*, 370; *Williams v. Davis*, 56 T. 250; *Wylie v. Posey*, 71 T. 34, 9 S. W. 87. See 2 Tex. Civ. Prac. §§ 1270, 1722; also, No. 134 of Practical Forms.

This article does not apply when there is a legal obstacle to the issuance of an execution during the year. *Gruner v. Westin*, 66 T. 213, 18 S. W. 512; *Semple v. Eubanks*, 13 C. A. 418, 35 S. W. 509.

Judgment lien is not lost because plaintiff in execution had it returned without a levy. *Pfeuffer v. Werner*, 27 C. A. 288, 65 S. W. 888.

The judgment lien is lost if diligence is not used in having execution on the judgment issued. *First Nat. Bank v. Adams*, 31 C. A. 413, 72 S. W. 403.

Where the only proof of issuance of execution on judgment, an abstract of which has been filed in another county, was an execution which appeared never to have been delivered to an officer for service, it was insufficient to sustain enforcement of judgment as against land subsequently acquired. *Schneider v. Dorsey*, 96 T. 544, 74 S. W. 527.

Under Art. 3726, requiring property executions to be issued in the first instance to

the county in which judgment was rendered, and providing that upon the return thereof, wholly or partly unsatisfied, execution may issue to any other county, Art. 3727 providing that, where the execution requires the sale or delivery of specific property, it may be issued to the county where the property or some part of it is situated, and this article, an execution issued to a county other than the one where judgment was rendered for the sale of attached property in such other county prevented the judgment becoming dormant without the issuance of any execution to the county in which judgment was rendered within 12 months. *Kingman Texas Implement Co. v. Borders* (Civ. App.) 156 S. W. 614.

**Action to restore lien.**—A judgment which, though not dormant, has lost its lien, may be made the basis of an action to restore the lien either by scire facias or by action of debt. *Anderson v. Boyd*, 64 T. 108.

**Art. 5618. [3291] Satisfaction of judgment, shown how.**—Satisfaction of any judgment in whole or in part may be shown:

1. By return upon an execution issued upon said judgment, or by a certified copy of such return, certified by the officer to whom the return is made, such certificate showing the names of the parties to the judgment, the number and style of the suit, the date and amount of the judgment, the court in which rendered, and the dates of the issuance and return of the execution.

2. By a receipt, acknowledgment or release signed by the party entitled to receive payment of the judgment, or his agent, or attorney of record, and acknowledged or proven for record in the same manner as deeds are required to be.

**Satisfaction.**—That judgment against husband had not been satisfied when suit to establish property of wife was begun held not established by production of an execution returned, "No property found." *Maddox v. Summerlin* (Civ. App.) 47 S. W. 1020.

Where defendants attached plaintiff's property, which was sold, and the proceeds deposited in court, plaintiffs were entitled to a credit on the judgment for the full amount received for the property. *Hamburger v. Kosminsky* (Civ. App.) 61 S. W. 958.

Unless the clerk of the district court is made the agent of the judgment creditor, a payment of money due on the judgment to the clerk is not a satisfaction of the judgment. *City of Whitesboro v. Diamond* (Civ. App.) 75 S. W. 540.

A payment of a joint judgment against a principal and surety by a surety held a satisfaction of the judgment. *Tariton v. Orr*, 40 C. A. 410, 90 S. W. 524.

Payments made on a judgment to an attorney who had not recovered the judgment, and did not represent the judgment creditor, were ineffective. *Morrison v. Hammack*, 152 S. W. 494.

**Art. 5619. [3292] Satisfaction of judgment to be entered on judgment record.**—Sufficient space shall be left at the foot of each abstract of a judgment recorded in the judgment record for the entry of credits upon and satisfaction of such judgment, and it shall be the duty of the clerk to enter such credits and satisfaction whenever the same are made to appear, as provided in the preceding article.

**Art. 5620. [3293] Abstract from United States courts may be recorded, etc.**—An abstract of a judgment rendered in this state by any United States court may be recorded and indexed in the same manner provided for the judgments of the courts of this state, upon the certificates of the clerks of such United States courts; and the record and index of such judgments shall have the same force and effect as that of a judgment of a court of this state.

**In general.**—When an abstract of a judgment of a United States court is recorded and indexed in the same way as is required for recording and indexing a judgment of a state court, it operates as a lien in the same manner as is provided for a judgment of a state court. *Bourn v. Robinson*, 49 C. A. 157, 107 S. W. 875.

## CHAPTER TWO

### MECHANICS, CONTRACTORS, BUILDERS AND MATERIAL MEN

Art.		Art.	
5621.	In favor of whom.	5626.	Description of property.
5622.	When to be filed.	5627.	What is sufficient diligence.
5623.	Written notice to owner.	5628.	Priority of lien.
5624.	Form of fixing lien on unwritten contracts.	5629.	When sold separately purchaser may remove.
5625.	Form when material is furnished to contractor or builder.	5630.	Sale must be under judgment.
		5631.	On homesteads, how fixed.

Art.	Art.
5632. Notice to owner of property.	5636. When indebtedness accrues.
5633. Diligence, what is sufficient.	5637. Liens upon equal footing.
5634. Contractor to be furnished by owner with account.	5638. Speedy enforcement of.
5635. Original contractor to defend suit by subcontractors, etc.	5639. Release to be filed by mechanics, etc., when.

**Article 5621. [3294] In favor of whom.**—Any person, or firm, lumber dealer or corporation, artisan, laborer, mechanic, or sub-contractor, who may labor or furnish material, machinery, fixtures or tools to erect any house or improvement or to repair any building or improvement whatever, or who may labor or furnish material, machinery, fixtures or tools for the construction or repair of levees or embankments to be erected for the reclamation of overflow lands along any river or creek in this state, or furnish any material for the construction or repair of any railroad within this state under or by virtue of a contract with the owner, owners, or his or their agent, trustee, receiver, contractor or contractors, upon complying with the provisions of this chapter, shall have a lien on such house, building, fixtures, improvements, land reclaimed from overflow or railroad, and all its properties, and shall have a lien on the lot or lots of land necessarily connected therewith, or reclaimed thereby, to secure payment for the labor done, lumber, material, machinery or fixtures and tools furnished for construction or repair. The word "improvement" as herein used shall be construed so as to include wells, cisterns, tanks, reservoirs or artificial pools or lakes made for supplying or storing water, and all pumps, syphons, wind mills or other machinery or appliances used for raising water for stock, domestic use or for irrigation purposes. [Acts 1889, p. 110. Amend. Acts 1895, p. 194. Acts 1913, p. 252, sec. 1, amending Art. 5621, Rev. St. 1911.]

See *Johnson v. Phelps & Bigelow Windmill Co.* (Civ. App.) 37 S. W. 764; *Childress v. Smith*, 37 S. W. 1076; *Rockwell Bros. & Co. v. Hudgens*, 57 C. A. 504, 123 S. W. 185; *Freeman v. Barry* (Civ. App.) 133 S. W. 748; *Johnson v. Griffiths & Co.*, 135 S. W. 633.

**Property subject to lien.**—Public buildings and grounds are not subject to builders' liens. *Atascosa County v. Angus*, 83 T. 202, 18 S. W. 563, 29 Am. St. Rep. 637; *City of Dallas v. Loonie*, 83 T. 291, 18 S. W. 726.

Fixtures erected on land can be affected with a lien for materials furnished to erect them only by operation of the statute. *Nicholstone City Co. v. Smalley*, 21 C. A. 210, 51 S. W. 527.

The construction of roads is a public work, and laborers and materialmen have no lien for labor and material furnished. *National Bank of Denison v. Coleman* (Civ. App.) 151 S. W. 1123.

Materialmen and laborers can fix no lien upon public works for money due them for materials furnished or labor performed in the construction of such works. *Jones Lumber Co. v. Guaranty State Bank & Trust Co.* (Civ. App.) 157 S. W. 472.

**Right to lien—Nature of claim.**—The lien exists when the sale and delivery of the materials were made without the limits of this state. *Fagan v. Boyle Ice Mach. Co.*, 65 T. 324.

The lien of a mechanic for material for the construction of a building cannot be defeated by reason of its delivery, by direction of the owner of the house, at some other place than where the house is being erected. *Trammell v. Mount*, 68 T. 210, 4 S. W. 377, 2 Am. St. Rep. 479.

A materialman is entitled to a lien only for materials actually used in the construction of a building, and not for those purchased, but returned. *Murphy v. Fleetford*, 30 C. A. 487, 70 S. W. 989.

Claims for furnishing tools, coal and oil, for the railroad company are not claims for "material" within the meaning of this article. *Waters-Pierce Oil Co. v. U. S. & Mex. T. Co.*, 44 C. A. 397, 99 S. W. 214.

The lien for material for the construction of a railroad is not given by Const. art. 16, § 37, but by this article. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 382.

A statute giving a mechanic's lien for labor done, or materials, etc., furnished for construction or repair of a building, does not give a lien for "meals," "lodging," sundry expenses" or for "over bill." *Van Horn Trading Co. v. Day* (Civ. App.) 148 S. W. 1129.

An architect preparing plans and specifications for a building and superintending its construction furnishes "labor" for the erection of such building and is entitled to a mechanic's lien under this article, even if such architect is not an "artisan," "laborer," or "mechanic," since, by the use of the expression "any person or firm, \* \* \* who may labor," an intention is evidenced to provide a lien for any and all persons, whether artisans, laborers, mechanics, or not, who may labor to erect a house or improvement. *Sanguinett & Staats v. Colorado Salt Co.* (Civ. App.) 150 S. W. 490.

**Contract with or consent of owner.**—A parol declaration by the owner of land that a materialman's lien existed on the land and improvements does not create such lien against one taking a subsequent lien. *Lyon v. Elser*, 72 T. 304, 12 S. W. 177.

A person in possession of land under a written contract of purchase is not the owner of the land or of the improvements he may place upon it, and for this reason cannot fix a

lien on either. The parties so furnishing material and performing labor may be subrogated to the rights of the person in possession on paying the balance of the purchase money. *Galveston Ex. Ass'n v. Perkins*, 80 T. 62, 15 S. W. 633; *Sheer v. Cummings*, 80 T. 294, 16 S. W. 37.

Persons owning land in severalty may by a joint building contract subject the same to a lien which may be enforced in one suit. *Carter Lumber Co. v. Simpson*, 83 T. 370, 18 S. W. 812.

One who acquires the title to the land on which the improvements were made, during the performance of the contract for such improvement, is the owner within the meaning of the law. *Schultze v. Alamo Ice & Brewing Co.*, 21 S. W. 160, 2 C. A. 236.

The contract of an original contractor need not be in writing. *State v. Cherokee Iron Mfg. Co.*, 22 S. W. 253, 2 C. A. 588.

This article does not apply to a contract with a lessee. *Penfield v. Harris*, 7 C. A. 659, 27 S. W. 762.

As to a building contract void for uncertainty. *Macatee v. Hamilton*, 15 C. A. 108, 38 S. W. 530.

No liens attach for permanent improvement by lessee without lessor's knowledge or consent. *Hammond v. Martin*, 15 C. A. 570, 40 S. W. 347.

A contract by one to furnish brick and stone, and to erect the walls of a building, held to constitute such person an independent contractor. *Kahler v. Carruthers*, 18 C. A. 216, 45 S. W. 160.

Two contracts to build held one, in effect, so that a materialman could not fix a lien on the amount due the contractor on the one building, where the cost of completing the other building, which the contractor had abandoned, was more in excess of the contract price than the amount due on the former building. *Timmons v. Casey*, 19 C. A. 476, 47 S. W. 805.

A mistake in written contracts for improving a lot and adjacent parts of lots, intended to give the improver a lien therefor, in stating the number of feet frontage, held not to affect the extent of the lien. *Bringhurst v. Mutual Building & Loan Ass'n*, 19 C. A. 355, 47 S. W. 831.

The statute not requiring the affidavit by an agent to show the agency it is not error to omit the showing. *Riter v. Houston Oil Refining & Manufacturing Co.*, 19 C. A. 516, 48 S. W. 758.

Where the lien is given by contract, independent of the statute, the ownership of the land by the person executing the contract, or his authority, need not be shown. *Wilson v. Vick* (Civ. App.) 51 S. W. 45.

A contract held to give a materialman a lien, independent of the statute. *Id.*

An agent unauthorized to improve his principal's realty cannot charge it with a lien for materials furnished him therefor. *Nicholstone City Co. v. Smalley*, 21 C. A. 210, 51 S. W. 527.

Act of owner in allowing part of materials to be purchased on his responsibility does not annul contract, so as to render him liable for all materials furnished. *Sunset Brick & Tile Co. v. Stratton* (Civ. App.) 53 S. W. 703.

One executing mechanic's lien held to have an equitable title, entitling him to create the lien. *Geisberg v. Mutual Building & Loan Ass'n* (Civ. App.) 60 S. W. 478.

A person in possession of land under a written contract to purchase is not, within the meaning of this article the owner of the land or the improvements he may place on it, and for this reason he cannot fix a lien upon either. *Faber v. Muir*, 27 C. A. 27, 64 S. W. 940.

Materialmen held entitled to recover from the owner of a building for materials furnished, without regard to the contractor's contract, where the owner agreed to pay such materialmen for the material before it was delivered. *Williamson v. D. M. Smith & Co.* (Civ. App.) 79 S. W. 51.

Parties contracting for a "builder's lien" will be construed to have used the term in its statutory sense as including the land. *D. June & Co. v. Doke*, 35 C. A. 240, 80 S. W. 402.

Description of property in a building contract providing for a lien held sufficient. *Id.* Equity will correct a mutual mistake in a written instrument creating mechanic's lien. *Silliman v. Taylor*, 35 C. A. 490, 80 S. W. 651.

Where the owner of land contracts for the erection of an improvement, giving a mechanic's lien and notes, the giving of a lien for attorney's fees is valid. *Summerville v. King*, 98 T. 332, 83 S. W. 680.

Under the constitution, an original contractor held entitled to a lien on nonhomestead property without having a written recorded contract. *Guarantee, Savings, Loan & Investment Co. v. Cash* (Civ. App.) 87 S. W. 749.

A notary held not disqualified, by interest of a firm of which he was a member, to take an acknowledgment to a mechanic's lien contract. *Roane v. Murphy* (Civ. App.) 96 S. W. 782.

Statement by the owner that he would pay all bills, and requesting a materialman to continue delivering material will not support a claim for a lien for materials furnished the contractor before such statement was made. *Elliott v. Waites & Wilkie* (Civ. App.) 124 S. W. 992.

A contract to purchase land does not make the purchaser the "owner" within this article. *Hubbell v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 313.

Under the circumstances, held that certain inadvertent mistakes in a contract for the erection of a building would be corrected, and the contract, as corrected, would be enforced, in an action to recover the balance due thereunder, and to enforce materialmen's liens. *Howell v. McMurry Lumber Co.* (Civ. App.) 132 S. W. 848.

Const. art. 16, § 37, giving materialmen a lien upon buildings for the value of materials furnished therefor, and requiring the legislature to provide for the enforcement of such liens, is self-executing and not subject to conditions not imposed by the constitution itself, so that the fact that a contract for materials for erecting a building did not give the materialman a lien would not deprive him of a lien for the materials furnished. *Id.*

Where a vendor sells property with the agreement that improvements are to be made upon it by the vendor, materialmen and laborers are entitled to a lien for materials or

labor furnished in making the improvements. Panhandle Telephone & Telegraph Co. v. Kellogg Switchboard & Supply Co. (Civ. App.) 132 S. W. 963.

Representations by joint owner of building under construction made to materialman that part of price was being withheld from contractor held not a promise to pay for material. Kuteman v. Lacy (Civ. App.) 144 S. W. 1184.

Owners of property who gave a contract for a mechanic's lien held estopped to claim that there was no such contract after its transfer to an innocent purchaser for value. Cain v. Bonner (Civ. App.) 149 S. W. 702.

That a builder under a contract for the completion of a building which the owners had started had an option which he afterwards exercised of using the material already purchased by the owners at the actual price paid for the same will not invalidate the portion of the contract already given providing for a mechanic's lien on the premises. *Id.*

Where an owner frequently visited his premises while plaintiff did work thereon, and saw and knew that work was done for his benefit and he suggested changes and supervised the work, there was an implied contract for the work on which a mechanic's lien for the reasonable value thereof could be predicated. Tenison v. Hagendorn (Civ. App.) 155 S. W. 690.

In the absence of evidence that an owner of property is a married man or the head of a family, the property is subject to a mechanic's lien for the cost of an improvement thereon, though there is no evidence of a written contract for the improvement. *Id.*

— **Breach of contract.**—One who by his own fault fails to erect a house in conformity to his contract so to do does not acquire the right to a lien on the premises. Paschall v. Pioneer Savings & Loan Co., 19 C. A. 102, 47 S. W. 98.

Where a contractor for improvements, through his own fault only partially completes the work, he may not avail himself of the lien contracted for, but his remedy is on a quantum meruit. Murphy v. Williams (Civ. App.) 116 S. W. 412.

— **Persons entitled to lien.**—A corporation may acquire a lien. Fagan v. Boyle Ice Mach. Co., 65 T. 324.

An original contractor is one who sells building material to the owner of the property without the intervention of a middleman. Matthews v. Brewing Ass'n, 83 T. 604, 19 S. W. 150.

A mechanic's lien may exist for material furnished under a contract with a subcontractor. Bassett v. Mills, 89 T. 162, 34 S. W. 93; Berry v. McAdams (Civ. App.) 50 S. W. 952.

Liability of owner who completes building for subcontractors' liens. House v. Schulze, 21 C. A. 243, 52 S. W. 654.

A contract between the owner of property and a contractor held not to authorize a mechanic's lien in favor of the materialman. James v. St. Paul's Sanitarium, 24 C. A. 664, 60 S. W. 322.

Mechanics and laborers who build machine shops, workshops, roundhouses, etc., for a railroad, are governed by this article in fixing a lien upon such structures and not by Art. 5640. National Bank v. Gulf, C. & S. F. Ry. Co., 95 T. 176, 66 S. W. 206.

Facts held to establish a substantial completion of a building contract, precluding the owners from asserting the invalidity of certain mechanic's lien notes executed to a trustee for the contractors, on the ground that the contract was abandoned, and the work completed under a different arrangement. Roane v. Murphy (Civ. App.) 96 S. W. 782.

Liability of the owner under a building contract to a materialman stated. Lonergan v. San Antonio Loan & Trust Co., 101 T. 63, 104 S. W. 1061, 106 S. W. 876, 130 Am. St. Rep. 803.

A transferee of notes given to a contractor for the price of work contracted for and the lien securing them held not entitled to enforce the lien on the homestead on the contractor abandoning the work. Murphy v. Williams (Civ. App.) 116 S. W. 412.

One advancing money on notes given by an owner to a contractor held to acquire a lien on the nonhomestead land of the owner. *Id.*

A person held, under the facts, not entitled to a foreclosure of a contractor's lien. Morris v. Shepard, 56 C. A. 313, 120 S. W. 571.

Where a building contractor was not entitled to a mechanic's lien for work on a homestead, because of his abandonment thereof before substantial performance, his assignee of the owner's notes for the price was also without right to a lien. Murphy v. Williams, 103 T. 155, 124 S. W. 900.

A subcontractor has no laborer's lien for wages for so much of the amount due as was earned by his own employes, though he oversaw their work. Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery (Civ. App.) 140 S. W. 111.

An "original contractor" within this article is one, who, for a fixed price, agrees to perform certain work, and does not include persons doing carpentry work, etc., by the day. Van Horn Trading Co. v. Day (Civ. App.) 148 S. W. 1129.

**Operation and effect—Amount and items secured.**—A lien does not attach for work not mentioned in the contract. Wright v. Meyer (Civ. App.) 25 S. W. 1124.

Tools rented for use in moving a house are within this article. Burke v. Brown, 10 C. A. 298, 30 S. W. 936.

Attorney's fees stipulated for in a note given under a contract secured by mechanic's lien are not secured by the lien. Matthews v. Texas Building & Loan Ass'n (Civ. App.) 48 S. W. 744.

A mechanic's lien held security for extras, though everything else has been paid. Zollars v. Snyder & Lacey, 43 C. A. 120, 94 S. W. 1096.

An owner having promptly interpleaded various materialmen claiming a fund payable to the contractor, and paid the fund into court as soon as the order was obtained, held not liable for interest. Beilharz v. Illingsworth (Civ. App.) 132 S. W. 106.

— **Time of accrual or commencement.**—The lien of a mechanic, though not fixed before registry of the contract or bill of particulars, relates back to the time when the work was performed or the material furnished, and takes precedence of all claims on the property which have been created since that time. Trammell v. Mount, 68 T. 210, 4 S. W. 377, 2 Am. St. Rep. 479. See Ricker v. Schadt, 5 C. A. 460, 23 S. W. 907; Smith v. Huckaby, 4 C. A. 80, 23 S. W. 397.

The mechanic's lien is secured by Const. art. 16, § 37. It exists as soon as the material is furnished or work is done. It is secured on compliance with the statute, and relates back to the beginning of the erection of the building, and takes precedence of all claims to the property improved arising thereafter. *Implement Co. v. Light Co.*, 74 T. 605, 12 S. W. 489; *Oriental Hotel Co. v. Griffiths*, 88 T. 574, 33 S. W. 652, 30 L. R. A. 765, 53 Am. St. Rep. 790.

A mechanic's lien attaches when the steps prescribed by the statute are followed. *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

The lien of a contractor who completed improvements already begun on a building held to date only from the time he began work and not to relate back to the beginning of the improvements. *Quinn v. Dickinson* (Civ. App.) 146 S. W. 993.

— **Accrual of indebtedness.**—See note under Art. 5636.

— **Property, estates and rights affected.**—When materials are furnished under a single contract for buildings to be erected on two or more contiguous lots owned by one person, the lien attaches to all the lots for all the material used. *Lyon v. Logan*, 68 T. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

The lien is confined to the property on which the work is done. *Lambert v. Williams*, 21 S. W. 108, 2 C. A. 413.

A contract provided for a lien on lot 9 and the improvements thereon. The improvements were upon lots 9 and 10. It was held the lien was valid as to lot 9, and improvements on both lots. *Crooker v. Grant*, 24 S. W. 689, 5 C. A. 182.

By the constitution the mechanic's lien attaches to the land upon which the building stands to the extent that the lands are necessary to its enjoyment, etc. *Strang v. Pray*, 89 T. 625, 35 S. W. 1054.

Under this article and Art. 5628 and 5629, as against the rights of the lienholder, the improvements do not become a part of the real estate, but are treated as if they had been made under a contract for removal, because the statute provides that foreclosure may be had upon the house alone, and that the purchaser might remove it, which could not be done consistently with the proposition that such improvements become a part of the realty. *Summerville v. King*, 98 T. 332, 83 S. W. 681.

Subsequent purchasers of two lots cannot complain that their property was held responsible for labor and materials furnished for their lots and another under a single contract. *Guarantee Savings, Loan & Investment Co. v. Cash* (Civ. App.) 87 S. W. 749.

Where labor and materials were furnished under a single contract for the improvement of three houses, each separate lot held liable for the entire debt. *Id.*

Claimants for liens for materials and labor furnished held entitled to share only in the amount in the hands of the owner after deducting from the contract price what it reasonably cost the owner to complete the building on the contractor quitting work. *Fall v. Nichols*, 43 C. A. 532, 97 S. W. 145.

Claims of persons who had furnished material for an original contractor held not payable out of payments accruing under a new contract between the city and M. to finish the work the original contractor had abandoned. *Ross v. Beaumont Brick Co.*, 53 C. A. 469, 116 S. W. 643.

**Assignment of claim.**—The assignments of a contractor on a fund in the owner's hands held to rank in the order they were given. *Harris County v. Donaldson*, 20 C. A. 9, 48 S. W. 791.

The assignee of a mechanic's lien can maintain an action on the claims assigned him together with his own. *House v. Schulz*, 21 C. A. 243, 52 S. W. 654.

Plaintiff, though a bona fide holder of a note and mortgage purporting to create a mechanic's lien, held not entitled to assert such lien, where his assignor could not have done so. *First Nat. Bank v. Campbell*, 24 C. A. 160, 58 S. W. 628.

A debt to accrue under a building contract held to have a sufficient potential existence after the contract was made to sustain a parol equitable assignment of a part thereof to the contractor's surety. *Campbell v. J. E. Grant Co.*, 36 C. A. 641, 82 S. W. 794.

That a building contractor's surety was not entitled to a lien for materials furnished as against the owner did not preclude him from maintaining equitable assignment of the fund to become due the contractor. *Id.*

It was not essential to the validity of an equitable assignment of a part of a fund due a building contractor to his surety that notice of such assignment be given to the debtor. *Id.*

An order drawn by a contractor on the owner of a building in favor of a materialman, is an equitable assignment of so much of the fund on hand due the contractor on the contract as it was given for. *Foley v. Houston Co-op. & Mfg. Co.* (Civ. App.) 106 S. W. 160.

The right of an assignee of notes given for the purchase price of improvements to be constructed on a homestead, to a mechanic's lien thereon, is limited to the right of the contractor. *Murphy v. Williams*, 103 T. 155, 124 S. W. 900.

Orders drawn by a contractor on the owner in favor of a materialman and accepted held an equitable assignment superior to any claim or lien of other materialmen, of which notice was not given to the owner prior to notice of the assignment. *Beilharz v. Illingsworth* (Civ. App.) 132 S. W. 106.

A lumber company, to which all money due under a building contract had been assigned, to secure it for advances, etc., held not a trustee for subcontractors and materialmen, nor required to pay their claims in preference to its own. *South Texas Lumber Co. v. Concrete Const. Co.* (Civ. App.) 139 S. W. 913.

An assignment by a contractor to a materialman of the balance due under the contract, and the acceptance thereof by the owner, held to pass to the assignee the ownership of the balance due under the contract. *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

A municipality which advanced money to a contractor for work yet to be done is not liable to one having a verbal assignment of the proceeds of such work, where the contractor took the advance and abandoned work altogether. *Alfalfa Lumber Co. v. City of Brady* (Civ. App.) 149 S. W. 204.

An order by a contractor to the supervising architect of a school building, on whose certificate estimates under the contract were to be paid to pay a materialman and charge

to the contractor's account, was good as an equitable assignment of part of the fund in the hands of the school trustees. *A. A. Fielder Lumber Co. v. Smith* (Civ. App.) 151 S. W. 605.

Where a contractor assigns parts of funds due or to become due him, the assignees are entitled to be paid in the order of the dates of such assignments. *Youngberg v. El Paso Brick Co.* (Civ. App.) 155 S. W. 715.

An agreement by a contractor that a note given by him should be paid out of the next week's estimate on a job he had was not an assignment of his claim. *Id.*

A writing by a contractor: "This will authorize you to pay to E. the amount of their account to be deducted from any moneys due me on that job"—was a sufficient equitable assignment of a fund partly then existing and to arise in the future as the work on the job progressed, and no acceptance was necessary. *Id.*

**Waiver, discharge, release and satisfaction.**—When a mechanic's lien has attached, the taking of a negotiable security for the debt does not of itself operate as a release of the lien. *Pope v. Graham*, 44 T. 196.

If one undertakes to furnish the material and build a house for another, to be paid for when the work is complete, and the structure is destroyed by fire during the progress of the work, without fault of either party, the builder cannot recover for the material furnished and labor performed. Otherwise, if the contract be for the builder to furnish material and perform labor in altering a structure already erected, there being no agreement as to when payment should be made, and, without fault of either contracting party, the structure itself is destroyed by fire. *Weis v. Devlin*, 67 T. 507, 3 S. W. 726, 60 Am. Rep. 38.

In the absence of an express agreement, the taking of drafts for materials furnished to build a house does not discharge. *Jones v. White*, 72 T. 316, 12 S. W. 179.

A mechanic does not waive his lien by taking a mortgage of the building, where he does not intend to waive it. *Farmers' & Mechanics' Nat. Bank v. Taylor*, 91 T. 78, 40 S. W. 876, 966.

Building contractor held not estopped from asserting lien by taking notes secured by mortgage for the amount. *Farmers' & Mechanics' Nat. Bank v. Taylor*, 91 T. 78, 40 S. W. 876, 966.

One who is estopped by representations made from asserting a claim to a lot superior to a mechanic's lien will be bound by such lien, although not a party to the contract on which it is based. *Lindsley v. Parks*, 17 C. A. 527, 43 S. W. 277.

A mechanic's lien held not waived by taking a renewal note for additional indebtedness and for additional security. *Myers v. Humphries* (Civ. App.) 47 S. W. 812.

Defendant, who induced plaintiff to furnish material by accepting orders which it afterwards refused to pay, held to have no standing in equity to claim a waiver of right to mechanic's lien by acceptance of independent security. *Southern Building & Loan Ass'n v. Bean* (Civ. App.) 49 S. W. 910.

A mechanic's lien that has once attached to the lot and the house erected on it, is not lost by the destruction of the house, but upon the erection of a new house attaches to it. *Cain v. Texas Building & Loan Association*, 21 C. A. 61, 51 S. W. 879.

In an action against a husband and wife on a note given for the construction of a house, held, that a written waiver by the husband of all claims for failure to comply with the building contract was admissible. *Rhodes v. Jones*, 26 C. A. 568, 64 S. W. 699.

**Art. 5622. [3295] When to be filed.**—In order to fix and secure the lien herein provided for, it shall be the duty of every original contractor, within four months, and every journeyman, day laborer or other person seeking to obtain the benefits of the provisions of this law, within thirty days after the indebtedness shall have accrued, to file his or their contract in the office of the county clerk of the county in which such property is situated, and cause the same to be recorded in a book to be kept by the county clerk for that purpose; provided, that, if such journeyman, day laborer or other persons have no written contract, it shall be sufficient for them to file an itemized account of their claim, supported by affidavit, showing that the account is just and correct, and that all just and lawful offsets, payments and credits known to the affiant have been allowed. [Acts 1889, p. 110.]

See *Freeman v. Barry* (Civ. App.) 133 S. W. 748; *Johnson v. Griffiths & Co.*, 135 S. W. 683.

**Necessity of filing.**—Under Const. art. 16, § 37, providing for mechanics' liens, an original contractor who performs labor or furnishes material is entitled to a lien, though he does not record his contract or account as provided by this article. *Farmers' & Mechanics' Nat. Bank v. Taylor*, 91 T. 78, 40 S. W. 876, 966.

The lien of an original contractor being given by the constitution, he need not file his contract as a condition precedent to fixing the lien. *Kahler v. Carruthers*, 13 C. A. 216, 45 S. W. 160.

One who furnishes material to a contractor, but fails to comply with the statute, has no lien on the property. *James v. St. Paul's Sanitarium*, 24 C. A. 664, 60 S. W. 322.

Every one save an original contractor must file his contract to furnish material or do the work in the office of the county clerk in the manner prescribed in this article in order to fix his lien. *Faber v. Muir*, 27 C. A. 27, 64 S. W. 940, 941.

Where a building contract provided that the contractor should have a builder's lien, the filing and recording required in the case of statutory liens was not necessary to render the lien binding as between the parties and all others having notice. *D. June & Co. v. Doke*, 35 C. A. 240, 80 S. W. 402.

Under Const. art. 16, § 37, recording held not necessary to give a building contractor a lien as against the owner or any one charged with notice. *Id.*



A mechanic's lien being created by the Constitution is not lost by a failure to comply with statutory regulations in regard thereto. *Blakeney v. Nalle & Co.*, 45 C. A. 635, 101 S. W. 875.

The statute prescribing the method of preserving a lien must be complied with, or the lien will not prevail as against third persons. *Kinsey v. Spurlin* (Civ. App.) 102 S. W. 122.

Where a supply company furnishes a railroad company material for building its road it must comply with Arts. 5622 and 5623 in order to fix its lien. It has no lien by virtue of Const. art. 16, § 37, alone. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 332.

The appointment of a receiver can in no way interfere with the statutory proceedings necessary to fix and secure liens upon property in his hands; and where railroad property is in hands of a receiver, compliance with the statute is necessary to fix lien for material furnished. *Id.*

**Time for filing.**—A record of the contract within the time prescribed by the statute is essential to secure a lien. *Cameron v. Marshall*, 65 T. 7; *Quinn v. Logan*, 67 T. 600, 4 S. W. 247.

After the appointment of a receiver for the debtor, a creditor who has a lien for materials, etc., furnished before the appointment of the receiver, may record his contract and thus secure his lien. *Fagan v. Boyle Ice Mach. Co.*, 65 T. 324.

The lien attaches if the account is delivered to the proper officer for filing within 30 days after the indebtedness shall have accrued. A party is not prejudiced by the failure of the clerk to record it within that time. *Bassett v. Brewer*, 74 T. 554, 12 S. W. 229.

The language of this statute does not require the contract to be filed after the indebtedness accrues to secure the lien, but that the filing of it later will not have the effect to secure the lien. It may be filed at the time it is made. *Claes v. Dallas L. Ass'n*, 83 T. 50, 18 S. W. 421.

The lien is secured by filing the account, in the case of an original contractor, within four months from the time the indebtedness accrued, and a person furnishing material directly to the owner is an original contractor. *Baxter Lumber Co. v. Nickell* (Civ. App.) 60 S. W. 451.

Statement of time when material was to be considered delivered for construction, as regards the running of time for perfecting lien. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 377.

The requirement in this article as to the time within which mechanic's lien claims must be filed, is mandatory. *Van Horn Trading Co. v. Day* (Civ. App.) 148 S. W. 1129.

Filing of a claim for a mechanic's lien does not fix a lien if the account was not filed in time, nor govern claims not lienable as affecting venue of an action against the debtors. *Id.*

**Contract to be recorded.**—The record of a note, August 27, 1884, reciting that it was "in settlement for account for lumber due January 1, 1884," and bearing date June 26, 1884, and payable 60 days thereafter, does not fix the materialman's lien. *Lyon v. Elser*, 72 T. 304, 12 S. W. 177.

The written contract to be recorded as provided in this article is the one by virtue of which the material was furnished, and not any subsequent contract relating to the same matter. *Lyon v. Ozee*, 66 T. 95, 17 S. W. 405. But see *Mundine v. Berwin*, 62 T. 341. See *Tinsley v. Boykin*, 46 T. 599; *Reese v. Corlew*, 60 T. 70; *Lyon v. Elser*, 72 T. 304, 12 S. W. 177; *Johnson v. White* (Civ. App.) 27 S. W. 174; *Whiteselle v. Texas Loan Agency* (Civ. App.) 27 S. W. 309; *Warner Elevator & Mfg. Co. v. Houston* (Civ. App.) 28 S. W. 405; *Id.*, 30 S. W. 437, 31 S. W. 353, 499, 88 T. 489.

Under a statute requiring the lienor to file his contract with the county clerk, a bill of items can be filed, the contract partly consisting of letters written by the lienor and out of his possession. *Riter v. Houston Oil Refining & Manufacturing Co.*, 19 C. A. 516, 48 S. W. 758.

**Mode and sufficiency of filing and recording.**—The record may be a book in which mortgages are also recorded. *Quinn v. Logan*, 67 T. 600, 4 S. W. 247.

The fact that the registration of a contract or bill of particulars, with its accompanying statement necessary to fix a mechanic's lien, is made in a book also used by the clerk to record bills of sale, will not affect the validity of the record, if the book is also used for the purpose of recording all mechanics' liens. *Lyon v. Logan*, 68 T. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

**Effect of failure to file.**—It has been held that the failure to record a bill of particulars as required in this article defeated the lien. *Lyon v. Ozee*, 66 T. 95, 17 S. W. 405. As to failure to deliver a copy to the debtor, see *Gillespie v. Remington*, 66 T. 108, 18 S. W. 338.

A mechanic's lien as between the parties is valid although it is not recorded. *Windmill Co. v. Parker* (Civ. App.) 30 S. W. 365; *Lignoski v. Crooker*, 86 T. 324, 24 S. W. 278, 788; *Lippencott v. York*, 86 T. 276, 24 S. W. 275; *Johnson v. Improvement Co.*, 88 T. 505, 31 S. W. 503; *Strang v. Pray* (Civ. App.) 34 S. W. 666.

The lien is not defeated by the failure to record caused by the fact that the written contract is in the possession of the owner of the property, who refused to surrender it for registration. *Strang v. Pray* (Civ. App.) 34 S. W. 666; *Parks v. Tippie* (Civ. App.) 34 S. W. 676.

A contractor is entitled to a lien, as against the owner, without filing and recording his contract. *Farmers' & Mech. Nat. Bank v. Taylor*, 91 T. 78, 40 S. W. 876, 966.

As between the original contractor and the owner, and purchasers from the owner with notice, in order to establish the former's lien for material and labor, on the lot on which the building stands, it is not necessary for him to file his contract or bill of particulars, as required by this article; and where the property improved is not a home-stand, the contract need not be in writing nor recorded, as he has a lien by virtue of labor and material furnished. *Guarantee Savings Loan & Investment Co. v. Cash* (Civ. App.) 87 S. W. 751.

Under Const. art. 16, § 37, providing that materialmen shall have a lien on the building for the value of their material furnished therefor, and directing the legislature to

provide by law for the speedy enforcement thereof, the legislature cannot affix conditions to the lien given by the constitution except to protect the owner or a purchaser of the property, and where tiling was furnished and used by the contractor for repair of a building, and notice thereof was given the owner, failure to file the account in the county clerk's office, as required by this article, did not render the lien unenforceable. *Texas Builders' Supply Co. v. Beaumont Const. Co.* (Civ. App.) 150 S. W. 770.

**Curing defects.**—A deed given to secure extension of debt, reciting that a mechanic's lien therefor was duly executed and acknowledged, held not to cure a defective certificate of acknowledgment to such lien. *Starnes v. Beitel*, 20 C. A. 524, 50 S. W. 202.

Fact of foreclosure held not to prevent correction of mistake in description in instrument creating mechanic's lien. *Silliman v. Taylor*, 35 C. A. 490, 80 S. W. 651.

**Art. 5623. [3296] Written notice to owner.**—Any person, firm, or corporation, who may furnish any material to any contractor, sub-contractor, agent, or receiver, to be used in the erection of any house, building or improvement, or to repair any house, building or improvement, or to construct or repair any railroad, or its properties, by giving written notice to the owner or his agent of such house, building or improvement, or the railroad company, its agent or receiver, of each and every item furnished, and by showing how much there is due and unpaid on each bill of lumber or material furnished by said lumberman, corporation, or material man under said contract, or at any time within ninety days after the indebtedness shall have accrued, may fix and secure the lien provided for in this chapter as to the material furnished at the time or subsequent to the giving of the written notice above provided for by filing in the office of the county clerk of the county in which such property is situated, and, if it be a railroad company, in any county through which its road may pass, an itemized account of his or their claim, as provided in this article, and cause the same to be recorded in a book kept by the county clerk for that purpose; provided, that in no case shall the owner be compelled to pay a greater sum for or on account of labor performed or material, machinery, fixtures and tools furnished as provided in this chapter than the price or sum stipulated in the original contract between such owner and the original contractor or builder of such house, building, fixtures, improvements or repairs. [Amend. 1895, p. 194.]

See, also, notes under Art. 5635.

**Cited.**—*Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683; *A. A. Fielder Lumber Co. v. Smith*, 151 S. W. 605.

**In general.**—Construing section 1 of the act of November 17, 1871 (P. D. 7112), which is substantially the same as article 3165 of the Revised Statutes of 1879, it was held by the court of appeals that the lien will not bind the property in the hands of a bona fide purchaser for value, without notice of such lien upon it, although the property was purchased within the time limited for filing the lien. *Odum v. Loomis*, 1 App. C. C. § 524. And see *Mundine v. Berwin*, 62 T. 341.

Under the law authorizing materialmen to fix their lien by notice on the owner, the notice does not affect payments already made under the contract. *Riter v. Houston Oil Refining & Manufacturing Co.*, 19 C. A. 516, 48 S. W. 758.

One who furnishes material to a subcontractor to be used in the construction of a house may, by complying with the provisions of this article, fix a lien upon the property, and secure the payment of the price of the material so furnished without regard to the original contractor. He does not have to take any notice of the original contractor but is required to give notice to the owner of the property of the material furnished to enable him to subject the property to his lien. *Padgitt v. Dallas Brick & Const. Co.*, 92 T. 626, 50 S. W. 1010.

Payment to contractor after notice of subcontractors' liens. *House v. Schulze*, 21 C. A. 243, 52 S. W. 654.

One who has furnished material for the construction of a county courthouse cannot maintain an action to set aside a fraudulent transfer of moneys due the contractor from the county, upon which no lien has been acquired under this article. *Herring-Hall-Marvin Co. v. Kroeger*, 23 C. A. 672, 57 S. W. 981.

Where the owner of a building paid a contractor after notice from a materialman that such contractor had not paid for material purchased and used in constructing such building, and there is a fund from which such materialman can recover a portion of his claim, the owner is responsible to him only for the balance of his claim after such portion is recovered, not exceeding such payment after notice to the contractor. *Baumgarten v. Mauer* (Civ. App.) 60 S. W. 451.

The provision in this article for notice in writing to the owner by one claiming a lien, applies to all liens, whether given by the constitution or by statute, when the materials are furnished to the contractor and not to the owner. *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

**Notice to owner—Necessity.**—Where a contractor throws up the contract, and is paid before notice of lien, the materialman cannot recover of the owner. *Riter v. Houston Oil Refining & Manufacturing Co.*, 19 C. A. 516, 48 S. W. 758.

**Materialman's lien defeated by owner paying contractors the contract price by assumption of claims against them prior to notice of such lien.** *Sunset Brick & Tile Co. v. Stratton* (Civ. App.) 53 S. W. 703.

The practical effect of this article in connection with Art. 5635 is to garnish so much of the sum due from the owner of the building as may be necessary to pay for material furnished; but for the protection of the owner he and his property are exempted from liability for such claims, unless written notice be given before he pays the contractor. The object is to give full opportunity to the materialman to assert and enforce his claim in such manner as to appropriate to himself the benefit of the contract made between the owner and the original contractor, but in doing so he must have due regard to the rights of the former, giving due notice of the claim as the law directs. *Berry v. McAdams*, 93 T. 431, 55 S. W. 1114.

Materialman cannot claim lien on funds due contractor in hands of county without written notice of claim, as provided in this article. *Herring-Hall-Marvin Co. v. Kroeger*, 23 C. A. 672, 57 S. W. 980.

Under this article and Arts. 5635 and 5637, the owner cannot be held liable to materialmen for sums he has bound himself to pay on written orders of the contractor, where no notice has been given, though Art. 5637 also declares that liens for material furnished shall be on an equal footing. *Beilharz v. Illingsworth* (Civ. App.) 132 S. W. 106.

A materialman, who does not give to the owner the notice in writing required by this article, does not acquire any lien, especially where the owner has accepted an order from the contractor in favor of another materialman for the balance due on the contract. *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

The provision of the mechanics' lien statute requiring notice to be given the owner is necessary for his protection when the material is furnished by some person other than the contractor, and in such case notice to the owner is required. *Texas Builders' Supply Co. v. Beaumont Const. Co.* (Civ. App.) 150 S. W. 770.

— **Time for giving.**—It is not necessary to give immediate notice to the owner as the items are furnished, to entitle a materialman to enforce a lien as against a contractor and his sureties. *Johnson v. Amarillo Imp. Co.*, 88 T. 505, 31 S. W. 503.

The time limitation (90 days) refers to the filing, and the notice is to be given as the material is furnished. Art. 5625 makes this plain. *Nichols v. Dixon*, 99 T. 263, 89 S. W. 766.

— **Sufficiency.**—That notice by materialmen to the owner was not given as the items were furnished held not to prevent them from reaching the amount due on the contract at time of notice. *Riter v. Houston Oil Refining & Manufacturing Co.*, 19 C. A. 516, 48 S. W. 758.

Failure to give notice of claim in the time and manner prescribed by statute held not to defeat a lien of which owner had notice. *Padgitt v. Dallas Brick & Construction Co.* (Civ. App.) 51 S. W. 529.

It is sufficient to serve a member of a church building committee of an unincorporated society with notice of a subcontractor's claim in order to fix the lien. *Id.*

The owner of a building having actual notice of the materialman's claim held liable for the materials. *Delauney v. Butler* (Civ. App.) 55 S. W. 752.

Actual verbal notice to the owner of claim by a materialman is not a sufficient compliance with this article. *Berry v. McAdams*, 93 T. 431, 55 S. W. 1112.

The owner will be protected in payments made by him to the original contractor in accordance with the terms of the contract against the claim of a subcontractor, laborer or materialman, unless prior to such payments he had given notice of such claim as directed by the statute. Actual notice is not sufficient, but the written notice required by the statute must be given. *Nichols v. Dixon* (Civ. App.) 85 S. W. 1052.

A furnisher of materials having notified the owner of its claim, and fixed its lien, when the owner had more than enough in his hands to pay it, it was immaterial that it did not give notice of the items of its bills as the materials were furnished. *Nichols v. Dixon*, 99 T. 263, 89 S. W. 765.

— **Itemized account—Necessity.**—A materialman in order to fix his lien must file an itemized account of his claim with the county clerk. Art. 5631 does not aid the lien, notwithstanding the fact that the original contractor fixed his lien by written contract, as this article requires. *Gilmer v. Wells*, 17 C. A. 436, 43 S. W. 1058.

Const. art. 16, § 37, declares that mechanics and materialmen shall have a lien for the value of their labor done or material furnished, and the legislature shall provide for the efficient enforcement of such liens. Held that, though the legislature had power to provide for the service of a written notice by a claimant on the owner before payment to the contractor, it had no right to require the filing of an account or bill of particulars with the county clerk within 90 days after accrual of the indebtedness in order to save a materialman's lien, except as against subsequent purchasers. *Beilharz v. Illingsworth* (Civ. App.) 132 S. W. 106.

— **Sufficiency.**—It is not necessary that the account should state a specific date for each item, the times between which the articles were delivered being stated. *Stuart v. Broome*, 59 T. 466. An account filed and recorded, after giving the date and names of the parties, continued as follows: "To painting house of Mr. P. in and outside, two coats, \$405." Held, that the contract being for the entire job, for a sum certain, the whole was properly aggregated in one item; second, the fact that the account did not bear the exact date when the work was completed was immaterial. *Pool v. Wedemeyer*, 56 T. 287; *Houston Cotton Exchange v. Crawley*, 3 App. C. C. § 138.

An account specified as "bill of sash and doors" and a "bill of mill work" is not an itemized account sufficient to fix a materialman's lien nor is an account having no date sufficient. *Meyers v. Wood*, 95 T. 67, 65 S. W. 174.

**Art. 5624. [3297] Form of fixing lien on unwritten contract.**—If there be no written contract, it shall be the duty of the person seeking to obtain the benefit of this chapter to deliver to the clerk of the county

court a sworn account as provided for in articles 5622 and 5623, to be filed and recorded as therein provided, and in such cases when the labor is performed for or the material is furnished to the owner of the building or improvements, or the owner or receiver of any railroad, the following form may be used, and will be sufficient to fix the meaning contemplated by this chapter:

The State of Texas,  
County of —.

A B, affiant, makes oath and says that the annexed is a true and correct account of the labor performed (or material furnished) C D, of — county, Texas, and that the prices thereof as set forth in said account hereto annexed are just and reasonable, and the same is unpaid; that said labor was performed (or material furnished, or both) for said C D at the time in said account mentioned, under and by virtue of a contract between affiant (or affiant's principal) and C D, and that due notice was given by affiant (or his principal) of the labor performed (or material furnished) in accordance with article 3296 [5623]; and affiant further makes oath and says that he is informed that C D was at the time said contract was made and entered into and said labor was performed (or material furnished) the owner of the house (or improvements) described as follows: (Here describe the house or improvements.) And the said house (or improvements) is situated upon a certain lot or tract of land which affiant is informed is owned by said C D, and which is described as follows: (Here describe the lot or lots or the land.) And this affiant (or his principal) claims a lien upon said house (or improvements) and upon said land. (Or if the material was furnished to any railroad company, its agent or receiver, to construct or repair its railroad or other property, then the affiant shall describe said railroad by giving its charter name and the name of the receiver, if any, and the agent of said company, if any, with whom the contract was made, and that affiant or his principal claims a lien on said railroad and its property); provided, however, a substantial compliance with the above form shall be deemed sufficient to fix and secure the lien. [Id. sec. 4. Amend. 1895, p. 194.]

**Art. 5625. [3298] Form when material is furnished to contractor or builder and not the owner of property.**—If the labor is performed for, or the material is furnished to, a contractor, builder, agent or receiver, and not the owner of the property, then the following form shall be deemed sufficient to fix the lien provided for by this chapter:

The State of Texas,  
County of —.

A B, affiant, makes oath and says that the annexed is a true and correct account of the labor performed for (or the material furnished to) C D, a contractor (builder, agent, or receiver) by affiant (or his principal), and the prices therefor as set forth in the annexed account are just and reasonable, and that the same is unpaid (or the sum of \$—, as shown by said account, is unpaid) after allowing all just and lawful offsets, payments and credits known to affiant; that said labor was performed (or material furnished, or both) for (or to) said C D, to be used in the erection of a house (or building or improvements, or in the repair of the house, building or improvement, or in the construction or improvement of the railroad or its property), owned, as affiant is informed and believes, by E F, of — county, Texas, and that said labor was performed (or material furnished, or both) to (or for) said C D, under and by virtue of his contract between affiant (or his principal) and said C D. (And in case of material furnished, affiant shall further swear that he has given to the owner, his agent or representative or receiver, notice in writing of each item of said account as required in article 3296 [5623] as the same was furnished to said C D; provided, however, that a sub-

stantial compliance with the above form shall be deemed sufficient to fix and secure the lien.) [Id. sec. 5. Amend. 1895, p. 194.]

See, also, notes under Art. 5635.

**Sufficiency of notice.**—Under this article service by the materialman on the owner of a copy of the contract with the contractor to furnish the materials and of a copy of the account filed with the county clerk was not a sufficient compliance with the statute to effect a lien on the property. *Spann v. King*, 56 C. A. 49, 121 S. W. 207.

**Art. 5626. [3299] Description of property.**—In case the contract is filed and recorded as provided for in article 5527 [5622], a like description of the house, building or improvement, and the lot or tract of land, shall accompany the same, as is required in the foregoing forms, except that the same is not required to be under oath. [Id. sec. 6.]

**Sufficiency of statement and description.**—A description which would be adequate in a conveyance is sufficient. *Swope v. Stantzenberger*, 59 T. 387. A description which can be rendered certain by the references in it is sufficient. *Stuart v. Broome*, 59 T. 466; *Gillespie v. Remington*, 66 T. 108, 18 S. W. 338.

If there is enough in the description to enable a party familiar with the locality to identify the premises with reasonable certainty, it will be sufficient. *Scholes v. Hughes*, 77 T. 482, 14 S. W. 148.

A claim of a lien on one of two lots is void for uncertainty. *Lyon v. Logan*, 66 T. 57, 17 S. W. 264.

It is not necessary that the interest or title of the debtor in the property should be set out in the statement. *Gillespie v. Remington*, 66 T. 108, 18 S. W. 338.

The lien of a mechanic or materialman, like the vendor's lien, arises out of the transaction and cannot be created by contract. If there appears enough in the contract to enable a party to identify the premises intended to be described, with reasonable certainty, to the exclusion of others, it will be sufficient. *Houston v. Myers*, 88 T. 126, 30 S. W. 912. See *Wright v. MacDonnell*, 30 S. W. 907, 88 T. 140.

**Art. 5627. [3300] What is sufficient diligence; what included on property in city and country.**—When a contract or account is filed and recorded as required by the preceding article, it shall be deemed sufficient diligence to fix and secure this lien. If this lien is against land in a city, town or village, it shall extend to or into the lot or lots upon which such house, building or improvement is situated, or upon which such labor was performed; and, if the lien is against land in the country, it shall extend to and include fifty acres upon which such house, building or improvements are situated, or upon which such labor has been performed; and, if the lien is against a railroad company, it shall extend to and include all of its property. [Id. sec. 7. Amend. 1895, p. 194.]

See notes under Art. 5621.

The words "preceding article" are used in place of "preceding sections" of the original act. The amendment of 1895 reads "preceding section."

**Extent of land affected.**—Where buildings are erected under an entire contract on three lots, one of which is separated from the others by intervening land, the lien for labor and materials furnished does not extend to each lot. It is because the land improved is one, that the improvement is regarded as one. *Guarantee Sav., Loan & Ins. Co. et al. v. Cash*, 99 T. 555, 91 S. W. 781.

**Effect of claiming lien on too much land.**—The fact that a lien is claimed on more land than it can lawfully cover cannot vitiate it in its application to so much of the land as the lien may properly apply to, unless the claim is intentionally or fraudulently made, or would operate to the injury of the owner or third persons. *Lyon v. Logan*, 68 T. 521, 5 S. W. 72, 2 Am. St. Rep. 511.

**Art. 5628. [3301] Priority of lien.**—The lien herein provided for shall attach to the house, building, improvements or railroad for which they were furnished, or the work was done, in preference to any prior lien or encumbrance or mortgage upon the land upon which the houses, buildings or improvements, or railroad, have been put, or labor performed, and the person enforcing the same may have such house, building or improvement, or any piece of the railroad property, sold separately; provided, any lien, encumbrance or mortgage on the land or improvement at the time of the inception of the lien herein provided for shall not be affected thereby, and holders of such liens need not be made parties in suits to foreclose liens herein provided for. [Id. sec. 8. Amend. 1895, p. 194.]

See 2 Tex. Civ. Prac. § 932, and notes.

**Priorities.**—If the account is duly filed within the time required by this article, the lien is superior to a mortgage executed after the work was begun. *Schultze v. Alamo Ice & Brewing Co.*, 21 S. W. 160, 2 C. A. 236.

The mere assent of a prior lienor to the erection of a building on a lot subject to his lien does not import a surrender of the priority of his lien. *Security Mortgage & Trust Co. v. Caruthers*, 11 C. A. 430, 32 S. W. 837.

The lien upon a building for labor and material is superior to all other liens. *Oriental Hotel Co. v. Griffiths*, 88 T. 574, 33 S. W. 652, 30 L. R. A. 765, 53 Am. St. Rep. 790; *People's Building, Loan & Savings Ass'n v. Clark* (Civ. App.) 33 S. W. 881.

Where one advanced money and took a mortgage while a contractor was at work on the building, held, that he was affected with notice of the contractor's lien. *Farmers' & Mechanics' Nat. Bank v. Taylor*, 91 T. 78, 40 S. W. 876, 966.

The purchaser of property upon which a mechanic's lien rests and which was sold to him subject to the lien, which the owner regarded as valid, cannot dispute it. *Michigan Savings & Loan Association v. Attebery*, 16 C. A. 222, 42 S. W. 569.

A deed of trust executed subsequent to a mechanic's lien does not impair the latter as the mechanic's lien would take precedence over it. *Mutual Building & Loan Ass'n v. McGee* (Civ. App.) 43 S. W. 1030.

Building and loan association which induced plaintiff to furnish material by accepting orders drawn by owner, which it afterwards refused to pay, cannot assert lien prior to plaintiff's mechanic's lien, for sums paid by it to complete building. *Southern Building & Loan Ass'n v. Bean* (Civ. App.) 49 S. W. 910.

Liens held to prevail against subsequent claim of wife that property was not community, but separate, property. *House v. Schulze*, 21 C. A. 243, 52 S. W. 654.

A mortgage given to raise money to complete a plant already projected held subsequent to liens for materials thereafter furnished. *Sullivan v. Texas Briquette & Coal Co.* (Civ. App.) 60 S. W. 330.

When a mortgage is given by a corporation on its own property to secure money to carry on business, subsequent labor and materialmen's liens on said property do not have priority over the mortgage lien. *Sullivan v. Texas Briquette Coal Co.*, 94 T. 541, 63 S. W. 307.

A mortgage lien on real estate covered improvements placed on the building which could not be severed from it, and was superior to a subsequent mechanic's lien for such improvements. *Citizens' Nat. Bank v. Strauss*, 29 C. A. 407, 69 S. W. 36.

Contract to furnish material held insufficient to give seller superior lien to that obtained under deed of trust of property, executed after date of contract, but before use of material. *Martin v. Texas Briquette & Coal Co.* (Civ. App.) 77 S. W. 651.

New contract for furnishing material held not to continue whatever lien prior contract for similar material had superior to that of deed of trust. *Id.*

A mechanic's lien for improvements, based on real estate subject to a vendor's lien, held subsequent to the latter. *Watson v. Markham & Reese*, 33 C. A. 476, 77 S. W. 660.

Knowledge by the seller of machinery that a house to hold it must be built by the buyer on credit was sufficient to charge the seller with notice of the building contractor's lien. *D. June & Co. v. Doke*, 35 C. A. 240, 80 S. W. 402.

Claims for material for construction or repair of the railroad are subordinate to rights of holders of mortgage bonds when the mortgage is on the road at time of inception of lien, unless the material was for new construction constituting a betterment, thus increasing security of mortgagee. *Waters-Pierce Oil Co. v. U. S. & Mex. T. Co.*, 44 C. A. 397, 99 S. W. 214.

A building erected by a tenant cannot be subjected to a mechanic's lien for materials as against a subsequent purchaser for valuable consideration, without notice of the lien or of the tenant's claim to the building. *Denison Lumber Co. v. Milburn* (Civ. App.) 107 S. W. 1161.

The claim of a materialman for money in the hands of a city retained from money due a contractor held superior to the claim of an assignee of another materialman under garnishment proceedings against the city. *Ross v. Beaumont Brick Co.*, 53 C. A. 469, 116 S. W. 643.

Under this article, mechanics' liens do not have preference over a prior lien or incumbrance on the land at the inception of the mechanics' liens, and a mechanic's lien is not superior to a prior vendor's lien. *Hubbell v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 313.

Claims by a materialman for extras furnished to the owner to enable him to complete building after the contractor had abandoned the same held entitled to preference over claims for materials furnished the contractor. *Bellharz v. Illingsworth* (Civ. App.) 132 S. W. 106.

A mechanic's and materialman's lien for improvements held inferior to certain other liens. *Quinn v. Dickinson* (Civ. App.) 146 S. W. 993.

— **Estoppel to assert priority.**—An agreement by a mechanic's lien holder held to estop him from asserting that his lien was prior to that of another. *Cain v. Texas Building & Loan Ass'n*, 21 C. A. 61, 51 S. W. 879.

— **Application of payments.**—Where a deed of trust was executed to a building and loan association to discharge a note for the purchase price of a lot and to pay for material used in building a house on it, it was proper, on rescission of the contract, to apply plaintiff's payments to a discharge of the vendor's lien and not to the debt for material. *North Texas Sav. & Bldg. Ass'n v. Jackson* (Civ. App.) 63 S. W. 344.

— **Sale of property and apportionment of proceeds.**—Held, that the proceeds of the sale of land should be paid pro rata between a mortgagee and mechanic's lienor. *Owens v. Heibredner* (Civ. App.) 44 S. W. 1079.

A sale of both house and lot to satisfy a mechanic's lien on the one and a vendor's lien on the other, held by different persons, held proper, where the house could not be removed from the lot without great loss. *Kahler v. Carruthers*, 18 C. A. 216, 45 S. W. 160.

Where one person had a first lien on a building and lot, and another person a prior lien on machinery in the building, it was proper to order the building and lot and the machinery sold separately. *D. June & Co. v. Doke*, 35 C. A. 240, 80 S. W. 402.

**Art. 5629. [3302] When improvements sold separately, purchaser may remove.**—When the house, building, improvement, or any piece

of the railroad's property are sold separately, the officers making the sale shall place the purchaser in possession thereof; and such purchaser shall have the right to remove the same within a reasonable time from the date of the purchase. [Id. sec. 9. Amend. 1895, p. 194.]

**Art. 5630. [3303] Sale must be under judgment.**—Every sale must be upon judgment rendered by some court of competent jurisdiction, foreclosing such lien and ordering sale of such property. [Id. sec. 10.]

**Art. 5631. [3304] On homestead, how fixed.**—When material is furnished, labor performed, erections or repairs made upon a homestead, if the owner thereof is a married man, then to fix and secure the lien upon the same, it shall be necessary for the person or persons who furnished the material or performed the labor, before such material is furnished or labor is performed, to make and enter into a contract in writing, setting forth the terms thereof, which shall be signed by the owner and his wife, and privily acknowledged by her, as is required in making sale of homestead. And such contract shall be recorded in the office of the county clerk in the county where such homestead is situated, in a well-bound book to be kept for that purpose; provided, when such contract has been made and entered into by the husband and wife and the contractor or builder, and the same has been recorded, as heretofore provided, then the same shall inure to the benefit of any and all persons who shall furnish material or labor thereon for such contractor or builder. [Id. sec. 11.]

**In general.**—Acts of preparation on the premises are not necessary. The execution of a building contract, coupled with the intention to use the lot as a homestead, is sufficient to establish its character. *Cameron v. Gebhard*, 85 T. 610, 22 S. W. 1033, 34 Am. St. Rep. 832; *Heady v. Bexar Building & Loan Ass'n (Civ. App.)* 26 S. W. 468. See *Gallagher v. Keller*, 29 S. W. 647, 87 T. 472.

A builder's lien may be given to secure payment of the value of the labor and material actually expended in making improvements on the homestead. *Pioneer Savings & Loan Co. v. Edwards*, 12 C. A. 556, 34 S. W. 192; *Claes v. Association*, 83 T. 50, 18 S. W. 421; *Lippencott v. York*, 86 T. 276, 24 S. W. 275; *Luzenberg v. Association*, 29 S. W. 237, 9 C. A. 261. As to the lien of the builder of a party-wall, see *Knowles v. Ott (Civ. App.)* 34 S. W. 295.

A contractor agreed with husband and wife to furnish labor and material to improve their homestead. Contractor furnished money to the husband who paid for the labor and material. It was held that the contractor had a lien. *First Nat. Bank of Muscogee v. Campbell (Civ. App.)* 46 S. W. 845.

The provisions of the mechanic's lien law as to enforcing the lien held not to apply to liens created under the constitution for the improvement of homesteads. *Myers v. Humphreys (Civ. App.)* 47 S. W. 812.

Where the building was intended as a homestead, and the holders of mechanics' liens had knowledge sufficient to put them on inquiry as to such intention, their liens held not entitled to priority over a claim under the original contract by an assignee who completed the building. *Haldeman v. McDonald (Civ. App.)* 58 S. W. 1040.

If a building is erected to be occupied by the owner and his family as a homestead, and the owner and his family move into the house before it is completed and thereafter occupy it as a home, the property becomes a homestead from the inception of the contract for the construction of the building, and hence materialmen furnishing material to the contractors after the making of the contract can acquire no lien. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co. (Civ. App.)* 143 S. W. 317.

**Homestead defined.**—See Art. 3786.

**Necessity for compliance with requirements.**—When before or after the contract is performed an express lien is given by a written contract, it may be secured by its record. *Mundine v. Berwin*, 62 T. 341; *Lyon v. Elser*, 72 T. 304, 12 S. W. 177; *Claes v. Dallas Loan Ass'n*, 83 T. 50, 18 S. W. 421. But a lien upon the homestead must be secured under this article. *Cameron v. Marshall*, 65 T. 7.

An express agreement in a mechanic's contract, that he shall have a lien upon the homestead as provided by law, will not create a lien until all the requirements of the statute have been complied with. *Cameron v. Marshall*, 65 T. 7; *Building & L. Ass'n v. Logan (Civ. App.)* 33 S. W. 1088.

Material furnished for the erection of a building on a homestead will not support a mechanic's lien, in the absence of a written contract for such materials signed by the owner and his wife, as required by Const. art. 16, § 50. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co. (Civ. App.)* 143 S. W. 317.

**Sufficiency of contract.**—The contract, in order to secure a lien, must be in writing. *Huff v. Clark*, 59 T. 347; *Cameron v. Gebhard (Civ. App.)* 21 S. W. 786. If the contract is for material it must be executed before the purchase. *Lyon v. Ozee*, 66 T. 95, 17 S. W. 405.

*F. T. and L. T., husband and wife, executed to H. & Co. their joint promissory note for \$1,221, reciting therein that the amount for which it was given was for a balance due to payees for lumber and material furnished in the construction and repair of their homestead and hotel, situated, etc., and that the note constituted a builder's lien on the property until paid; which note was duly acknowledged and recorded.*

In a suit by H. & Co. to recover on the note and to enforce their lien on the property, held: (1) That the presumption is that the property was the homestead of the defendants. (2) That the material having been furnished prior to, and not in pursuance of, the contract, the note did not create a lien upon the homestead. (3) That, independent of the mechanic's lien which the law creates, such a note as the one described would constitute an express lien by contract, enforceable except as against the homestead. *Taylor v. Huck*, 65 T. 238.

When the contract has been properly executed the remedies of the parties are the same as under other contracts. *Fullenwider v. Longmoor*, 73 T. 480, 11 S. W. 500.

The consent of the wife must precede the purchase of the material. *Lyon v. Ozee*, 66 T. 96, 17 S. W. 405; *Walker v. House* (Civ. App.) 24 S. W. 82.

Where the contract for the erection of a building and the note for the price are on the same piece of paper, they need not be separately acknowledged. *Bosley v. Pease* (Civ. App.) 22 S. W. 516.

The contract need not be recorded in a book kept for that purpose. It may be recorded in a book in which other instruments are recorded. *Id.*

A contract under this article should be signed and acknowledged by the husband and wife. *Kalamazoo Nat. Bank v. Johnson*, 24 S. W. 350, 5 C. A. 535.

A mechanic's lien cannot be fixed upon the business homestead of the head of a family, except by contract signed by the husband and wife and duly acknowledged. *Security Mortgage & Trust Co. v. Caruthers*, 11 C. A. 430, 32 S. W. 337.

Contract for improvement of homestead held substantially performed, so as to entitle contractor to mechanic's lien. *First Nat. Bank v. Campbell* (Civ. App.) 46 S. W. 845.

If an attorney was the agent of lienholders and fraudulently represented to a married woman that he could and would foreclose claims for improvements on her homestead, which had not become a lien thereon by compliance with this article, and she was thereby induced or coerced into executing the deed and conveying the property to him, to secure such lien claims in the belief that such representations were true, such conveyance was voidable. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

**Certificate.**—Failure to certify a wife's acknowledgment to a building contract, on which a claim to a lien on a homestead is based, held not to avoid the contract as to a mechanic's lien. *Interstate Building & Loan Ass'n v. Goforth*, 94 T. 259, 59 S. W. 871.

— **Action to correct.**—See Art. 6852.

**Personal judgment.**—In the absence of priority of contract the right to personal judgment under the statute is dependent at least upon the right to a lien. There being no lien and the property being a homestead, there can be no personal judgment. *Muller v. McLaughlin*, 37 C. A. 449, 84 S. W. 689.

**Estoppel to allege invalidity of lien.**—In proceedings to foreclose a mechanic's lien on a homestead, held that a wife was not estopped from alleging the invalidity of the lien by a written waiver of the failure to perform the building contract, executed by the husband. *Rhodes v. Jones*, 26 C. A. 568, 64 S. W. 699.

**Art. 5632. [3305] Notice of sub-contractor or laborer to owner of property.**—Every person, except the original contractor or builder, or those claiming under article 5523 [5623] who may wish to avail himself of the benefits of this law, shall give at least ten days' notice in writing before the filing of the lien, as herein required, to the owner or owners, or agent, or either of them, that he holds a claim against such house, building or improvement, setting forth the amount, and from whom the same is due; and thereafter said owner, or owners, or agent, shall be authorized to retain in his hands the amount claimed until the same is settled or determined not to be owing. [Id. sec. 12.]

See Art. 5623 and notes.

*Cited*, *Johnson v. Griffiths & Co.* (Civ. App.) 35 S. W. 683; *Muller v. McLaughlin*, 37 C. A. 449, 84 S. W. 688.

**Construction.**—The owner of property who has accepted estimates and becomes obligated to pay before notice of sub-contractor's claims, is protected to the extent of his payments on such estimates. *House v. Schulze*, 21 C. A. 243, 52 S. W. 654.

This article does not create any right, in favor of the persons to whom it refers, to the fund in question. Its purpose is to aid such persons in respect to a lien on the property and to give them a lien in a proper case after the owner has paid the contractor in full. The retention by the owner of the unpaid contract price, which this and succeeding articles authorize, is to afford him a means of protection against the threatened lien. He may use such fund to satisfy such claim and thereby avoid liability for it, or a lien upon his property. But he is not restrained by said article from using the funds as he may please, except at the peril of having himself or his property subjected to a charge to that extent. Where a contractor employs sub-contractors in building a house, the latter's liens on the house are superior to the contractor's where he has failed to pay the sub-contractors and their right to the fund which is to pay for the house is superior to his. *Texas Builders' Supply Co. v. National Loan & Investment Co.*, 22 C. A. 349, 54 S. W. 1059.

**Effect of notice.**—If the owner of the property is indebted to the contractor, the service of the notice in fixing the lien, if followed by the acts required to fix it, secures the fund in the hands of the owner under a contract, as does a writ of garnishment in an ordinary case, subject to a pro rata distribution with other lienholders under the contract. *Fullenwider v. Longmoor*, 73 T. 480, 11 S. W. 500.

The owner of land on which a building is being erected under contract is not liable to a sub-contractor for any amount paid to the contractor before such owner is served with notice of a sub-contractor's claim. After the lien is established, the sub-contractor



tor's right relates back to the date of notice to the owner and becomes a lien for such amount then due, or which may have subsequently accrued in favor of, the contractor, not to exceed the sub-contractor's demand, there being no other mechanic's lien thereon. *Dudley v. Jones*, 77 T. 69, 14 S. W. 335; *Burt v. Parker County*, 77 T. 333, 14 S. W. 335.

**Art. 5633. [3306] Diligence, what is sufficient.**—A compliance with the provisions of the preceding article shall be deemed sufficient diligence to fix the liability of the owner of such house, building or improvement for the payment of such demand, subject to the subsequent provisions of this law. [Id. sec. 13.]

See *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683; *Muller v. McLaughlin*, 37 C. A. 449, 84 S. W. 688.

**Art. 5634. [3307] Contractor to be furnished by owner with account.**—Whenever any such account shall be placed in the hands of such owner, or his authorized agent, it shall be the duty of such owner, or his agent, to furnish his contractor with a true copy of said attested account; and, if said contractor shall not, within ten days after the receipt of said copy of attested account, give the owner written notice that he intends to dispute said claim, he shall be considered as assenting to the demand, which shall be paid by the owner when it becomes due. [Acts 1876, p. 91, sec. 7.]

See *Muller v. McLaughlin*, 37 C. A. 449, 84 S. W. 688; *Johnson v. Griffiths & Co.* (Civ. App.) 135 S. W. 683.

**Art. 5635. [3308] Original contractor to defend suits by sub-contractors, etc.**—In all cases when a lien shall be filed under a provision of this chapter by any person other than the original contractor or builder, it shall be the duty of the original contractor to defend any action brought thereupon, at his own expense; and, during the pending of such action, the owner may withhold from the contractor or builder the amount of money for which such lien shall be filed, and, in case of judgment against the owner or his property upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of said judgment and costs; and, if he shall have settled with the contractor or builder in full, he shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor or builder was originally the party liable. But no owner or proprietor shall in any case be required to pay, nor his property be liable for, any money that he may have paid to the contractor before the fixing of the lien or before he has received written notice of the existence of the debt; and all sub-contractors, laborers and material men shall have preference over other creditors of the principal contractor or builder; provided, further, a copy of each bill of lumber furnished to the contractor or builder, as the same is furnished, shall be delivered to the owner of said homestead, said bill specifying each item so furnished, how much is paid thereon, and what is due for lumber or material furnished for said contract prior thereto; provided, when the debt is paid under the contract for such building or improvements, the party for whose interest the contract was recorded shall enter a relinquishment showing a full compliance of said contract to the extent of all money due them from the original contractor or builder on account of labor done or material furnished; and the money due said original contractor or builder from the person owning or having improvements made shall not be garnished by other creditors to the prejudice of such sub-contractors, mechanics, laborers or material men. [Id. sec. 14.]

See *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

**In general.**—If material has been furnished to a sub-contractor and the law has been compiled with so that a lien is fixed upon the property and the owner owes to the original contractor a sufficient amount of the contract price to settle the claim, the property may be subjected to its payment although the contractor may have paid to the sub-contractor more than the latter was entitled to receive. *Padgitt v. Dallas Brick & Const. Co.*, 92 T. 626, 50 S. W. 1010.

In order for a claimant to have filed his lien, "as provided by this law," he must have given the notice prescribed by this article and Arts. 5623 and 5625, and in filing his claim must have made affidavit to the giving of such notice, and if he has omitted to do

this he is excluded by the first proviso in Art. 5623 from the equality declared by the first part of that article. *Nichols v. Dixon*, 99 T. 263, 89 S. W. 766.

Under this article and Arts. 5623 and 5637, the owner cannot be held liable to materialmen for sums he has bound himself to pay on written orders of the contractor, where no notice has been given, though Art. 5637 also declares that liens for material furnished shall be on an equal footing. *Beilharz v. Illingsworth* (Civ. App.) 132 S. W. 106.

**Art. 5636. [3309] When indebtedness accrues.**—When labor is performed by the day or week, then the indebtedness shall be deemed to have accrued at the end of each week during which labor is performed. When material is furnished, the indebtedness shall be deemed to have accrued at the date of the last delivery of such material, unless there is an agreement to pay for such material at a specified time. [Id. sec. 15.]

**Accrual of indebtedness.**—When lumber furnished on contract is delivered from time to time, the indebtedness accrues upon the last delivery. *Matthews v. Brewing Ass'n*, 83 T. 604, 19 S. W. 150.

When material is furnished for the construction of a building, an indebtedness is deemed to have accrued from the date of the last delivery of such material, unless there is an agreement to pay at a specified time. *Baxter Lumber Co. v. Nickell* (Civ. App.) 60 S. W. 451.

**Accrual of lien.**—See notes under Art. 5621.

**Art. 5637. [3310] Liens upon equal footing.**—The liens for work and labor done or material furnished, as provided in this chapter, shall be upon an equal footing, without reference to date of filing the account or lien; and, in all cases when a sale shall be ordered and the property sold, which may be described in any account or lien, the proceeds arising from such sale, if not sufficient to discharge all the liens against the same, without reference to the date of filing the account or lien, shall be paid pro rata on the respective liens; provided, such accounts or liens shall have been filed and suit brought as provided by this law; provided, that nothing in this law shall be so construed as in any manner affecting the contract between said owner and original contractor as to the amount, manner or time of payment of said contract price. [Id. sec. 16.]

See, also, notes under Art. 5635.

**In general.**—All liens for work and labor done or material furnished, are put upon an equal footing by the statute without reference to the date of filing the account or lien. *Baumgarten v. Mauer* (Civ. App.) 60 S. W. 453.

Equality is given by this article only to such liens as have been filed "as provided by this law," and one can only secure the lien by showing that he has done that which the statute requires. *Nichols v. Dixon*, 99 T. 263, 89 S. W. 766.

Where a contractor has received a large part of the contract price and then abandons the contract, the amount to be distributed among those who have fixed their liens under the statute is not the balance of the contract price remaining in the hands of the owner, but the amount left in his hands after he has paid others for the completion of the building according to the contract. *Slade v. Amarillo Lumber Co.* (Civ. App.) 93 S. W. 475.

**Art. 5638. Enforcement of.**—Whenever any mechanic or artisan shall perform any labor or service for any contractor, sub-contractor, agent or receiver, in the erection of any house, building, fixture or improvement, or to repair any house, building, fixture or improvement, or as a necessary incident in connection with such work of construction or repair, it shall be the duty of the owner of such property, or such agent or receiver, to retain in his hands, to secure the payment of the artisans and mechanics who may perform such labor or service, ten per cent of the contract price of such building, fixture or improvement, or the repair thereof, and, in the event there be no fixed contract price, then a sum equivalent to ten per cent of the value of such building, fixture or improvement, or the repair thereof; provided, that the amount so retained by the owner, agent or receiver as the work progresses shall not fall below one-tenth of the value of such building, fixture or improvement, or the repair thereof, measured by the proportion that the work done bears to the work to be done thereon, and using the contract price or the reasonable value of the completed building, fixture or improvement, or the repair thereof, as a basis of computation of value. Such fund or funds shall be retained by the owner, or agent, or receiver for the purpose herein named during the progress of the work of con-

struction upon such building, fixture or improvement, or the repair thereon, and for thirty days subsequent to the completion thereof. Any mechanic or artisan who may file a mechanic's lien upon said building, fixture or improvement so made or erected or repaired in accordance with the law applying thereto, shall have a preference lien upon said fund so retained in the hands of such owner, or agent, or receiver; provided, that all mechanics and artisans filing such lien shall be entitled to share ratably therein. In the event the owner of such building, fixture or improvement, or such agent, or receiver shall refuse or fail to comply with the provisions of this law, and to retain such fund or funds in his hands as herein provided, the mechanics and artisans performing work thereon and in connection therewith, who may file liens thereon in accordance with law, shall have ratably among themselves preference liens, to be preferred above all other liens and claims whatsoever upon such house, building, structure, fixture or improvement, and all its properties, and on the lot or lots of land necessarily connected therewith, to secure payment for such labor thereon. The provisions of this article shall not be construed to deprive artisans and mechanics of the remedies given them for enforcement of their liens as set out in other provisions of this chapter, except in so far as they may be in conflict herewith; and the provisions of this article shall be cumulative of the other provisions of this chapter. [Acts 1909, p. 184, sec. 1.]

**Enforcement in general.**—As to foreclosure of mechanics' liens, see *Land Mortgage Bank of Texas v. Quannah Hotel* (Civ. App.) 32 S. W. 573; *Id.*, 89 T. 332, 34 S. W. 730.

**Liberal construction of statute.**—As regards the enforcement of mechanics' liens the rule seems to be that, where the lien is given by the constitution, the law giving the remedy is to be construed liberally; in other cases, strictly. *Warner Elevator Mfg. Co. v. Maverick*, 88 T. 489, 30 S. W. 437, 31 S. W. 353, 499; *Tyler Tap R. Co. v. Driscoll*, 52 T. 13; *Central & M. R. Co. v. Henning*, 52 T. 466.

Under a petition to foreclose a mechanic's lien, showing separate contracts for buildings on separate lots, held not error to foreclose the lien on all the lots, it appearing that the contracts were made for a firm, which owned the equitable title. *Berry v. McAdams* (Civ. App.) 50 S. W. 952.

Where a discount was credited to defendant by a materialman by mistake and without consideration, the materialman was not bound to allow the same. *Noyes v. Smith* (Civ. App.) 77 S. W. 649.

The action was to recover the balance due under a contract for the erection of a house and to foreclose a materialman's lien on the lot, and the contract, by the inadvertence of the scrivener, recited that plaintiff lumber company, was "a corporation," when it was a copartnership, and described the lot as situated in a different county from that in which it was situated, but the material furnished was used in erecting the dwelling specified in the contract on the lot specified therein. Held, that the contract would be corrected and enforced according to the parties' intention in the same action. *Howell v. McMurry Lumber Co.* (Civ. App.) 132 S. W. 848.

Where, in an action by a materialman against the contractor, his surety, and the owner, another materialman, intervened, and the owner paid into court the balance found due on the contract, which was substituted for the owner, claimants, in order to participate in the distribution of the fund, held required to establish valid liens enforceable against the property of the owner. *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

Where plaintiff never had nor was entitled to the possession of property attached by him in an action for a debt, he could not, after failing to establish defendant's ownership of the property, in that action enforce a laborer's lien against the property. *Jackson v. Downs* (Civ. App.) 149 S. W. 236.

A mechanic's lien contract, transferred by the original lienor to a building and loan company to secure it on a loan made the owner of the house and her husband, cannot be foreclosed to pay attorney's fees due under the loan agreement. *Cain v. Bonner* (Civ. App.) 149 S. W. 702.

**Evidence.**—In a suit to foreclose a materialman's lien, evidence held to warrant a finding that the lumber was used in the construction of the building on which the lien was sought. *Noyes v. Smith* (Civ. App.) 77 S. W. 649.

In a proceeding by a subcontractor to enforce a mechanic's lien for a balance owed by the owner to the contractor, evidence held insufficient to sustain a judgment for plaintiff. *Carson v. Gilchrist* (Civ. App.) 136 S. W. 529.

In an action against a railroad to foreclose a lien, evidence held to support a finding that the balance due a lienor represented only his reasonable wages and the value of the use of his teams and tools; and that he made no profit above the reasonable value of his own and his employes' labor and the use of his teams and tools. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 154 S. W. 1027.

**Judgment on foreclosure.**—See Art. 2000.

**Foreclosure sale.**—A purchaser at foreclosure of mechanic's liens is subrogated to the rights of the mechanics. *Owens v. Heidebreder* (Civ. App.) 44 S. W. 1079.

The owner of property subject to a mechanic's lien may insist on his nonexempt property being first subjected thereto, before selling his homestead. *King v. C. M. Hapgood Shoe Co.*, 21 C. A. 217, 51 S. W. 532.

**Art. 5639. Release to be filed by mechanics, etc., when.**—All parties who are authorized under this law to file a lien, and have done so, and had such lien recorded, shall, when such lien is paid or satisfied, or have received their proper lienable parts for which the owner of the building would be liable under this law, shall record a relinquishment and satisfaction of such lien. [Acts 1876, p. 91, sec. 18.]

## CHAPTER THREE

### LIENS OF RAILROAD LABORERS

Art. 5640. Railroad laborers to have lien.	Art. 5642. Venue.
5641. Lien, how foreclosed.	5643. Lien ceases, when.

**Article 5640. [3312] Railroad laborers, etc., to have lien, when.**—All mechanics, laborers and operatives who may have performed labor, or worked with tools, teams or otherwise, in the construction, operation or repair of any railroad, locomotive, car or other equipment of a railroad, and to whom wages are due or owing for such work, or for the work of tools or teams thus employed, or for work otherwise performed, shall hereafter have a lien prior to all others upon such railroad and its equipments for the amount due him for personal services, or for the use of tools or teams. [Acts 1887, p. 17, sec. 1.]

**In general.**—Where defendant issued scrip to its employés, payable when its first train should reach a certain point over the new road, and subsequently abandoned work, so that the condition never happened, it could not take advantage of its own wrong by postponing collection of workmen's claims on ground that such scrip had never matured. *Gulf & B. V. Ry. Co. v. Winder*, 26 C. A. 263, 63 S. W. 1043.

Where it appeared that interveners, claiming a lien for construction work on a railroad, were not entitled to such lien, held error to refuse to dismiss their pleas of intervention. *Id.*

The term "railroad" as used in this article is confined to the limits of the right of way of such railroads. *National Bank v. Gulf, C. & S. F. Ry. Co.*, 95 T. 176, 66 S. W. 205.

Appointment of a receiver for a railroad held not to excuse noncompliance with statute to fix and secure liens. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 377.

In an action for the price of railroad material, held, that a finding of liability against the defendant was necessarily a finding of the existence of a lien. *Richardson v. Herbert* (Civ. App.) 135 S. W. 623.

To entitle one to a laborer's lien under this article it must appear that claimant was entitled to wages for actual labor done by him. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 140 S. W. 111.

**Constitutionality.**—The legislature may provide that the claims of employés of railroads shall be liens prior in right to any mortgage or conveyance made subsequent to the passage of the statute. *Hubbell v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 313.

**Who entitled to lien.**—The foreman or superintendent of a company of laborers is within the meaning of the statute, and entitled to a lien for his services. *T. & St. L. R. R. Co. v. Allen*, 1 App. C. C. § 569.

Under this article the fact that a lien claimant contracted with the general contractor to move dirt and rock at a specified price per cubic yard and clear land at a specified price per acre did not, of itself, render him a subcontractor rather than a laborer, or deprive him of his right to a lien; that being only the method employed to determine the price to be paid for the work. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 154 S. W. 1027.

— **Laborers under subcontractor.**—The laborers under a subcontractor are entitled to the lien. *A. & N. W. Ry. Co. v. Daniels*, 62 T. 70.

— **Party furnishing teams, etc.**—A party who furnishes teams and tools and performs work on a railroad has a valid and subsisting lien upon the road and its equipments to secure the payment of such indebtedness. *G. B. & S. W. Ry. Co. v. Fontaine*, 23 C. A. 519, 57 S. W. 874.

A subcontractor, letting teams to a contractor for work on a railroad, held not to have a lien thereon under this article. *Eastern Texas R. Co. v. Foley*, 30 C. A. 129, 69 S. W. 1030.

Parties who clear weeds, etc., off of the right of way of railroad with their own labor and teams are laborers, and the work so done is work performed in the operation and repair of the railroad within the meaning of this article and Art. 5641, and gives them a lien against the railroad and equipments. *Missouri, K. & T. Ry. Co. v. Bryan* (Civ. App.) 107 S. W. 577.

Under this article, a person who, while work was being done in the construction of a railroad by his employés and by the use of his teams and tools, worked in the black-

smith shop and procured supplies for the use of his men and teams and for the repair of his tools was entitled to a lien for such work, where it was necessary for the proper prosecution of the work on the grade. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 154 S. W. 1027.

Under this article a person who hired his teams and tools to the general contractor, and who neither worked with them, nor furnished any one to work with them, was not entitled to a lien. *Id.*

**Labor in erection of machine shops, etc.**—This article does not give mechanics and laborers who perform labor in the erection of machine shops, workshops, roundhouses, etc., a lien on such structures, but such mechanics and laborers, in order to fix liens are governed by the provisions of Art. 5621 et seq. *National Bank v. Gulf, C. & S. F. Ry. Co.*, 95 T. 176, 66 S. W. 205.

— **Civil engineer.**—A civil engineer is not a "laborer" within the meaning of this article, so as to give him a lien for his services or use of tools upon the railroad. *Gulf & B. V. Ry. Co. v. Berry*, 31 C. A. 408, 72 S. W. 1050.

— **Contractors and subcontractors.**—Contractors and subcontractors are not within the provisions of this article. *Krakauer v. Locke*, 25 S. W. 700, 6 C. A. 446; *Parks v. Locke* (Civ. App.) 25 S. W. 702.

The statute does not give a lien to contractors or subcontractors, but only to laborers, mechanics and operatives as such, for the work of tools and teams. It is only those who work as mechanics, laborers or operatives with tools and teams who have the lien. *Eastern Texas Ry. Co. v. Foley*, 30 C. A. 129, 69 S. W. 1030.

Where a contractor for construction work for a railroad owned all the stock of the railroad, the contractor held without authority to incur the railroad property with a lien in its own favor. *United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Civ. App.) 112 S. W. 447.

A subcontractor on railroad construction work has no laborer's lien for wages for so much of the amount due as was earned by his own employes though he oversaw their work. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 140 S. W. 111.

— **Bookkeeper and auditor.**—A bookkeeper and auditor in the employ of a company which built a railroad has no lien thereon for the amount due him for his services. *Milligan v. S. A. & G. S. Ry. Co.* (Civ. App.) 46 S. W. 918.

**Property subject to lien.**—The lien is confined to the roadbed and its equipments, and does not include the movable property not part of the equipments of the road. *T. & St. L. R. R. Co. v. Allen*, 1 App. C. C. § 572.

Under this article there is a right to a lien either on the right of way or the equipment. *Concho, S. S. & L. V. Ry. Co. v. Kennedy* (Civ. App.) 146 S. W. 345.

Under this article, a judgment giving a lien on the rolling stock, movable equipments, "and other personal property," was unauthorized as to such "personal property." *Id.*

**Assignment.**—Time checks for labor on a railroad done for a contractor, and accounts for wages, are assignable, and carry the lien with them. *T. & P. R. R. Co. v. McMullen*, 1 App. C. C. § 160; *T. & St. L. R. R. Co. v. Allen*, 1 App. C. C. § 570; *A. & N. W. R. R. Co. v. Rucker*, 59 T. 587; *A. & N. W. R. R. Co. v. Daniels*, 62 T. 70.

The lien of laborers for work performed in constructing a railroad passes to the person purchasing time checks given in payment of the wages of such laborers. *Texas & N. O. Ry. Co. v. Dorman* (Civ. App.) 62 S. W. 1086.

**Priorities.**—Certificates issued to pay off labor liens existing against the road when it goes into the hands of a receiver are superior to all other liens, and the court is authorized to order the receiver to issue such certificates by means of which to raise money to pay off the liens. *Kampmann v. Sullivan*, 26 C. A. 308, 63 S. W. 176.

Where the court in railroad receivership proceedings authorized the issuance of receivers' certificates for labor performed and material furnished before the appointment of the receiver, the certificates so far as they were for labor performed were superior to a vendor's lien for the price of a part of the right of way conveyed to the railroad, but the vendor's lien was superior to the certificates so far as they were issued for materials furnished; the statute making the lien of railroad laborers prior to all other liens. *Hubbell v. Texas Southern Ry.* (Civ. App.) 126 S. W. 313.

**Necessity of notice.**—A laborer's failure to give notice to the railroad company of his claim against contractors for wages before the company's settlement with the contractor would not defeat a right to a lien under this article prior to all others upon the railroad for the amounts due for personal services, etc. *Ft. Worth & D. C. Ry. Co. v. Read Bros. & Montgomery* (Civ. App.) 140 S. W. 111.

**Contract with construction company.**—Contract between defendant company and a construction company that payment for construction work was not to be made until defendant's bonds were floated held not to affect the rights of laborers working under such construction company to a lien for their work. *Gulf & B. V. Ry. Co. v. Winder*, 26 C. A. 263, 63 S. W. 1043.

Where a construction company makes a contract with the railway company to construct the roadbed and do the grading, the contract relates back and makes the construction company the contractor of the railway company ab initio, and those who performed personal services for the construction company and furnished tools and teams have a lien on the road to secure the pay due them. *Id.*

**Art. 5641. [3313] Lien, how foreclosed.**—In all suits for wages due by a railroad company for such labor as heretofore mentioned, upon proof being satisfactorily made that such labor had been performed, either at the instance of said company, a contractor or sub-contractor, or agent of said company, and that such wages are due, and the lien given by the preceding article is sought to be enforced, it shall be the

duty of the court having jurisdiction to try the same to render judgment for the amount of wages found to be due, and to adjudge and order said railroad and equipments, or so much thereof as may be necessary, to be sold to satisfy said judgment. In all suits of this kind, it shall not be necessary for the plaintiff to make other lienholders defendants hereto, but such lienholders may intervene and become parties thereto and have their respective rights adjusted and determined by the court. [Acts 1879, p. 8, sec. 2.]

**Jurisdiction.**—See notes under Art. 1705.

**Necessity for perfecting lien.**—Filing of suit to foreclose lien on a railroad, however early, held not to dispense with statutory steps to perfect lien. *United States & Mexican Trust Co. v. Western Supply & Mfg. Co.* (Civ. App.) 109 S. W. 377.

**Parties in general.**—See notes under § 70 at end of Title 37, Chapter 5.

**Action directly against company.**—Mechanics, etc., may maintain an action directly against the company to enforce the statutory lien for work done by them under a sub-contractor. *A. & N. W. R. Co. v. Daniels*, 62 T. 70.

**Judgment on foreclosure.**—See Art. 2000.

**Right to sell part of railroad and equipment.**—This article seems to contemplate that a part only of the railroad and its equipments may be sold to satisfy the laborer's lien. *Weddington v. Carver*, 45 C. A. 68, 100 S. W. 788.

**Art. 5642. [3314] Venue.**—Suits by mechanics, laborers and operatives for their wages due by railroad companies, may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action, or part thereof, accrued, or in the county in which the principal office of such railroad company is situated, and in all such suits service of process may be made in the manner now required by law. [Id. sec. 3.]

**Art. 5643. [3315] Lien ceases, when.**—The lien created by article 5640 shall cease to be operative in twelve months after the creation of the lien, if no steps be sooner taken to enforce it. [Id. sec. 4.]

**Construed.**—Read altogether, this and the three immediately preceding articles, leave little room as to the intention of the legislature expressed in this article. The only method provided for the enforcement of the lien is by suit, which is only maintainable after the labor is performed and after the wages are due (Art. 5641), and it would be unreasonable to suppose that limitation should begin to run before the suit could be brought. Any other interpretation might materially interfere with the right of a laborer to make contract for the payment of his wages in future, and would fall far short of that liberal construction so uniformly extended to this class of statute. *Gulf & E. V. Ry. Co. v. Berry*, 31 C. A. 408, 72 S. W. 1050.

## CHAPTER FOUR

### LIENS OF ACCOUNTANTS, BOOK-KEEPERS, ARTISANS, CRAFTSMEN, FACTORY OPERATIVES, MILL OPER- ATIVES, SERVANTS, MECHANICS, QUARRYMEN, COMMON LABORERS AND FARM HANDS

Art.

5644. Who entitled to liens.

5644a. Laws repealed.

5645. Liens, how fixed.

5646. Wages, when paid.

Art.

5647. Right of assignment.

5648. Lien ceases when.

5649. Laws not repealed.

**Article 5644. Who entitled to liens.**—That whenever any clerk, accountant, book-keeper, artisan, craftsman, factory operator, mill operator, servant, mechanic, quarryman, or common laborer, farm hand, male or female, may labor or perform any service in any office, store, saloon, hotel, shop, mine, quarry, factory or mill of any character, or who may perform any service in the cutting, preparation, hauling, handling, or transporting to any mill, or other point for sale, manufacture or other disposition, logs or timber, or who shall perform any service upon any wagon, cart, tram, or railroad or other means or methods of transporting such logs or timber, and in the construction or maintenance of such tram or railroad, constructed or used for the transportation of logs or timber to or for such mills or to its owner or operator, or to points for sale, shipment

or other disposition, or any farm hands, under or by virtue of any contract or agreement, written or verbal, with any person, employer, firm, corporation, or his, her, or their agent or agents, receiver or receivers, trustee or trustees, in order to secure the payment of the amount due or owing under such contract or agreement, written or verbal, the hereinafore mentioned employees shall have a first lien upon all products, machinery, tools, fixtures, appurtenances, goods, wares, merchandise, chattels, wagons, carts, tram roads, railroads, rolling stock, and appurtenances, or thing or things of value of whatsoever character that may be created in whole or in part by the labor of or that may be used by such person or persons, or necessarily connected with the performance of such labor or service, which may be owned by or in the possession or under the control of the aforesaid employer, person, firm, corporation, or his, or their agent or agents, receiver or receivers, trustee or trustees; provided, that the lien herein given to a farm hand shall be subordinate to the landlord's lien now provided by law. [Acts 1897, p. 218, sec. 1. Acts 1913, p. 151, sec. 1, amending Art. 5644, Rev. St. 1911.]

Cited, *Norwood v. Leeves* (Civ. App.) 115 S. W. 53; *Peacock v. Morgan*, 128 S. W. 1191; *Red Deer Oil Development Co. v. Huggins*, 155 S. W. 949.

**Jurisdiction.**—See notes under Title 35, Chapter 3.

**Necessity for notice.**—A laborer's lien given by this article is not such a lien as is given by Const. art. 16, § 37, to a mechanic or artisan, and a laborer's lien depends on the statute and is subject to its terms, one of which protects a purchaser without actual or constructive notice of the lien. *Partin, Fondren & Fowler v. Wallace*, 56 C. A. 631, 121 S. W. 515.

**Lien for wages only.**—This law gives a lien only for the wages of the servant, and when the contract declared on is one for hire, he can claim a lien only in case he sustains his allegation that the sum is due under the contract, continued in force by the employer's failure to insist on the discharge. The servant has no lien for damages for breach of contract for hire. Under a contract of hire for a year payable monthly, the laborer is not required to fix his lien for the wages falling due each month. *Mudgett v. Texas Tobacco Growing Mfg. Co.* (Civ. App.) 61 S. W. 152.

**Priority.**—Where a farm laborer worked under a contract for \$20 per month from January 1st to September 1st, he had a lien on the crop for the whole amount due, superior to a mortgage lien on said crop. *Cash v. First Nat. Bank of McGregor*, 26 C. A. 109, 61 S. W. 723.

Under the express provisions of this article the lien of a landlord for rent and advances made to a tenant, to enable him to gather the crops, is superior to a laborer's lien. *Paine v. Dorough* (Civ. App.) 132 S. W. 369.

**Persons entitled to lien.**—Where a person makes a contract with a lumber company for hauling lumber by own labor and teams to be paid \$3 per 1,000 feet, he has no lien under this article for his labor and team. The statute does not apply to a contract of this kind. *Sparks v. Crescent Lumber Co.*, 40 C. A. 222, 89 S. W. 424.

A superintendent or manager of a brick manufacturing plant, employed by contract as such does not come within any of the classes of persons mentioned in this article and has no lien for his services under this article, although he may at times have performed the same kind of work that common laborers performed about the plant. He was not hired as a common laborer and was not required by his contract to do the work of one but as superintendent and manager could have hired others to do the menial work which he performed from choice. *Lindale Brick Co. v. Smith*, 54 C. A. 297, 118 S. W. 570.

In order to fix a lien for labor under this article it must appear that the person claiming such lien is within the class named in the statute, and that the labor or services performed by him were performed under the conditions named in the statute. *Bush Bros. Lumber & Milling Co. v. Eastwood* (Civ. App.) 132 S. W. 389.

Under this article the term "in any manufactory or mill of any character" refers to labor performed in or about such place, and no lien exists where the services are wholly performed at a place miles distant from the mill and have no immediate connection with the operation thereof, and hence one engaged at a distant place in cutting and hauling logs to be sawed at the mill was not entitled to a lien. *Id.*

Where plaintiff contracted to haul logs at a specified rate per thousand feet, he was not entitled to a laborer's lien; the word "laborer," in this article meaning one who labors with his hands for wages, and not including one who contracts for the hauling of lumber with his wagon and team. *Jackson v. Downs* (Civ. App.) 149 S. W. 286.

**Property subject to lien.**—This article gives a lien on a sawmill and machinery to laborers who do service in connection with the operation of the mill. *Sparks v. Crescent Lumber Co.*, 40 C. A. 222, 89 S. W. 424.

**Necessity of duplicate accounts.**—See notes under Art. 5645.

**Computation of time for filing account.**—See notes under Art. 5645.

**Art. 5644a. Laws repealed.**—That all laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed; provided that this Act shall not be so construed as to repeal chapter 2 of title 86, of the Revised Civil Statutes of the state of Texas,

relating to liens of mechanics, contractors, builders and materialmen. [Id. sec. 2.]

**Art. 5645. Liens, how fixed.**—Whenever any person, employer, firm, corporation, his, her or their agent or agents, receiver or receivers, trustee or trustees, shall fail or refuse to make payments as hereinafter prescribed in this law, the said clerk, accountant, bookkeeper, farm hand, artisan, craftsman, operative, servant, mechanic, quarryman, or laborer, who shall have performed service of any character, shall make or have made duplicate accounts of such service, with amount due him or her for the same, and present, or have presented, to aforesaid employer, person, firm or corporation, his, her or their agent or agents, receiver or receivers, trustee or trustees, one of the aforesaid duplicate accounts within thirty days after the said indebtedness shall have accrued. The other of the said duplicate accounts shall, within the time hereinbefore prescribed, be filed with the county clerk of the county in which said service was rendered, and shall be recorded by the county clerk in a book kept for that purpose. The party or parties presenting the aforesaid account shall make affidavit as to the correctness of the same. A compliance with the foregoing requirements in this article shall be necessary to fix and preserve the lien given under this law; and the liens of different persons shall take precedence in the order in which they are filed; provided, that all persons claiming the benefit of this law shall have six months within which to bring suit to foreclose the aforesaid lien; and provided, further, that a substantial compliance with the provisions of this article shall be deemed sufficient diligence to fix and secure the lien hereinbefore given; provided, that any purchaser of such products from the owner thereof shall acquire a good title thereto, unless he has at the time of the purchase actual or constructive notice of the claim of such lienholder upon such products, said constructive notice to be given by record of such claim, as provided for in this law, or by suit filed. [Acts 1897, p. 218, sec. 2.]

*Cited, Norwood v. Leeves (Civ. App.) 115 S. W. 53; Bush Bros. Lumber & Milling Co. v. Eastwood, 132 S. W. 389; Red Deer Oil Development Co. v. Huggins, 155 S. W. 949.*

*Jurisdiction.*—See notes under Title 35, Chapter 3.

**Computation of time for filing account.**—If day laborers are paid at the end of each day, then for the purpose of fixing the lien the time is computed from the end of the week. If to be paid at end of week, the time is computed from the contract due date. So of employment by the month. *Sparks v. Crescent Lumber Co., 40 C. A. 222, 89 S. W. 424.*

An indebtedness for labor accrues on the date fixed by agreement for the payment therefor, and a lien for the labor filed within 30 days after such date is filed within 30 days after the accrual of the indebtedness as required by this article. *Partin, Fondren & Fowler v. Wallace, 56 C. A. 631, 121 S. W. 515.*

Plaintiff worked as a farm hand from May 25 to August 6, 1908, but the payment for services was not due until the cotton was sold, and before the cotton was sold it was taken in sequestration proceedings on October 23, 1908, and plaintiff did not present his account until November 7, 1908. Held, under this article and Arts. 5644, 5646, that the account was filed in time, and plaintiff was entitled to recover in the sequestration proceedings. *Neblett v. Barron, 104 T. 111, 134 S. W. 208.*

**Necessity of duplicate accounts.**—Under Arts. 5644, 5645, 5648, in the absence of any compliance with the provisions as to the duplicate accounts, no lien could be created. *Peacock v. Morgan (Civ. App.) 128 S. W. 1191.*

**Affidavit.**—Under the statute giving a lien to farm laborers on crops raised, a laborer's affidavit for such lien is not defective for failing to state the crops raised. *Allen v. Glover, 27 C. A. 483, 65 S. W. 379.*

The affidavit for a mechanic's lien, required by this article is fatally defective where it does not describe the property. *Merchants' & Planters' Bank v. Hollis, 37 C. A. 479, 84 S. W. 269.*

The "account for services" to which affidavit is required to be made, must show the property or article upon which labor and services have been performed and the amount due for same. The affidavit must be of affiant's knowledge and not to the "best of affiant's knowledge and belief." *Id.*

An affidavit for a lien under this article, for labor, which states the amount of the debt, and that it was for labor performed, and which avers that the affidavit was made to fix a lien on the product, is sufficient. *Partin, Fondren & Fowler v. Wallace, 56 C. A. 631, 121 S. W. 515.*

**Art. 5646. Wages, when paid.**—Under the operation of this law, all wages, if service is by agreement performed by the day or week, shall be due and payable weekly, or, if by the month, shall be due and pay-



able monthly; all payments to be made in lawful money of the United States. [Id. sec. 3.]

See *Norwood v. Leeves* (Civ. App.) 115 S. W. 53; *Red Deer Oil Development Co. v. Huggins*, 155 S. W. 949.

Computation of time for filing account.—See notes under Art. 5645.

**Art. 5647. Right of assignment.**—Any of the parties named in article 5644 may transfer or assign their rights hereunder, and their assignee or assignees shall have the same rights and privileges as are conferred upon such persons enumerated in article 5644. [Id. sec. 4.]

Cited, *Norwood v. Leeves* (Civ. App.) 115 S. W. 53; *Peacock v. Morgan*, 128 S. W. 1191; *Red Deer Oil Development Co. v. Huggins*, 155 S. W. 949.

In general.—Time check issued by an employer to an employé held primarily a contract to pay money on a day named, and transferable. *Aldridge Lumber Co. v. Graves* (Civ. App.) 131 S. W. 846.

Assignee of a time check issued by an employer to an employé on proving an assignment to him for value may recover thereon. Id.

One to whom a paving contractor made an assignment of the amounts due on work yet to be performed cannot complain that the city made advances on the contract contrary to its provision; the contractor having abandoned work altogether. *Alfalfa Lumber Co. v. City of Brady* (Civ. App.) 149 S. W. 204.

**Art. 5648. Lien ceases, when.**—The lien created by this chapter shall cease to be operative after six months after the same is fixed, unless suit is brought within said time to enforce such lien. [Id. sec. 5.]

See *Norwood v. Leeves* (Civ. App.) 115 S. W. 53; *Peacock v. Morgan*, 128 S. W. 1191; *Red Deer Oil Development Co. v. Huggins*, 155 S. W. 949.

Necessity of duplicate accounts.—See notes under Art. 5645.

**Art. 5649. Laws not repealed.**—This chapter shall not be so construed as to repeal chapter 2 of this title, relating to liens of mechanics, contractors, builders and material men. [Id. sec. 6.]

See *Norwood v. Leeves* (Civ. App.) 115 S. W. 53; *Peacock v. Morgan*, 128 S. W. 1191; *Red Deer Oil Development Co. v. Huggins*, 155 S. W. 949.

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## CHAPTER FIVE

### LIENS ON DOMESTIC VESSELS

Art.  
5650. Lien on vessels, when.

Art.  
5651. Law not affected.

**Article 5650. [3316] Lien on vessels, when.**—Every person who may furnish supplies or materials, or do repairs or labor for or on account of any domestic vessel, owned in whole or in part in this state, shall have a lien on such vessel, her tackle, apparel, furniture and freight money, for the security and payment of the same. [Act Feb. 3, 1848. P. D. 4600.]

**Art. 5651. [3317] Not to affect laws of liens for seamen's wages.**—The provisions of the preceding article shall not be construed to alter or affect in any way the general law regulating the liens of seamen on foreign vessels. [P. D. 4601.]

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## CHAPTER SIX

### LIEN—LIVE STOCK

Art.  
5652. Lien of keeper of stallion.

Art.  
5653. Period of such lien.

**Article 5652. [3335] Keeper of stallion, etc., a lien.**—The owner or keeper of any stallion, jack, bull or boar, who keeps the same confined for the purpose of standing him for profit, shall have a preference lien upon the progeny of such stallion, jack, bull or boar, to secure the pay-

ment of the amount due such owner or keeper, for the services of such stallion, jack, bull or boar, and such lien shall exist by reason of the force and effect of the provisions hereof, and it shall never be necessary in order to secure and fix said lien to secure, file or register any contract or statement thereof with any officer, nor shall it be necessary that the owner of such progeny execute any contract whatever, but that such preference lien may be foreclosed in the same manner as the statutory landlord's lien is by law enforced; provided, that where parties misrepresent their stock by false pedigree, no lien shall obtain. [Acts 1889, p. 115. Amended 1905, p. 24.]

**Art. 5653. [3336] Period of such lien.**—The lien herein provided for shall remain in force for a period of ten months from the birth of said progeny, but shall not be enforced until five months shall have elapsed after such birth. [Id.]

## CHAPTER SEVEN

### CHATTEL MORTGAGES

Art.		Art.	
5654.	Reservation of title in chattel mortgages.	5658.	County clerk to keep book, etc.
5655.	All instruments intended to operate as liens to be recorded.	5659.	Satisfaction to be entered.
5656.	Duty of clerk receiving.	5660.	Property not to be removed.
5657.	Copy to be received in evidence.	5661.	Not to be recorded at length.
		5662.	Provision for destruction of.

[In addition to the notes under the particular articles, see also notes of decisions relating to subject of chapter 7 in general, at end of chapter.]

**Article 5654. [3327] Reservations of title, mortgages, and to be recorded.**—All reservation of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservations be in writing and registered as required of chattel mortgages; provided, that nothing in this law shall be construed to contravene the landlord and tenant act. [Acts 1885, p. 76.]

See notes under Art. 5655.

**Conditional sales.**—A lien upon a personal chattel sold cannot be created by a parol reservation in the sale when the property is delivered to the purchaser. *Gay v. Harde-man*, 31 T. 245.

Property may be conveyed by deed, which will be construed as evidencing a conditional sale and not a mortgage, though the consideration is the payment of a debt with a condition for repurchase within a designated time. This occurs when it is intended and stipulated that the debt is paid by the conveyance. If the deed was intended merely as a security for the debt, it would be regarded as evidencing a mortgage. *Miller v. Yturria*, 69 T. 549, 7 S. W. 206.

A conditional sale passes the title to the property to the vendee, with the reservation or condition that the vendor may repurchase the same at a fixed price and at the specified time. If there is a debt, it becomes extinguished by the transaction. The delivery of the possession of the property to the mortgagee or vendee does not affect the question of the character of the instrument. *Soell v. Hadden*, 85 T. 182, 19 S. W. 1087.

Mortgage and conditional sale distinguished. *Eckford v. Berry* (Civ. App.) 27 S. W. 840.

The mortgagee of the stock of a retail merchant has a superior claim to that of the manufacturer who delivered the goods to the retail merchant under an unrecorded written agreement reserving title in himself. Not, however, the case where the mortgaged debt is a pre-existing one and there was no extension of time. *Bowen v. Lansing Wagon Works*, 91 T. 385, 43 S. W. 872.

Unrecorded bill of sale of cattle held not an executed contract, where they are left in possession of the seller, to be accepted and paid for before driven to pasture. *Edwards v. Irvin* (Civ. App.) 45 S. W. 1026.

Where one makes a pretended sale, an innocent purchaser from the buyer, without notice, will be protected. *Therriault v. Compere* (Civ. App.) 47 S. W. 750.

A reservation of title to personal property sold held not to defeat a recovery by seller of the contract price, after delivery of the goods and default in payment by the purchaser. *Jaeggli v. Phears*, 30 C. A. 212, 70 S. W. 330.

Under contract of conditional sale, the seller held to have the right to retake possession in default of payment. *Henderson v. Mahoney*, 31 C. A. 539, 72 S. W. 1019.

A sale of oil tank cars upon condition held not to pass title to the purchasers. *Smith v. Texas & N. O. R. Co.*, 101 T. 405, 108 S. W. 819.

A sale of cattle held an absolute sale. *Whitsett v. Carney* (Civ. App.) 124 S. W. 443. "Absolute" and "conditional" sales defined and distinguished. *Id.*

A seller retaining title until the price is paid, and entitled to take possession on the nonpayment of any installment at maturity, held to convert the goods, when assuming control of them before maturity of any installment of the price. *Roberson v. Withers* (Civ. App.) 152 S. W. 1160.

— **Mortgages.**—A contract that personal property contracted to be sold and actually delivered should remain the property of the vendor until paid in full is a chattel mortgage and can be registered as such. *Garretson v. De Poyster*, 4 App. C. C. § 137, 16 S. W. 106.

A stipulation in an order for books that the sale is conditional upon payment of price, and the title should remain in the vendor until price is paid, is a chattel mortgage. *Clark v. West Pub. Co.* (Civ. App.) 26 S. W. 527.

The retention of property by a purchaser with the agreement that no title shall pass until payment is a mere bailment and not within the provisions of this article. *Farmers' National Bank v. Henderson* (Civ. App.) 29 S. W. 562.

A contract of sale reserving title to secure price held not a mortgage only as to creditors of purchaser having judgment at time of sale. *Mechanics' Bank of St. Louis, Mo., v. Gullett Gin Co.* (Civ. App.) 48 S. W. 627.

Reservation of title to a chattel sold and delivered as security for the purchase money thereof is but a chattel mortgage, and does not give a vendor's lien. *Parlin & Orendorf Co. v. Davis' Estate* (Civ. App.) 74 S. W. 951.

Contention that, when consideration is not paid, delivery of personal property with agreement that no title is to pass until consideration is paid is a bailment, held untenable, under this article. *Eason v. De Long*, 38 C. A. 531, 36 S. W. 347.

The effect of this article is to declare that when property is sold to another and the title to it is reserved by the vendor until the purchase money is paid, the transaction creates a chattel mortgage as well between the vendor and vendee as to all others. This declaration seems to apply to all reservations of the title to, or property in chattels as security for the purchase money, whether the reservation be by parol or in writing. *Id.*

Where one sells personal property to another, a verbal reservation of the title in the seller at the time of the sale, to secure the payment of the purchase money thereof (possession of said property being delivered to the purchaser at the time of the sale), constitutes a valid mortgage between the buyer and seller. *Crews v. Harlan*, 99 T. 93, 87 S. W. 653, 659, 13 Ann. Cas. 863.

A sale of personal property with a verbal reservation of title to secure the price constitutes a valid mortgage. *Crews v. Harlan* (Civ. App.) 88 S. W. 411.

The sale of goods with reservation of title in the seller to secure the purchase money constitutes a mortgage. *Wright v. Texas Moline Plow Co.*, 40 C. A. 434, 90 S. W. 907.

Under this article notes for the purchase price of rails, which reserved the title to the seller, though possession was given to the purchaser, were chattel mortgages. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co.* (Civ. App.) 144 S. W. 343.

**Waiver of reservation of title.**—When the owner of personal property transfers his possession to one who executes his notes under a contemporaneous contract, by the terms of which the title is to remain with the vendor until the price is paid, the original owner, in default of payment, may elect either to enforce payment or reclaim possession. The assertion of either right is the abandonment of the other. *Bensinger Co. v. Cain*, 4 App. C. C. § 289, 18 S. W. 136; *Bank v. Thomas*, 69 T. 237, 6 S. W. 565.

Notes for the purchase price were taken under an agreement that until paid the title to the property should remain in the seller. The notes were indorsed, but on failure to collect were returned to the seller and the indorsement erased. Held, that the trust relation with the purchaser was severed, the title to the property passed to the purchaser, and could not be restored to the seller without the purchaser's consent. *Merchants' & Planters' Bank v. Thomas*, 69 Tex. 237, 6 S. W. 565.

A condition that the title shall not pass to the buyer unless payment of the price is made may be waived by the seller. *Continental Bank & Trust Co. v. Hartman* (Civ. App.) 129 S. W. 179.

A waiver by a seller of the condition of cash payment of the price to the passing of the title must be made voluntarily, and where the seller's conduct is such as to clearly indicate his intention to waive the condition and make the delivery unconditional the title passes. *Id.*

**Necessity of registration.**—It is unimportant whether creditors have notice or not. Registration is essential to give the instrument effect as to them. *Brothers v. Mundell*, 60 T. 246; *Keller v. Smalley*, 63 T. 519.

An instrument was executed by the owner of goods, purporting to "bargain, sell and confirm" the property to another, who paid therefor \$800 cash, executed a note for deferred payment and went into possession. It recited that the instrument should remain in full force and effect, if the balance of the purchase-money was paid; if not paid, then the maker of the instrument reserved the right to repossess himself of the goods and dispose of the same, and "then the above conveyance shall be henceforth null and void." Held: The title passed, to be divested by the seller, by sale, in the event of non-payment of the note. If such an instrument is not recorded, the seller can assert no right to the goods as against a creditor of the vendee who has seized the same under legal process. *Key v. Brown*, 67 T. 300, 3 S. W. 443.

As to creditors, the deposit of a chattel mortgage with the clerk in compliance with the statute is absolutely necessary to give it validity; as to subsequent purchasers, the mortgage is valid if they have actual notice of its existence. *Freiberg v. Magale*, 70 T. 116, 7 S. W. 684.

A. sold a quantity of wood to B., a wood dealer. An instrument in writing was executed to the effect that A. appointed B. his agent to sell the wood and pay the proceeds to C. for A. It was shown that this was intended as security, and that B. became absolutely bound for the price of the wood. Held: That the instrument was a mortgage, and, not being recorded, it was of no force as against one who purchased the wood, if he paid value therefor, whether he had notice of A.'s claim or not. *Lewis v. Bell* (Civ. App.) 40 S. W. 747.

An unrecorded chattel mortgage where the mortgagee takes possession before bill of sale to the property is made, is good. *Smith v. Connor* (Civ. App.) 46 S. W. 267.

Where goods conditionally sold are removed into a state where registration is necessary, the conditions are void, unless statutes of such state are complied with. *Sanger v. Jesse French Piano & Organ Co.*, 21 C. A. 523, 52 S. W. 621.

Under the facts disclosed, held, that a vendee was a bona fide purchaser, as against claimant under an unrecorded conditional sale. *Sanger v. Jesse French Piano & Organ Co.* (Civ. App.) 75 S. W. 39.

**Validity as between parties.**—A reservation of lien by vendor of personal property not recorded or a chattel mortgage unrecorded is not void as between the parties. *Brewing Association v. Manufacturing Co.*, 81 T. 99, 16 S. W. 797.

This does not prohibit conditional sales as between the parties thereto. *Parlin v. Harrell*, 27 S. W. 1084, 8 C. A. 368.

An unrecorded lien by contract on the property on which a windmill is erected, reserved in the contract of sale, is valid between the parties. *Phelps & B. W. Co. v. Parker* (Civ. App.) 30 S. W. 365.

The reservation of title in chattels by seller is good as against an assignee taking property under a general assignment for the benefit of creditors. *Mansur & Tebbetts Implement Co. v. Beer*, 19 C. A. 311, 45 S. W. 972.

It has been held that instruments containing reservations of title in the sale and delivery of chattels, such as before had been known as conditional sales, although unregistered, created valid liens as between the parties, and that subsequent mortgagees were not lien creditors within the sense of the statute, but were to be classed as purchasers, and in order to postpone the prior lien to their mortgage, antecedent debts, to secure which the mortgage had been given, were not a sufficient consideration. *Turner v. Cochran*, 94 T. 480, 61 S. W. 924.

Contract of sale, reserving title in seller until payment for property by buyer, held valid immediately on execution, regardless of registration, as against all parties except lien creditors and bona fide purchasers or mortgagees. *Hall v. Keating Implement & Machine Co.*, 33 C. A. 526, 77 S. W. 1054.

As between the buyer and the seller of personalty under a conditional sale, it is not necessary that the instrument be registered in order to create a lien. *Wm. Cameron & Co. v. Jones*, 41 C. A. 4, 90 S. W. 1129.

Under this article an unrecorded chattel mortgage is valid between the parties thereto. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co.* (Civ. App.) 144 S. W. 343.

**Who are "creditors."**—A mortgagee, when the mortgage has been duly recorded, is a lien creditor within the meaning of the statute. *Tufts v. Blanton*, 2 App. C. C. § 294; *Kilgore v. Graves*, 2 App. C. C. § 409; *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657; *McKeen v. Sultenfuss*, 61 T. 325.

One who has not acquired a lien by process of law on chattels claimed under a prior unrecorded mortgage is not a creditor within the meaning of the statute regarding chattel mortgages, and is not entitled to protection as such. *Overstreet v. Manning*, 67 T. 657, 4 S. W. 248.

Creditors are those who have a lien on the property. *Parlin v. Harrell*, 27 S. W. 1084, 8 C. A. 368, citing *Grace v. Wade*, 45 T. 527; *Brothers v. Mundell*, 60 T. 240; *Overstreet v. Manning*, 67 T. 657, 4 S. W. 248; *Berkey & G. F. Co. v. Sherman Hotel Co.*, 81 T. 135, 16 S. W. 807.

The "creditor," within the meaning of the statute, is one who has acquired rights by an attachment or other process of law, and not merely a general creditor who has acquired no interest in the property mentioned in the mortgage. *Snyder v. First Nat. Bank* (Civ. App.) 32 S. W. 162. Subsequent purchasers and mortgagees, and other lienholders in good faith, stand on the same footing. One who purchases at a voluntary sale from his debtor, and pays no money, but credits the amount of the consideration on a pre-existing debt, is not a bona fide purchaser for value. *Overstreet v. Manning*, 67 T. 657, 4 S. W. 248; *Brothers v. Mundell*, 60 T. 240; *Keller v. Smalley*, 63 T. 512.

This article applies to lien creditors only. *Avery v. Mansur & T. I. Co. et al.* (Civ. App.) 37 S. W. 466.

All persons are included within the term creditors whose claims are, upon certain conditions, charged by law as specific liens upon certain property, such as holders of attachment, execution, judgment, landlords' and mechanics' liens, and all others are excluded. The statute does not make the requirement of good faith as to creditors in order that the unregistered mortgage become void, but it does make such requirement of subsequent purchasers, mortgagees, etc. *Oak Cliff College for Young Ladies v. Armstrong* (Civ. App.) 50 S. W. 610.

The word "creditor" in this article means creditors having some sort of lien fixed by law or legal proceedings upon the particular property and does not include a mere general creditor. The word "purchasers" includes mortgagees for value. *Eason v. Garrison & Kelley*, 36 C. A. 574, 82 S. W. 801.

Under this and the following articles the term "creditors" applies to those persons whose claims are upon certain conditions charged by law as specific liens upon the property, such as holders of attachments, executions, judgments, landlords' and mechanics' liens, and as to subsequent purchasers and lienors in good faith, and so such a mortgage is not void as to a prior trust deed on land which did not include the personalty embraced in the chattel mortgage. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co.* (Civ. App.) 144 S. W. 343.

Where the beneficiary of a trust deed, which did not include after-acquired property, foreclosed after a tramway had been laid upon the land, the judgment of foreclosure which followed the description of the deed of trust did not make the beneficiary a "creditor" within the purview of this article, with respect to the rails of the tramway which were subject to an unrecorded chattel mortgage, for the judgment created no lien, but only enforced one. *Id.*

**Art. 5655. [3328]** All instruments intended to operate as liens to be recorded.—Every chattel mortgage, deed of trust, or other instrument of writing, intended to operate as a mortgage of or lien upon personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument, shall be absolutely void as against the creditors of the mortgagor or person making same, and as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument, or a true copy thereof, shall be forthwith deposited with and filed in the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then, of the county of which he shall at that time be a resident; provided, that written contracts for the conditional sale, lease or hire of railroad equipments and rolling stock, by which the purchase money is therein agreed to be paid at any time or times after the date of such contract, with a reservation of title or lien in the vendor, lessor or bailor until the same has been fully paid, shall be recorded in the office of the secretary of state, in a book of records to be kept by him for that purpose; and, on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract, a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument to be acknowledged by the lessor, vendor or bailor, or his or its assignee, and recorded as aforesaid; and for such services the secretary of state shall be entitled to a fee of five dollars for recording each of said contracts and each of said declarations, and a fee of one dollar for entering such declaration on the margin of the record. [Acts 1879, p. 134, sec. 1. Amended Acts 1897, p. 209.]

See authority cited under Art 5654; *Ames Iron Works v. Chinn*, 15 C. A. 88, 38 S. W. 247.

**Who are "creditors."**—See notes under Art. 5654.

**Who are purchasers.**—An assignee under a general assignment for the benefit of creditors is not a purchaser within the meaning of this statute. *Keller v. Smalley*, 63 T. 512.

This statute evidently means a purchaser of goods by contract—one who, of his own volition, buys them and pays a price agreed upon and receives a transfer therefor from one who sells and delivers them. It does not contemplate a wrongdoer or trespasser upon the property who against his will is cast in judgment for the value of it and takes title unwillingly, by operation of law upon payment of the judgment. *Scott v. Cox*, 30 C. A. 190, 70 S. W. 805.

**Filing, recording and registration.**—It was the intention of the act of April 22, 1879, to dispense with the registration in full of chattel mortgages, and to provide in lieu of it for the deposit with the clerk of the original mortgage itself, or a true copy of it, there to be kept for the inspection of the parties interested, and to have a minute of the mortgage entered in a book, so that it might be perceived what were its contents, date of filing, etc. *Brothers v. Mundell*, 60 T. 240.

An indorsement on a chattel mortgage by the county clerk that it had been "filed for record" on a certain day, and that it had been recorded in a book for the registry of deeds, is not such evidence of a deposit and filing as required by the statute. Such an instrument is not admissible in evidence as against creditors of the mortgagor; and as against subsequent purchasers and mortgagees and lienholders in good faith, it is void. *Id.*

On the back of a chattel mortgage was the following indorsement by the clerk: "This instrument was filed for record on the 15th of February, at the hour of 10 o'clock a. m., 1883, and duly registered in Book I of Chattel Mortgages, page 24." Held, the indorsement sufficiently indicated the "time of receiving" the instrument. *Cook v. Hallsell*, 65 T. 1.

To prove the registry of a chattel mortgage, the record book containing the entry, or a certified copy of the entry, should be produced. *Id.*

An indorsement "filed for record" at a certain date given is sufficient. *Cook v. Hallsell*, 65 T. 1. But see *Brothers v. Mundell*, 60 T. 240.

The acknowledgment or proof for registration is not necessary where the original of a chattel mortgage is deposited with the county clerk of the proper county. *Hicks v. Ross*, 71 T. 358, 9 S. W. 315; *Chator v. Brunswick Co.*, 71 T. 589, 10 S. W. 250.

A conveyance to a trustee for the benefit of creditors named included real estate and a stock of merchandise. The deed was filed for record as for real estate, and a copy of the deed deposited with the county clerk for entry as a chattel mortgage. The deed was duly acknowledged. The execution of the deed was proved. Held, that the registration laws were complied with, so as to give to the deed effect from date of filing against an attaching creditor. The neglect of the clerk to make proper record entries, as required by

the statute, would not prejudice the rights of the beneficiaries. *Willis v. Thompson*, 85 T. 301, 20 S. W. 155.

The failure of the clerk to enter a mortgage in the proper book, after filing, does not affect the rights of the mortgagee. *Cleveland v. Empire Mills*, 25 S. W. 1055, 6 C. A. 479.

A purchase money chattel mortgage, though not recorded until more than two months after it was given and only a few hours before the levy of an attachment on the property is not void as against the attachment. See Art. 5655. *Moore v. Masterson*, 19 C. A. 308, 46 S. W. 855.

Where a chattel mortgage is filed as soon as it reasonably can be, after its execution and delivery, it will take effect from the time of delivery, and prevail against a lien created between the time of delivery and the time of filing in the clerk's office. *Cameron Ice Co. v. Wallace*, 21 C. A. 141, 50 S. W. 628.

The appellees did business in a town ten miles from the county seat between which points ran a daily train, leaving the former about 5 o'clock p. m., and arriving at the latter about 6 p. m. A chattel mortgage executed and delivered to appellees at their place of business at noon on the 14th of the month and filed at the county clerk's office in the county seat at 9 o'clock on the morning of the 17th of the same month was not filed "forthwith" within the meaning of the law, so as to defeat an attachment lien secured on the mortgaged property on the 16th of the month, in the absence of facts showing why the mortgage was not filed more promptly. *Hackney v. Schow*, 21 C. A. 613, 53 S. W. 713.

Where a mortgage was executed at about 2 o'clock p. m. on Saturday and then and there delivered to the mortgagee, and afterwards during that afternoon before 5 o'clock he passed by the courthouse, and did not step in and deposit the instrument with the county clerk, and gave no reason for not doing so, but filed it the following Monday, the mortgage was not filed "forthwith," so as to become superior to the landlord's lien on the mortgaged goods for rent. *Austin v. Welch* (Civ. App.) 72 S. W. 884.

Failure of the county clerk to discharge his duty in respect to mortgages duly filed with him does not affect the mortgagee's rights. *Scaling v. First Nat. Bank*, 39 C. A. 154, 87 S. W. 715.

Where chattels, mortgaged in a foreign state, were brought into Texas with the knowledge of the mortgagee, who did not register his mortgage there, an innocent purchaser for value will take priority over the lien of the mortgage. *Best v. Farmers' & Merchants' Bank* (Civ. App.) 141 S. W. 334.

Under this article a mortgage filed before the rights of other persons in respect to the mortgaged property have intervened is valid. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co.* (Civ. App.) 144 S. W. 343.

The fact that a chattel mortgage was witnessed by two of the beneficiary parties would not invalidate its registration, since, under the statute, a chattel mortgage is entitled to registration, though not witnessed at all. *Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones* (Civ. App.) 152 S. W. 441.

— **Necessity for recording.**—A unregistered mortgage is not by the terms of the statute made void as to all parties. It is made void as to "creditors" of the maker only when not "forthwith deposited with and filed in the office of the county clerk" of the proper county, and when not "accompanied by an immediate delivery and followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument;" thus presenting two co-existing elements that must be shown before the creditor has the right to have the instrument declared void. *Randolph v. Brown*, 21 C. A. 617, 53 S. W. 825.

A chattel mortgage is effectual, as between the parties, without being recorded. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

— **County of record.**—A recital in a mortgage of the residence of the maker is prima facie evidence of the locality of the property, indicating where the mortgage should be deposited for record. *Chator v. Brunswick*, 71 T. 589, 10 S. W. 250.

A mortgage held properly filed for record in the county where the property was situated. *Oxsheer v. Watt* (Civ. App.) 42 S. W. 121.

When the maker of a chattel mortgage is a resident of this state, the mortgagee has the choice to record the instrument in the county in which the mortgagor resides, or in the county where the property is at the time situated. *Oxsheer v. Watt*, 91 T. 402, 44 S. W. 67.

Registration of a chattel mortgage covering property in an unorganized county in the county in which that county was attached for judicial purposes held not constructive notice to subsequent purchasers and mortgagees where the unorganized county was attached to a third county for registration purposes. *First Nat. Bank v. McElroy*, 51 C. A. 284, 112 S. W. 801.

That a chattel mortgagor residing in an unorganized county was qualified for jury service in the county to which that county was attached for judicial purposes held not to make registration of the mortgage in the organized county proper, where the unorganized county was attached to a third county for registration purposes. *Id.*

Where an unorganized county is attached to an organized county for "judicial surveying and all other purposes," the latter is the county in which instruments affecting property situated in the former are to be recorded for the purpose of giving notice to persons to be affected by such instruments. *Id.*

— **Foreign registration.**—A mortgagee of personalty was not at fault in failing to give notice of the mortgage by registration or otherwise to the citizens of another state into which the property was removed, where sufficient time therefor did not elapse between the removal and a sale of the property to a person without notice. *Blythe v. Crump*, 28 C. A. 327, 66 S. W. 885.

The constructive notice obtained by registering a chattel mortgage in a foreign state depends upon the statutes of that state. *Best v. Farmers' & Merchants' Bank* (Civ. App.) 141 S. W. 334.

A lien acquired by the registration of a chattel mortgage in a foreign state will not be given priority in Texas. *Id.*

— **Record as notice and effect as to priority.**—The filing of a chattel mortgage for registry, in absence of fraud, gives it validity against a subsequent attaching creditor. It operates upon the property, although an immediate change of possession was not given to the trustee named in the mortgage, and to whom right to possession was given. *Willis v. Thompson*, 85 T. 301, 20 S. W. 155.

A mortgage filed with reasonable diligence is superior to the lien of an attachment levied before the actual filing of such mortgage of an earlier date. *Baker v. Smelser*, 88 T. 26, 29 S. W. 377, 33 L. R. A. 163; reversing s. c., 26 S. W. 905, 6 C. A. 751.

A duly recorded chattel mortgage held constructive notice to a subsequent mortgagee. *Oxsheer v. Watt* (Civ. App.) 42 S. W. 121.

A mortgage filed a few hours previous to the levy of an attachment held superior to the attachment. *Moore v. Masterson*, 19 C. A. 308, 46 S. W. 855.

Assignees of property covered by recorded chattel mortgage held to take with constructive notice thereof. *Greer, Mills & Co. v. Crenshaw* (Civ. App.) 76 S. W. 589.

A mortgage, reciting it was executed "this ——— day of August, 1892," and registered on the 20th day of that month, is a valid mortgage as of that day against third persons. *Becker v. Bowen* (Civ. App.) 79 S. W. 45.

Registration of chattel mortgage executed by married woman alone held not constructive notice of the mortgage. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

A chattel mortgage held entitled to appropriate so much of the mortgaged property as was necessary to satisfy his demands for advances made up to the date of the recording of a junior mortgage. *Bank of Omaha v. Pope* (Civ. App.) 103 S. W. 692.

Recorded mortgage of animals to be acquired by the mortgagor held constructive notice of the mortgagee's lien as against a party converting part of them after things necessary for their identification as indicated by the mortgage had been done. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

Where a chattel mortgage upon cattle was registered, such registration was constructive notice to a subsequent mortgagee, and the first mortgage has priority over a second mortgage. *Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce* (Civ. App.) 139 S. W. 665.

Where defendant, intending to purchase property and to give a note therefor, executed a mortgage on the property to the sureties on the note, and afterwards executed a mortgage on the property to secure the purchase price to seller, who did not know of the prior mortgage, his lien was superior, notwithstanding priority of record. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

Where a seller agreed with the buyer that the latter might borrow from a third person the money to make the cash payment and secure the same by a chattel mortgage on the property, it was inequitable to hold that the purchase-money mortgage, filed for record after the mortgage to the third person, was superior thereto. *Pace v. J. M. Radford Grocery Co.* (Civ. App.) 152 S. W. 1130.

Under this article the record of a chattel mortgage as required by law is constructive notice to all parties subsequently dealing with the property. *American Type Founder Co. v. First Nat. Bank of Teague* (Civ. App.) 156 S. W. 309.

— **Failure to file or record mortgage.**—A chattel mortgage, where possession of the mortgaged property remains with the mortgagor, and the instrument is not filed as required by statute, is absolutely void as to creditors of the mortgagor, whether or not they had actual notice of such mortgage, or were creditors in good faith of the maker of the instrument. *Brothers v. Mundell*, 60 T. 240.

A chattel mortgage not filed is not void as between the mortgagor and mortgagee, and the right to impeach it for fraud, etc., does not pass to the assignee of the mortgagor by a voluntary assignment for the benefit of creditors. *Keller v. Smalley*, 63 T. 512.

The lien of a landlord will prevail over a mortgage executed by the tenant upon property subject to the lien, where the mortgagee does not forthwith file the mortgage for record, as required by statute. *Liquid Carbonic Acid Mfg. Co. v. Lewis*, 32 C. A. 481, 75 S. W. 47.

Where one takes a chattel mortgage, but does not file it forthwith, and the mortgagor gives a second mortgage on the same property before the first mortgage is filed, the second mortgagee acquires the superior lien, even though he does not file his mortgage until after the first mortgage is filed. *McCarthy v. North Texas Loan Co.* (Civ. App.) 101 S. W. 835.

Under this article a lienholder in "good faith" is one who pays a valuable consideration at the time of acquiring the lien without notice of the mortgage, and hence the holder of a deed of trust on land did not, by obtaining a judgment of foreclosure in which the description of the property followed the description as given in the deed of trust, become a lienholder in good faith as against one who furnished rails for the construction of a tramway on the land subsequent to the date of the deed of trust and took a chattel mortgage for the price of such rails which he failed to record. *Stewart & Alexander Lumber Co. v. Miller & Vidor Lumber Co.* (Civ. App.) 144 S. W. 343.

An unrecorded chattel mortgage would be void as to a subsequent mortgagee, under a recorded mortgage, having no notice of the prior mortgage. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

In determining the priority of chattel mortgages, it was immaterial that there was a change of possession under the senior unrecorded mortgage upon the day that the junior mortgage was given. *Dunlap v. Broyles* (Civ. App.) 146 S. W. 578.

Under this article an unrecorded chattel mortgage was void as to a chattel mortgage executed and delivered for a valuable consideration and without notice, actual or constructive, of its existence. *Id.*

A purchaser from a bona fide purchaser without notice of an unrecorded chattel mortgage unaccompanied by any change of possession acquires title as against the mortgagee. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 146 S. W. 1191.

Under this article a chattel mortgage not recorded, unaccompanied by any change of possession of the mortgaged chattels from the mortgagor to the mortgagee, is void as to a bona fide purchaser from the mortgagor without notice of the mortgage. *Id.*

A chattel mortgagee of a firm who did not record his mortgage prior to the purchase by third persons of the entire firm business held but a simple firm creditor. *Id.*

An unrecorded chattel mortgage is not void as to subsequent purchasers, lienholders, and mortgagees, unless they have become such in good faith. *Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones (Civ. App.) 152 S. W. 441.*

Where hogs were subject to a verbal chattel mortgage, a purchaser who bought without notice is not guilty of a conversion of mortgaged property, and the mortgagee has no right of action against him. *May v. Merchants' & Planters' Nat. Bank of Mt. Vernon (Civ. App.) 152 S. W. 1194.*

**Conversion of property.**—Conversion in general, see notes at end of chapter.

A stranger who converts cattle covered by duly recorded mortgage held liable, although the conversion took place in a state other than that where the mortgage was recorded. *Scaling v. First Nat. Bank, 39 C. A. 154, 87 S. W. 715.*

**Art. 5656. [3329] Duty of clerk receiving.**—Upon the receipt of such instrument, the clerk shall endorse thereon the day and hour when the same was deposited in his office for record, and shall keep the same on file in his office for the inspection of all parties interested until satisfaction thereof shall be entered, as provided in article 5659; provided, that if a copy be presented to the clerk for filing, instead of the original instrument, he shall carefully compare such copy with the original, and the same shall not be filed unless it is a true copy thereof, and a copy can be filed only when the original has been witnessed by two subscribing witnesses or acknowledged or proven for record and certified as required in case of other instruments for the purpose of being recorded. [*Sen. Jour. 1895, p. 479.*]

See notes under Art. 5655.

**Art. 5657. [3330] Copy of instrument evidence of what.**—A certified copy of any such instrument so filed as aforesaid, certified to under the hand and seal of the clerk of the county court in whose office the same shall have been filed, shall be admitted in evidence in like manner as the original might be, unless the execution of the original has been denied under oath by the party sought to be charged thereby; provided, that the party desiring to use such instrument shall file the same in the papers of the cause before announcing ready for trial, and not afterwards; and such certified copy shall in all cases be received as evidence of filing and entry thereof in chattel mortgage record according to the endorsement of the clerk thereon. [*Id. 480.*]

**Original as best evidence.**—If a copy of a chattel mortgage is filed with the clerk, and a question is raised as to whether it is a true copy, or as to whether the original was acknowledged, the original would seem to be the best evidence of those facts and should be admitted to prove them. *Boykin v. Rosenfield & Co., 69 T. 115, 9 S. W. 318.*

**Admissibility in evidence of certified copy of chattel mortgage.**—A certified copy of a chattel mortgage is admissible in evidence, the certificate of the clerk showing that the original is on deposit in his office. *Oxsheer v. Watt, 91 T. 402, 44 S. W. 67.*

A certified copy of a chattel mortgage held admissible in evidence without proof of its loss. *Morris v. Moon (Civ. App.) 120 S. W. 1063.*

It is not necessary to file a certified copy of a chattel mortgage in the papers of the case three days before trial as required in case of a deed. It is sufficient if it is done before announcement of ready. *Id.*

A certified copy of order for goods filed as a chattel mortgage held properly admitted in evidence. *Bybee v. Embree-McLean Carriage Co. (Civ. App.) 135 S. W. 203.*

**Art. 5658. [3331] County clerk to keep book.**—The county clerk shall keep a book in which shall be entered a minute of all such instruments, which shall be ruled off into separate columns, with heads as follows: Time of reception, name of mortgagor, name of mortgagee or trustee and cestui que trust, date of instrument, amount secured, when due, property mortgaged, and remarks; and the proper entry shall be made under each of such heads. Under the head of property mortgaged, it will be sufficient to enter a general description of the property pledged and the particular place where located, and index shall be kept in the manner as required for other records. [*Id. sec. 4.*]

See notes under Art. 5655.

**Art. 5659. [3332] Satisfaction to be entered.**—When the debt secured by any such instrument shall have been paid or satisfied, it shall be the duty of the mortgagee, his assignee, attorney or legal representative to enter, or cause to be entered, and attested by the clerk, as afore-



said, satisfaction thereof, in the record book in which the instrument is entered, which may be done under the head of "remarks;" and any instrument acknowledging payment or satisfaction need not be recorded at length, but the entry as above provided showing the same has been paid shall be sufficient, and the original instrument or copy thereof on file shall then be delivered to the mortgagor or maker upon demand, or the clerk may mail the same to him. [Sen. Jour. 1895, p. 480.]

See notes under Art. 5655.

**Art. 5660. [3333] Property not to be removed.**—The person making any such instrument shall not remove the property pledged from the county, nor otherwise sell or dispose of the same without the consent of the mortgagee; and, in case of any violation of the provisions of this article, the mortgagee shall be entitled to the possession of the property, and to have the same then sold for the payment of his debt, whether the same has become due or not. [Id. sec. 6.]

See *Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co.* (Civ. App.) 129 S. W. 1161.

**Removal or transfer of property.**—A mortgagee of chattels has the right of possession immediately upon the removal of the mortgaged property. *Hargadine-McKittrick Dry-Goods Co. v. First Nat. Bank of Jacksboro*, 14 C. A. 416, 37 S. W. 622.

A chattel mortgagee has no lien on proceeds of voluntary sale of chattels by mortgagor. *Estes v. McKinney* (Civ. App.) 43 S. W. 566.

Rights of a transferee of personalty held subject to those of a prior mortgagee. *Crane v. McGuire* (Civ. App.) 64 S. W. 942.

When the mortgaged property has been removed from the county, or the mortgagor transfers the same without the consent of the owner, or otherwise sells or disposes of it, the mortgagee or his legal representative in case of his death, can take possession of and sell same. He may do this through an agent although he can not appoint a substitute trustee. *Kelly v. Wimbish* (Civ. App.) 65 S. W. 388.

A mortgagee's lien on personalty follows the mortgaged property into another state, to which it is removed without his knowledge or consent. *Blythe v. Crump*, 28 C. A. 327, 66 S. W. 885.

In a suit by chattel mortgagees to establish a trust in the proceeds of the sale of the mortgaged property, the question of registration of the mortgagees could not affect the question of ownership of the proceeds of the sale. *Texas Moline Plow Co. v. Kingman Texas Implement Co.*, 32 C. A. 343, 80 S. W. 1042.

A chattel mortgagee held entitled to foreclosure of property sold by mortgagor as against both mortgagor and purchaser, and not compelled to take a personal judgment. *Ranger Mercantile Co. v. Terrett* (Civ. App.) 106 S. W. 1145.

A person furnishing a tenant supplies and taking in payment mortgaged cotton also incumbered with a landlord's lien held liable to the mortgagee for the amount of the debt less the amount of the landlord's lien. *Id.*

The mere change in the locality or possession of a mortgaged chattel would not affect the mortgage. *McDaniel v. Staples* (Civ. App.) 113 S. W. 596.

A purchaser of mortgaged chattels with the mortgagee's consent is not charged with the duty of seeing that the proceeds of the sale are paid to the mortgagee. *Rusk County Lumber Co. v. Meyer* (Civ. App.) 126 S. W. 317.

The buyer of property subject to a chattel mortgage held not required to tender the amount of the mortgage debt as a condition to the assertion of his title to the property. *Hughes v. Smith* (Civ. App.) 129 S. W. 1142.

Where a chattel mortgage was executed and registered in a county, the removal of the property to another county for more than four months would not affect the mortgagee's right, if such removal was without his knowledge or consent. *Id.*

Where a chattel mortgagor conveyed the mortgaged property to a third person, he conveyed whatever right or title he then had. *Id.*

Chattel mortgage held not invalidated by removal of chattels from county where mortgage was recorded without mortgagee's consent. *Triplitt v. Stone* (Civ. App.) 145 S. W. 660.

A chattel mortgagor may not deduct from the proceeds of a sale of the mortgaged chattels the expenses incurred by him in the management and keeping of the chattels. *Rodgers v. Sturgis Nat. Bank* (Civ. App.) 152 S. W. 1176.

**Art. 5661. [3334] Not to be recorded at length.**—Chattel mortgages and other instruments intended to operate as mortgages or liens upon personal property shall not hereafter be recorded at length as heretofore required; and, when deposited and filed in accordance with the provisions of this law, shall have the force and effect heretofore given to a full registration thereof, and all persons shall be thereby charged with notice thereof, and of the rights of the mortgagee, his assignee or representative thereunder, but nothing herein contained shall be so construed as to in any manner affect the rights of any person under any instrument heretofore recorded as required by law. [Id. sec. 7.]

**In general.**—The clause "all persons shall be thereby charged with notice thereof" does not enlarge the scope of the notice as defined therein. *Ætna Ins. Co. v. Holcomb*, 89 T. 404, 34 S. W. 915.

**Art. 5662. Destruction of chattel mortgages.**—All chattel mortgages filed with the county clerks of this state in accordance with law shall be prima facie presumed to have been paid after the expiration of six years from the date of the maturity of the debts such mortgages were intended to secure, unless the owner or holder of such mortgage, his agent or attorney, shall, within three months next before the expiration of said time, file an affidavit in writing with the county clerk stating that such debt has not been paid, and the amount still due thereon. If such affidavit is not filed, the clerk shall, at the expiration of said time, make disposition of such mortgage, either by delivering the same to the maker or by burning the same. [Acts 1907, p. 272.]

DECISIONS RELATING TO SUBJECT OF CHAPTER SEVEN IN GENERAL

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|-----------------------------------------------------|--------------------------------------------------------------------------|
| 1. Chattel mortgages—Nature.                        | 15. — Property mortgaged and estates and interests of parties therein.   |
| 2. — Distinguished from other transactions.         | 16. Bona fide purchasers.                                                |
| 3. — Property which may be the subject of mortgage. | 17. Priorities of mortgages.                                             |
| 4. — Debts which may be secured.                    | 18. — Mortgagee as bona fide purchaser.                                  |
| 5. — Parties.                                       | 19. — Notice affecting priority.                                         |
| 6. — Consideration.                                 | 20. Rights and liabilities of parties—Possession or control of property. |
| 7. — Equitable mortgage.                            | 21. — Conversion of or injury to property.                               |
| 8. — Absolute bill of sale as mortgage.             | 22. — Measure of damages for conversion.                                 |
| 9. — Form of instrument.                            | 23. Assignment of mortgage or debt.                                      |
| 10. — Description of property.                      | 24. Waiver or loss of lien.                                              |
| 11. — Execution.                                    | 25. Payment, release or satisfaction.                                    |
| 12. — Estoppel to raise objections.                 | 26. Foreclosure.                                                         |
| 13. Construction and operation—What law governs.    | 27. Judgment of foreclosure of liens.                                    |
| 14. — Debts secured.                                |                                                                          |

1. **Chattel mortgages—Nature.**—A creditor of the mortgagor may levy upon, under execution, and sell his interest in the mortgaged chattel property. The purchaser would buy subject to the mortgage lien, and the mortgagee, if his rights as lienholder are jeopardized, may sequester the property in a suit against the mortgagor and purchaser. *Sparks v. Pace*, 60 T. 298.

A mortgagee, although invested with the legal title, is a mere trustee for the mortgagor, and cannot maintain an action of trespass to try title to recover possession, and cannot convey the property to another. *Pratt v. Godwin*, 61 T. 331; *Edrington v. Newland*, 57 T. 627.

Chattel mortgage defined. *Johnson v. Robinson*, 68 T. 400, 4 S. W. 625; *Wallace v. Bagley*, 26 S. W. 519, 6 C. A. 484.

The mortgagor of personal property, while he cannot sell or remove it without the consent of the mortgagee, has a restricted control of it. If he attaches it to the homestead, it is exempt from forced sale at the suit of any other creditor. *Low v. Tandy*, 70 T. 745, 8 S. W. 620.

The fact that a creditor is otherwise secured does not invalidate a second mortgage by a falling debtor. It might entitle him to marshal securities. *Padgitt v. Porter* (Civ. App.) 26 S. W. 429.

Instrument construed as a chattel mortgage. *Harris v. Croley* (Civ. App.) 40 S. W. 510.

Instrument to secure seller by appointing buyer agent to make resale and account for proceeds held a chattel mortgage. *Lewis v. Bell* (Civ. App.) 40 S. W. 747.

Chattel mortgages give only a lien on the mortgaged property; the legal title remaining in the mortgagor. *Hughes v. Smith* (Civ. App.) 129 S. W. 1142.

2. — **Distinguished from other transactions.**—In determining whether an instrument is intended to operate as a conditional sale or as a security, the intention of the parties may be shown by evidence of the surrounding circumstances. *Hudson v. Wilkinson*, 45 T. 444; *Alstin v. Cundiff*, 52 T. 453; *Hardie v. Campbell*, 63 T. 292; *De Bruhl v. Maas*, 54 T. 464; *Calhoun v. Lumpkin*, 60 T. 185.

When the possession of personal property which has been mortgaged is delivered to the mortgagee, or to another for him, it becomes in effect a pledge, and the rights of the parties are to be determined by the principles of law applicable to pledges. *Hudson v. Wilkinson*, 61 T. 606.

When a written instrument, from its terms or surrounding circumstances, appears to have been given as a security for a debt, it will be held a mortgage of the property conveyed, though it may contain no terms of defeasance. *National Bank of Texas v. Lovenberg*, 63 T. 506.

For an instrument held to be a deed and not a mortgage, see *Seeligson v. Singleton*, 66 T. 271, 17 S. W. 541. An instrument which gives to the grantees the power to take possession of, control and sell the merchandise of the makers, to secure a debt, operates as a mortgage and not as an assignment. *Stiles v. Hill*, 62 T. 429; *Jackson v. Harby*, 65 T. 710; *Baldwin v. Peet*, 22 T. 708, 75 Am. Dec. 806; *Watterman v. Silberberg*, 67 T. 100, 2 S. W. 578.

Instrument for sale of goods, property to remain in vendor until price paid, construed, and held a chattel mortgage, which could be foreclosed for the price remaining due. *Loftus v. King*, 23 C. A. 36, 56 S. W. 109.

Instrument for sale of merchandise held a chattel mortgage. *Hall v. Keating Implement & Machine Co.*, 33 C. A. 526, 77 S. W. 1054.

One to whom a fraternal benefit certificate is assigned as collateral security to the extent of the debt has a lien thereon to secure the payment of the indebtedness, especially for premiums or dues paid at the request of the assignor to keep the certificate alive. *Coleman v. Anderson* (Civ. App.) 82 S. W. 1057.

A certain assignment of rents securing a note held to have amounted to a mortgage. *Thatcher v. Jeffries* (Civ. App.) 91 S. W. 1091.

A mortgage is a conveyance of an estate or property by way of pledge, to become void on payment of debt, and is not a mere lien. *Poarch v. Duncan*, 41 C. A. 275, 91 S. W. 1110.

A certain instrument held a mortgage, and not a sale of cotton, and the one executing it liable for the taxes assessed after its execution. *McKinney Cotton Oil Mill Co. v. Van Brown* (Civ. App.) 111 S. W. 438.

In equity, a mortgage is not a conveyance of the legal title, but only a security for debt. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

A written transfer of money that will be due, which in its last clause states the purpose to be to secure payment of a note, no other consideration being stated, will be construed only to describe the debt to be paid and will not be held a mortgage. *A. A. Fielder Lumber Co. v. Smith* (Civ. App.) 151 S. W. 605.

A transfer of a policy of life insurance by a debtor to a creditor having no insurable interest in the debtor's life, operates only as a mortgage to secure the debt and interest and premiums subsequently paid by the creditor and interest, and to that extent is valid. *Harde v. Germania Life Ins. Co.* (Civ. App.) 153 S. W. 666.

**3. — Property which may be the subject of mortgage.**—Machinery necessary to the operation of a mill and not actually annexed thereto, and which can be removed without damage to the freehold, is not a part of the realty. *Hutchins v. Masterson*, 46 T. 554, 26 Am. Rep. 286; *Menger v. Ward* (Civ. App.) 28 S. W. 824; *Willis v. Munger Imp. Cotton Machine Mfg. Co.*, 13 C. A. 677, 36 S. W. 1010.

One who has in contemplation of the purchase of property may by contract impose a lien which will be valid in equity, and will attach as a charge upon the particular property, as soon as he acquires title thereto. *Taylor v. Huck*, 65 T. 238.

Whatever may be the subject of an absolute sale may be the subject of a mortgage. A contingent possibility not coupled with interest is not a subject of sale. Things which have a potential existence, that is, things which are the natural product or expected increase of something belonging to the vendor, are subject to sale or mortgage. Thus, a man may sell the wool to grow upon his own sheep, or the crops to grow upon his own land. *Dupree v. McClanahan*, 1 App. C. C. § 594.

A mortgage on standing trees to be cut by the mortgagor is not void as a chattel mortgage. *Boykin v. Rosenfield*, 69 T. 115, 9 S. W. 318.

A mortgage on personal and real property thereafter to be acquired, or a mortgage of crops to be raised during a series of years to secure rents, is valid in equity. *Richardson v. Washington*, 88 T. 339, 31 S. W. 614.

A chattel mortgage by a husband, covering separate property of the wife, cannot be foreclosed as to such property. *Parish v. Austin* (Civ. App.) 76 S. W. 533.

A mortgage on crops not yet planted is a valid equitable mortgage as between the parties, and will attach to the crop after it is planted and grown. *Conley v. Nelin* (Civ. App.) 128 S. W. 424.

Rule at law and in equity as to the mortgage of after-acquired property stated. *Speer v. Allen* (Civ. App.) 135 S. W. 231.

By the doctrine of "potential existence," a mortgage of property not in existence, or which the mortgagor does not own, may be upheld at common law. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

Under the doctrine of "intervening act," the grant of a future interest may take effect and operate as a conveyance of the legal title. *Id.*

In equity, the lien of a mortgage on after-acquired property will attach on its acquisition by the mortgagor. *Id.*

In the absence of statutory prohibition, any salable property may be mortgaged. *Clark v. Altizer* (Civ. App.) 145 S. W. 1041.

**4. — Debts which may be secured.**—A mortgage can be made to cover future debts, and such a mortgage will be good not only between the parties, but as to purchasers from the mortgagor with notice of the mortgage. *Freiberg v. Magale*, 70 T. 116, 7 S. W. 684.

**5. — Parties.**—Chattel mortgage held to create no lien, being executed by one not the owner, nor authorized by him to execute it. *Martin v. Armstrong* (Civ. App.) 62 S. W. 83.

**6. — Consideration.**—It was sufficient consideration for the giving of a chattel mortgage that a surety upon the note secured by it required it to be given as a condition precedent to his becoming surety. *Dunlap v. Broyles* (Civ. App.) 146 S. W. 578.

**7. — Equitable mortgage.**—Where a vendee agreed to execute a mortgage to secure the price, but failed to do so, and the vendor shipped the goods in reliance on the agreement, he was entitled to enforce the lien by subjecting the property to the payment of the debt. *Perkins v. Frank* (Civ. App.) 64 S. W. 236.

An equitable lien on personalty held created by one loaning money for the purchase thereof with an oral agreement for a lien. *Galbraith v. First State Bank & Trust Co.* (Civ. App.) 133 S. W. 300.

Where one agrees to execute a mortgage on certain property, and has the ability to perform the agreement, equity will enforce the agreement as a mortgage. *Speer v. Allen* (Civ. App.) 135 S. W. 231.

An equitable chattel mortgage is created by an agreement founded on a valuable consideration to give a mortgage. *Edwards v. Mayes* (Civ. App.) 136 S. W. 510.

**8. — Absolute bill of sale as mortgage.**—An absolute bill of sale may be shown to be a mortgage. *Anglin v. Barlow* (Civ. App.) 45 S. W. 827.

Certain evidence held competent to show that bill of sale was in reality a mortgage. *Harris v. Staples* (Civ. App.) 89 S. W. 801.

**9. — Form of instrument.**—No particular form of words is necessary to constitute a mortgage. It must clearly indicate the creation of the lien, specifying the

debt to secure which it is given, and the property upon which it is to take effect. Whatever the form of the contract may be, if it is intended thereby to create a security it is an equitable mortgage. *Calder v. Ramsey*, 66 T. 218, 18 S. W. 502; *Mason v. Bumpass*, 1 App. C. C. § 1338; *Mann v. Falcon*, 25 T. 271; *Bogges v. Brownson*, 59 T. 417; *Cason v. Chambers*, 62 T. 305; *McKeen v. James*, 25 S. W. 408, 27 S. W. 59, 87 T. 193. Its character is not affected by the fact that no defeasance is expressed. *Calder v. Ramsey*, 66 T. 218, 18 S. W. 502.

There is no particular formality necessary in the creation of a trust, and the trust can be manifested by any subsequent acknowledgment by the trustee. *Wallace v. Pruitt*, 1 C. A. 231, 20 S. W. 728.

As to the terms of a chattel mortgage, see *Meyer Bros. Drug Co. v. Rather* (Civ. App.) 30 S. W. 812.

Reservation in chattel mortgage of rights which law would give mortgagor in absence of such reservation does not invalidate mortgage. *Parlin & Orendorff Co. v. Hanson*, 21 C. A. 401, 53 S. W. 62.

Irrelevant matter in mortgage of personalty held surplusage, not vitiating the instrument or rendering it incompetent in the prosecution for fraudulently disposing of the mortgaged property. *Harris v. State* (Cr. App.) 67 S. W. 327.

A chattel mortgage good as between the parties may be created by parol. *Edwards v. Mayes* (Civ. App.) 136 S. W. 510.

A chattel mortgage given to secure notes is not invalid, because bearing a date prior to the date of the notes. *Bates v. Hill* (Civ. App.) 144 S. W. 288.

10. — **Description of property.**—Where the description of property in a mortgage is ambiguous or inconsistent one part with another, but may apply to either of two tracts, its record will affect a subsequent purchaser with notice, and so where the purchaser from his knowledge of the property is able to correct the error in the description of the property. But if the discrepancy is of a substantial nature the rule would be different. *Carter v. Hawkins*, 62 T. 393.

A chattel mortgage held not void for uncertainty in description of the property mortgaged. *Oxshier v. Watt*, 91 T. 124, 41 S. W. 466, 66 Am. St. Rep. 863.

A recorded mortgage on 50 cows branded COOK on the left side and AK on left hip is constructive notice of the mortgagee's lien on that many cows in a herd containing more than that number. *Avery v. Popper*, 92 T. 337, 49 S. W. 219, 50 S. W. 122, 71 Am. St. Rep. 849.

A mortgage describing property included therein as "two Ledgerwood engines," without giving other means of identification, held insufficient to create a lien. *Solinsky v. O'Connor* (Civ. App.) 54 S. W. 935.

Descriptions contained in a chattel mortgage held sufficient to affect third parties with notice of the property covered. *Johnson v. Brown* (Civ. App.) 65 S. W. 485.

A chattel mortgage, describing the property as "two gray mares," contains a sufficient description, where second mortgagees had actual notice as to the mares referred to. *Blythe v. Crump*, 28 C. A. 327, 66 S. W. 885.

Description in a chattel mortgage held sufficient to cover crops growing when the mortgage was executed. *Becker v. Bowen* (Civ. App.) 79 S. W. 45.

Mortgage of cattle held to sufficiently describe the mortgaged property. *Scaling v. First Nat. Bank*, 39 C. A. 154, 87 S. W. 715.

A description in a chattel mortgage which will enable third persons to identify the property, aided by inquiries which the mortgage indicates, is sufficient. *Harless v. Jester* (Civ. App.) 97 S. W. 138.

A chattel mortgage of diamond rings held to sufficiently describe the property. *Id.*

A description of property in a chattel mortgage as "one blue mare mule, 15½ hands high, of the value of \$100," was sufficient to charge constructive notice as to the property mortgaged. *Watt v. Parlin & Orendorff Co.*, 44 C. A. 439, 98 S. W. 428.

There is no ambiguity in the description in a deed of trust which comprises everything owned by the grantor in a certain county. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 528.

Chattel mortgages held to have sufficiently described the property. *Beaumont Rice Mills v. Port Arthur Rice Milling Co.* (Civ. App.) 141 S. W. 349.

"One 3-70 saw secondhand gin outfit complete, including engine and boiler," sufficiently described chattel mortgage property; it being ascertainable by parol evidence. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

As against third persons a chattel mortgage must point out the subject-matter, so that a third person may identify the property by the aid of such inquiries as the instrument itself suggests. *Pitluk & Meyer v. Butler* (Civ. App.) 156 S. W. 1136.

Description of property in chattel mortgage as "one black mare mule colt eight months old" held sufficient to charge a purchaser from the mortgagor with notice, and hence the purchaser took subject to the mortgage. *Id.*

11. — **Execution.**—A valid mortgage cannot exist in the absence of the consent of the parties to the contract, nor is the contract, even with consent, consummated until the delivery of the instrument, which constitutes its written evidence. *Wallis v. Taylor*, 67 T. 431, 3 S. W. 321.

A chattel mortgage is not operative until accepted by the beneficiaries. *Milling Co. v. Eaton*, 86 T. 401, 25 S. W. 614, 24 L. R. A. 369; *Wallace v. Bagley*, 26 S. W. 519, 6 C. A. 484; *Murphy v. Milling Co.* (Civ. App.) 26 S. W. 853; *Sugar Refinery Co. v. Harrison*, 9 C. A. 141, 29 S. W. 500. See *McLaughlin v. Carter*, 13 C. A. 694, 37 S. W. 666.

Assent of mortgagee does not validate the mortgage as against parties acquiring interests in mortgaged property prior to such assent. *Whitaker v. Sanders* (Civ. App.) 52 S. W. 638.

The fact that a chattel mortgage was witnessed by two of the beneficiary parties would not invalidate its registration, since, under the statute, a chattel mortgage is entitled to registration, though not witnessed at all. *Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones* (Civ. App.) 152 S. W. 441.

12. — **Estoppel to raise objections.**—Where plaintiff is estopped by his conduct from claiming ownership of animals as against defendants, whose title is based on a chattel mortgage made by plaintiff's father, it is immaterial in whose legal possession the

animals were when the mortgage was made. *Saenz v. O. F. Mumme & Co.* (Civ. App.) 85 S. W. 59.

A landlord, who had released his lien on half a certain crop to a mortgagor, held not such a stranger to the transaction as to enable him to take advantage of an insufficient description of the crop. *Gaulding v. Masterson* (Civ. App.) 101 S. W. 1017.

13. **Construction and operation—What law governs.**—When a chattel mortgage is executed in a state other than that in which the property is situated, the *lex situs* governs. *Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce* (Civ. App.) 139 S. W. 665.

14. — **Debts secured.**—An instruction that plaintiff might recover attorney's fees for taking possession of mortgaged property if he had probable cause to believe that mortgagor was about to remove the same from the county held error where the affidavit for sequestration only alleged that plaintiff feared defendant would remove the property from the county. *McMillan v. Moon*, 18 C. A. 227, 44 S. W. 414.

A purchaser of property covered by a recorded mortgage for an unlimited sum held to take with notice of the advances made by the mortgagee. *Bullard v. Stewart*, 46 C. A. 49, 102 S. W. 174.

A chattel mortgage construed to cover advances made by the mortgagee during a certain year only. *Bank of Omaha v. Pope* (Civ. App.) 103 S. W. 692.

A chattel mortgage given to secure advances made and to be made to a tenant to grow and market a crop of rice held not to cover a lien under a prior mortgage to which the second mortgagee had been subrogated. *Sweeney v. Farmers' Rice Milling & Storage Co.* (Civ. App.) 137 S. W. 1147.

15. — **Property mortgaged and estates and interests of parties therein.**—A mortgage of cattle as between the parties to the instrument includes its increase. *First Nat. Bank v. Mortgage & Inv. Co.*, 6 C. A. 59, 24 S. W. 691; *Id.*, 86 T. 636, 26 S. W. 488.

If the mortgagor in possession, by agreement with the mortgagee, annex a mortgaged chattel to his own land, the mortgagee's rights are not affected, and he may still treat it as personal property. *Harkey v. Cain*, 69 T. 146, 6 S. W. 637.

As between the parties to the instrument a mortgage of personal property covers the increase. *Bank v. Western M. & I. Co.*, 24 S. W. 691, 6 C. A. 59. See *Edwards v. Osman*, 84 T. 659, 19 S. W. 868.

A mortgagor is entitled to sever, in law or in fact, the crops which stand upon his lands at any time prior to the destruction of his title by sale under the mortgage. *Lombardi v. Sherr*, 14 C. A. 594, 37 S. W. 613, 971.

A mortgage of part of a herd of cattle held to confer on the mortgagee the right to select them, which right he might exercise by suit to foreclose and sequestration of such animals. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

A chattel mortgage executed by husband and wife is a lien on all the property described, whether it be separate or community property. *Id.*

A mortgage of a number of cattle of a herd, not designating the particular ones, held to confer on the mortgagee the right to select the required number from the entire herd. *Avery v. Popper* (Sup.) 48 S. W. 572.

Where a chattel mortgage on animals and their offspring, part of a larger herd, does not designate the particular animals, the lien on the young is lost, unless the mortgagee, before the offspring have separated from their dams, designates the animals he intends to hold. *Id.*

A mortgage of a drug stock and merchandise held not to include prescriptions that had been filled. *R. C. Stuart Drug Co. v. Hirsch* (Civ. App.) 50 S. W. 583.

A chattel mortgagee cannot incur with his debt property not included in the mortgage. *Solinsky v. O'Connor* (Civ. App.) 54 S. W. 935.

Power to sell under a mortgage covers only that property included within a valid description. *Id.*

A clause in the descriptive portion of a chattel mortgage, "and all cord wood and piling cut by or for me," is insufficient to cover after-acquired property. *Galveston, H. & H. R. Co. v. Hill Mercantile Co.*, 31 C. A. 196, 71 S. W. 797.

A second chattel mortgage on certain cattle held to cover all the cattle covered by the first mortgage. *Scott v. Llano County Bank*, 99 T. 221, 89 S. W. 749.

Mortgage on crops executed in 1902 held not to cover crops raised by the mortgagor on different lands in 1904. *McDavid v. Phillips*, 100 T. 73, 94 S. W. 1131; *Id.* (Civ. App.) 94 S. W. 1129.

A deed of trust giving a lien on all the other property of grantor, whether "real, mixed, or personal," will include the grantor's equitable title to certain tank cars. *Smith v. Texas & N. O. R. Co.* (Civ. App.) 105 S. W. 528.

Lumber pointed out by a mortgagor as included in the mortgage will be held to be included in the mortgage, although not originally so included. *American Nat. Bank of Paris v. First Nat. Bank*, 52 C. A. 519, 114 S. W. 176.

A description in a chattel mortgage held restricted in its meaning to the specific piece of machinery thereby described. *McGregor v. Port Huron Engine & Thresher Co.* (Civ. App.) 120 S. W. 1128.

Where cotton to be raised on certain premises was mortgaged, and the mortgagor raised no cotton there, cotton raised on other premises could not be substituted under the mortgage in the absence of fraud of the mortgagor. *Conley v. Nelin* (Civ. App.) 128 S. W. 424.

Chattel mortgage of 300 head of yearlings held to sufficiently describe them as cattle, as distinguished from horses or sheep. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

Acts done by the mortgagor of after-acquired property held to show a purpose to bring such after-acquired property within the terms of the mortgage and to render the mortgage valid. *Id.*

A chattel mortgage on all machinery appurtenant to a ginhouse, "such as are not previously incumbered," and providing that it should not affect a previous lien, covered machinery released from the prior chattel mortgage by sale. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

16. **Bona fide purchasers.**—A person is not a bona fide purchaser for value where the sole consideration is canceling of pre-existing debt or assuming of debt for which he is already bound. *Lewis v. Bell* (Civ. App.) 40 S. W. 747.

A carrier who had delivered goods to the vendor of defendant, an innocent purchaser for value, on a forged order purporting to be signed by the consignees, held entitled to recover under the rule of caveat emptor. *Gulf, C. & S. F. Ry. Co. v. Taylor*, 18 C. A. 571, 45 S. W. 749.

An heir purchasing from a widow certain personalty of her deceased husband held chargeable with knowledge that her title was only to one-half of the community interest, and that she could not pass title of her minor children in such property. *Gurley v. Dickason*, 19 C. A. 203, 46 S. W. 53.

In an action by the seller to recover the property sold, on the ground of the buyer's fraud, where the jury found that there was no fraud, the seller is not entitled to recover the price from a bona fide purchaser from the buyer. *Walsh v. Leeper Hardware Co.* (Civ. App.) 50 S. W. 630.

One crediting the amount of a debt as consideration of a purchase is not a bona fide purchaser. *Sanger v. Jesse French Piano & Organ Co.*, 21 C. A. 523, 52 S. W. 621.

Purchaser of goods from a seller, who had obtained them by fraudulent representations of his solvency, held an innocent purchaser for value without notice, and hence entitled to the goods against the original seller. *Wear & Boogher Dry-Goods Co. v. Crews*, 23 C. A. 667, 57 S. W. 73.

Where a purchaser executed a note in payment of goods, but did not prove that the note was negotiable, he was not entitled to the rights of a purchaser for value. *Perkins v. Frank* (Civ. App.) 64 S. W. 236.

A buyer held to take property free from an equitable claim of a third person; it not appearing that he had notice of it. *Wootton v. Thomson*, 55 C. A. 583, 119 S. W. 117.

An owner of personalty, who is induced by fraud to part with the possession, may recover the possession of an innocent purchaser; but an owner who is induced by fraud to part with the title may not recover of an innocent purchaser. *McDonald v. Humphries* (Civ. App.) 146 S. W. 712.

17. **Priorities of mortgages.**—Priority of lien of livery stable keeper, see notes under Art. 5664.

A second mortgagee who acquires his right without notice of a prior mortgage stands in no better position than a subsequent purchaser without notice. In the latter case it has been held that a pre-existing debt is not a sufficient consideration as a basis for an innocent purchase without notice. *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657; *Bailey v. Tindall*, 59 T. 540; *McKamey v. Thorp*, 61 T. 648; *Overstreet v. Manning*, 67 T. 659, 4 S. W. 248; *First Nat. Bank v. Western Mortg. Co.*, 24 S. W. 691, 6 C. A. 59.

Chattel mortgage is subject to a prior lien of an attachment. *Smelser v. Baker*, 26 S. W. 905, 6 C. A. 751.

The superior right of the holder of a chattel mortgage, the property having been sold under attachment proceedings by another creditor before judgment, is not affected thereby, and he may intervene in the suit to protect his interests. *Ballinger Nat. Bank v. Bryan*, 12 C. A. 673, 34 S. W. 451.

Purchasers of chattels under a trust deed given by a corporation held to take subject to a prior vendor's lien, only in so far as they had notice thereof. *College Park Electric Belt Line v. Ide*, 15 C. A. 273, 40 S. W. 64.

Where defendant purchased land to which a boiler was attached, without actual notice that it was subject to a chattel mortgage, held that his title was not affected by the mortgage. *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 C. A. 694, 41 S. W. 335.

Delivery of cattle by a sheriff to a chattel mortgagee under a range levy in sequestration proceedings was sufficient to entitle such mortgagee to hold the cattle, as against subsequent attaching creditors of the mortgagor. *Randolph v. Brown*, 21 C. A. 617, 53 S. W. 825.

An innocent purchaser of personalty incumbered by a mortgage takes title subject to the lien, where the mortgagees are not negligent in respect to giving notice. *Blythe v. Crump*, 28 C. A. 327, 66 S. W. 885.

Pledgee of chattel held to have a lien prior to that retained by the seller of the chattel by a chattel mortgage. *Sweeney v. Taylor Bros.*, 41 C. A. 365, 92 S. W. 442.

Purchaser of mortgaged machinery having notice of mortgage held liable thereon. *Trabue v. Wade & Miller* (Civ. App.) 95 S. W. 616.

Facts held not to constitute a conversion of certain cotton as against a chattel mortgagee. *Harvey v. Geo. Wilder & Co.* (Civ. App.) 131 S. W. 851.

In the absence of registration statutes, the right of priority between junior and senior chattel mortgagees where the mortgages were given to secure notes, is a subject peculiarly applicable to equitable jurisdiction. *Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce* (Civ. App.) 139 S. W. 665.

A mortgage, executed to plaintiff by defendant after he had, in contemplation of purchasing the property, executed to others a purported mortgage on the same chattels while they belonged to plaintiff, was entitled to priority over the prior mortgage. *Tips v. Gay* (Civ. App.) 146 S. W. 306.

As between chattel mortgages, the prior one is superior, unless the subsequent mortgagee took in good faith, which can only be shown by proof of payment of valuable consideration and want of notice. *Neely-Harris-Cunningham Co. v. Lacy Bros. & Jones* (Civ. App.) 152 S. W. 441.

Where a seller agreed with the buyer that the latter might borrow from a third person the money for the cash payment and secure it by a chattel mortgage on the property, it was inequitable to hold the purchase-money mortgage superior to the mortgage to the third person. *J. H. & J. T. Pace v. J. M. Radford Grocery Co.* (Civ. App.) 152 S. W. 1130.

18. **Mortgagee as bona fide purchaser.**—A mortgagee securing a pre-existing debt held based on sufficient consideration to entitle the mortgagee, without notice of a prior unrecorded mortgage, to a priority. *McKinney v. Williams* (Civ. App.) 45 S. W. 335.

Buyer of cattle and mortgagee for pre-existing debt held not innocent purchasers, so

as to entitle them to rights superior to another mortgagee. *Belcher v. Cassidy Bros. Live Stock Commission Co.*, 26 C. A. 60, 62 S. W. 924.

A mortgagee in a second mortgage of chattels held entitled to the protection of an innocent purchaser. *Beaumont Rice Mills v. Bridges*, 45 C. A. 439, 101 S. W. 511.

19. — **Notice affecting priority.**—A chattel mortgage, though not filed, held available against a bill of sale, where possession was taken. *Smith v. Connor* (Civ. App.) 46 S. W. 267.

One taking second mortgage, charged with notice of a prior registered mortgage, holds subject thereto, notwithstanding fraudulent registration of a release of which he had no knowledge. *Ross v. Strahorn-Hutton-Evans Commission Co.*, 18 C. A. 698, 46 S. W. 398.

Notice given by plaintiff to one of the defendants that he had a mortgage on the crops of a third person held ineffective. *McKinney v. Ellison* (Civ. App.) 75 S. W. 55.

Evidence held sufficient to put party on inquiry as to the existence of a mortgage on chattels at the time he caused an attachment to be levied thereon. *Cassidy v. Willis & Connally*, 33 C. A. 289, 78 S. W. 40.

Priorities of chattel mortgages as affected by a mortgagee taking possession stated. *First Nat. Bank v. McElroy*, 51 C. A. 284, 112 S. W. 801.

If a person took a mortgage on chattels executed under a name other than the mortgagor's, who afterwards sold them under his customary name to a purchaser in good faith without notice of the mortgage, held, that the mortgagee, having made the loss possible, should stand it, and not the purchaser. *Bradford v. Lembke* (Civ. App.) 118 S. W. 159.

A mortgage or other conveyance signed in a wrong name, or a name by which the grantor is not customarily known, imparts no notice. *Id.*

20. **Rights and liabilities of parties—Possession or control of property.**—Where a deed of trust, in which the trustee is also agent of the beneficiaries, provides that upon default in any payment the beneficiaries may, at their option, treat the debt secured as due, and sell the property, such election may be made by such agent on behalf of his principal, and need not be formally declared; the election being sufficiently made by the trustee advertising the property for sale. *Chase v. Bank*, 1 C. A. 595, 20 S. W. 1027.

Though a chattel mortgage provides that on nonpayment mortgagee may recover possession, he cannot by force enter a house and take the same. *Gillett v. Moody* (Civ. App.) 54 S. W. 35.

Provision in a chattel mortgage given to secure price for a peaceable taking possession by the mortgagee, on default in payment, held valid. *Singer Mfg. Co. v. Rios*, 96 T. 174, 71 S. W. 275, 60 L. R. A. 143, 97 Am. St. Rep. 901.

In an action to recover animals, held, that plaintiff's possession, when his father made the mortgage under which defendants claim, was not such as to make defendants trespassers in taking the animals under the mortgage. *Saenz v. O. F. Mumme & Co.* (Civ. App.) 85 S. W. 59.

The buyer of property subject to chattel mortgage has the legal title and is entitled to possession until the right is cut off either by judicial foreclosure or by sale in accordance with the terms of the mortgage. *Hughes v. Smith* (Civ. App.) 129 S. W. 1142.

The sale by a mortgagee in possession, of timber on the mortgaged land and receipt of the purchase money, discharged the timber from the lien, so that neither the mortgagee nor a subsequent holder could assert it against the timber. *Berry v. Hindman* (Civ. App.) 129 S. W. 1181.

A chattel mortgagee held guilty of negligence in not obtaining possession of the chattels mortgaged. *Best v. Farmers' & Merchants' Bank* (Civ. App.) 141 S. W. 334.

Where a chattel mortgagee of a mule, who had power on default to take possession, the mortgage having been registered, brought suit against a purchaser of such mule for "title and possession," he should be allowed to recover possession for the purpose of sale, although he could not recover title. *Butts v. Lucia* (Civ. App.) 153 S. W. 686.

21. — **Conversion of or injury to property.**—Where the mortgaged property has been sold, the remedy of the mortgagee is to follow the property into the hands of such purchasers. *Robinson v. Veal*, 1 App. C. C. § 311.

As to the remedy of the mortgagee for mortgaged property which has been converted by a wrong-doer, see *Brown v. Grinnan*, 2 App. C. C. § 414.

A mortgagor of personal property retaining possession may sue for its wrongful conversion. *Weir Plow Co. v. Armentrout*, 9 C. A. 117, 28 S. W. 1045, 29 S. W. 405.

A purchaser of the property who thereafter sells, in denial of the mortgagee's right, is liable for its conversion. *Western Mortg. & Inv. Co. v. Shelton*, 29 S. W. 494, 8 C. A. 550.

Where original security is adequate, creditor has no cause of action against one levying on property covered by chattel mortgage given as additional security. *Canfield v. Moore*, 16 C. A. 472, 41 S. W. 718.

One who purchases mortgaged property with knowledge of the mortgage, and sells it in hostility to the mortgagee, is liable to him as for a conversion. *McCown v. Kitchen* (Civ. App.) 52 S. W. 801.

Assignee of a mortgage having sequestered mortgaged chattels, which had been attached, and having paid the attachment lien decreed prior to his mortgage, held entitled to relief, as against subsequent attaching creditors, though the mortgage was invalid. *Randolph v. Brown*, 21 C. A. 617, 53 S. W. 825.

Certain cotton held not to be incumbered by a certain mortgage, so as to render its attachment as property of the mortgagor wrongful. *Blount v. Lewis* (Civ. App.) 59 S. W. 293.

The exercise of the mortgagee's right to take possession of mortgaged property on the mortgagor's default, as provided by the terms of a chattel mortgage, and the mortgagee's act in securing such right by procuring a seizure of the property under a writ of sequestration, cannot be made the ground of an action for damages by the mortgagor. *Wedig v. San Antonio Brewing Ass'n*, 25 C. A. 153, 60 S. W. 567.

Where title to goods sold passes a notice by the seller to a person intending to purchase, that the former claims title thereto does not render the latter liable for conversion in subsequently purchasing the goods. *International & G. N. R. Co. v. Ogburn*, 26 C. A. 217, 63 S. W. 1072.

A mortgagee of personal property converted by third persons may elect to recover the value thereof from the latter, and is not required to enforce his mortgage. *Parlin & Orendorff Co. v. Moore*, 28 C. A. 243, 66 S. W. 798.

Mortgagees of chattels held not barred from enforcing the lien against one converting the chattels, though not intervening in action by the owner for conversion. *Scott v. Cox*, 30 C. A. 190, 70 S. W. 802.

Attachment of property covered by a chattel mortgage held a conversion; the mortgagor being entitled to have the value of the property applied to the satisfaction of the notes secured by the mortgage, pursuant to an agreement to that effect. *Bledsoe v. Palmer* (Civ. App.) 81 S. W. 97.

Mortgagee held entitled to sue one who converts mortgaged property, regardless of the question of other security. *Scaling v. First Nat. Bank*, 39 C. A. 154, 87 S. W. 715.

A mortgagee in a chattel mortgage held entitled to sue one converting the mortgaged chattels. *American Nat. Bank v. First Nat. Bank*, 41 C. A. 392, 92 S. W. 439.

A landlord of a mortgagor in a chattel mortgage held guilty of a conversion of the mortgaged chattels. *Roche v. Dale*, 43 C. A. 287, 95 S. W. 1100.

A mortgagee in a chattel mortgage held estopped from maintaining a suit against another mortgagee for the conversion of the property covered by the mortgage. *McCarthy v. North Texas Loan Co.* (Civ. App.) 101 S. W. 835.

Where a mortgagee transfers all the rights which it acquired as a purchaser on foreclosure of the mortgage to a third person, the fact that such third person takes possession of property not included in the description of the mortgage does not render the mortgagee liable for the conversion. *Smith v. Texas & N. O. R. Co.*, 101 T. 405, 108 S. W. 819.

If the mortgage on fixtures attached to a homestead is void, a purchaser of such fixtures from the owner cannot be held liable for the conversion of mortgaged property. *Doak v. Moore*, 48 C. A. 594, 109 S. W. 405.

In an action for the conversion of mortgaged cotton, defendant was properly allowed his rent and the expenses incident to gathering and preparing the cotton for the market. *McDaniel v. Staples* (Civ. App.) 113 S. W. 596.

In an action against the purchaser of mortgaged chattels for conversion, evidence held to show that the mortgagee consented to the sale. *Rusk County Lumber Co. v. Meyer* (Civ. App.) 126 S. W. 317.

Exercise of dominion by a mortgagee in possession of property inconsistent with the rights of the mortgagor held to amount to a conversion if the mortgagor elected to so treat it. *Payne v. Lindsley* (Civ. App.) 126 S. W. 329.

A chattel mortgagee out of possession may sue for conversion of the property. *Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co.* (Civ. App.) 129 S. W. 1161.

A third person who appropriates to his own use or destroys mortgaged personalty is guilty of conversion. *Id.*

On suit against a third person for converting mortgaged personalty by selling it, the buyer's willingness to have the mortgage foreclosed is immaterial. *Id.*

Mortgagee of personal property held entitled to bring action against a trespasser who had converted part of such mortgaged property, before exhausting its remaining security. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

An owner of property may recover it from an innocent purchaser from the thief. *Morris v. Shuttles Bros. & Lewis* (Civ. App.) 139 S. W. 1053.

Plaintiff, having recovered judgment on a claim transferred to him by defendant, and having foreclosed a chattel mortgage securing the debt, is not entitled to hold defendant as for conversion, because he, by mistake, receipted the claim and delivered the evidence thereof to the debtor, instead of to plaintiff. *Port Arthur Townsite Co. v. Johnson* (Civ. App.) 149 S. W. 552.

In an action by a mortgagee for the conversion of mortgaged property, evidence held not to show the value of the chattels at the time and place of conversion. *Johnson v. Oswald* (Civ. App.) 151 S. W. 1164.

Where hogs were subject to a verbal chattel mortgage, a purchaser who bought without notice is not guilty of a conversion of mortgaged property, and the mortgagee has no right of action against him. *May v. Merchants' & Planters' Nat. Bank of Mt. Vernon* (Civ. App.) 152 S. W. 1194.

22. — Measure of damages for conversion.—Where a person has acquired mortgaged property from one having no right to dispose of the same, and, after being notified of the claim of the mortgagee, disposes of the same to a third party, who converts the same to his own use, the mortgagee can by proper proceedings recover the value of the property to the extent of his interest therein from the first purchaser. *Brown v. Grinnan*, 2 App. C. C. § 414.

The measure of a mortgagee's damages for the conversion of the mortgaged property by a stranger is the amount of his debt, if that be less than the value of the property converted. *Scaling v. First Nat. Bank*, 39 C. A. 154, 87 S. W. 715.

Where mortgaged property is converted, and the mortgagee elects to follow the specific property, he may recover its value, though it has been increased by its change in form. *American Nat. Bank of Paris v. First Nat. Bank*, 52 C. A. 519, 114 S. W. 176.

Where a debt is less than the value of the mortgaged property, the amount of the debt is the measure of damages to the mortgagee for the conversion of the mortgaged property. *Watkins v. Citizens' Nat. Bank of Rockwall*, 53 C. A. 437, 115 S. W. 304.

In trover for a piano sold to plaintiff by defendant, plaintiff was only entitled to recover the market value of the piano, less the amount of the indebtedness due to defendant, secured by a lien on the piano. *Thos. Goggan & Eros v. Garner* (Civ. App.) 119 S. W. 341.

Where mules subject to a chattel mortgage, were sold to a third person and wrongfully taken from his possession by the mortgagee, the value of their hire per day was not the proper measure of damages for their detention where it extended over a considerable period. *Hughes v. Smith* (Civ. App.) 129 S. W. 1142.

A chattel mortgagee can recover the value of the property on its conversion not exceeding the amount of the mortgage; not being bound to foreclose. *Buffalo Pitts Co. v. Stringfellow-Hume Hardware Co.* (Civ. App.) 129 S. W. 1161.



The mortgagee of personal property is entitled to recover, from one who converts the same to his own use and prevents foreclosure, the value of the property converted, to the extent of his lien. *Barron v. San Angelo Nat. Bank* (Civ. App.) 138 S. W. 142.

One converting to his own use mortgaged chattels is only liable to the mortgagee for their market value at the time and place of conversion, and, where the value exceeds the debt, then only to the extent of the debt. *Johnson v. Oswald* (Civ. App.) 151 S. W. 1164.

When mortgaged personal property is converted by a third person, the mortgagee has a right of action against the wrongdoer for his damages measured by the value of the property, if it does not exceed the amount of the secured debt. *Busch v. Brown* (Civ. App.) 152 S. W. 683.

**23. Assignment of mortgage or debt.**—The assignee of a debt secured by mortgage on land, of which he is in possession, and holding the claim as a lien thereupon, cannot be disturbed by one claiming under the mortgagor, until the mortgage debt is satisfied. *Duke v. Reed*, 64 T. 705, citing *Hannay v. Thompson*, 14 T. 142; *Loving v. Milliken*, 59 T. 423.

The security for a debt inures to the benefit of the holder of the evidence of the indebtedness. *Dorsey v. Frank*, 15 C. A. 47, 38 S. W. 645.

Where part of a series of notes secured by lien were transferred absolutely, the assignee was entitled to precedence of the others as to the security, without taking up the whole series. *Dilley v. Freedman*, 25 C. A. 39, 60 S. W. 448.

Assignee of notes secured by mortgage on merchandise became mortgagee, and had the right, as against other creditors, to purchase mortgagor's property in payment of debts secured. *Hall v. Keating Implement & Machine Co.*, 33 C. A. 526, 77 S. W. 1054.

**24. Waiver or loss of lien.**—While the mortgagor may not have power to sell, yet having paid the price obtained to the mortgagee, its retention is equivalent to a ratification of the sale. The mortgagee could not have the thing mortgaged and its price. *Hicks v. Ross*, 71 T. 358, 9 S. W. 315.

The fact that the mortgagees consented to a sale of part of the property to pay a prior lien will not waive their lien on the other property covered thereby. *Walhoefer v. Hobgood*, 18 C. A. 291, 44 S. W. 566.

Willingness of the mortgagees to authorize a sale of mortgaged property will not, without consent, give a right to sell. *Id.*

Where a mortgage was expressly subject to a prior mortgage on the same chattels, held, that junior mortgagee could not claim that senior mortgagee had, by his acts, warranted a conclusion that mortgagor had the right to sell without restriction. *Godair v. Tillar*, 19 C. A. 541, 47 S. W. 553.

A chattel mortgage lien held not waived by the mortgagee. *Mayers v. McNeese* (Civ. App.) 71 S. W. 68.

Where a mortgagee consented to sale of mortgaged personalty, but refused to release mortgage, it was not waived. *Trabue v. Wade & Miller* (Civ. App.) 95 S. W. 616.

The right of a mortgagee in a chattel mortgage to insist that his mortgage is superior to another mortgage held waived. *McCarthy v. North Texas Loan Co.* (Civ. App.) 101 S. W. 835.

Where a mortgagee consents to a sale of the property by the mortgagor, he waives the lien of his mortgage as against the purchaser. *Rusk County Lumber Co. v. Meyer* (Civ. App.) 126 S. W. 317.

A lien on personalty held not lost by the article being attached to the homestead of the one giving the lien. *Galbraith v. First State Bank & Trust Co.* (Civ. App.) 133 S. W. 300.

A chattel mortgage lien held waived by the mortgagee. *Thompson v. Perryman* (Civ. App.) 141 S. W. 184.

**25. Payment, release or satisfaction.**—An agreement in parol between a mortgagor and mortgagee for the transfer of chattels in payment of the mortgage debt transfers the title without specific delivery. *Downey v. Taylor* (Civ. App.) 48 S. W. 541.

Holders of notes taken up at maturity for the makers, with an understanding that they were to be kept alive, were entitled to the benefit of a lien securing the notes, as against the objection that they were thereby paid. *Dilley v. Freedman*, 25 C. A. 39, 60 S. W. 448.

The taking of a second mortgage to secure the same debt secured by a first mortgage on the same property does not operate as a satisfaction and release in law of the first mortgage. *Adams-Burks-Simmons Co. v. Johnson*, 51 C. A. 583, 113 S. W. 176.

A chattel mortgagor may convey his legal title to the mortgagee in satisfaction of the debt, or other consideration. *Hughes v. Smith* (Civ. App.) 129 S. W. 1142.

In order to set aside and invalidate a note and chattel mortgage, there must have been an express contract made after their execution. *Stewart v. State*, 60 Cr. R. 92, 131 S. W. 329.

In an action to foreclose a chattel mortgage where the mortgagor had given a second mortgage to discharge the first, and the mortgages were transferred to different parties by the mortgagee, held, that the second mortgagee was not entitled to interpose the defense of payment. *Third Nat. Bank of Springfield, Mass., v. National Bank of Commerce* (Civ. App.) 139 S. W. 665.

A chattel mortgage being but an incident of the debt, the payment of the debt for which it was given extinguishes the mortgage. *American Type Founder Co. v. First Nat. Bank* (Civ. App.) 156 S. W. 300.

Where the buyer of personal property gives a chattel mortgage for the price, the giving of another mortgage to secure the identical debt, coupled with the execution of new notes and the cancellation of the old, does not discharge the original chattel mortgage, where the only consideration was an extension of time. *Id.*

**26. Foreclosure.**—The purchaser of 300 horses, of which a mortgagee has a right to select 50, to the knowledge of the purchaser, is not prejudiced by a foreclosure of 50 average head. *Oxshier v. Watt*, 91 T. 124, 41 S. W. 466, 66 Am. St. Rep. 863.

A transaction held to constitute the payment of a note for the purchase price of a chattel secured by a mortgage, but not to make the person paying the note the owner of the chattel. *Roche v. Dale*, 43 C. A. 287, 95 S. W. 1100.

**27. Judgment of foreclosure of liens.**—See Art. 2000.

There is no essential difference between a mortgage with power of sale and an ordinary mortgage in reference to the right to foreclose through a judgment of court after the period of limitation has elapsed, if that be pleaded as a defense. The remedy by sale under a deed of trust is cumulative only, and it may be enforced by judicial proceedings. *Blackwell v. Barnett*, 52 T. 326; *Morrison v. Bean*, 15 T. 269.

The registry of a chattel mortgage must be shown in foreclosure proceedings by the record book containing the entry, or by a certified copy of the entry. *Cook v. Halsell*, 65 T. 1.

A trustee empowered to sell on non-payment of the debt to secure which the trust is created cannot appoint an agent to sell for him. *Fuller v. O'Neil*, 69 T. 349, 6 S. W. 181, 5 Am. St. Rep. 59.

Where a trust deed authorizes a sale for cash, and the trustee, who is also the mortgagee or agent of the mortgagee, purporting to sell for cash, gives credit to the bidder in order to induce him to make the property bring the full value of the debt secured, this is not to the injury of the mortgagor or those claiming under him, and will not avoid the sale. *Chase v. Bank*, 1 C. A. 595, 20 S. W. 1027.

A sale of property under a deed of trust at a place not authorized is void. *Durrell v. Farwell* (Civ. App.) 27 S. W. 795.

As to the regularity of a trustee's sale, see *Seip v. Grinnan* (Civ. App.) 36 S. W. 349.

A judgment in a foreclosure action, wherein the decisive question is the priority of one of two mortgages, rendered without determining such question, will be reversed. *Blythe v. Crump*, 28 C. A. 327, 66 S. W. 885.

A national bank holding a mortgage on cattle was authorized to contract to obtain from the mortgagor the title to the cattle, and resell them to a third person, or to foreclose and buy at the sale, applying its bid on the debt. *Dupree v. First Nat. Bank* (Civ. App.) 146 S. W. 608.

## CHAPTER EIGHT

### OTHER LIENS

[For lien of landlord, see Landlord and Tenant.]

Art.	Art.
5663. In favor of hotels, etc.	5668. Non-resident owner.
5664. Livery stable keepers.	5669. Balance, how disposed of.
5665. Possession may be retained, when.	5670. Final disposition of balance.
5666. Where no price agreed upon.	5671. Other liens, etc., not affected.
5667. Sales may be made for charges.	

[In addition to the notes under the particular articles, see also notes under decisions relating to subject-matter of chapter in general, at end of chapter.]

**Article 5663. [3318] Lien in favor of hotels and boarding houses.**—Proprietors of hotels and boarding houses shall have a special lien upon all property or baggage deposited with them for the amount of the charges against them or their owners if guests at such hotel and boarding house. [Act May 2, 1874, p. 200, sec. 1. P. D. 7116f.]

**Lien of lodging house keeper.**—A lodging house keeper held not entitled to the lien given by statute to boarding house keepers. *Hardin v. State*, 47 Cr. R. 493, 84 S. W. 591.

**Drummers' trunks and samples.**—Proprietors of hotels do not acquire a lien on the trunks and drummer's samples belonging to his employer, where the proprietors know the facts at the time the drummer becomes their guest. *Torrey v. McClellan*, 17 C. A. 371, 43 S. W. 64.

**Power of jury to exempt property.**—The finding by the jury that party is indebted for board charges the lien to attach to the property of the boarder and the jury has no power by its verdict to exempt part of the property. *Kingsbury v. Price* (Civ. App.) 59 S. W. 52.

**Art. 5664. [3319] Lien of livery stable keepers and pasturers.**—Proprietors of livery or public stables shall have a special lien on all animals placed with them for feed, care and attention, as also upon such carriages, buggies or other vehicles as may have been placed in their care, for the amount of the charges against the same; and this article shall apply to and include owners or lessees of pastures, who shall have a similar lien on all animals placed with them for pasturage. [Id. Amend. 1895, p. 96.]

**Ownership and possession of cattle.**—Claimants of cattle held to have had such possession as entitled them to a statutory trial of the right of property, where the cattle were levied upon under a judgment foreclosing plaintiff's lien. *Craig v. Martin-Bennett Co.* (Civ. App.) 102 S. W. 1172.

Where the owner of cattle placed them in the pasture of one J., who under this article had a lien thereon for pasturage, J. was the special owner as against the real owner, and an indictment for their theft should have alleged ownership in J. or real ownership in the owner and special ownership in J. *McKnight v. State* (Cr. App.) 156 S. W. 1188.

**Priority of lien.**—A chattel mortgage on a horse is superior to a subsequent lien of a stable keeper when the horse is placed in the stable by the mortgagor without the knowledge or consent of the mortgagee. *Blackford v. Ryan* (Civ. App.) 61 S. W. 161.

The lien of proprietor of livery stable for board, care, etc., of property placed with him is inferior to that of a mortgage lien given by the owner of the property of which the proprietor has constructive notice. *Masterson v. Pelz* (Civ. App.) 86 S. W. 57.

**Art. 5665. [3320] Mechanics may retain possession of article repaired, when.**—Whenever any article, implement, utensil or vehicle shall be repaired with labor and material, or with labor and without furnishing material, by any carpenter, mechanic, artisan or other workman in this state, such carpenter, mechanic, artisan or other workman is authorized to retain possession of said article, implement, utensil or vehicle until the amount due on same for repairing by contract shall be fully paid off and discharged. [Act April 7, 1874, p. 68, sec. 1. P. D. 7116a.]

**Right to possession.**—One who repairs a machine has a right to possession until the repairs are paid for. *Henderson v. Mahoney*, 31 C. A. 539, 72 S. W. 1019.

**Effect of death of owner.**—The fact that owner of property placed in possession of mechanic to be repaired, dies before its redelivery and payment for repairs, and the claim therefor is presented and allowed against his estate does not take away the mechanic's lien. *Lithgow v. Sweedberg* (Civ. App.) 78 S. W. 247.

**Art. 5666. [3321] Where no price is agreed upon.**—In case no amount is agreed upon by contract, then said carpenter, mechanic, artisan or other workman shall retain possession of such article, implement, utensil or vehicle, until all reasonable, customary and usual compensation shall be paid in full. [Id. sec. 1.]

**Art. 5667. [3322] When property may be sold for charges.**—When possession of any of the property embraced in the four preceding articles has continued for sixty days after the charges accrue, and the charges so due have not been paid, it shall be the duty of the persons so holding said property to notify the owner, if in the state and his residence be known, to come forward and pay the charges due, and, on his failure within ten days after such notice has been given him to pay said charges, the persons so holding said property, after twenty days' notice, are authorized to sell said property at public sale and apply the proceeds to the payment of said charges, and shall pay over the balance to the person entitled to the same.

**Art. 5668. [3323] When owner lives out of the state or residence is unknown.**—If the owner's residence is beyond the state or is unknown, the person holding said property shall not be required to give the ten days' notice mentioned in the preceding article before proceeding to sell.

**Art. 5669. [3324] Balance, how disposed of.**—If the person who is legally entitled to receive the balance mentioned in this chapter is not known, or has removed from the state or from the county in which such repairing was done, or such property was so held, it shall be the duty of the person so holding said property to pay the balance to the county treasurer of the county in which said property is held, and take his receipt therefor. [Id. sec. 3.]

**Art. 5670. [3325] What is to be done finally with the balance.**—Whenever any balance mentioned in this chapter shall remain in the possession of the county treasurer for the period of two years unclaimed by the party legally entitled to the same, such balance shall become a part of the county fund of the county in which the property was so sold, and shall be applied as any other county fund or money of such county is applied or used. [Id. sec. 4.]

**Art. 5671. [3326] Other liens and contracts not affected.**—Nothing in this title shall be construed or considered as in any manner impairing or affecting the right of parties to create liens by special contract or agreement, nor shall it in any manner affect or impair other liens arising at common law or in equity, or by any statute of this state, or any other lien not treated of under this title.

DECISIONS RELATING TO SUBJECT-MATTER OF CHAPTER IN GENERAL

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|-------------------------------------------------------|---------------------------------------------------------------------------------------|
| 1. Liens in general.                                  | 32. Attorney's lien.                                                                  |
| 2. Waiver or release of lien in general.              | 33. — Subject-matter to which lien attaches.                                          |
| 3. Vendor's lien—In general.                          | 34. — Priorities.                                                                     |
| 4. — Lien reserved in contract or conveyance.         | 35. Carrier's lien.                                                                   |
| 5. — Implied or equitable lien.                       | 36. Landlord's lien.                                                                  |
| 6. — Operation and effect.                            | 37. Liens incident to partnerships.                                                   |
| 7. — Amount and extent of lien.                       | 38. — Waiver or loss.                                                                 |
| 8. — Property subject to lien.                        | 39. Liens incident to tenancies in common.                                            |
| 9. — Priority of lien.                                | 40. Remedies of seller.                                                               |
| 10. — Assignment of lien or claim for purchase money. | 41. Judgment of foreclosure of liens.                                                 |
| 11. — Transfer of property by purchaser.              | 42. Pledges.                                                                          |
| 12. — Waiver, loss or discharge of lien.              | 43. — Title of pledgor.                                                               |
| 13. — Payment, release or satisfaction.               | 44. — Pledgee as bona fide purchaser.                                                 |
| 14. Marshaling.                                       | 45. — Possession or control of property.                                              |
| 15. Enforcement of vendor's lien.                     | 46. — Expenses incurred.                                                              |
| 16. — Defenses.                                       | 47. — Enforcement of right of action pledged and failure to collect or fix liability. |
| 17. — Limitations.                                    | 48. — Conversion of property before default.                                          |
| 18. — Evidence.                                       | 49. — Action for proceeds of property.                                                |
| 19. — Judgment or decree.                             | 50. — Payment or discharge of debt.                                                   |
| 20. — Actions to set aside foreclosure decree.        | 51. — Transfer of property by pledgee.                                                |
| 21. — Sale and proceeds.                              | 52. — Return of property on payment or other discharge.                               |
| 22. — Title and rights of purchasers at sale.         | 53. — Sale of property.                                                               |
| 23. — Redemption from sale.                           | 54. — Actions to enforce right of action pledged.                                     |
| 24. Right to recover possession of land in general.   | 55. Indemnity bonds.                                                                  |
| 25. Actions for recovery of possession of land.       | 56. Subrogation.                                                                      |
| 26. Lien of purchaser of land for purchase money.     | 57. — Discharge of incumbrances by purchasers of property.                            |
| 27. Bona fide purchasers in general.                  | 58. — Persons making advances for discharge of debt or incumbrance.                   |
| 28. Factor's lien.                                    | 59. — Benefit of remedies of creditor.                                                |
| 29. Lien of bank on deposits and for money loaned.    | 60. — Extent of right.                                                                |
| 30. — Waiver.                                         | 61. — Actions for enforcement.                                                        |
| 31. Depositor's lien—Saving department.               |                                                                                       |

1. **Liens in general.**—A contract to perfect title to lands, and to sell them for a compensation out of the proceeds, held not to create a lien on them. *Girand v. Barnard* (Civ. App.) 47 S. W. 482.

Where defendant fraudulently prevented the conveyance of certain land to plaintiff as agreed, it was proper to adjudge a lien against the land in plaintiff's favor for its value. *Mansfield v. Neese*, 21 C. A. 584, 54 S. W. 370.

Judgment enforcing trust for maintenance charged on net income of lands devised for life, remainder to devisee's children, by which amount of allowance necessary is determined against children and adjudged a lien on income, held proper. *McCreary v. Robinson* (Civ. App.) 57 S. W. 682.

The directors of a selling corporation, who will be individually benefited by the performance of an agreement by the purchaser of the corporate property, are, as individuals, entitled to damages for a breach of the agreement, and such damages constitute an equitable lien analogous to a debt for the purchase price. *Scott v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 66 S. W. 485.

A transaction resulting in the execution and delivery of a note held to create a contract lien as between the parties and others not purchasers for value without notice. *Melton v. Beasley*, 56 C. A. 537, 121 S. W. 574.

A party furnishing supplies to an unincorporated missionary association and taking its note in payment therefor had an equitable lien on its property, which it could enforce by action. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

Where equity fastened a constructive trust on a house forming a part of the realty on which it was situated, equity could decree a lien on the land, and direct a sale thereof to protect the interest of the beneficiary. *Miller v. Himebaugh* (Civ. App.) 153 S. W. 338.

2. **Waiver or release of lien in general.**—One having a lien on lumber held not to have waived it by authorizing its sale. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

3. **Vendor's lien—In general.**—As to vendor's lien. *Rawles v. Perkey*, 50 T. 311; *Cameron v. Romele*, 53 T. 244; *Russell v. Kirkbride*, 62 T. 455; *Taylor v. Callaway*, 27 S. W. 934, 7 C. A. 461; *Wilson v. Houston* (Civ. App.) 36 S. W. 832.

It is not essential that the amount due shall be made payable to the vendor; it may be made payable to other parties, and a new note may be given payable to a different party. *Robertson v. Guerin*, 50 T. 317; *Ellis v. Singletary*, 45 T. 27; *Wright v. Wooters*, 46 T. 383; *Clements v. Neal*, 1 U. C. 41.

An agreement by the grantee, as part consideration for the conveyance, to assume a debt owing by the grantor, makes him personally liable, and fixes a lien on the property conveyed to secure the debt so assumed. *Mitchell v. National Railway Building & Loan Ass'n* (Civ. App.) 49 S. W. 624.

An agreement which gives intervener a "vendor's lien" on land bought from a third person with her money may create a lien giving intervener a right to foreclosure. *Ford v. Ford*, 22 C. A. 453, 54 S. W. 773.

When real property on which a vendor's lien is reserved in the purchase-money notes is sought to be recovered after the default of the vendee, the plaintiff may show that the vendee has recently recognized his obligation on the notes. *Ellis v. Hannay* (Civ. App.) 64 S. W. 684.

Vendor's intention to retain the superior title should be given effect where it can be gathered from the language used. *Lipscomb v. Fuqua*, 55 C. A. 535, 121 S. W. 193.

One conveying to a railroad a right of way may have a vendor's lien for the unpaid price. *Hubbell v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 313.

4. — **Lien reserved in contract or conveyance.**—When a vendor retains in his deed a lien for the purchase-money he has a superior right to the land against the vendee, and those in privity with him, as long as the purchase-money remains unpaid. Until the land is paid for, the vendee, and those claiming in his right as against the vendor, have merely an equitable, and not a legal, title to the land. Subsequent purchasers are bound by notice of the equities apparent in the line of their title. *Peters v. Clements*, 46 T. 114; *Masterson v. Cohen*, 46 T. 520; *Roosevelt v. Davis*, 49 T. 463; *Webster v. Mann*, 52 T. 416; *Ufford v. Wells*, 52 T. 612; *Hale v. Baker*, 60 T. 217.

When the lien is retained by an express recital in the deed (*Ransom v. Brown*, 63 T. 188; *Slaughter v. Owens*, 60 T. 668; *Monroe v. Buchanan*, 27 T. 241; *Peters v. Clements*, 46 T. 114; *Baker v. Compton*, 52 T. 252; *Willis v. Gay*, 48 T. 463, 26 Am. Rep. 328; *Texarkana Nat. Bank v. Daniel* [Civ. App.] 31 S. W. 704; *Parker v. Bank* [Civ. App.] 27 S. W. 1071; *Bergman v. Blackwell* [Civ. App.] 23 S. W. 243; *Steffian v. Bank*, 69 T. 513, 6 S. W. 823; *Bank v. Ackerman*, 70 T. 315, 8 S. W. 45), or a mortgage or deed of trust is taken contemporaneously with the deed (*Dunlap's Adm'r v. Wright*, 11 T. 597; *Ballard v. Anderson*, 18 T. 377; *Baker v. Clepper*, 26 T. 629, 84 Am. Dec. 591; *De Bruhl v. Maaas*, 54 T. 464), or where the conveyance is by bond, conditional on payment (*Browning v. Estes*, 3 T. 462, 49 Am. Dec. 760; *Estes v. Browning*, 11 T. 237, 60 Am. Dec. 238; *Lander v. Rounsaville*, 12 T. 195; *Harris v. Catlin*, 53 T. 1), the superior title remains in the vendor so long as he holds the debt for the unpaid purchase money, and he may rescind and recover the land (*Tom v. Wollhoefer*, 61 T. 277; *Todd v. Caldwell*, 10 T. 236; *Edwards v. Atkinson*, 14 T. 373; *Peters v. Clements*, 46 T. 114; *Masterson v. Cohen*, Id. 520), or may sell the land (*Franklin v. Tiernan*, 56 T. 625; *Burson v. Blackley*, 67 T. 5, 2 S. W. 668), subject to adjustment of equities (*Coddington v. Wells*, 59 T. 49; *Thomas v. Beaton*, 25 T. Sup. 318; *Tadlock v. Eccles*, 20 T. 784, 73 Am. Dec. 213; *Milligan v. Ewing*, 64 T. 258; *Cassaday v. Frankland*, 55 T. 457; *Rogers v. Blum*, 56 T. 6), unless the right to rescind has been waived by suit for purchase money (*Roberts' Heirs v. Lovejoy*, 60 T. 253), or by waiver of time (*Reddin's Heirs v. Smith*, 65 T. 26); in which case the right would be revived, when time is made material, by a new demand (*Eckhardt v. Schlecht*, 29 T. 129; *Hood v. People's Bldg. Ass'n*, 27 S. W. 1046, 8 C. A. 385; *McPherson v. Johnson*, 69 T. 484, 6 S. W. 798; *Abernethy v. Bass*, 29 S. W. 398, 9 C. A. 239; *Morrison v. Barry*, 10 C. A. 22, 30 S. W. 376; *Howard v. Herman*, 29 S. W. 542, 9 C. A. 79; *Moran v. Wheeler*, 27 S. W. 54, 87 T. 179; *Patterson v. Tuttle* [Civ. App.] 27 S. W. 758).

A reservation of the lien may be made in the notes (*Lundy v. Pierson*, 67 T. 233, 2 S. W. 737; *Willis v. Gay*, 48 T. 463, 26 Am. Rep. 328; *Irvin v. Garner*, 50 T. 54; *Ellis v. Singletary*, 45 T. 27; *Behrens v. Dignowitty*, 4 C. A. 201, 23 S. W. 288); and so when the note is executed by a married woman (*Davis v. Wheeler* [Civ. App.] 23 S. W. 435), and continues until the debt is paid or the lien discharged by a valid agreement (*Robertson v. Guerin*, 50 T. 317).

A description of land in a vendor's lien note as 80 acres in a certain section is certain, and warrants a judgment foreclosing an undivided 80 acres in the survey. *Fontaine v. Bohn* (Civ. App.) 40 S. W. 637.

A mere recital in a deed, showing that a part of the purchase money is evidenced by promissory notes described therein, does not retain the vendor's lien, which is necessary to keep the superior title in the grantor. The conveyance vests title in the grantee subject only to equitable lien for the balance of the purchase money evidenced by the notes. *Proetzel v. Rabel*, 21 C. A. 559, 54 S. W. 373.

A lien on land, reserved in a note given to procure money with which to reimburse sureties, who were protected by a lien on the property, held valid. *Lennox v. Sanders* (Civ. App.) 54 S. W. 1076.

A deed reserving a vendor's lien as security for the payment of the price in Mexican dollars held to create a valid lien. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 398, 1190.

A vendor's lien reserved in a deed to property subsequently occupied by the grantee as his homestead held valid, though the debt secured was not a part of the purchase price nor money obtained from the vendor. *Kateyer v. Mitchell* (Civ. App.) 110 S. W. 462.

A purchaser of land gave as part payment his note which contained a vendor's lien. The vendor transferred the note to a third person, and the purchaser paid it. Thereafter the third person advanced to him a specified sum under an agreement that the payment of the vendor's lien note should be withdrawn to the amount advanced, and that the land should stand as security therefor, and a new note for the amount advanced was executed. Held, that the transaction resulting in the execution and delivery of the second note created a contract lien good as between the parties and others not purchasers for value without notice. *Melton v. Beasley*, 56 C. A. 537, 121 S. W. 574.

The recital in a note given by a purchaser of land that it was secured by the S. E., S. W. quarter of the N. E. lot, etc., held a sufficient reservation of an express lien on the property. *Buckley v. Runge*, 57 C. A. 322, 122 S. W. 596; *Id.* (Civ. App.) 136 S. W. 533.

Neither the recital in a note given as the purchase money of land, nor defendant's indorsement thereon agreeing to pay it after it was barred by limitations, held to create a lien on the land to secure the note as against such indorser, nor did the circumstances raise an implied lien. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

The reservation in purchase-money notes of an express vendor's lien held sufficient

to preserve to the vendor the superior title to the land until the notes are paid. *Buckley v. Runge* (Civ. App.) 136 S. W. 533.

A vendor's lien reserved in a note for the balance of the price held not invalid because the note did not describe the land, which was fully described in the deed executed the next day as a part of the same transaction. *Miller v. Linguist* (Civ. App.) 141 S. W. 170.

Notes given for the price, in which a lien is reserved, and a deed, reserving a lien to secure payment of the notes, held required to be construed as one contract. *Beckham v. Scott* (Civ. App.) 142 S. W. 80.

5. — **Implied or equitable lien.**—The vendor's lien upon land for unpaid purchase money exists by operation of law (*Briscoe v. Bronaugh*, 1 T. 326, 46 Am. Dec. 108; *Robertson v. Paul*, 16 T. 472; *Brown v. Christie*, 35 T. 689; *Malone v. Kaufman*, 38 T. 454; *White v. Blums*, 40 T. 225; *Flanagan v. Cushman*, 48 T. 244; *Baker v. Compton*, 52 T. 252; *Rogers v. Down*, 56 T. 1; *Joiner v. Perkins*, 59 T. 300; *Helm v. Weaver*, 69 T. 143, 6 S. W. 420; *Steffian v. Bank*, 69 T. 513, 6 S. W. 823; *Bank v. Ackerman*, 70 T. 315, 8 S. W. 45), unless expressly waived (*Cresap v. Manor*, 63 T. 485; *Joiner v. Perkins*, 59 T. 300). When the lien is not reserved in the deed or note, a subsequent purchaser without actual notice is not affected thereby. *Taylor v. Callaway*, 7 C. A. 461, 27 S. W. 934. As to vendor's lien, and effect of failure to pay purchase money, see *Dunlap v. Wright*, 11 T. 597, 62 Am. Dec. 506; *Baker v. Ramey*, 27 T. 53; *Robertson v. Guerin*, 50 T. 317; *Harris v. Catlin*, 53 T. 8; *Lundy v. Pierson*, 67 T. 253, 2 S. W. 737; *Fievel v. Zuber*, 67 T. 275, 3 S. W. 273; *Helm v. Weaver*, 69 T. 143, 6 S. W. 420; *Cattle Co. v. Boon*, 73 T. 556, 11 S. W. 544; *Lanier v. Foust*, 81 T. 189, 16 S. W. 994; *Pierce v. Moreman*, 84 T. 596, 20 S. W. 821; *Watson v. Baker*, 71 T. 739, 9 S. W. 867; *Meyer v. Smith*, 3 C. A. 37, 21 S. W. 995; *Foster v. Andrews*, 4 C. A. 429, 23 S. W. 610; *Davis v. Wheeler* (Civ. App.) 23 S. W. 435; *Ellis v. Singletary*, 45 T. 37; *Slaughter v. Owens*, 60 T. 668; *Goddard v. Peeples*, 11 C. A. 615, 33 S. W. 314; *Texas Land & Cattle Co. v. Watkins*, 12 C. A. 603, 34 S. W. 996; *Behrens v. Dignowitty*, 23 S. W. 288, 4 C. A. 201.

Where a lien for purchase money is reserved on other property, the implied lien on the land will not be presumed. *Weeks v. Barton* (Civ. App.) 31 S. W. 1071.

One who conveys and delivers possession of land retains a vendor's lien, though no agreement therefor was made. *Marshall v. Marshall* (Civ. App.) 42 S. W. 353.

A party having an equitable lien on certain property has also an equitable lien on the sum recovered by its legal owner from one wrongfully appropriating such property to his own use. *Scott v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 66 S. W. 485.

Where note is given in payment for land, the vendor has a lien on the same by implication, in the absence of a reservation of the lien in the note. *Brandenburg v. Norwood* (Civ. App.) 66 S. W. 587.

Stipulation in a contract of sale of property of one street railway to another held not to afford the beneficiaries under the stipulation a vendor's lien on the property for damages resulting from a breach. *Scott v. Farmers' & Merchants' Nat. Bank*, 97 T. 31, 75 S. W. 7, 104 Am. St. Rep. 835.

Notwithstanding absolute conveyance, vendor's lien held to subsist as between vendor and vendee and all purchasers with notice that any of the purchase money is unpaid. *Cecil v. Henry* (Civ. App.) 93 S. W. 216.

In an action to cancel a vendor's lien on plaintiff's land, the extent to which defendant might assert an equitable creditor's lien, determined. *McKinley v. Wilson* (Civ. App.) 96 S. W. 112.

A vendor who has delivered possession has an equitable lien upon the land for the unpaid purchase money, though he has taken no distinct agreement or separate security for it, and though the deed recites full payment. *Springman v. Hawkins*, 52 C. A. 249, 113 S. W. 966.

The foundation of an equitable lien is a contract, expressed or implied, operating on some specific property. *Vivion v. Nicholson*, 54 C. A. 43, 116 S. W. 386.

A deed of trust from P. to W., being a valid lien on the property, became also, by subsequent deed from P. to T. and the assumption by T. of the W. debt as part of the purchase price, a valid vendor's lien upon the property. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

No vendor's lien held to exist in favor of a party to a contract for transfer of property who did not hold the title thereto. *Jef Chaison Townsite Co. v. Beaumont Sawmill Co.* (Civ. App.) 133 S. W. 714.

"Equitable lien," defined. *Atlanta Nat. Bank v. Four States Grocer Co.* (Civ. App.) 135 S. W. 1135.

In every sale of real estate, where the purchase price is not paid, a lien exists by operation of law, in the absence of a contrary agreement or understanding. *Noblett v. Harper* (Civ. App.) 136 S. W. 519.

A mere lender of money used to purchase land conveyed to the borrower has no lien upon the land. *Jordan v. Jordan* (Civ. App.) 154 S. W. 359.

6. — **Operation and effect.**—Where lands were sold, and vendor's lien reserved, and afterwards reconveyed in discharge of the debt due for purchase price, held, no recovery could be had by vendors for timber removed in violation of the contract of sale. *Carey v. Starr*, 93 T. 508, 56 S. W. 324.

Where a deed reserved a vendor's lien, the legal title remained in the vendor until the price was paid. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 398, 1190.

The legal title to land held not to have passed to the grantee under a deed reserving a vendor's lien to secure notes which were never paid. *Lacey v. Smith* (Civ. App.) 111 S. W. 965.

A deed reserving a vendor's lien has the effect of a mortgage, and renders the transaction executory. *Honaker v. Jones*, 102 T. 132, 113 S. W. 748.

A deed of land reserving a vendor's lien to secure deferred payments held to vest only in the purchaser an equity in the land, and the superior legal title remains in the vendor. *De Steaguer v. Pittman*, 54 C. A. 316, 117 S. W. 481.

The superior title to land sold remains in the vendor until payment of the balance of the price, where vendor's lien is reserved to secure the same. *Miller v. Linguist* (Civ. App.) 141 S. W. 170.

7. — **Amount and extent of lien.**—Note given for interest after payment of the principal, and secured by trust deed on part of the land, properly enforced as a vendor's lien. *Cherry v. Nash* (Civ. App.) 21 S. W. 411.

A vendor's lien note may be filed for attorney's fees. *Green v. Johnson* (Civ. App.) 44 S. W. 6.

A vendor has a lien for the interest agreed to be paid on the purchase money. *Id.* Lien reserved in deed extends only to that part of the price for which the lien is expressly reserved. *Shotwell v. McCardell*, 19 C. A. 174, 47 S. W. 39.

Where land and chattels are sold for a gross amount, the reservation of a vendor's lien for the entire amount binds the land for the amount of the notes, with interest and attorney's fees provided for therein. *Honaker v. Jones*, 102 T. 132, 113 S. W. 748.

Payment of interest by plaintiff, for the maker of certain vendor's lien notes, held not to vest in plaintiff any interest in the notes or right to a lien for the interest so paid. *Rutherford v. Gaines*, 103 T. 263, 126 S. W. 261.

In a suit on vendor's lien notes, plaintiff held entitled to recover ten per cent. attorney's fees. *Id.*

8. — **Property subject to lien.**—Where land incumbered with an unrecorded vendor's lien is sold to an innocent purchaser, the lien attaches to the proceeds, though invested in an unperfected pre-emption right. *Rose v. Taylor*, 17 C. A. 535, 43 S. W. 285, 44 S. W. 326.

A vendee's homestead claim held subject to vendor's lien for the purchase price. *Green v. Johnson* (Civ. App.) 44 S. W. 6.

Machinery placed on lots by a vendee, which may be removed without injury to the realty, does not become a part thereof as against one having a lien from the purchase of vendor's lien notes. *Mundine v. Pauls*, 28 C. A. 46, 66 S. W. 254.

The intention with which machinery is attached to realty is to be considered in determining if such machinery becomes a part of the realty, as between the owner and holder of a lien thereon. *Id.*

Where a machine was sold under a conditional sale, reserving title in the seller until it was paid for, the buyer by attaching it to the realty could not affect the seller's rights to enforce its lien. *Wm. Cameron & Co. v. Jones*, 41 C. A. 4, 90 S. W. 1129.

Where notes executed as a part of the purchase price of land seem to reserve a lien on the entire tract conveyed, but the deed made at the same time, which must be considered together with the notes, provided that the vendor's lien applies to only a part of the land, no lien exists on the part not included in the deed. *Broom v. Herring*, 45 C. A. 653, 101 S. W. 1023.

A lien upon land includes the growing timber standing thereon at the time the lien is created. *American Nat. Bank of Paris v. First Nat. Bank*, 52 C. A. 519, 114 S. W. 176.

9. — **Priority of lien.**—Priority as between vendor's lien and mechanic's lien, see notes under Art. 5628.

The assignee of one of several lien notes is not entitled to priority of payment over the assignor who retains one of the notes. *Salmon v. Downs*, 55 T. 243; *Wooters v. Hollingsworth*, 58 T. 371.

The vendor's lien on land, when held with the vendor's superior title, in the application of the proceeds of the sale of the land has precedence over every class of claims. *Toullerton v. Manchke*, 11 C. A. 148, 32 S. W. 238; *Hambien v. Folts*, 70 T. 132, 7 S. W. 834; *Abernathy v. Bass*, 29 S. W. 398, 9 C. A. 239; *White v. Cole*, 87 T. 500, 29 S. W. 759.

Evidence held sufficient to support a verdict that defendant's right to land by purchase was superior to plaintiff's alleged vendor's lien. *Mallard v. Jackson* (Civ. App.) 45 S. W. 204.

The fact that an agent of record owner having possession became agent of another claiming interest under unrecorded deed held not notice of latter's claim to holder of vendor's lien. *Ferguson v. McCrary*, 20 C. A. 529, 50 S. W. 472.

Information received, pending suit to foreclose a vendor's lien, that a third person claimed the land, held to charge plaintiff with notice. *Id.*

In suit to foreclose vendor's lien securing a note, holder of another note so secured, who was joined as defendant, held not affected by notice to plaintiff of subsequent claim. *Id.*

Transactions held not to destroy the vendor's lien or affect its priority. *Barnes v. Nix* (Civ. App.) 56 S. W. 202.

A title to land acquired by foreclosure of vendor's lien notes to the common source of title held prior to the title acquired on foreclosure of notes executed by a subsequent purchaser. *Edwards v. Anderson*, 31 C. A. 131, 71 S. W. 555.

Vendor's liens, continued for the beneficiary in a deed of trust given to raise money to pay the notes creating such liens, held superior to the lien of the co-tenant on the grantor's share for rents and profits wrongfully retained by such grantor. *Flach v. Zanderson* (Civ. App.) 91 S. W. 348.

A conveyance by vendor's heirs retaining a vendor's lien held to vest a superior title to that acquired under foreclosure of a deed of trust executed by the vendee. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 547.

A creditor of a railroad not a party to receivership proceedings at the time of the issuance of receiver's certificates may contest the priority of payment of the certificates as against his lien. *Hubbell v. Texas Southern Ry.* (Civ. App.) 126 S. W. 313.

A lienholder's release of homestead property which was part of a number of lots subject to the lien, held not to prejudice one having a subsequent lien on other lots. *First State Bank of Teague v. Cox* (Civ. App.) 139 S. W. 1.

Debts of the owners of a homestead, assumed by the purchaser as liens thereon, held superior to a vendor's lien note accepted by the owner of the homestead in payment. *Quinn v. Dickinson* (Civ. App.) 146 S. W. 993.

10. — **Assignment of lien or claim for purchase money.**—Where several notes given for the purchase money of the same land are in the hands of different parties, they have equal rights to satisfaction out of the land. *McDonough v. Cross*, 40 T. 261; *Wooters v. Hollingsworth*, 58 T. 371; *Glaze v. Watson*, 55 T. 563; *Delespine v. Campbell*, 45 T. 628.

The superior title to the land does not pass by the assignment of the purchase-money notes only. *Cannon v. McDaniel*, 46 T. 313; *Toullerton v. Manchke*, 11 C. A. 148, 32 S. W. 238. An assignment by the vendor of his interest in the land and the purchase-money notes vests the superior title in the assignee (*Jackson v. Ivory* [Civ. App.] 30 S. W. 716), and the re-transfer to him of the note does not re-invest the title (*Cassaday v. Frankland*, 55 T. 452; *Id.*, 62 T. 418; *McCamy v. Waterhouse*, 80 T. 341, 16 S. W. 19; *Moore v. Glass*, 25 S. W. 128, 6 C. A. 368).

If a vendor transfers the notes, he no longer has any title in the land, superior or otherwise; nor does the superior title pass to the assignee or transferee, though the vendor's lien does. *Baker v. Compton*, 52 T. 252; *Cassiday v. Frankland*, 1 U. C. 533; *Harrison v. McMurray*, 71 T. 122, 8 S. W. 612; *Hamblen v. Folts*, 70 T. 132, 7 S. W. 834; *Stephens v. Mathews' Heirs*, 69 T. 341, 6 S. W. 567; *Lundy v. Pierson*, 67 T. 233, 2 S. W. 737; *Nass v. Chadwick*, 76 T. 572, 13 S. W. 383; *McCamy v. Waterhouse*, 80 T. 341, 16 S. W. 19; *Moore v. Glass*, 25 S. W. 128, 6 C. A. 368.

The assignee of a purchase-money note acquires thereby no possessory right to the land, and on default of payment cannot recover it. *Baker v. Compton*, 52 T. 262; *Cassaday v. Frankland*, 55 T. 458; *Russell v. Kirkbride*, 62 T. 456; *Elliott v. Blanc*, 54 T. 216.

The assignment of vendee's note for land transfers the lien reserved in the deed, the record of which is constructive notice of the lien only. To affect subsequent purchasers or mortgagees with notice of the assignment of the note it should be recorded. *Moran v. Wheeler* (Civ. App.) 26 S. W. 297.

The assignment of a negotiable note for land, secured by the vendor's lien, should be recorded, to charge a subsequent mortgagee with notice. *Patterson v. Tuttle* (Civ. App.) 27 S. W. 758.

A second vendee of land, holding by assignment the unpaid note of the first vendee, which is barred by limitation, may enforce the lien and recover the land. *White v. Cole*, 29 S. W. 759, 87 T. 500.

When a part of a note secured by the vendor's lien is assigned, the payee will retain the vendor's lien on the land to the extent of the purchase money due to him. *Christoff v. Chesley*, 11 C. A. 122, 32 S. W. 355.

Purchaser of vendor's lien held entitled to enforce it as against subsequent purchasers of the land. *Houghton v. Rogan*, 17 C. A. 285, 42 S. W. 1018.

Innocent purchaser of vendor's lien notes before maturity held to occupy same position as purchaser of land. *Mansur & Tebbetts Implement Co. v. Beer*, 19 C. A. 311, 45 S. W. 972.

A vendor's transfer of a purchase-money note and all his interest in the land held to transfer the legal title to the transferee. *New England Loan & Trust Co. v. Willis*, 19 C. A. 128, 47 S. W. 389.

Assignment of inferior lien by vendor's assignee held not to carry the legal title with it. *Davis v. Hertman*, 19 C. A. 442, 48 S. W. 50.

Where a deed to land expressly reserved a vendor's lien, and notes given by a subsequent purchaser of a part of such tract were secured by lien, an indorsee of such notes held to take subject to the first lien. *Spencer v. Jones*, 92 T. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

Transferee of purchase-money notes, secured by lien, being also transferee of title of part of the vendors, may on default recover from other vendor. *Anderson v. Sillman*, 92 T. 560, 50 S. W. 576.

The transferee of a vendor's lien note may compel the vendor to transfer to him the superior title which the vendor holds in trust for him. *Dittman v. Iselt* (Civ. App.) 52 S. W. 96.

Where a vendor takes notes for the price, secured by a vendor's lien, and assigns one of the notes, the assigned note is entitled to priority over the others, and a sale under foreclosure of such note passes good title, although the vendor was not made a party. *Douglass v. Blount*, 22 C. A. 493, 55 S. W. 526.

The assignment of purchase-money notes secured by a vendor's lien reserved in the deed carries to the assignee all rights under the lien, so that he is entitled to redeem from the foreclosure of another lien. *Douglass v. Blount* (Civ. App.) 62 S. W. 429.

A person other than the vendor, who is holder of a vendor's lien note, has no superior title to the land such as will entitle him to take possession of the property on failure of the vendee to pay the note at its maturity. *Fox v. Robbins* (Civ. App.) 62 S. W. 815.

A person to whom vendor's lien notes are transferred, but who does not receive a conveyance of the title of the vendor, does not occupy the position of the original vendor, but only acquires a lien on the land. *Mundine v. Pauls*, 28 C. A. 46, 66 S. W. 254.

A bona fide indorsee before maturity of a note apparently secured by a vendor's lien held entitled to such lien, though in fact it did not exist as between the immediate parties to the original transaction. *Graves v. Kinney*, 95 T. 210, 66 S. W. 293.

A transfer of a note given in payment of the purchase price of land carries with it the vendor's lien. *Brandenburg v. Norwood* (Civ. App.) 66 S. W. 587.

An assignee of one of several vendor's lien notes, who forecloses it, whereupon sale is made to a third person, is not entitled to participate in the proceeds of a second foreclosure sale at the suit of the holder of the remaining notes. *Douglass v. Blount*, 95 T. 369, 67 S. W. 484, 58 L. R. A. 699.

Rule of distribution of proceeds of foreclosure of vendor's lien notes, as between foreclosing assignee and purchaser at foreclosure sale of previously assigned note, stated. *Id.*

Deed from vendor to subsequent assignee of part of purchase money notes held not to enable such assignee to redeem from foreclosure of one note by a prior assignee. *Id.*

Assignee of vendor's lien note held bound by vendor's previous release of parcel conveyed by vendee, whereby lien on other parcels was impaired. *Lattimore v. Provine*, 29 C. A. 111, 69 S. W. 222.



An assignee of a vendor's lien note after maturity takes subject to the equities of persons previously receiving conveyances from the vendee, accompanied by releases given by the vendor. *Id.*

Vendor's lien notes not valid in favor of a purchaser after maturity. *Lybrand v. Fuller* (Civ. App.) 69 S. W. 1005.

Where one or more of a series of notes secured by a lien is assigned, the assigned note is entitled to priority in the lien over the other notes of the series. *Perry v. Dowdell*, 38 C. A. 96, 84 S. W. 833.

Assignees of notes given for the price of land held entitled to first liens respectively on the parcels of land for the price of which the notes were given. *Colquitt v. Sturm* (Civ. App.) 91 S. W. 872.

An assignee of notes given for the purchase price of land secured by a vendor's lien, and a grantee of the vendor's interest, has the same right to recover the land on the nonpayment of the notes as the original vendor would have. *Rutherford v. Mothershed*, 42 C. A. 360, 92 S. W. 1021.

The right of an assignee of purchase-money notes and the grantee of the vendor's interest in the land to recover the land on the nonpayment of the notes held defeated only by paying or tendering the balance of the purchase money represented by the notes. *Id.*

Purchaser of lien notes held not charged with notice that the property was the homestead of the lienors. *Sanger Bros. v. Brooks* (Civ. App.) 100 S. W. 798.

Statement of the seller of vendors' lien notes held not to put buyer on notice that the transaction resulting in their execution was simulated. *Id.*

Purchasers of vendors' lien notes without notice that the property was the homestead of the lienors, or that the transaction involved was simulated, held entitled to foreclose the lien. *Id.*

A transferee of a note secured by a mortgage held chargeable with knowledge that the premises conveyed by the mortgage were a homestead, and that his rights were those of a mortgagee of a homestead. *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779.

The legal title, on the death of a vendor, expressly reserving a lien, held to vest in his heir in trust for the holder of the purchase-money note and for the purchaser on his paying the note. *Atteberry v. Burnett*, 102 T. 118, 113 S. W. 526.

A vendor assigning the vendor's lien note holds the legal title in trust for the assignee only to the extent that he cannot dispose of it so as to defeat the lien of the note. *Atteberry v. Burnett*, 52 C. A. 617, 114 S. W. 159.

The assignee of notes given for the purchase price of land secured by vendor's lien, who takes a conveyance of the vendor's interest, has the same right to recover the land on nonpayment of the notes as the original vendor would have. *Crain v. National Life Ins. Co. of United States*, 56 C. A. 406, 120 S. W. 1098.

An assignee of a vendor's lien note does not, by the assignment, take the superior legal title held by the vendor. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

The assignment of a claim for the purchase price of land evidenced by a note carries with it the vendor's lien. *Singletary v. Goeman* (Civ. App.) 123 S. W. 436.

The purchaser of notes reserving a vendor's lien, in due course of trade before maturity and for a valuable consideration, without notice of a parol dedication of a part of the land by the maker, will be protected as an innocent purchaser as against such dedication. *Adoue & Lobit v. Town of La Porte* (Civ. App.) 124 S. W. 134.

A vendor's lien may be assigned. *Hubbell v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 313.

The holder of purchase price notes as security for other indebtedness has no lien on the land. *Hightower Bros. v. W. F. Taylor Co.* (Civ. App.) 126 S. W. 621.

Original holders of vendor's lien notes releasing the notes without authority held not liable for the value of a mortgage lien attaching after the release. *Broun v. Busch* (Civ. App.) 128 S. W. 1156.

An assignee of vendor's lien notes can recover from the original holder damages reasonably resulting from the latter's unauthorized release of the lien. *Id.*

Facts held not to excuse original holder's unauthorized release of a vendor's lien. *Id.* The assignee of a vendor's lien note which was assigned without recourse held not entitled to priority. *Fitch v. Kennard* (Civ. App.) 133 S. W. 738.

An assignee of vendor's lien notes, who does not take a conveyance of the vendor's title, held to be merely the owner of the lien with right to foreclose. *Gulf, C. & S. F. Ry. Co. v. Blount* (Civ. App.) 136 S. W. 566.

A vendor who expressly reserves a lien to pay purchase-money notes after assigning the notes, without transferring the legal title, holds it in trust for the assignee of the notes and the vendee. *Ross v. Bailey* (Civ. App.) 143 S. W. 961.

A purchaser of a vendor's lien note after maturity takes the note subject to all defenses available against the payee. *Burnett v. Atteberry*, 105 T. 119, 145 S. W. 582.

A vendor's lien passes by an assignment of purchase money notes retaining such lien. *Busch v. Broun* (Civ. App.) 152 S. W. 683.

A transfer of a vendor's lien note by the payee's indorsement conveys with it the lien for the transfer secured; a written transfer not being necessary. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

11. — Transfer of property by purchaser.—Where a note is given for the purchase money of a survey of land, a subdivision thereof in the hands of a subsequent vendee is only bound for such proportion of unpaid purchase money as the value of the subdivision bears to the value of the entire survey. *Attaway v. Carter*, 1 U. C. 73.

A vendor's lien does not pass by a sale of the land upon which the lien exists. *Davis v. Wheeler* (Civ. App.) 23 S. W. 435.

A vendor's lien upon land must be retained in the deed, or shown by a recorded instrument, in order to charge an innocent purchaser. *Moran v. Wheeler*, 27 S. W. 54, 87 T. 179; *Patterson v. Tuttle* (Civ. App.) 27 S. W. 758.

One who buys land from a vendee who has not paid all of the purchase money therefor, though no express lien has been reserved, takes the property charged with the lien in a case where the consideration is a pre-existing debt. *Marshall v. Marshall* (Civ. App.) 42 S. W. 353.

One who purchases land subject to vendor's lien, and assumes the debt, held primarily liable, as between him and his grantor. *Pickett v. Jackson* (Civ. App.) 42 S. W. 568.

A note recites that it is given for part purchase price of land; that it is secured by a vendor's lien; the deed reserves the vendor's lien and is recorded. A purchaser of the note before maturity without notice can enforce the lien against the land, although it had been sold to a subsequent purchaser, and as between the grantor and grantee no such lien existed. *Houghton v. Rogan*, 17 C. A. 285, 42 S. W. 1018.

The payee of three vendor's lien notes assigned one of them and retained the other two. He brought suit on the two notes and foreclosed. Held; That the judgment would not be set aside at the instance of the holder of the third note, who attempted to intervene, but the land having been bought in by the payee of the other two notes would be charged with a lien in favor of the holder of the third note. *Benson v. Panther*, 17 C. A. 464, 43 S. W. 804.

Facts held to establish assumption of a vendor's lien note by purchaser of the land. *Clayton v. Watkins*, 19 C. A. 133, 47 S. W. 810.

A subsequent sale by the purchaser held not to revive a lien for attorney's fee, stipulated for only in the renewal of a purchase-money note after the property had become the homestead of the purchaser. *Bullard v. Mayne* (Civ. App.) 49 S. W. 522.

Foreclosure of a vendor's lien does not affect the interest of the purchaser's subsequent grantees without notice, and they may perfect their title by paying the purchaser at the foreclosure sale. *Thompson v. Robinson*, 93 T. 165, 54 S. W. 243, 77 Am. St. Rep. 343.

Vendor, retaining lien, held to have notice by record of vendee's plat and of subsequent conveyances, of platting of land into town lots and subsequent disposition thereof. *Lattimore v. Provine*, 29 C. A. 111, 69 S. W. 222.

Where vendor's lien notes are given, subsequent purchasers, not shown to have assumed the notes, are not personally liable thereon. *McNeill v. Cage*, 38 C. A. 45, 85 S. W. 57.

Where a purchaser of a homestead subject to an invalid deed of trust assumed the debt secured thereby as a part of the consideration, the lien so created inured to the holder of the notes secured by the deed. *Fontaine v. Nuse*, 38 C. A. 358, 85 S. W. 352.

Grantee, who assumed vendor's lien notes, held not entitled to judgment in respess to try title as against the holder of the notes without paying the same. *Diffie v. Thompson* (Civ. App.) 88 S. W. 381.

Holder of vendor's lien notes, to whom the land was conveyed by the maker, held entitled to the payment of such notes before his superior right to the land could vest in a grantee who assumed the same. *Id.*

The failure of a grantee to pay a note assumed by him held to give the holder of the note the right to foreclose the lien on the granted land given to secure it. *Diffie v. Thompson* (Civ. App.) 90 S. W. 193.

A vendor executing a deed containing a reservation of a vendor's lien for the unpaid purchase price is not bound to inquire from purchasers of the vendee as to the right by which they claim the land, nor to ascertain whether they know of the vendor's rights. *Gilbough v. Runge*, 99 T. 539, 91 S. W. 566, 122 Am. St. Rep. 659.

Possession by purchasers of a vendee in a deed containing a reservation of a vendor's lien held not to affect the vendor's right to enforce the lien. *Id.*

A vendee in a deed containing a reservation of a vendor's lien for the unpaid purchase price acquires the right of possession and the right to transfer the same, and purchasers hold in subordination to the vendor's lien. *Id.*

Plaintiff held to have received land free from a vendor's lien. *Drumm Commission Co. v. Core*, 47 C. A. 216, 105 S. W. 843.

Grantee of land from purchaser under executory contract subject to vendor's lien held required in order to defeat suit for recovery of land conveyed to him for nonpayment by his grantee of the vendor's lien note, to show that such note had not been paid in whole or in part. *Wood v. O'Hanlon*, 50 C. A. 642, 111 S. W. 178.

Where lands subject to an incumbrance are sold to different persons in different parcels at different times, the dates when the respective legal titles vest in the purchasers prima facie determine the order of liability for the incumbrance. *Watson v. Vansickle* (Civ. App.) 114 S. W. 1160.

Land conveyed by the purchaser should be subjected to the payment of vendor's lien notes in the reverse order of its alienation. *Watson v. Vansickle* (Civ. App.) 114 S. W. 1160; *John M. Bonner Memorial Home v. Collin County Nat. Bank*, 57 C. A. 313, 122 S. W. 430; *Hawkins v. Potter* (Civ. App.) 130 S. W. 643.

In an action to enforce personal liability on purchase-money notes which defendant agreed to pay, held, that he was entitled to specific performance of an agreement to rescind such assumption. *Hill v. Hoeldtke*, 54 C. A. 201, 117 S. W. 217.

Evidence held to show a defense to personal liability on vendor's lien notes through assumption of the debt. *Id.*

One held a bona fide purchaser for value acquiring title good as against a lien. *Buckley v. Runge*, 57 C. A. 322, 122 S. W. 596.

Where a vendor releases his lien on a part of the land sold, record of the release is not notice of its existence so as to charge parties dealing with the remaining part. *Vansickle v. Watson*, 103 T. 37, 123 S. W. 112.

A reference in a release by a vendor of his lien on a part of the land held evidence that he knew of prior sales of the remainder to others, charging him with knowledge of their rights to invoke a rule in their favor as to marshaling assets and securities in a case where land subject to a lien is divided and sold to different persons at different times. *Id.*

A grantor reserved a lien to secure the notes for the price. The purchaser conveyed the land to a grantee, who gave a note for the price and assumed the original purchase-money notes; the purchaser reserving a vendor's lien. The second grantee conveyed the timber on the land and thereafter conveyed the land to a third person, and after the payment of the original purchase-money notes the original vendor conveyed the land to the third person. Held, that the subsequent conveyance by the original grantor to the third

person conveyed nothing, and hence did not affect the title of the purchaser of the timber since the payment of the lien notes extinguished whatever interest the original vendor possessed. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

The transfer to a transferee of mortgaged land of a secured note and trust deed held not to release a subsequent vendor's lien retained by the mortgagor upon selling to such transferee's grantor, such transferee taking with notice of the vendor's lien, so that the mortgagor was entitled to have the amount of such lien credited on the mortgage note. *Magerstadt v. Martin* (Civ. App.) 124 S. W. 459.

A grantee of land who assumes the payment of notes secured by vendor's lien becomes primarily liable as an original promisor. *Hoeldtke v. Horstman* (Civ. App.) 128 S. W. 642.

It is not essential to the liability of a grantee of land who assumes the payment of vendor's lien notes that he should receive actual notice of the holder's acceptance of such promise to pay. *Id.*

A purchaser, who assumed vendor's lien notes executed by his grantor, was bound to make payment thereof to the holder at maturity. *Lott v. Cousins* (Civ. App.) 134 S. W. 270.

A purchaser of land held to have constructive notice that another had a vendor's lien upon it, securing unpaid purchase-money notes. *Buckley v. Runge* (Civ. App.) 136 S. W. 533.

One having a vendor's lien upon land is not entitled to have a personal judgment against a subsequent incumbrancer, the land alone being liable for the vendor's lien. *First State Bank of Teague v. Cox* (Civ. App.) 139 S. W. 1.

Where land subject to a lien is sold in parcels the parcel last sold is primarily liable for payment of the lien. *Id.*

Where land subject to a vendor's lien was by the owner granted to his wife by way of gift, she took subject to all claims against it, regardless of her knowledge of such claims. *Shannon v. Buttery* (Civ. App.) 140 S. W. 858.

A contract of a purchaser to pay indebtedness secured by vendor's lien on the property held not revocable without the consent of the person holding the lien. *Hill v. Hoeldtke*, 104 T. 594, 142 S. W. 871, 40 L. R. A. (N. S.) 672.

A suit by the original vendor and mortgagee against a remote vendee held one to recover the unpaid balance of a debt, and not the unpaid balance of a judgment in a former suit against the original maker and other vendees. *Middleton v. Nibling* (Civ. App.) 142 S. W. 968.

A second or subsequent vendee held a joint and several obligor as to the original grantor and payee of the debt, with reference to its payment. *Id.*

An assignment of vendor's lien notes is such an instrument as is required by the registry laws to be recorded in order to be effectual against subsequent purchasers for valuable consideration without notice. *Busch v. Broun* (Civ. App.) 152 S. W. 683.

It is not necessary that the note be recorded in order to convey the security of the lien with the transfer of a vendor's lien note by the payee's indorsement thereon if subsequent purchasers had notice of the lien. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

One who when he purchased land knew that a vendor's lien was outstanding was not a purchaser without notice. *Id.*

Under provision of a deed that grantee assumes payment of vendor's lien notes as part of the consideration, but shall not be liable on any deficiency judgment after foreclosure, held, that purchaser did not undertake to become personally liable for any balance that might remain after foreclosure of the lien securing them. *Martin v. Rutherford* (Civ. App.) 153 S. W. 156.

Where notes given for the purchase price of land acknowledged that a vendor's lien was retained to secure their payment, one who purchased from the grantee with knowledge of such notes takes subject to the reservation of the grantor's lien. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

12. — **Waiver, loss or discharge of lien.**—When the lien is by operation of law, the taking of a distinct and independent security operates as a waiver, unless it appears that the vendor also relied on his lien. *Parker County v. Sewell*, 24 T. 238; *Brown v. Christie*, 35 T. 689; *Faver v. Robinson*, 46 T. 204; *Cresap v. Manor*, 63 T. 485; *Joiner v. Perkins*, 59 T. 300. The lien follows the debt. *Moore v. Raymond*, 15 T. 554; *Murray v. Able*, 19 T. 213, 70 Am. Dec. 330; *Watt v. White*, 33 T. 421; *Glaze v. Watson*, 55 T. 563; *Flanagan v. Cushman*, 48 T. 241; *Dibrell v. Smith*, 49 T. 475; *Irvin v. Garner*, 50 T. 56; *Eylar v. Eylar*, 60 T. 315; *White v. Downs*, 40 T. 225; *De Bruhl v. Maas*, 54 T. 464; *H. & T. C. Ry. Co. v. Bremond*, 66 T. 159, 18 S. W. 448. And can be enforced against a subsequent holder of the land with knowledge. *Porterfield v. Taylor*, 60 T. 264. But who lost right to redeem by discharging the original debt. *Tom v. Wollhoefer*, 61 T. 277. And the lien is lost when the action for the debt is barred. *Pitschki v. Anderson*, 49 T. 1; *Redus v. Burnett*, 59 T. 576; *Hale v. Baker*, 60 T. 217; *Perry v. Woodson*, 61 T. 228; *Rindge v. Oliphint*, 62 T. 682; *Ransom v. Brown*, 63 T. 188.

A lien reserved in the deed is not waived by substituting for the original note a new note executed by the purchaser and another who was under no obligation originally to pay, or by the subsequent execution of a new note, or by taking a deed of trust on the same land, unless there was an intention not to rely on the lien. *Slaughter v. Owens*, 60 T. 668; *Ellis v. Singletary*, 45 T. 27; *Flanagan v. Cushman*, 48 T. 241; *Glaze v. Watson*, 55 T. 568; *Varner v. Carson*, 59 T. 303; *Irvin v. Garner*, 50 T. 49; *Perry v. Woodson*, 61 T. 229; *Johnson v. Townsend*, 77 T. 643, 14 S. W. 233; *Slaton v. Welborne*, 78 T. 252, 14 S. W. 587. The lien is not affected by the fact that the note for the purchase money was, by direction of the vendor, executed to a third person. *Joiner v. Perkins*, 59 T. 300.

The right to rescind cannot be exercised when facts exist which make it inequitable. *Milligan v. Ewing*, 64 T. 258; *Scarborough v. Arrant*, 25 T. 131; *Thomas v. Beaton*, 25 T. Sup. 321; *Coddington v. Wells*, 59 T. 49.

A vendor's lien is not affected by the substitution of other notes in lieu of those first given. *Helm v. Weaver*, 69 T. 143, 6 S. W. 420.

A vendor's lien is not waived by acceptance of a new note with accrued interest, or obtaining judgment on said note. *Marshall v. Marshall* (Civ. App.) 42 S. W. 353.

Where vendor's lien notes, made in consideration of bond for deed, have been negotiated, vendor cannot extinguish lien by retaking possession of the land, though purchaser has abandoned contract without recording bond. *Rose v. Taylor*, 17 C. A. 535, 43 S. W. 285, 44 S. W. 326.

Levy of attachment on land affected held not a waiver of a vendor's lien. *Taylor v. Fryar*, 18 C. A. 266, 44 S. W. 183.

Vendor's lien not reserved in deed held not lost, where purchaser conveyed to third persons, and thereafter took reconveyance, where it is not alleged that the purchases were for a valuable consideration. *Seibert v. Bergman* (Civ. App.) 44 S. W. 872.

Execution by vendor of deed to correct description in previous deed held not to discharge the land from the lien reserved in first deed. *Smith v. Ojerholm* (Civ. App.) 51 S. W. 37.

Where land was sold with agreement that the purchaser might forfeit it to the government, and repurchase it, without affecting the vendor's rights, held, that the vendor could enforce his lien after repurchase. *Garrett v. Findlater*, 21 C. A. 635, 53 S. W. 839.

Where the lien for the purchase price of land was expressly reserved, the taking of renewal notes, with other security, of itself neither released the lien nor created a presumption that it was intended to be discharged. *Wilcox v. First Nat. Bank*, 93 T. 322, 55 S. W. 317.

A plea that land is the homestead of defendant is insufficient to defeat an action to foreclose a vendor's lien, where no other facts are pleaded to show that the lien has been discharged. *Jackson v. Bradshaw*, 24 C. A. 30, 57 S. W. 878.

Where vendee of land subject to vendor's lien dies, his estate holds the land subject to the conditions of the contract. *Curran v. Texas Land & Mortgage Co.*, 24 C. A. 499, 60 S. W. 466.

Where a decree foreclosing vendor's lien authorized reconveyance, and before reconveyance vendor sold improvements to one who removed them, acceptance of reconveyance held a waiver of a right of action against the purchaser. *Smith v. Frio County* (Civ. App.) 66 S. W. 711.

Acceptance by vendor of reconveyance after judgment foreclosing vendor's lien, as authorized by the decree, held not to have constituted waiver of vendor's right of action against vendee for removal of improvements subsequent to the decree. *Id.*

Assignor of one of a series of notes secured by lien, who guarantees payment, held to waive his lien on account of the notes retained. *Anderson v. Perry*, 98 T. 493, 85 S. W. 1138.

Failure of vendor, after decease of vendee, to enforce remedy under vendor's lien through the probate court, held to result in a loss of the debt. Art. 3488; *Wall v. Club Land & Cattle Co.* (Civ. App.) 88 S. W. 534.

Where plaintiff paid the balance due on a purchase-money note with the understanding that he was to hold the same until the land subject to the vendor's lien should be conveyed to him, a subrogation took place, and the lien was not discharged by a conveyance of less land than was contemplated. *Brown v. Rash*, 40 C. A. 203, 89 S. W. 438.

A vendor who had executed a release of his vendor's lien, expressly reserved, held not entitled to recover the land. *Branch v. Taylor*, 40 C. A. 248, 89 S. W. 813.

In an action to enforce a lien, where the lienholder had purchased an interest in the property subject to the lien, held only that portion of the indebtedness which was a charge upon the interest purchased was extinguished by the purchase. *Stone v. Pettus*, 47 C. A. 14, 103 S. W. 413.

Vendor, accepting reconveyance from vendee of lots subject to vendor's lien, held chargeable with amount received by sale of part of property reconveyed, and, if the amount so received exceeds the amount of the lien, the lien is discharged, and property conveyed by the vendee to a third person is relieved from liability to it. *Wood v. O'Hanlon*, 50 C. A. 642, 111 S. W. 178.

Facts held to require the affirmance of action of the lower court in a partition proceeding in making a purchase-money note given by plaintiff's grantor a charge in plaintiff's hands. *Nelson v. Brown* (Civ. App.) 111 S. W. 1106.

Waiver of a vendor's equitable lien is not shown merely because the clause in the form used providing for the retention of a lien was eliminated in drawing the deed. *Springman v. Hawkins*, 52 C. A. 249, 113 S. W. 966.

The lien securing the payment of interest on purchase-money notes held not lost by the taking of a separate note therefor. *Honaker v. Jones* (Civ. App.) 115 S. W. 649.

A grantee who assumes a payment of vendor's lien notes is not released from liability by a reconveyance to his grantor. *Hoeldtke v. Horstman* (Civ. App.) 128 S. W. 642.

The taking of other security held to be a waiver of a vendor's lien, if unexplained. *Noblett v. Harper* (Civ. App.) 136 S. W. 519.

The holder of a vendor's lien, with notice that a prospective purchaser would not purchase unless the land was free from all liens, who permitted the purchaser to acquire title, thinking that he had a title free from all liens, and did not inform him of the lien, but purposely concealed it from him for six or more years, was estopped to enforce the lien. *Burnett v. Atterberry*, 105 T. 119, 145 S. W. 582.

Rights of holders of a vendor's lien note transferred to them by the vendors as collateral security held not affected by an agreement between the vendors and third parties as to priority of loan to vendor. *Brasfield v. Young* (Civ. App.) 153 S. W. 180.

Any unpaid balance of purchase money is secured by vendor's lien, though it was originally understood that it should all be paid on delivery of deed, and this was waived as to part of it, and the purchaser's oral promise to pay the balance accepted. *Detering v. Boyles* (Civ. App.) 155 S. W. 984.

13. — **Payment, release or satisfaction.**—Payment by a vendee of the amount due his vendor under a contract for the purchase of land, on a judgment against him as garnishee in a suit against his vendor, is a sufficient payment of the purchase money to entitle him to specific performance. *Scarborough v. Arrant*, 25 T. 129; *Nance v. Warren*, 1 U. C. 508.

The vendee, when sued for the land, may tender the money due, and this will save the forfeiture, no matter how long he may have been in default. *Tom v. Wollhoefer*, 61 T. 277.

The release of one parcel or share of land from a vendor's lien, in an executory contract which originally covered all other parcels or shares, would release all holding under the first vendor from the proportionate amount of their respective original liabilities which the value of the amount released bears to the total value of all. *Burson v. Blackley*, 67 T. 5, 2 S. W. 668.

It is the duty of the vendor of land, having a lien thereon, on the payment of the purchase-money, to execute a release of such lien at his own expense. A tender of the amount due on condition that a release be executed is valid. The release cannot be made by an attorney holding the note for collection, unless he shows an express authority to that effect. *Engelbach v. Simpson*, 12 C. A. 188, 33 S. W. 596.

Vendor, releasing lien on lot conveyed by vendee held to thereby proportionately relieve from lien lots previously conveyed by vendee. *Lattimore v. Provine*, 29 C. A. 111, 69 S. W. 222.

Where a special administrator was ordered not to pay out any money without an order of court, he should not receive credit for money paid without an order as interest on vendor's lien notes held against the estate. *James v. Craighead* (Civ. App.) 69 S. W. 241.

Compromise agreement between vendor and vendees construed, and held to extinguish vendee's debt, so that any claim to lien on house removed from land during vendee's possession was ipso facto canceled, notwithstanding reservation that nothing therein should prejudice vendor's claim to the house. *Moody v. Gaston*, 39 C. A. 290, 87 S. W. 224.

That plaintiff in trespass to try title denied that defendant held a lien on the premises in question, held not to preclude him from discharging the lien and recovering the land. *Mason v. Bender* (Civ. App.) 97 S. W. 715.

Where the vendor released part of the land from a vendor's lien, held, he was entitled to a lien on the balance for all unpaid purchase money, and not merely for a pro rata share thereof. *Smith v. Owen*, 49 C. A. 51, 107 S. W. 929.

A grantee of land under a deed from the purchaser held to take the land subject to the vendor's lien retained by the person conveying the land to the purchaser, and, on such vendor releasing his lien on a part of the land, the lien could not be enforced for the benefit of the purchaser. *Watson v. Vansickle* (Civ. App.) 114 S. W. 1160.

A tender not including attorney's fees for collection of notes for the purchase price held insufficient to release a vendor's lien. *Honaker v. Jones* (Civ. App.) 115 S. W. 649.

A vendor retaining a lien for the purchase money cannot take a reconveyance of part of the land in part payment, and subsequently convey to a third person, to the prejudice of one who had acquired an equitable interest at the time of such reconveyance, known to the parties at the time. *John M. Bonner Memorial Home v. Collin County Nat. Bank*, 57 C. A. 313, 122 S. W. 430.

When a vendor of a 203-acre tract, on a sale by a subsequent purchaser of 103 acres, released his vendor's lien thereon, a reference in the release to prior sales by the same purchaser to two other persons of the remaining 100 acres subject to the lien, and not included in the release, is sufficient evidence that he knew of such sales, charging him with knowledge of the rights of such persons to invoke the rule that, where land subject to a lien is divided into parcels and sold to different persons at different times, the parcels are chargeable to pay the debt in the inverse order of their alienation, and that if a lienholder, with knowledge of the facts, release from his lien a tract thus made primarily chargeable, those liable secondarily are also released, so far as is necessary to prevent injury to those purchasing them. *Vansickle v. Watson*, 103 T. 37, 123 S. W. 112.

A conveyance by the original vendor to a subsequent grantee held not to vest the grantee with title as against the right of buyer of timber on the land from an intermediate purchaser. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

The release of a vendor's lien by the holder of a note secured by the lien vests the legal title in the original vendee. *Atteberry v. Burnett* (Civ. App.) 130 S. W. 1028.

Release of a vendor's lien in consideration of the indorsement of a purchase-money note held without consideration. *Id.*

Legal title held by one vendor of an undivided interest in land sold under an executory contract retaining a vendor's lien held to pass to the vendee upon payment to such vendor of his part of the note. *Id.*

A lienholder cannot release part of the land subject to his lien, to the damage of one who purchased or secured an incumbrance on another part of the land prior to the release. *First State Bank of Teague v. Cox* (Civ. App.) 139 S. W. 1.

A vendor held entitled to treat a supplemental agreement as rescinded, and to assert a lien for the amount of a note. *Dishman v. Frost* (Civ. App.) 140 S. W. 358.

Payment and discharge of a vendor's lien by the vendee vests the legal title to the property in the vendee. *Davidson v. Bodan Lumber Co.* (Civ. App.) 143 S. W. 700.

A vendor's lien retained in the deed of conveyance is discharged on payment of the price. *Burnett v. Atteberry*, 105 T. 119, 145 S. W. 582.

Where an undisclosed purchaser of real estate, who is not personally liable for a vendor's lien note, pays half of such note, and gives his personal obligation to pay the balance, a discharge of the lien is supported by a sufficient consideration. *Id.*

A vendor's lien is discharged against the property in favor of a purchaser for whose benefit a release of the lien was secured. *Id.*

Right of action for wrongful release of vendor's lien is an independent one, and need not be prosecuted in the same suit with the action on the notes or for a foreclosure of the lien. *Busch v. Brown* (Civ. App.) 152 S. W. 683.

The measure of damages recoverable by an assignee of a vendor's lien for his assignor's wrongful release of the lien is the value of the security lost not exceeding the amount of the debt or the unpaid balance of the debt when the action is instituted. *Id.*

The cause of action by an assignee of a vendor's lien against his assignor for a wrongful release of the lien sounds in tort, and rests upon the right to restitution commensurate with the loss sustained. *Id.*

Vendor's unauthorized act in releasing lien which he had assigned held not excusable on the theory that he could have been compelled to execute the release, or be subject to an action to remove a cloud. *Id.*

Vendor who, at the request of his assignee, executed release of vendor's lien, held not liable to a subsequent assignee where a subsequent purchaser became such in reliance on the assignee's representations, and not on the release. *Id.*

After an assignment of a vendor's lien, the assignee alone had authority to release the lien prior to payment of the secured debt and to execute the written evidence thereof, and the assignor had no such authority. *Id.*

Vendor executing release of lien held liable to an assignee thereof, where third persons had acquired rights superior to that of the assignee in reliance on such release. *Id.*

The release by the original vendor of the vendor's lien would not affect one who had previously purchased and held a vendor's lien note with the knowledge of the parties to the release. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

A purchaser of land who has assumed payment of incumbrances thereon cannot, without the consent of the owners of such incumbrances, be relieved of liability therefor. *Boles v. Aldridge* (Civ. App.) 153 S. W. 373.

**14. Marshaling.**—When one creditor has a lien on two funds of the debtor, and another has a lien on one only, the former may be compelled to first seek satisfaction out of that fund on which the latter has no lien, provided he shall not be delayed or inconvenienced in the collection of his debt. *Wilkes v. Adler*, 68 T. 690, 5 S. W. 497; *Wharmond v. Edgewood Distilling Co.* (Civ. App.) 32 S. W. 227.

**15. Enforcement of vendor's lien.**—When several notes are held by different parties they have equal rights, and the holder of the note last due is not precluded by a proceeding to which he was not a party. *McDonough v. Cross*, 40 T. 251; *Delespine v. Campbell*, 45 T. 628; *Robertson v. Guerin*, 50 T. 317; *Wright v. Wooters*, 46 T. 383.

Payment may be enforced by foreclosure of the vendor's lien, or the sale may be disaffirmed and the land recovered by the vendor. *Nass v. Chadwick*, 70 T. 157, 7 S. W. 828; *Hamblen v. Folts*, 70 T. 132, 7 S. W. 834; *Stephens v. Matthews' Heirs*, 69 T. 341, 6 S. W. 567; *Lanier v. Foust*, 81 T. 186, 16 S. W. 994.

Where judgment was taken on notes given for the price, the vendor lost any right to rescind, and the purchaser became the legal owner. *McClure v. Bryant*, 18 C. A. 141, 44 S. W. 3.

A vendor's lien could not be apportioned, as between different tracts held by different persons, in the absence of evidence as to the respective values of the tracts, and where one of such persons was not a party. *Murrell v. Kelly-Goodfellow Shoe Co.*, 18 C. A. 114, 44 S. W. 27.

Where vendor's lien is reserved, and vendee makes default, vendor may rescind contract and recover land, or affirm contract with foreclosure. *Curran v. Texas Land & Mortgage Co.*, 24 C. A. 499, 60 S. W. 466.

Foreclosure of vendor's lien held not to affect the rights of a claimant not made a party to the suit. *Douglass v. Blount* (Civ. App.) 62 S. W. 429.

Where a vendor, having a lien expressly reserved, sues for the land itself, he need not, in order to recover, refund any purchase money that may have been paid by the vendee. *Walsh v. Ford*, 27 C. A. 573, 66 S. W. 854; *Branch v. Taylor*, 40 C. A. 248, 89 S. W. 813.

One who forecloses a vendor's lien held to possess only such rights as the judgment gives him. *Wall v. Club Land & Cattle Co.* (Civ. App.) 88 S. W. 534.

Where there is a default in the payment of the purchase money due for land, the vendor, with lien reserved by the note or deed, has the election of suing on the note and to foreclose his lien, or to sue for the land itself. *Branch v. Taylor*, 40 C. A. 248, 89 S. W. 813.

Measure of vendor's recovery in case of failure of his title to the land conveyed defined. *Williams v. Finley*, 99 T. 463, 90 S. W. 1087.

The court may foreclose a lien as an ordinary lien, though plaintiff pleads a vendor's lien which he does not possess. *Adams v. Bartell*, 46 C. A. 349, 102 S. W. 779.

Where a conveyance reserved a vendor's lien a written instrument was not required to divest the vendee's rights on his failure to pay the price as agreed. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 398, 1190.

A vendor reserving a vendor's lien may, on the purchaser's default, rescind the contract and recover the land, or affirm the contract and foreclose his lien. *Atteberry v. Burnett*, 52 C. A. 617, 114 S. W. 159.

Where lands and chattels are sold for a lump sum, and notes taken retaining a lien on the land for the full amount, it may be foreclosed without showing the proportion given for the price of the land. *Honaker v. Jones* (Civ. App.) 115 S. W. 649.

The foreclosure of a vendor's lien held to extinguish the rights of a town under a prior parol dedication. *Adoue & Lobit v. Town of La Porte* (Civ. App.) 124 S. W. 134.

Where a vendor indorsed in blank one of the purchase-money notes to C. and in a suit to foreclose the lien C. claimed that the vendor was personally liable, and the maker insolvent, the court properly decreed priority to C. to prevent circuity of action. *Walcott v. Carpenter* (Civ. App.) 132 S. W. 981.

A payee in a renewal note executed in place of one given for the price of real estate held entitled to enforce it, together with a vendor's lien on the real estate. *Singleton v. Spear* (Civ. App.) 139 S. W. 33.

The assignee of vendor's lien notes can foreclose against a building removed from the land without his knowledge or consent. *Bowden v. Bridgman* (Civ. App.) 141 S. W. 1043.

A purchaser of one vendor's lien note held entitled to declare the entire series due, and upon purchase of the rest to enforce all of them against the land. *Quinn v. Dickinson* (Civ. App.) 146 S. W. 993.

Where a vendor assigned the vendor's lien notes and quitclaimed his interest to the assignee, the latter could enforce his rights by action on the notes and a foreclosure of the lien, or by suing for the land. *Woodward v. Ross* (Civ. App.) 153 S. W. 158.

**16. — Defenses.**—A vendee entering into possession of land, the lien being retained to secure the purchase-money, cannot defeat payment and hold possession without proof that vendor's title was defective to the extent that there is danger of eviction, and that when he entered into the contract he was in possession of the land and was induced to make the contract by the representations of his vendor that he was the owner of the superior title. *Hubert v. Grady*, 59 T. 502; *Twohig v. Brown*, 85 T. 51, 19 S. W. 768; *Ogburn v. Whitlove*, 80 T. 239, 15 S. W. 807; *Cook v. Coleman* (Civ. App.) 33 S. W. 756.

The lien may be defeated by showing a superior outstanding title. *Fisher v. Abney*, 69 T. 416, 9 S. W. 321.

One making a sale of land to which he has no title cannot foreclose a vendor's lien for the price. *Laux v. Laux*, 19 C. A. 693, 50 S. W. 213.

In action to foreclose lien, defect of title held no defense where fraud was not alleged. *Knight v. Coleman County* (Civ. App.) 51 S. W. 258.

Defendants, holding land in privity with one who purchased subject to vendor's lien, are limited to the defenses to foreclosure of the lien which such purchaser had. *Moore v. Vogel*, 22 C. A. 235, 54 S. W. 1061.

In an action to foreclose a vendor's lien, defendants, made parties as purchasers, cannot assert an adverse title. *Id.*

A vendor who has retained a vendor's lien, and who seeks to rescind the sale and recover the land, is not bound to recompense the vendee for improvements and what he has already paid on the purchase price. *Banks v. McQuatters* (Civ. App.) 57 S. W. 334.

In suit to enforce vendor's lien notes, held not indispensable that a tender of the amount due should have been made in open court to defeat the plaintiff's right to recover the land. *McCord v. Hames*, 38 C. A. 239, 35 S. W. 504.

Resistance of deceased vendee's widow and children to establishment of vendor's lien notes against estate of vendee held not to estop them from insisting in suit to enforce the notes that they should be allowed to pay off the notes and thereby defeat the plaintiff's recovery of the land. *Id.*

A vendor cannot assert a lien retained by him in purchase-money notes, where the title conveyed by him fails, and the purchaser is required to purchase the paramount title from another. *Williams v. Finley*, 99 T. 468, 90 S. W. 1037.

Fraud of a transferee of vendor's lien notes held no defense to suit thereon. *Zan v. Clark*, 53 C. A. 525, 117 S. W. 892.

One held a mere trustee for the maker of a note secured by a vendor's lien and not entitled to urge the defenses of limitation and homestead rights in a suit to foreclose the lien. *Zeno v. Adoue*, 54 C. A. 36, 117 S. W. 1039.

In a suit to foreclose a vendor's lien, it is no defense that defendant has made permanent and valuable improvements. *Long v. Riley* (Civ. App.) 139 S. W. 79.

Breach of a warranty deed arising from the existence of an outstanding mortgage held no defense to an action by the grantor to enforce a vendor's lien. *Hoy v. Peacock* (Civ. App.) 154 S. W. 677.

17. — **Limitations.**—See notes under Art. 5694.

18. — **Evidence.**—Certain indorsements on duplicate of vendor's lien note held not to show that it was not the original. *Southern Building & Loan Ass'n v. Brackett*, 91 T. 44, 40 S. W. 719.

In action to foreclose vendor's lien, defendants, having answered by general denial, are not entitled to judgment on evidence of superior title. *Moore v. Vogel*, 22 C. A. 235, 54 S. W. 1061.

Where plaintiff sought the foreclosure of a vendor's lien, or, in the alternative, possession of the land, defendant could not complain of a judgment foreclosing the lien on evidence justifying a judgment for possession. *Liner v. J. B. Watkins Land Mortg. Co.*, 29 C. A. 187, 63 S. W. 311.

In an action to foreclose a vendor's lien reserved in a deed, evidence considered, and held, that a subsequent purchaser of part of the premises could not complain of the release from the lien of another portion thereof in accordance with the terms of the deed, or of the platting of the remaining land and dedication of the streets and alleys to the public. *Bangs v. Crebbin*, 29 C. A. 385, 69 S. W. 441.

In an action on a vendor's lien note, evidence held insufficient to show a legal eviction of defendant from the land conveyed. *Wilson v. Moore* (Civ. App.) 85 S. W. 25.

Evidence held not to show that a note was given for a part of the price for which property was originally sold, so as to make it a vendor's lien. *Honaker v. Jones*, 103 T. 239, 122 S. W. 529, 126 S. W. 4.

In an action to foreclose a vendor's lien and to recover damages against a third person for a trespass impairing the security of the lien, evidence held insufficient to support the verdict against the third person. *Craven Lumber Co. v. Allen* (Civ. App.) 134 S. W. 238.

19. — **Judgment or decree.**—See notes under Art. 2000 et seq.

20. — **Actions to set aside foreclosure decree.**—In an action to set aside a decree foreclosing a vendor's lien, the market value at time of foreclosure was the true criterion in determining whether the value of the land exceeded the debt. *Fox v. Robbins* (Civ. App.) 70 S. W. 597.

21. — **Sale and proceeds.**—Foreclosure of a purchase-money mortgage and sale of portion of land deprive the vendors of the legal title to land not sold. *Gardener v. Griffith*, 93 T. 355, 55 S. W. 314.

The transfer of a purchase-money note, with a vendor's indorsement in blank, held to entitle the indorsee to priority of payment out of the proceeds of a sale of the land on foreclosure of the vendor's lien. *Walcott v. Carpenter* (Civ. App.) 132 S. W. 981.

22. — **Title and rights of purchasers at sale.**—One who assigns one of three notes secured by a vendor's lien, and purchases the property foreclosed under the two remaining notes, held to take such property subject to the lien of the third note. *Benson v. Panther*, 17 C. A. 464, 43 S. W. 804.

A purchaser at a sale under an attempted foreclosure of a vendor's lien held to stand in the vendor's place under an executory contract for a sale. *Thompson v. Robinson*, 93 T. 165, 54 S. W. 243, 77 Am. St. Rep. 843.

Purchaser of land at foreclosure sale, who was entitled, as against claimant under vendor's lien, to have the land resold, or to pay the balance of purchase price and keep the land, held to have forfeited such right by resisting payment on the merits. *Douglass v. Blount* (Civ. App.) 62 S. W. 429.

The purchaser of real estate at a sale foreclosing vendor's lien, having knowledge of facts which would put a reasonably prudent man on inquiry as to the ownership of machinery on the premises, held chargeable with knowledge of the facts. *Mundine v. Pauls*, 28 C. A. 46, 66 S. W. 254.

The owner of real estate through a title derived from the foreclosure of a vendor's lien held, on a subsequent foreclosure of the lien by another note holder, to be entitled to one-half the proceeds of the sale, if not in excess of the debt, and to any excess remaining after the payment of the debt. *Lewis v. Ross*, 95 T. 358, 67 S. W. 405.

A purchase by an attorney at a foreclosure sale under process controlled by him held valid as against any claim of the judgment defendant. *Douglass v. Blount*, 95 T. 369, 67 S. W. 484, 58 L. R. A. 699.

Purchaser at foreclosure by assignee of purchase money note held to take subject to proportionate lien of notes remaining in vendor's hands, vendor not having been made a party. *Id.*

Surety, purchasing at vendor's lien foreclosure sale, held, under the facts, to be a purchaser for value, though money paid by him was credited on judgment against him. *McLane v. Sullivan*, 29 C. A. 247, 69 S. W. 191.

On foreclosure of a vendor's lien by judicial sale of the property, the superior title of the vendor vests in the purchaser. *Flack v. Braman*, 45 C. A. 473, 101 S. W. 537.

A purchaser from the purchaser at a sale of land sold under a judgment foreclosing a vendor's lien in an action fraudulently instituted held chargeable with knowledge of the facts and not thereafter entitled to hold the land against plaintiff, the true owner of the lien. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

If the proceedings in a suit to enforce a vendor's lien were void, those claiming under the purchaser could not recover the land in trespass to try title, without paying, or offering to pay, the purchase money secured by the lien. *Gibson v. Oppenheimer* (Civ. App.) 154 S. W. 694.

23. — **Redemption from sale.**—The owner of a note, secured by a vendor's lien and acquired prior to a suit to foreclose note secured by a prior lien, held entitled to redeem from the purchaser at the sale. *Rogers v. Houston* (Civ. App.) 60 S. W. 445.

Where plaintiff, claiming under a vendor's lien, asked to be allowed to redeem from a foreclosure sale, he was not required to return a part of the purchase price which had been paid in cash. *Douglass v. Blount* (Civ. App.) 62 S. W. 429.

The purchaser of land sold in pursuance of the foreclosure of a vendor's lien cannot complain of a judgment giving the holder of a junior lien the right to redeem by payment of the amount of the bid at the foreclosure sale on the ground that a resale should be ordered. *Id.*

Sufficient privity of estate held to exist between purchaser at foreclosure sale and one claiming under a vendor's lien, so that claimant was entitled to redeem. *Id.*

A part of a tract of land incumbered by a vendor's lien held first chargeable with the lien on a foreclosure, and on the proceeds of a sale thereof discharging the lien, the remainder of the tract was freed from liability. *Hawkins v. Potter* (Civ. App.) 130 S. W. 643.

A grantee of land, as a part of the consideration, assumed the payment of certain notes. Thereafter an action was brought on the notes and to foreclose the vendor's lien, and the land was sold under the judgment. Held, that the grantee had no right, after such sale, to redeem by paying the notes. *Oliver v. Bordner* (Civ. App.) 145 S. W. 656.

Where a purchaser out of possession tendered the unpaid part of the price secured by vendor's lien, but the tender was refused by one in possession, the latter was properly charged with the rents of the property from the date of the tender to the date of the trial of the suit by the purchaser to redeem. *Dreyer v. Southard* (Civ. App.) 148 S. W. 1103.

In a suit to redeem from a vendor's lien in which plaintiff alleged in his petition that he tendered into court the principal, interest, and attorney's fees, and the court found that the tender was made after the suit was begun, an allowance of the attorney's fees to defendant was proper. *Id.*

Right of a subsequent purchaser or incumbrancer to redeem from foreclosure of a vendor's lien held not affected by the judgment where he was not a party. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

24. **Right to recover possession of land in general.**—A lienholder in possession cannot be ousted without payment of the lien. *Garrett v. McClain*, 18 C. A. 245, 44 S. W. 47.

The only remedy of a mere assignee of a vendor's lien note held a suit on the note, but, where he secures a conveyance of the land, he may recover the land. *Atteberry v. Burnett*, 52 C. A. 617, 114 S. W. 159.

The general rule is that where a vendor, or those claiming under him, has done nothing to waive the right, he may in every case of an executory sale, when a purchaser makes default in payment, sue to recover the land. *Crain v. National Life Ins. Co. of United States*, 56 C. A. 406, 120 S. W. 1098.

Instrument held not to vest the absolute title to the land in the purchaser, with an implied lien only for the unpaid purchase money, but to show an intent that the superior title should remain in vendor until full performance by the purchaser. *Lipscomb v. Fuqua*, 55 C. A. 535, 121 S. W. 193.

The assignee of vendor's lien notes is not entitled to possession before foreclosure. *Bowden v. Bridgman* (Civ. App.) 141 S. W. 1043.

A vendor of land, whose vendee has not made default in a purchase upon installments, cannot maintain trespass to try title against one claiming adversely to the vendee, though as between himself and the vendee he holds the superior title under a reservation in the vendor's lien. *State v. Dayton Lumber Co.* (Civ. App.) 155 S. W. 1178.

25. **Actions for recovery of possession of land.**—Facts held not to preclude the holder of vendor's lien notes from recovering the land on default in payment without return of the part of the purchase price paid and paying for improvements. *Crain v. National Life Ins. Co. of United States*, 56 C. A. 406, 120 S. W. 1098.

The heirs of a vendor held not barred by laches of their right to recover the land on the superior title based on a reservation of an express lien on the property for the price. *Buckley v. Runge*, 57 C. A. 322, 122 S. W. 596.

In trespass to try title by an administrator, evidence held not to raise the issue of estoppel against plaintiff to assert a vendor's lien. *Atteberry v. Burnett* (Civ. App.) 130 S. W. 1028.



The heirs of a vendor of land held not barred by a lapse of time from recovery of such land by virtue of a reservation of a vendor's lien in notes for unpaid purchase money. *Buckley v. Runge* (Civ. App.) 136 S. W. 533.

Where a vendor forecloses his lien and buys the property at the foreclosure sale, without making a subsequent purchaser from the vendee a party, he may recover the land unless such subsequent purchaser satisfies the lien claim. *Gulf, C. & S. F. Ry. Co. v. Blount* (Civ. App.) 136 S. W. 566.

Subsequent purchasers subject to vendors' lien notes held entitled to defeat an action in trespass to try title by tendering the amount due on the notes. *Id.*

26. **Lien of purchaser of land for purchase money.**—Where a decree was made rescinding a sale for fraud, held, that the purchaser had a lien on the vendor's interest in the land for the price paid, but that the lien was confined to such interest at time of payment. *Ramirez v. Barton* (Civ. App.) 41 S. W. 508.

In a stated case a purchaser of several parcels of land, under a contract calling for a stipulated payment, held entitled to a lien upon the land not conveyed, but embraced in the contract. *Hough v. Fink* (Civ. App.) 141 S. W. 147.

A purchaser under a parol contract, who makes valuable improvements, held not entitled to abandon the land and sue for the value of his improvements, instead of specific performance, unless the vendor cannot pass title. *Combest v. Glenn* (Civ. App.) 142 S. W. 112.

An infant, bona fide purchaser of land, but who has not paid the entire price, is not entitled to a lien except for the amount paid; the notes given for the remainder being still in the vendor's hands, and not being shown to be negotiable. *Nellius v. Thompson Bros. Lumber Co.* (Civ. App.) 156 S. W. 259.

27. **Bona fide purchasers in general.**—See notes under Art. 6824.

28. **Factor's lien.**—Factors held not to have lien on goods purchased for principal, to cover damages arising from his refusal to receive other goods. *Beakley v. Rainier* (Civ. App.) 78 S. W. 702.

A factor's possession of goods on which he has made advances, in his own, for the purpose of sustaining a lien as against the principal. *Couturie v. Roensch* (Civ. App.) 134 S. W. 413.

An agent employed by bankrupts to purchase cotton for them with his own funds on a salary held a factor having a common-law lien on the bankrupts' goods for a general balance on account. *Id.*

29. **Lien of bank on deposits and for money loaned.**—A bank has a lien on money and funds of a depositor in its possession to secure a balance due the bank. *Bank v. De Morse* (Civ. App.) 26 S. W. 417.

An agreement between a bank and a borrower, by which the bank was to have a lien on cattle purchased by the borrower for its advances, held valid as to the parties and volunteers and persons having notice thereof. *Gardner v. Planters' Nat. Bank of Honey Grove*, 54 C. A. 572, 118 S. W. 1146.

A bank furnishing money to pay for cotton purchased by a buyer held to acquire a lien on cotton bought, good as between the parties and persons having notice; the bank taking tickets issued by the public weigher as representative of the cotton on agreement that any bills of lading issued would be delivered to it. *Celeste State Bank v. Puckett* (Civ. App.) 148 S. W. 331.

30. — **Waiver.**—The lien of a bank for cotton purchased by a cotton buyer held not waived by permitting the buyer to sell the cotton pursuant to a contract between the parties. *Celeste State Bank v. Puckett* (Civ. App.) 148 S. W. 331.

31. **Depositors' lien—Saving department.**—See Art. 437.

32. **Attorney's lien.**—The renewal of a purchase-money note, with a stipulation for attorney's fee, not in it originally, made after the property had become the home-stead of the purchaser, held not to create a lien for the attorney's fee. *Bullard v. Mayne* (Civ. App.) 49 S. W. 522.

Attorney has no lien by statute in Texas on judgment recovered to secure him for his services. *Dutton v. Mason*, 21 C. A. 389, 52 S. W. 651.

33. — **Subject-matter to which lien attaches.**—An attorney has a general lien for his professional dues upon the papers of his client in his hands and moneys collected. *Able v. Lee*, 6 T. 427; *Fowler v. Morrill*, 8 T. 153; *Casey v. March*, 30 T. 180; *Whittaker v. Clarke*, 33 T. 647; *Randolph v. Randolph*, 34 T. 181.

The lien of an attorney to secure his fees and disbursements does not extend to a debt not collected, or to a judgment, so as to prevent the payment by the judgment debtor to his client. *Casey v. March*, 30 T. 180; *Able v. Lee*, 6 T. 431; *Kinsey v. Stewart*, 14 T. 457; *Whittaker v. Clarke*, 33 T. 647; *Randolph v. Randolph*, 34 T. 181; *Croft v. Hicks*, 26 T. 333.

Attorneys whose services secured a judgment held to have no lien for their agreed compensation on a fund recovered from a bank in garnishment based on such judgment. *Raley v. Hancock* (Civ. App.) 77 S. W. 658.

Where an assignee of a note as collateral for a debt less than the amount thereof, collected the full amount of the note, he could appropriate the excess in satisfaction of his lien as an attorney for professional services rendered. *Thomson v. Findlater Hardware Co.* (Civ. App.) 156 S. W. 301.

An attorney, though having a lien on money collected for his client for services rendered, has no lien for the debt in the hands of the debtor before collection. *Id.*

At common law an attorney has a lien for the amount due him for professional services on all papers and money belonging to his client coming into his possession, but his lien on the papers is only passive and he may only retain them until his claim is paid. *Id.*

34. — **Priorities.**—An attorney's lien on a stock of goods for services in making and defending a trust deed thereof held superior to the right of the seller to recover them as having been fraudulently purchased. *Meyers v. Bloon*, 20 C. A. 554, 50 S. W. 217.

35. **Carrier's lien.**—See Title 20, Chapter 3.

36. **Landlord's lien.**—See Art. 5475 et seq.

**37. Liens incident to partnerships.**—A surviving partner, having an equitable lien on firm assets, can authorize a creditor to apply for the application of firm property to discharge firm debts. *Levy's Estate v. Archenhold* (Civ. App.) 44 S. W. 46.

The assumption and payment by one partner of partnership debts does not vest in him any lien upon firm assets superior to that of other creditors. *Schuster v. Farmers' & Merchants' Nat. Bank*, 23 C. A. 206, 54 S. W. 777, 55 S. W. 1121, 56 S. W. 93.

A partnership creditor as such has no lien upon partnership assets. *Id.*

Each partner has a lien upon the partnership assets to secure the payment of the partnership debts, which continues to exist after dissolution. *Blackwell v. Farmers' & Merchants' Nat. Bank*, 97 T. 445, 79 S. W. 518.

On the dissolution of a partnership, where a firm indebtedness to one partner is established, fixing a lien upon the share of the other for the entire indebtedness and authorizing execution for the full amount against such share held error. *Meeve v. Eberhardt*, 49 C. A. 327, 108 S. W. 1013.

Simple firm creditors have no specific lien, either legal or equitable, on the firm property. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 146 S. W. 1191.

A lien given by a partner on his interest in the partnership property to secure an individual indebtedness is not invalid merely because the partnership is insolvent at the time. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

A creditor of a firm acquires no lien on the property of a new firm created by a third person acquiring the interest of a partner in the firm. *Freeman v. Huttig Sash & Door Co.*, 105 T. 560, 153 S. W. 122.

**38. — Waiver or loss.**—If one partner sells out to the other, who assumes the debts, the acceptance of the agreement to pay the debts is a waiver of the partner's lien on the property for firm debts. *Blackwell v. Farmers' & Merchants' Nat. Bank*, 97 T. 445, 79 S. W. 518.

A partner purchasing copartner's interest and attempting, without the aid of the court, to settle with firm and individual creditors, held to have lost partnership lien and to take the copartner's interest subject to a deed of trust thereon. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

**39. Liens incident to tenancies in common.**—A contract by tenants in common to pay a co-tenant their share of the expense of procuring their share in an estate, as soon as the litigation should terminate, does not create a lien on any of the property awarded as a result of the litigation. *Hume v. Howard* (Civ. App.) 48 S. W. 202.

One purchasing the interest of a tenant in common held to take it subject to the right of a co-tenant to enforce a claim against the land for services in looking after it. *Cotton v. Rand* (Civ. App.) 51 S. W. 55.

A tenant in common has no lien upon the share of his co-tenant for rents received by the latter without his share, in such sense as to entitle him to maintain a simple action for debt and foreclosure therefor. *Kalteyer v. Wipff*, 92 T. 673, 52 S. W. 63.

Where a tenant in common discharges an incumbrance against the common title, he acquires an equitable lien on the co-tenant's interest to the extent of the co-tenant's liability. *Niday v. Cochran*, 42 C. A. 292, 93 S. W. 1027.

A co-tenant having paid taxes on the common property held entitled to foreclose a lien only for the proportion chargeable against the interests of his co-tenants. *Anderson v. McGee* (Civ. App.) 130 S. W. 1040.

**40. Remedies of seller.**—A seller, who, on the refusal of the buyer to receive the goods, elects to keep them, cannot be charged with the amount he may realize from a subsequent sale thereof. *Sour Lake Townsite Co. v. B. Deutser Furniture Co.*, 39 C. A. 86, 94 S. W. 188.

Cause of action held to accrue to sellers on receipt of notice of refusal of buyers to accept goods, so that sellers were thereupon entitled to resell for buyer's account. *D. E. Foote & Co. v. Heisig & Norvell* (Civ. App.) 94 S. W. 362.

The right of sellers to recover for reasonable and necessary expense of resale on failure of the buyers to accept the goods does not depend on the contract of sale. *Id.*

Buyers held not entitled to assert that right of resale by sellers was not reasonably exercised because of delay in making resale. *Id.*

Where defendant refused to receive lumber purchased of plaintiff, the latter held authorized to sell the lumber at its market value, or, if there was no market at the place of delivery, to ship it to another point for resale at defendant's expense. *Texas & Louisiana Lumber Co. v. Rose* (Civ. App.) 103 S. W. 444.

Where defendant refused to accept lumber ordered of plaintiff, it was incumbent on the latter to show in an action for damages that he had used all proper means in reselling the lumber to effect a fair sale. *Id.*

A seller held to have waived its right to reclaim a safe sold to be paid for on delivery by extending the time of payment upon default. *Victor Safe & Lock Co. v. Texas State Trust Co.*, 101 T. 94, 104 S. W. 1040.

Where a seller, on the buyer's refusal to accept the goods, elects to resell and recover the difference between the contract price, and that obtained on the resale, he must resell within a reasonable time and at the best price he can reasonably obtain. *Carver, Frierson & Co. v. Graves*, 47 C. A. 481, 106 S. W. 903.

The remedies of the seller on the refusal of the buyer to receive goods contracted for, determined. *Avant v. Watson*, 57 C. A. 304, 122 S. W. 586.

The seller's election to resell the property as the buyer's agent and recover the difference between the contract price and that on resale, upon the buyer's refusal to receive and pay for the goods, is based on a right to damages. *Ogburn-Dalchau Lumber Co. v. Taylor* (Civ. App.) 126 S. W. 48.

Where the seller elects to sell the property for the buyer and recover the difference between the contract price and the resale price upon the buyer's refusal to receive the goods, the seller cannot sue for such difference until the resale is complete. *Id.*

The seller's remedies stated where the buyer refused to receive and pay for goods sold, the possession of which, but not the title, remains in the seller. *Id.*

The buyer of machinery to be manufactured countermanded the order after the machinery had been manufactured and was ready for shipment. Held, that the seller, treat-

ing the machinery as belonging to the buyer, could sell it on the buyer's account and recover the difference between the price it brought and the contract price. *Palestine Ice, Fuel & Gin Co. v. Walter Connally & Co.* (Civ. App.) 148 S. W. 1109.

The seller of lumber did not have the right to resume possession of it by force, because the purchaser did not pay the price as agreed. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

41. **Judgment of foreclosure of liens.**—See Art. 2000 et seq.

42. **Pledges.**—Pledge defined. *Smith v. Anderson*, 27 S. W. 775, 8 C. A. 188.

A sale under which the seller reserves the privilege of buying back the property is not a pledge. *Spencer v. Jones* (Civ. App.) 47 S. W. 29.

43. — **Title of pledgor.**—Real owner of note held estopped to question his bailee's pledge thereof. *May v. Martin*, 32 C. A. 132, 73 S. W. 840.

An assignment by the payee of a note as collateral for the payment of debts less than the amount of the note, makes the assignee the owner thereof to the extent of the debts but the payee is the equitable owner of the excess. *Thomson v. Findlater Hardware Co.* (Civ. App.) 156 S. W. 301.

44. — **Pledgee as bona fide purchaser.**—A pledgee of cotton, without notice of the claim of a subsequent purchaser against the pledgor, held entitled to the entire purchase price, where it amounted to less than the debt for which the cotton was pledged. *First Nat. Bank v. C. A. Andrews & Co.* (Civ. App.) 77 S. W. 956.

45. — **Possession or control of property.**—The pledgor of cotton tickets as collateral security for advances could not demand their surrender until the debt had been paid or payment tendered. *Carver Bros. v. Merrett* (Civ. App.) 155 S. W. 633.

46. — **Expenses incurred.**—The pledgee of a note and mortgage held entitled to incur reasonable expenses for the protection and collection of the security. *Ely-Walker Dry Goods Co. v. Colbert* (Civ. App.) 124 S. W. 705.

The attorney employed by the pledgee of a note to preserve and collect it is the attorney of the latter, and he may not make an unauthorized charge and hold the pledgor responsible therefor. *Id.*

47. — **Enforcement of right of action pledged and failure to collect or fix liability.**—One who has a note as collateral can recover the full amount thereof, notwithstanding part payment of his debt. *Jackson v. Chemical Nat. Bank* (Civ. App.) 46 S. W. 295.

One holding vendor's lien notes as collateral security, on a rescission by vendor and vendee, can enforce the note to the amount of the principal debt only. *Brotherton v. Anderson*, 27 C. A. 587, 66 S. W. 682.

Failure of the court to charge that a pledgee's duty to exercise diligence in collecting a collateral note did not arise until after its maturity held not error. *C. H. Larkin Co. v. Dawson*, 37 C. A. 345, 83 S. W. 882.

The pledgor of a note as collateral held relieved from responsibility in collecting the same. *Id.*

Where the collection of a collateral note was lost by the pledgee's gross negligence, pledgee held liable to the pledgor for the amount of the note, less the debt for which it was pledged. *Id.*

In an action by an assignee of the rights of insured for balance of proceeds of policy held by bank, issue held to be confined to indebtedness to bank at time of notice of assignment. *Tharp & Griffith v. Porter & Waters* (Civ. App.) 93 S. W. 530.

A pledgee must collect at maturity notes deposited with him as collateral, whether the debt of the pledgor is then due or not. *Daugherty v. Wiles* (Civ. App.) 156 S. W. 1089.

48. — **Conversion of property before default.**—The holder of collateral securities negligently lost or converted to his use is chargeable therefor. *Marberry v. Bank*, 26 S. W. 215, 6 C. A. 607.

A pledgee's sale of collaterals and assertion of absolute ownership thereof held a conversion, and authorized suit to recover the value thereof without tender of payment of the loan. *Oriental Bank of New York v. Western Bank & Trust Co.* (Civ. App.) 143 S. W. 1176.

49. — **Action for proceeds of property.**—In an action by assignee of insured for balance of proceeds held by bank held immaterial what consideration assignee gave for assignment, or whether he was an innocent purchaser. *Tharp & Griffith v. Porter & Waters* (Civ. App.) 93 S. W. 530.

50. — **Payment or discharge of debt.**—Life policy payable to insured's wife, assigned by her to secure his debt to employers under agreement for payment out of monthly salary, held released after lapse of time sufficient to extinguish the debt had they applied the salary. *Washington Life Ins. Co. v. Gooding*, 19 C. A. 490, 49 S. W. 123.

The maker and sureties of a note secured by pledge held not entitled to a credit equal to the depreciation in value of the pledge between dates of maturity of note and institution of suit. *Adoue & Lobit v. Hutches*, 32 C. A. 559, 75 S. W. 41.

Lien of bank on cotton, to the purchasers of which it had advanced money on the bills of lading, held terminated by the delivery to the bank of the proceeds of the sale of the cotton. *First Nat. Bank v. San Antonio & A. P. R. Co.*, 97 T. 201, 77 S. W. 410.

51. — **Transfer of property by pledgee.**—The consent of the pledgor is not essential to the right of the pledgee to make an assignment or subpledge of the property. *Coleman v. Anderson* (Civ. App.) 82 S. W. 1057.

52. — **Return of property on payment or other discharge.**—The holder of stock deposited as collateral cannot withhold possession thereof from the depositor, when the payment of the obligation secured is tendered, on notice from alleged purchasers of the stock to hold the same, when the agreement under which such purchasers claimed was not shown to be valid and binding. *Houston & T. C. R. Co. v. Conner*, 29 C. A. 259, 67 S. W. 773.

An assignee of a note as collateral for a debt less than the amount of the note is on his collection of the note a trustee for the payee of the excess. *Thomson v. Findlater Hardware Co.* (Civ. App.) 156 S. W. 301.

53. — **Sale of property.**—Authority given by a pledgor to sell the pledge at private sale, without advertisement or notice, is a waiver of notice to him. *Dullnig v. Weekes*, 16 C. A. 1, 40 S. W. 178.

An offer by a pledgee, authorized to sell the pledge at private sale, to sell it at a certain price, which offer was accepted, held not to invalidate the sale. *Id.*

Mere notice of ownership adverse to pledgor held insufficient to invalidate sale of pledge by pledgee. *May v. Martin*, 32 C. A. 132, 73 S. W. 840.

Facts held insufficient to constitute a sale of pledged securities, and that a transferee thereof, refusing to surrender the same on tender of the debt for which they were pledged, was liable for conversion thereof. *Hart v. Tyrrell*, 36 C. A. 626, 82 S. W. 1074, 86 S. W. 350.

A pledgee of commercial paper with power to sell held required to use diligence to get the best price. *King v. D. Sullivan & Co.* (Civ. App.) 92 S. W. 51.

Where the pledge contract authorizes either a public or private sale of the pledged property, public notice must be given thereof if the sale is public. *Amarillo Nat. Bank v. Harrington* (Civ. App.) 131 S. W. 231.

Notice of the time and the place of the sale of pledged property must be given to the pledgor as well as to the public, unless it is waived, as it may be. *Id.*

The payee of a note secured by the deposit, as collateral, of the note of a third person was not liable for any act or omission of its transferee in connection with the collection of the collateral note after the transfer. *Norvell-Shapleigh Hardware Co. v. Lumpkin* (Civ. App.) 150 S. W. 1194.

54. — **Actions to enforce right of action pledged.**—A party who holds a note as security for a sum less than the face of the note may sue thereon. The indorser may intervene to protect his interest. *Jackson v. Fawkes* (Sup.) 20 S. W. 136.

One taking stock as collateral for a note need not sell it before suing on the note. *Sinclair v. Weekes* (Civ. App.) 41 S. W. 107.

In an action by a pledgee of notes, secured by a conveyance of land, against the maker, who pleads homestead as a defense against the notes, plaintiff must show how much has been paid on the indebtedness of the pledgor and what other security he has. *Harrington v. Claffin*, 91 T. 294, 42 S. W. 1055.

One to whom a note is transferred as collateral security may maintain an action thereon in his own name. *McDaniel v. Chinski*, 23 C. A. 504, 57 S. W. 922.

Where it was agreed between the pledgor and pledgee of notes that the pledgor should commence all actions on past-due paper, the obligor of notes could not raise the objection that the pledgor could not maintain action thereon. *Liner v. J. B. Watkins Land Mortg. Co.*, 29 C. A. 187, 68 S. W. 311.

In an action by the pledgee of a note against the maker the defense being payment to the corporation pledgor, the act of the pledgee in suing the maker was a repudiation of the act of the pledgor in receiving payment as binding on plaintiff. *Landa v. Mechler* (Civ. App.) 111 S. W. 752.

In an action on a note by a person holding it as collateral security for a debt of the payee, he must allege and prove nonpayment of the secured debt. *Handley v. First Nat. Bank* (Civ. App.) 149 S. W. 742.

Where, in an action on a note assigned as collateral the maker pleaded and proved a good defense as against the payees, the pledgee could not recover in the absence of proof of nonpayment of the debt for which it was pledged, the amount due upon it, and what other security, if any, was held by the pledgee. *Wharton v. Washington County State Bank* (Civ. App.) 153 S. W. 699.

55. **Indemnity bonds.**—A bond given to a railroad company by contractors erecting buildings for a railway held an indemnity bond to the railroad, and not to give a right of action to the laborers against the sureties on the bond. *National Bank of Cleburne v. Gulf, C. & S. F. Ry. Co.*, 95 T. 176, 66 S. W. 203.

Bond given with a building contract, construed. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co.* (Civ. App.) 143 S. W. 317.

A bond given by a contractor to erect a building on land not a homestead, conditioned on performing the contract, paying all indebtedness, and completing the building, free of liens, payable to the owner, and providing that it was made for the use of all persons entitled to liens according to law, taken in connection with the contract reserving a portion of the price in liquidation of damages, held for the benefit of the owner of the building and lienholders, and one not a lienholder may not sue thereon. *Texas Glass & Paint Co. v. Southwestern Iron Co.* (Civ. App.) 147 S. W. 620.

A bond given by a contractor providing that it should inure to the benefit of materialmen and subcontractors, gives a right of action to such materialmen and subcontractors, regardless of whether they hold a lien. *United States Fidelity & Guaranty Co. v. Thomas* (Civ. App.) 156 S. W. 573.

56. **Subrogation.**—The right of subrogation held to be independent of any contractual relation between the parties. *Vasser v. City of Liberty*, 50 C. A. 111, 110 S. W. 119.

57. — **Discharge of Incumbrances by purchasers of property.**—The purchaser of land at a foreclosure sale is subrogated to all the rights of the plaintiff in the foreclosure proceedings at the institution of the suit. *Attaway v. Carter*, 1 U. C. 73; *Bartley v. Harris*, 70 T. 181, 7 S. W. 797.

One purchasing land under foreclosure of mechanics' liens held subrogated to the rights of the lienors as against the mortgagee. *Owens v. Heidebreder* (Civ. App.) 44 S. W. 1079.

A purchaser of attached land paying mortgage on land held entitled to be subrogated to the rights of the mortgagee. *Davis v. John V. Farwell Co.* (Civ. App.) 49 S. W. 656.

One in good faith taking under a void deed, and paying a mortgage he had assumed, held entitled to subrogation. *Murphy v. Smith* (Civ. App.) 50 S. W. 1040.

Where purchase-money notes and land are transferred by vendor to third person, and lien retained for payment, transfer subrogates such person to all rights of vendor. *Polk v. Kyser*, 21 C. A. 676, 53 S. W. 87.

Purchasers who paid notes secured by a lien on the land superior to theirs, believing it necessary, held subrogated to the rights of their payee. *Schneider v. Sellers*, 25 C. A. 226, 61 S. W. 541.

A purchaser of property under a trustee's sale is not subrogated to the rights of a prior mortgagee, thus cutting off the vendor's lien of his grantor under a contract for

the sale of the property, where the jury finds that contract for such sale constituted the consideration of the trustee's sale. *Scott v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 66 S. W. 485.

The purchaser of real estate under a void tax sale, on the recovery of the land in trespass to try title brought by the owner thereof, who was not the person to whom the land was taxed, will not be subrogated to the rights of the state for taxes paid, or entitled to be reimbursed from the owner. *Mumme v. McCloskey*, 28 C. A. 83, 66 S. W. 853.

Persons who had bought land from a city which had no title to it and had sold it to pay city bonds held entitled to be subrogated to the rights of the bondholders. *Vasser v. City of Liberty*, 50 C. A. 111, 110 S. W. 119.

Where the grantee of a purchaser of land at a tax sale was barred from recovering possession of the land by the adverse possession of other persons, held that he was entitled to be subrogated to the state's lien upon the land for the taxes paid. *Patton v. Minor* (Civ. App.) 117 S. W. 920.

A buyer of timber on land held by a purchaser subject to a vendor's lien held to acquire title thereto as against a claim of right by subrogation. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

An execution purchaser on the failure of title held entitled to be subrogated to the rights of the execution creditor and pursue his remedy against the execution debtor. *Rosenthal & Desberger v. Mounts* (Civ. App.) 130 S. W. 192.

Where a purchaser of personal property as part of the consideration discharged a chattel mortgage, he is not, where another chattel mortgagee sought to subject the property to his lien, entitled to subrogation to the lien of the first. *Sowder v. North Texas State Bank* (Civ. App.) 155 S. W. 971.

58. — **Persons making advances for discharge of debt or incumbrance.**—A lender of money to discharge a vendor's lien is substituted to the original lien or the creditor. *Hicks v. Morris*, 57 T. 658; *Wright v. Heffner's Executors*, 57 T. 518; *Dillon v. Kauffman*, 58 T. 696; *Warhumund v. Merritt*, 60 T. 24; *Eylar v. Eylar*, 60 T. 315; *Wright v. Wooters*, 46 T. 380.

One whose land is bound equally with that of another for the satisfaction of a vendor's lien, and who pays off a judgment for the debt, is entitled to contribution from the other; and in order to subject the land of such other to its proportional part of the judgment, he may be subrogated to all the rights of the plaintiff in the original judgment, and foreclose the vendor's lien. *Beck v. Tarrant*, 61 T. 402.

One who advances purchase money to discharge a vendor's lien is not subrogated to the rights of the vendor in the absence of a stipulation to that effect. *Ruhl v. Kauffman*, 65 T. 723; *Johnson v. Townsend*, 77 T. 639, 14 S. W. 233; *Int. Bldg. & L. Ass'n v. Hardy*, 14 C. A. 462, 37 S. W. 341.

The payment of a debt secured by lien, made by a stranger to the original contract under an agreement with the creditor that he may hold the security for his reimbursement, subrogates him to the rights of the original creditor. If the payment be made at the request of the debtor, with exclusive reliance on his promise to repay, the mortgage debt is extinguished, and no subsequent act of the mortgagor can revive it to the prejudice of a subsequent lienholder or one purchasing under him. *Fievel v. Zuber*, 67 T. 275, 3 S. W. 273.

One who discharges a debt secured by a prior mortgage is thereby subrogated to the right of the prior mortgagee to enforce repayment of the debt, and this in the absence of a formal transfer of the mortgage. He will hold the title secured as against subsequent incumbrances, and this when he has acquired the equity of redemption. *Fears v. Albea*, 69 T. 437, 6 S. W. 286, 5 Am. St. Rep. 78.

One paying a note of another secured by a chattel mortgage is subrogated to the rights of the payee. *Ploeger v. Johnson* (Civ. App.) 26 S. W. 432.

One furnishing the purchase money may be subrogated to the vendor's lien, when. *Kallman v. Ludenecker*, 28 S. W. 579, 9 C. A. 182.

One loaning money used in paying off vendor's lien on homestead held subrogated to rights of vendor. *Dixon v. National Loan & Investment Co.* (Civ. App.) 40 S. W. 541.

A junior lienholder, who paid off prior liens, held entitled to subrogation. *Southern Building & Loan Ass'n v. Skinner* (Civ. App.) 42 S. W. 320.

One loaning money to pay purchase-money notes, and taking deed of trust with security, held not subrogated to the rights of the holders of the notes. *Shappard v. Cage*, 19 C. A. 206, 46 S. W. 839.

Where a third person's money is employed to take up vendor's lien notes, such person is subrogated to the rights of the vendor. *Ford v. Ford*, 22 C. A. 453, 54 S. W. 773.

A wife, paying from her separate estate a deferred payment for land purchased by her husband, held not subrogated to the rights of the vendor, without pleading subrogation. *Strnad v. Strnad*, 29 C. A. 124, 68 S. W. 69.

Where one pays or advances money to pay a mortgage debt, with the understanding that he is to have the benefit of the mortgage, he becomes the holder of the lien by subrogation. *Powers v. McKnight* (Civ. App.) 73 S. W. 549.

Collectors of a draft, who became liable to consignor drawing same, held subrogated to his right of action against the carrier for conversion of the goods. *Gulf, C. & S. F. Ry. Co. v. North Texas Grain Co.*, 32 C. A. 93, 74 S. W. 567.

In trespass to try title, plaintiff held not entitled to be subrogated to a prior lien existing on the property. *Crebbin v. Moseley* (Civ. App.) 74 S. W. 815.

Persons who voluntarily paid notes of others secured by deed of trust held not subrogated to the rights of the former holders of the notes in the deed of trust. *Schneider v. Sellers* (Civ. App.) 81 S. W. 126.

Execution creditor of tenant, having paid judgment in favor of landlord against creditor and tenant, held subrogated to landlord's interest in cotton levied on in possession of tenant. *Miles v. Dorn*, 40 C. A. 298, 90 S. W. 707.

The beneficiary of a trust deed covering land part of which was the grantor's homestead held entitled to be subrogated to the rights of holders of vendor's liens paid off with a part of the proceeds of the trust deed. *Flynt v. Taylor*, 100 T. 60, 93 S. W. 423.

A mortgagee having paid taxes in order to save the land from sale, held not entitled

to a special execution against the land to compel reimbursement. *Stone v. Tilley* (Civ. App.) 95 S. W. 718.

Married women held entitled without knowledge or assent of husband to procure third person to discharge vendor's lien on homestead and become subrogated thereto. *Mergele v. Felix*, 45 C. A. 55, 99 S. W. 709.

A judgment debtor, having paid the judgment to the attorneys of the judgment creditors, held not entitled to subrogation to the rights of certain of such creditors on being compelled to pay them their portion a second time on their failure to receive such portion of the original payment. *Missouri, K. & T. Ry. Co. of Texas v. Ferris* (Civ. App.) 99 S. W. 896.

A county held subrogated to the rights of a mortgagee under a mortgage; its treasurer having wrongfully used its money to pay it. *Young v. Pecos County*, 46 C. A. 319, 101 S. W. 1055.

Equity will subrogate one advancing money to pay a purchase-money note, reserving a lien on the land, to the creditor's rights under the lien. *Manning v. Green*, 56 C. A. 579, 121 S. W. 721.

A bank loaning money to make a part payment on vendor's lien notes held to have become subrogated pro tanto to the rights of vendor. *John M. Bonner Memorial Home v. Collin County Nat. Bank*, 57 C. A. 313, 122 S. W. 430.

Where one, who furnished money to pay vendor's lien notes under an agreement that he should have a lien until he was reimbursed, was not repaid, he could foreclose his lien; but he could not rescind the contract of sale and recover the land. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

One furnishing money to pay vendor's lien notes, with the understanding that he should have a lien until he was reimbursed, became subrogated to the lien held by the vendor; but his rights were only those of a creditor holding a lien on the premises, and not the superior legal title held by the vendor. *Id.*

One voluntarily advancing money to pay vendor's lien notes without any understanding that he shall have a lien to secure a reimbursement is not entitled to subrogation. *Id.*

Under an agreement between chattel mortgagee for advances in growing and marketing crop, a prior mortgagee who had made advances for the same purpose held to subrogate the mortgagee to the rights of the prior mortgagee. *Sweeney v. Farmers' Rice Milling & Storage Co.* (Civ. App.) 137 S. W. 1147.

One merely advancing money with which to pay off vendor's lien notes, with no understanding as to having a lien, is not entitled to subrogation. *Davidson v. Bodan Lumber Co.* (Civ. App.) 143 S. W. 700.

An insurance agent who undertakes to procure a policy for an applicant, who agrees to pay the premium when the policy is issued, is entitled to be subrogated to the company's right to recover the premium upon himself paying the company the premium. *Galles & Bowie v. Alarcon* (Civ. App.) 145 S. W. 634.

The payment of a vendor's lien note held to discharge the lien and make the rights of one who furnished the money for such payment subject to those of all other lienholders. *Doyle v. Sullivan* (Civ. App.) 150 S. W. 473.

Where a creditor's agent, having a note for collection, paid the amount thereof to the creditor without it having been paid by the debtor, he became the owner of the note. *Norvell-Shapleigh Hardware Co. v. Lumpkin* (Civ. App.) 150 S. W. 1194.

Where partners borrowed money on their personal responsibility to pay a vendor's lien, the lien was extinguished and could not be subsequently revived for the benefit of the partner who paid the loan. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

59. — **Benefit of remedies of creditor.**—Persons subrogated to vendor's lien held entitled to enforce it by foreclosure. *Mergele v. Felix*, 45 C. A. 55, 99 S. W. 709; *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

60. — **Extent of right.**—A purchaser of mortgaged premises who pays the mortgage debt pursuant to his agreement to assume the same cannot, by subrogation, avail himself of the mortgagee's lien to the prejudice of a junior lien claimant. *McDowell v. M. T. Jones Lumber Co.*, 42 C. A. 260, 93 S. W. 476.

One furnishing money to pay vendor's lien notes held subrogated to the lien of the original vendor, but not to the superior legal title of the vendor. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

A bank cashing a check drawn on a special deposit, held to have no greater right of subrogation than the payee had. *Elliott v. First State Bank of Ft. Stockton* (Civ. App.) 135 S. W. 159.

61. — **Actions for enforcement.**—Evidence held to show that a minor's guardian paid out of the minor's funds an amount due from the minor's father on account of a mortgage executed by him jointly with his brothers, precluding a subsequent claim by the brothers of right to subrogation under the mortgage, on account of having paid the entire debt. *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

## TITLE 87

## LIMITATIONS

[See Taxation.]

## Chap.

1. Limitation of Actions for Lands.
2. Limitation of Personal Actions.

## Chap.

3. General Provisions.

## CHAPTER ONE

## LIMITATION OF ACTIONS FOR LANDS

## Art.

5672. Three years' possession, when a bar.  
 5673. "Title" and "color of title" defined.  
 5674. Five years' possession, when a bar.  
 5675. Ten years' possession, when a bar.  
 5676. Ten years' possession construed to embrace what.  
 5677. Lands surrounded by other lands, peaceable possession of defined.

## Art.

5678. Same subject.  
 5679. Possession gives full title, when.  
 5680. "Peaceable possession" defined.  
 5681. "Adverse possession" defined.  
 5682. Possession by different persons.  
 5683. Right of state not barred.  
 5684. Does not run against infants, etc.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 5672. [3340] Three years' possession, when a bar.**—Every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward. [Act Feb. 5, 1841, p. 119, sec. 15. P. D. 4622.]

**In general.**—See *Cole v. Grigsby* (Civ. App.) 35 S. W. 680.

Mere naked possession of land for three years, united to a subsequently acquired chain of title, will not constitute title or color of title within the meaning of the statute of limitations. *McCorkle v. Lawrence*, 21 T. 731; *Monroe v. Buchanan*, 27 T. 241; *Henderson v. Beaton*, 1 U. C. 17.

Laches of the owner in suing and in paying taxes will not defeat his action where there has not been actual adverse possession for a sufficient time to support a plea of limitation. *Williams v. Conger*, 49 T. 582; *Moss v. Berry*, 53 T. 632; *Murphy v. Welder*, 58 T. 235; *Mast v. Tibbles*, 60 T. 301; *Satterwhite v. Rosser*, 61 T. 166.

The wife's life estate in the separate property of the husband is not defeated by three years' adverse possession under the children and heirs of the husband. *Cockrell v. Curtis*, 83 T. 105, 18 S. W. 436.

Trespass to try title by creditor against grantee of debtor held barred by limitations after three years from judgment by creditor. *Stern v. Marx*, 23 C. A. 439, 56 S. W. 93.

To render a possession of three years a bar to the action by the true owner, the person in possession must have held under title or color of title. *Hulett v. Platt*, 49 C. A. 377, 109 S. W. 207.

One held to have acquired title by the three-year statute of limitations. *Id.*

Evidence held not to show such adverse possession by one as to give him title under the three or five year statutes of limitations. *Lake v. Earnest*, 53 C. A. 555, 116 S. W. 865.

Where, in trespass to try title, there was no evidence that tenants of defendants' grantor held possession for three years, there was no error in not submitting the question of possession of such tenants in a charge upon the three-year limitation as to such grantor. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

In trespass to try title, defendants held not to have acquired title under the three-year limitation. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

Where one had no title or color of title to certain land, limitations of three years could not be set up in his behalf. *Bunnell v. Sugg* (Civ. App.) 135 S. W. 701.

The three-year statute is not applicable in an action to quiet title by an heir who had not joined in conveying the land. *Woodburn v. Texas Town Lot & Improvement Co.* (Civ. App.) 153 S. W. 365.

**Art. 5673. [3341] "Title" and "color of title" defined.**—By the term "title," as used in the preceding article, is meant a regular chain of transfer from or under the sovereignty of the soil, and by "color of title" is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of in-

trinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant, or land scrip, with a chain of transfer down to him in possession. [Id. sec. 15. P. D. 4622.]

**In general.**—When the ancestor has conveyed land, his heirs upon regaining possession have no title, and cannot set up the limitation either of three or five years. *Harris v. Hardeaman*, 15 T. 466; *Id.*, 27 T. 248.

The re-enactment of the law defining color of title, with no change in its language, carried with it the construction given to the former statute in *Marsh v. Weir*, 21 T. 97. It is only such a defective muniment of title as is not wanting in "intrinsic fairness and honesty" that will support the statute of limitations of three years. Color of title cannot, in contemplation of the statute, exist when one of the links in the chain of title has been fraudulently obtained. *Hussey v. Moser*, 70 T. 42, 7 S. W. 606.

The written muniments of title need not be recorded under this article. *Craig v. Cartwright*, 65 T. 413.

One who has conveyed the land of which he is in possession thereby precludes himself from claiming title thereto under the statute under a deed prior in date to his conveyance. *Voight v. Mackle*, 71 T. 78, 8 S. W. 623.

Title by limitation under this article cannot be acquired by one who holds under an instrument executed by himself or by one who holds for him. *White v. Rosser* (Civ. App.) 27 S. W. 1062.

A break in defendant's chain of title held to render it insufficient to support a plea of limitations. *Baldwin v. Root*, 90 T. 546, 40 S. W. 3.

One who obtains judgment against his grantor establishing title under a conveyance, without joining one to whom he transferred his rights under such conveyance, has not color of title. *Morgan v. Baker* (Civ. App.) 40 S. W. 27.

Agreement construed, and held insufficient to establish color of title. *Craddock v. Burleson*, 21 C. A. 250, 52 S. W. 644.

In an action of trespass to try title, facts held to give plaintiff title to the premises under the three and five years statute of limitation. *Iiams v. Root*, 22 C. A. 413, 55 S. W. 411.

Evidence held not sufficient to authorize one in possession of land to take advantage of the statute, because of his not having color of title. *Bartell v. Kelsey* (Civ. App.) 59 S. W. 631.

In an action to recover property, held, that the occupant had not acquired title by adverse possession for more than three years under color of title. *Black v. Garner* (Civ. App.) 63 S. W. 918.

In trespass to try title, evidence held insufficient to show title in defendant by adverse possession under the three or five year statute of limitation. *William Carlyle & Co. v. Pruett*, 37 C. A. 384, 84 S. W. 372.

One claiming under a deed to an overlap of a junior on a senior survey must show possession of at least part of the overlap. *McLemore v. Lomax*, 38 C. A. 589, 86 S. W. 635.

In trespass to try title held, that defendant could not use the deeds under which plaintiff claimed as a basis for the five-year statute of limitations. *Hammond v. Hammond*, 43 C. A. 284, 94 S. W. 1067.

The three-year limitation held not applicable to bar plaintiffs' right in certain land as to which defendants had neither title nor color of title. *Beale's Heirs v. Johnson*, 45 C. A. 119, 99 S. W. 1045.

"Color of title" defined. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

The three-year limitation does not protect one not deraining title from the state. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13.

Defendants held not to have color of title from a sovereignty of the soil essential to a claim of adverse possession under the three-year statute of limitations. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Where title was complete in defendant's remote grantor at the latter's death, it was immaterial to defendant's right to claim title by adverse possession that deeds of subsequent grantors were not recorded a sufficient length of time before the commencement of the action to base a claim by limitations thereon. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

Where persons did not hold possession under title, or color of title, from the sovereignty of the soil, their chain of title not extending to the original grantee, they could not claim under the three-year limitation. *Barrera v. Guerra* (Civ. App.) 122 S. W. 902.

**Void, irregular or defective deeds.**—A deed executed by an attorney in fact after the death of his principal is not title or color of title. *Cox v. Bray*, 28 T. 247.

A deed by the husband to the wife, while void as to his creditors, is valid between the parties, and her possession through her husband is adverse within the meaning of the statute. *De Garca v. Galvan*, 55 T. 55; *Grigsby v. May*, 84 T. 256, 19 S. W. 343; *Evans v. Guipel* (Civ. App.) 35 S. W. 940.

Where one link in the chain of title shows on its face that the agent making the deed had no power to do so, it does not constitute color of title. *Green v. Hugo*, 81 T. 452, 17 S. W. 79, 26 Am. St. Rep. 824.

By the expression "be only in writing," it is intended to cover cases in which the evidence of right, though in writing, was not executed in the manner prescribed by law; and under the statute these are not defects which make the muniment wanting in intrinsic fairness and honesty. *Grigsby v. May*, 84 T. 240, 19 S. W. 343.

A void judgment in a chain of title does not constitute title or color of title. *Lati-mer v. Logwood* (Civ. App.) 27 S. W. 960.

A void deed does not constitute "title or color of title" because it is wanting in that "intrinsic fairness and honesty" required by the statute. A deed to part of the homestead signed by the husband but not by the wife, is void and does not constitute title or color of title. *Watson v. Watson* (Civ. App.) 55 S. W. 183.



Where a married woman's deed is not acknowledged as required by statute, held, that grantee has neither title nor color of title affording protection under the three-year limitation. *Silcock v. Baker*, 25 C. A. 508, 61 S. W. 939.

It is only such a defective instrument of title as is not wanting in "intrinsic fairness and honesty" as will support the statute of three years. Where a wife acknowledges a deed to her homestead thinking that it is a mortgage the transaction is not fair and honest. *Black v. Garner* (Civ. App.) 63 S. W. 921.

Possession on which a claim to land is based cannot be referred to a void tax title, acquired after the possession began. *Lynn v. Burnett*, 34 C. A. 335, 79 S. W. 64.

A deed of a wife's separate property, lacking a proper certificate of acknowledgment, though not in itself title or sufficient to show color of title supporting the three-year statute, may be made sufficient to show color by parol proof showing it was properly explained and acknowledged. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

Where one link in the chain of title of persons claiming land is void, they have no such color of title as would bar an action against them under the three-year statute. *Wall v. Lubbock*, 52 C. A. 405, 118 S. W. 886.

Where a married woman's deed, improperly acknowledged, was relied on as color of title, evidence that the deed was properly acknowledged in fact was admissible, though the right of action to correct the certificate was barred by limitations. *Veeder v. Gilmer* (Civ. App.) 120 S. W. 584.

A married woman's deed, though not properly acknowledged, may be color of title to support a plea of three-year limitation. *Id.*

Limitation of three years held no defense as against the heirs of a wife claiming against an unauthorized conveyance by the surviving husband. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

Where, in trespass to try title, defendant established by circumstances the execution of a lost deed to the land claimed by him, the title of plaintiff failed, but where defendant did not establish the execution of the deed, his claim of title by limitation of three years failed. *Pratt v. Townsend* (Civ. App.) 125 S. W. 111.

On the issue of title by adverse possession, deeds of married women, which were ineffective because not acknowledged as required by law, were admissible in evidence to shed light upon the nature of the possession of the grantees. *Carr v. Alexander* (Civ. App.) 149 S. W. 218.

**Conveyance by one without title.**—Where the land of a person has been sold under execution, a subsequent purchaser from him cannot plead three years' adverse possession. *Wright v. Dally*, 26 T. 730. And so where there is a subsequent sale under a judgment foreclosing an attachment lien prior to the conveyance. *Paxton v. Meyer*, 67 T. 96, 2 S. W. 817.

A purchaser from one who has previously sold his land to another acquires no title. *Elliot v. Whitaker*, 30 T. 411; *Allen v. Root*, 39 T. 589. A second vendee from the same vendor with knowledge of the former sale may prescribe under this article. *Snowden v. Rush*, 69 T. 593, 6 S. W. 767.

A deed is not title where the grantor has in fact no title. *Veramendi v. Hutchins*, 48 T. 531; *League v. Rogan*, 59 T. 427.

Deeds made by persons who, before executing them, had conveyed the property to others, do not connect the vendee with the sovereignty of the soil, and will not support the three-year statute of limitation. *Illies v. Frerichs*, 11 C. A. 575, 32 S. W. 915.

The sale of community interest of the wife on administration of the husband's estate held not to furnish color of title so as to support the three-year statute of limitation. *Arnold v. Hodge*, 20 C. A. 211, 49 S. W. 714.

A deed of land, executed by parties to a suit, where the judgment found that they had no interest to convey, held insufficient color of title to support the operation of the three-year statute of limitation. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

Where a patentee of land conveyed to a third person before conveying to defendant's prior grantors, and it was not shown that there had been any reconveyance of such outstanding title, defendants had not color of title from the sovereignty of the soil and could not therefore claim under the three-year statute of limitation. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Deeds made by persons who, before executing them, had conveyed to others, do not connect vendee with the sovereignty of the soil, and hence will not support the statute of three years. *Dixon v. Cruse* (Civ. App.) 127 S. W. 591.

Purchasers from her father, of the daughter's interest in the community estate, held not to have title or color of title so as to enable them to claim by the three-year limitation. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

The three-year statute is not applicable in an action to quiet title by an heir who had not joined in conveying the land. *Woodburn v. Texas Town Lot & Improvement Co.* (Civ. App.) 153 S. W. 365.

**Title bonds.**—A title bond, whether the purchase-money be paid or not, save as against the vendor, is title or color of title if connected with the sovereignty of the soil, under which a defendant may maintain his defense under the statutory limitation of three years. *Elliott v. Mitchell*, 47 T. 445; *Downs v. Porter*, 54 T. 59.

A bond for title held sufficient to support a plea of three-year limitation as against the obligor. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

**Patents, grants, certificates and surveys.**—A grant which has been annulled, and the land declared vacant, does not constitute color of title. *Marsh v. Weir*, 21 T. 97; *Summers v. Davis*, 49 T. 541; *Parker v. Bains*, 59 T. 15.

A junior patent for land constitutes title. *Marsh v. Weir*, 21 T. 110; *Galan v. Town of Goliad*, 32 T. 776; *Whitehead v. Foley*, 28 T. 12; *Stafford v. King*, 30 T. 277, 94 Am. Dec. 304; *Converse v. Langshaw*, 81 T. 275, 16 S. W. 1031. And so a patent is not vitiated as title by any vice in the chain of title preceding the patent. *Burleson v. Burleson*, 28 T. 417; *League v. Rogan*, 59 T. 427.

A grant that is void on its face does not constitute title or color of title. *Smith v. Power*, 23 T. 29; *Parker v. Bains*, 59 T. 15; *League v. Rogan*, 59 T. 427.

A pre-emption claim constitutes neither title nor color of title to support limitation. *Sutton v. Carabajal*, 26 T. 497; *Buford v. Bostick*, 58 T. 63; *Clark v. Smith*, 59 T. 275.

Unrecommended land certificates are not title or color of title. *Whitehead v. Foley*, 28 T. 268.

The real owner of the certificate, the transfer whereof was forged, may permit the patent to stand, and have judgment vesting title in himself by reason of his equitable title existing prior to the patent, or he may, by proper proceedings, procure a cancellation of the patent and the issuance of another to himself. *League v. Rogan*, 59 T. 427. Referring to *Wright v. Daily*, 26 T. 730; *Harris v. Hardeman*, 27 T. 249; *Elliot v. Whitaker*, 30 T. 420.

A land certificate being the mere evidence of a right, which right is in contemplation of law personal property, no adverse possession thereof can give title by limitation, either to the certificate or the right, of which it constitutes the evidence. *Harvey v. Cummings*, 68 T. 599, 5 S. W. 513.

As against title under certificate, limitation does not begin to run until the date of the location of the certificate. *Tarlton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

Although the three-year statute is applicable where the patent purports to pass the legal title, and does pass all the title the state has or can convey, though in fact no title passes to the grantee, yet where the patent is utterly void for want of authority in the officer issuing it, and does not in any manner bind the state, the three-year adverse possessor cannot prescribe under it. *Land & Mortgage Co. v. State*, 1 C. A. 616, 23 S. W. 258.

Color of title includes claims based upon unpatented certificate locations. *Creswell R. & C. Co. v. Waldstein* (Civ. App.) 28 S. W. 260.

Title of the patentee of land having been destroyed by plaintiff's ten years' adverse possession, defendant cannot show title under the three-year statute, by proof of subsequent entry as tenant of the patentee's heirs under written contract. *Grayson v. Peyton* (Civ. App.) 67 S. W. 1074.

Adverse possession under a void headright grant is not sufficient to give title under the three-year statute. *Sheppard v. Avery*, 28 C. A. 479, 69 S. W. 82.

Where land was patented to an entryman's heirs, the fact that they held possession for three years after plaintiff had acquired title by adverse possession held no defense to plaintiff's title. *Burton's Heirs v. Carroll*, 96 T. 320, 72 S. W. 581.

Three years' peaceable and adverse possession of land under patents does not confer title where the land so possessed is not included in such patents by a proper construction of their calls. *Atascosa County v. Alderman* (Civ. App.) 91 S. W. 846.

A patent regularly issued by the officer intrusted with the duty of issuing patents held to furnish to the patentee title or color of title. *Hulett v. Platt*, 49 C. A. 377, 109 S. W. 207.

The possession by a patentee of a tract of land held to extend to the entire tract, and to perfect his title by limitations. *Id.*

A pre-emption, location, and patents for land which was not vacant and unappropriated public domain held insufficient to support a title under the three-year statute. *Gilbert v. Harris* (Civ. App.) 109 S. W. 392.

A junior patent of land subject to grant by the state held a sufficient grant to support a defense of adverse possession under the three-year statute. *Williamson v. Brown*, 49 C. A. 402, 109 S. W. 412.

Title or color of title based on a grant from the state defined. *Id.*

Patent issued upon a location and survey made subsequent to a subsisting survey and location held void and not to serve as color of title to support a three-year limitation. *Keith v. Guedry* (Civ. App.) 114 S. W. 392.

A sale of school land while a prior valid sale to another is in force does not constitute color of title, within the meaning of the three-year statute. *Pohle v. Robertson*, 102 T. 274, 115 S. W. 1166.

A pre-emption claim is neither such title nor color of title as will support limitations. *Garrison v. Arnett* (Civ. App.) 126 S. W. 611.

An award of state school lands invalid for want of authority in the commissioner to make the sale is not title or color of title. *Id.*

Where the commissioner of the general land office classified land as dry grazing land previously patented to an individual and appraised it, and awarded it to a qualified purchaser and actual settler, who conveyed it to a qualified purchaser and actual settler, title under the award was not title or color of title. *Id.*

Where, even if the survey under which defendants claimed covered the land in controversy, the same was covered by plaintiff's admittedly valid older survey, the three-year statute would not apply, and defendants could acquire no title thereunder; they having no title or color of title, their claim being void. *Johnson v. Knippa* (Civ. App.) 127 S. W. 905.

If in trespass to try title, defendant claimed by limitation, under pre-emption claims, affidavits showing such claims were admissible. *Lafferty v. Stevenson* (Civ. App.) 135 S. W. 216.

Neither a pre-emption claim nor an award under the public free school land laws will support a title under the three-year statute, at least until proof of sufficient occupancy to entitle the proposed purchaser to pay for the land and take title. *Wolfarth v. De Lay* (Civ. App.) 142 S. W. 617.

One claiming under a patent, not void for want of authority on the part of the officer to issue it, has a sufficient connection with the sovereignty of the soil to support an adverse claim, when accompanied by the other statutory requirements. *Sabine Valley Timber & Lumber Co. v. Cagle* (Civ. App.) 149 S. W. 697.

A patent to S.'s heirs, vested sufficient title in them to sustain a plea of three years' limitations, though he had previously assigned the certificate under which the patent was granted; no warranty of title appearing to have accompanied the assignment. *Id.*

The inchoate right to purchase school land which one acquired by virtue of an award of the land to him by the commissioner of the general land office is not title or color of title within the three-year statute, at least until after the three years' occupancy required by law has been completed. *Morrow v. Conoway* (Civ. App.) 157 S. W. 430.

Execution sales.—A sheriff's sale of land, if valid, breaks the chain of title of the defendant in execution remaining in or taking possession subsequent to the sale, and

claiming under the statute of limitations of three years, as against the holder of the title which passed by the sheriff's sale. *Blum v. Rogers*, 71 T. 669, 9 S. W. 595.

The three-year statute as to those in possession under "color of title" does not apply to one purchasing at execution sale after the title had passed from the judgment debtor to his wife. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 258.

That one of the transfers in the chain of title of a holder of land was from an officer upon a sale under execution will not break the continuity of the running of the three-year statute against a former grantor endeavoring to assert a secret equity, in the absence of a showing that the sale was invalid. *Kennon v. Miller* (Civ. App.) 143 S. W. 986.

**Descent and devise.**—A will duly probated constitutes color of title, although it might have been set aside on proper proceedings. *Charle v. Saffold*, 13 T. 94.

The heirs of one who sold land to another derive no title given by inheritance, and cannot plead the limitations of three or five years. *Harris v. Hardeman*, 27 T. 248.

After death of the wife the husband cannot convey title or color of title to the interest of his deceased wife in the community property, unless authorized to sell by reason of community debts. *Veramendi v. Hutchins*, 48 T. 531; *Johnson v. Harrison*, 48 T. 257; *Bell v. Schwarz*, 56 T. 353.

Title by inheritance is sufficient to form a link in a chain of title which will sustain a plea of three-year limitation. *Kennon v. Miller* (Civ. App.) 143 S. W. 986.

Where one acquired title upon the death of her mother to an interest in the community property, purchasers of such interest from her father have no title or color of title, so as to enable them to claim under the three-year statute. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

**Tax sales and tax deeds.**—A valid tax deed passes only such title as the person against whom taxes were assessed had at the time of sale. If the title of the real owner was acquired at such sale, the purchaser would stand in relation to persons having no title, but in possession under claim of right, just as the real owner would have stood had there been no sale. *Jordan v. Higgins*, 63 T. 150.

A tax deed does not constitute title, unless the authority of the maker of the deed is shown by proof of performance of all precedent requisites. *Meredith v. Coker*, 65 T. 29. Citing *Davis v. Farnes*, 26 T. 296; *Yenda v. Wheeler*, 9 T. 408; *Hadley v. Tankersley*, 8 T. 12; *Robson v. Osborn*, 13 T. 298. See, also, *House v. Stone*, 64 T. 677; *Greer v. Howell*, 64 T. 688.

A claimant under a tax deed recorded, who fails to show a compliance with the law in those steps prerequisite to its validity, cannot obtain title under the three years' statute of limitations. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847.

No presumption arises from a tax deed that the requisite proceedings upon which the power to sell arises had been had. *Dawson v. Ward*, 71 T. 72, 9 S. W. 106.

The description in a tax deed, in order to support adverse possession, must be reasonably certain without the aid of extrinsic facts. *Day v. Needham*, 22 S. W. 103, 2 C. A. 680.

A void judgment does not constitute color of title, nor does a tax deed, in absence of authority for the sale. *Latimer v. Logwood* (Civ. App.) 27 S. W. 960.

Tax deed of nonresident's property does not constitute color of title, the levy of the collector being made before the time authorized by statute. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200.

Tax deeds are admissible for defendant, to support limitation, without proof of assessment of the land for taxes and due sale thereof. *Villareal v. McLaughlin* (Civ. App.) 62 S. W. 98.

A tax deed is not supported for a plea of three-year limitation without evidence that it was executed in completion of a sale regularly made for taxes duly levied and assessed. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

Though a tax judgment was voidable, it was admissible in evidence in behalf of purchasers at a sale thereunder in support of the three-year statute. *Carr v. Miller* (Civ. App.) 123 S. W. 1158.

**Description of property.**—Where the chain of title under which the benefit of three-year limitation is sought does not include the land in dispute in its description, such claim and possession does not mature into title. *Carley v. Parton*, 75 T. 98, 12 S. W. 950.

The description in a deed construed, and held to pass title to lands sufficiently to furnish color of title thereto to sustain adverse possession. *Allen v. Boggess*, 94 T. 83, 58 S. W. 833.

Defendant held to have acquired no title by possession of land not included in the boundaries of his deed, under the three or five year statute of limitations. *Giddings v. Winfree*, 32 C. A. 99, 73 S. W. 1066.

Where land was not embraced in the calls of the patent of one in possession thereof, who was using and cultivating it, the three and five year statutes of limitation had no application. *Ward v. Forrester* (Civ. App.) 87 S. W. 751.

A holding of land under the three and five year statute of limitations must be under a deed, and one cannot prescribe to a line beyond the calls of his deed under any interpretation of such calls. *Runkle v. Smith*, 52 C. A. 186, 114 S. W. 865.

One claiming under deeds calling for connection at a point 950 varas distant from a corner of a survey has no title or color of title to any part of the survey within the three-year statute of limitations. *McCaleb v. Campbell* (Civ. App.) 116 S. W. 111.

One claiming land under the three and five year limitations must show that his adverse possession was held under a deed embracing the land within its calls. *Lake v. Earnest*, 53 C. A. 555, 116 S. W. 865.

A deed held to convey land bounded as therein described by established lines, so that a possession under the deed, which was recorded, and payment of taxes, was sufficient to support a plea of limitations. *Pratt v. Townsend* (Civ. App.) 125 S. W. 111.

Defendants held a tract of land as tenants in common under mesne conveyances from a patentee, and, while their deeds purported to grant to them all the land comprehended in the surveys referred to in their deeds, the total of the land in the surveys exceeded the total number of acres mentioned in the patentee's original deeds. Held that,

as defendants had no deeds or title to such excess in their chain of title from the patentee, they could not show the regular chain of transfers from the sovereignty necessary to an acquisition of it under the three-year statute. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

A deed, the description of which did not cover the land in controversy, held no defense where no suit to reform it had been instituted within four years. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

**Art. 5674. [3342] Five years' possession, when a bar.**—Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward; provided, that this article shall not apply to any one in possession of land, who in the absence of this article would deraign title through a forged deed; provided, further, that no one claiming under a forged deed, or deed executed under a forged power of attorney, shall be allowed the benefits of this article. [Id. sec. 16. P. D. 4623. Acts 1879, ch. 125, p. 132.]

Cited. *Christy v. Romero* (Civ. App.) 140 S. W. 516.

**In general.**—All the incidents of the statute must concur and be continued for the time prescribed. *Mitchell v. Burdett*, 22 T. 635; *Winters v. Laird*, 27 T. 618; *Snowden v. Rush*, 76 T. 199, 13 S. W. 189; *Sorley v. Matlock*, 15 S. W. 261, 79 T. 304; *Converse v. Ringer*, 25 S. W. 705, 6 C. A. 51; *Willis v. Burke*, 27 S. W. 217, 7 C. A. 239; *Adkins v. Galbraith*, 10 C. A. 175, 30 S. W. 291; *Gillum v. Fuqua* (Civ. App.) 61 S. W. 938.

Heirs of an intestate can acquire title to land of their ancestor, against the administrators of the estate, by adverse possession under title in the same manner as any other person. *Duke v. Reed*, 64 T. 705.

A trustee cannot prescribe under the five-year statute in a suit to compel a reconveyance in accordance with the term of the trust deed under which he entered, except for that period of time which may elapse after he has repudiated the trust and given notice thereof to the cestui que trust. *Neyland v. Bendy*, 69 T. 711, 7 S. W. 497.

To sustain the plea of limitation of five years, continuity of possession and privity in the title are requisite, with the other conditions of hostile claim. *Heflin v. Burns*, 70 T. 347, 8 S. W. 48.

Fraudulent grantee of insolvent debtor held to acquire title, good against debtor's creditor, purchasing at his own execution sale and bringing trespass to try title, by five years' exclusive adverse possession. *Vodrie v. Tynan* (Civ. App.) 57 S. W. 680.

Possession by defendants held not to be under a deed, and therefore that they could only claim title by adverse possession under statute of limitations of ten years. *Mass v. Bromberg*, 28 C. A. 145, 66 S. W. 468.

A finding that possession of land was under recorded deeds, accompanied by assessment and payment of taxes, is sufficient to show adverse possession. *Sparks v. Hall*, 29 C. A. 177, 67 S. W. 916.

An action to recover land held barred by the five-year statute. *Robles v. Cooksey* (Civ. App.) 70 S. W. 584.

The five-year statute does not apply, where those claiming thereunder fail to show a deed of record or a payment of taxes. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 258.

One's title by deed being divested out of him by possession of another before he went into possession, he can claim only by limitation of ten years. *Smith v. Bunch*, 31 C. A. 541, 73 S. W. 559.

Where defendant did not have color of title, the five-year statute did not apply. *Nolan v. Mundine*, 34 C. A. 606, 79 S. W. 638.

Five years' continuous, adverse, and exclusive possession of an alley, under a deed properly acknowledged and recorded, and payment of taxes thereon, will bar an abutting owner of his easement and right of way over the alley. *Peden v. Crenshaw* (Civ. App.) 81 S. W. 369.

In trespass to try title, the evidence considered, and held insufficient to establish the acquisition of title in defendant under the five-year statute. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Pleas of the ten-year and five-year statute held sufficient to support a judgment for defendants in trespass to try title. *Elcan v. Childress*, 40 C. A. 193, 89 S. W. 84.

In trespass to try title, evidence held to entitle defendant to a judgment under the five-year statute. *Cook v. Spencer* (Civ. App.) 91 S. W. 813.

The record of certain warranty deeds to the property in controversy, and payment of taxes on the land, held color of title sufficient to support adverse possession under the five-year statute. *Milby v. Hester* (Civ. App.) 94 S. W. 178.

Performance of every essential requisite of the five-year statute of limitations by parties claiming land is of itself sufficient to vest title to the land in them. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

Defendant held to have acquired title to the land in controversy under the five-year statute. *Wm. D. Cleveland & Sons v. Smith* (Civ. App.) 113 S. W. 547.

Where defendant's grantor entered on a tract under a deed thereto, and erected houses, built corrals, opened up fields and grazed cattle thereon, claiming the whole tract as his own under the deed, such acts were sufficient to support a claim of title by limitations to the entire tract, whether the deed is considered as a duly registered deed under the five-year limitations, or as a written memorandum of title under the ten-year limitations. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

The cause of action in a formal action of trespass to try title to recover possession arose when defendant wrongfully took possession, and that having been done at least

eight years before suit was filed, and the deed under which defendant claimed being duly recorded and all taxes paid, plaintiff's right to recover is barred by the five-year statute. *Hoffman v. Buchanan*, 57 C. A. 368, 123 S. W. 168.

Proof that one occupied land as tenant of another continuously for more than five years, unaccompanied by proof that the latter during that time claimed the land under a recorded deed, and unaccompanied by evidence of payment of taxes by the latter, did not establish title in the latter under the five-year statute. *Kirby v. Hayden* (Civ. App.) 125 S. W. 993.

Adverse possession under deeds duly recorded to constitute title under the five-year statute of limitations defined. *Dunn v. Taylor* (Civ. App.) 143 S. W. 311.

One held to have acquired title by adverse possession under the five and ten year limitation. *Horan v. O'Connell* (Civ. App.) 144 S. W. 1048.

In order to give title under the five-year limitation, all the requirements of the statute must be concurrently performed; and hence more than five years' continuous occupancy and use of land under a deed and payment of taxes is insufficient, if the deed was not of record full five years. *William Cameron & Co. v. Collier* (Civ. App.) 153 S. W. 1178.

In an action to recover land, evidence held insufficient to sustain a plea of five-year limitation. *Snow v. Letcher* (Civ. App.) 154 S. W. 355.

Where defendants were in possession under color of title, and exercised acts of ownership and paid the taxes, the fact that the abstract number under which the land was rendered up to 1904 was not the proper abstract number of the survey will not prevent their acquisition of title by adverse possession, where the survey had not been given a separate abstract number until 1904, but was located under headright certificate consisting of two surveys, and was regarded by all until 1904 as having the same abstract number as the larger tract. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

**Possession.**—When defendant is claiming a tract of land, he must show that he has had possession of the land claimed by him, under his deed, for the space of time required by the statute. *Kilpatrick v. Sisneros*, 23 T. 113.

A city may hold land appropriated by it for public streets adversely to the owner. The ordinary uses of a public street should be regarded as such adverse possession. It seems however, that in claiming under the statute of five years, payment of taxes should be proven by the city as in other cases. *Moore v. City of Waco*, 85 T. 206, 20 S. W. 61.

When a party claims land adversely by virtue of a tax deed not void on its face duly recorded and has actual possession of it by inclosure with a quantity of other lands and pays all taxes on it, he fulfills all the requirements of the five-year statute and can hold the land. The statement in *Kent v. Cecil*, 25 S. W. 715, that the land being inclosed with other lands would not constitute adverse possession supporting a claim under the five-year statute, made by the same court that renders this opinion, was wrong. *Smith v. Kenny* (Civ. App.) 54 S. W. 801.

Possession must be adverse and hostile to the owner. *Clark v. Kirby* (Civ. App.) 25 S. W. 1096.

This article applies to a survey included within a pasture inclosing more than 5,000 acres, and hence an action against a purchaser of such survey at a tax sale who has occupied the same and paid taxes thereon for five years is barred. *Cunningham v. Matthews* (Civ. App.) 57 S. W. 1115.

Adverse possession must have continued for five years under a deed registered for that period. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200.

Where land is conveyed, and before the deed is recorded a portion of the tract is conveyed to an innocent purchaser, and the first purchaser afterwards takes possession of the land, but does not occupy the portion included in the second conveyance, such possession for the statutory time will not give title thereto. *Payton v. Caplen*, 24 C. A. 364, 59 S. W. 624.

One holding part of a league of land under a registered deed until his title is perfected by limitations does not extend his possession to the balance, so that the statute will run in his favor, by taking a deed thereto and paying taxes. *Hill v. Harris*, 26 C. A. 408, 64 S. W. 820.

Proof of adverse possession under deed held to satisfy five-year statute. *Harris v. Bryson & Hartgrove*, 34 C. A. 532, 80 S. W. 105.

Evidence held insufficient to show adverse possession for five years. *Buster v. Warren*, 35 C. A. 644, 80 S. W. 1063.

Defendants in trespass to try title to land cannot avail of the benefit of the record and possession of their vendors, as possession by them must be under the record of the particular deed under which they claim. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Possession under a recorded deed held not to be connected with prior possessions, so as to create title under the five-year statute. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

A party held not entitled to claim adversely a part of a tract not inclosed or occupied, though he claimed the entire tract under a recorded deed. *Holland v. Nance*, 102 T. 177, 114 S. W. 346.

The use of a strip of land by the public as a way held not such adverse possession as will support the municipality's claim to title by five years' possession under a deed. *City of Houston v. Bammel*, 53 C. A. 336, 115 S. W. 661.

If one entered upon land under a duly recorded deed, and held open and notorious possession thereof, it was immaterial to his right to claim by adverse possession whether any one actually knew of his claim and possession. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

Pasturing the owner's cattle on land inclosed for that purpose and under his exclusive control is such use and enjoyment as is sufficient under the five-year statute. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

Where the deeds under which a party claimed title defined the boundaries, a fence embracing more land than the field notes called for, used as a boundary fence by permission or otherwise sufficient to hold stock, was a sufficient barrier to show possession of the land to ripen into title by adverse possession, in the absence of some adverse possession of a part of it by some one asserting a superior title. *Dunn v. Taylor* (Civ. App.) 143 S. W. 311.

Where a possessor sells his land and remains in possession claiming it, he breaks the possession essential to establish title by adverse possession. *Id.*

Evidence held insufficient to show continuous adverse possession of certain lands in controversy for five years. *Dunn v. Taylor* (Civ. App.) 147 S. W. 287.

The five-year statute was ineffective to establish any title by prescription under a recorded deed while the land remained unoccupied. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

Where a company inclosed with a fence and controlled and used a large body of land including the tract in controversy, the fact that within this inclosure there were tracts controlled and used by others did not prevent the five-year statute from running in favor of the company as to the tract in controversy. *Id.*

Possession of one tract of land under a deed conveying several tracts extends to all. *Snow v. Letcher* (Civ. App.) 154 S. W. 355.

When the real owner is in possession of land, one holding an inferior title is restricted to his actual possession. *Chicago, R. I. & G. R. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

**Use and enjoyment.**—See note under Possession, ante.

Pasturing the owner's cattle on land inclosed for that purpose and under his exclusive control is such use and enjoyment as is sufficient. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

**Payment of taxes.**—It is necessary to prove the payment of taxes for the entire term upon all the land specified in the deed. *Kelly v. Medlin*, 26 T. 48. See *Hoehn v. House* (Civ. App.) 31 S. W. 83.

It is the duty of a party claiming land to render it for assessment and pay taxes. The fact that the land has not been assessed does not exclude the nonpayment of taxes. *Ledyard v. Brown*, 27 T. 393. See *Hoehn v. House* (Civ. App.) 31 S. W. 83.

A certificate by the tax collector of the county where the land is situate, that no taxes are charged against said land on his books, is not sufficient evidence of payment of taxes. *Acklin v. Paschal*, 48 T. 147.

The failure to prove payment of taxes for any year of the five-year possession under a recorded deed will be fatal. *Murphy v. Welder*, 58 T. 235.

Proof of payment of taxes is sufficient without regard to assessment. *Cantagrel v. Von Lupin*, 53 T. 570.

In the absence of evidence showing payment of taxes, the defense of limitation of five years cannot be considered. *Henderson v. Beaton*, 1 U. C. 17.

The possessor under a junior grant who pays taxes upon the land in litigation under assessment in name of the junior grant is not deprived of the benefit of such payment by reason of his not paying in the name of the senior grant. The description of the land is good upon either grant. *Harrison v. McMurray*, 71 T. 122, 8 S. W. 612.

The defendant paid taxes upon two hundred acres out of the survey of which the land in controversy was a part. He owned by undisputed title about 210 acres, which added to the 20 acres in controversy made 230 acres subject to taxation. It was presumed that his payment of taxes was upon lands of which his title was undisputed. The facts did not support the five-year statute. *Bassett v. Martin*, 83 T. 339, 18 S. W. 587.

Payment of taxes may be proven by direct or circumstantial evidence, or by parol testimony. Where land is incorrectly listed upon the tax rolls, the parol testimony to payment will be evidence of payment upon the lands assessed. The taxpayer cannot apply such payment to lands not listed. *Dutton v. Thompson*, 85 T. 115, 19 S. W. 1026.

Where one pleading the five-year statute seeks to account for his failure to pay taxes for two years by showing that another under whom he claims did pay the taxes for those years, he must show that such other person was then in actual possession, claiming under deed duly registered, else he cannot tack his own possession to the title acquired from such other person. *Tarlton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

Limitation is complete without payment of taxes due after the expiration of the five years. *Halbert v. Brown*, 9 C. A. 335, 31 S. W. 535.

Under a plea of five-year limitation, in an action to divest title by possession under a tax deed, payment of taxes on the land for the full term necessary to complete the bar must be shown as concurrent with the possession. *Taylor v. Brymer*, 17 C. A. 517, 42 S. W. 999.

To support adverse possession the taxes need not be paid each year as they accrue. *Capps v. Deegan* (Civ. App.) 50 S. W. 151.

Where the grantee in a recorded deed pays taxes on the number of acres called for in his deed, actually believing he is paying for the full quantity in his possession, he is not deprived of the five-year limitation merely because his tract is larger than he supposed. *Henning v. Wren*, 32 C. A. 538, 75 S. W. 905.

The payment of taxes and possession must concur. That is, all the taxes. If part of the taxes for one year remain unpaid title by limitation is not obtained. *Wall v. Club Land & Cattle Co.* (Civ. App.) 88 S. W. 535.

In trespass to try title, a defendant held not to have acquired title by adverse possession, under the five-year statute, because of failure to pay taxes. *Club Land & Cattle Co. v. Wall*, 99 T. 591, 91 S. W. 778, 122 Am. St. Rep. 666; *Id.* (Sup.) 92 S. W. 984.

Right of one having the legal title to land held unaffected by his nonclaim or failure to pay taxes or the payment of taxes by another claiming under a void deed. *Hunter v. Hodgson* (Civ. App.) 95 S. W. 637.

One held to have paid taxes on a certain survey as regards the question of title by adverse possession. *Yarborough v. Moody*, 48 C. A. 227, 106 S. W. 891.

When taxes must be paid. *Hirsch v. Patton*, 49 C. A. 499, 108 S. W. 1015.

Payment of taxes on land by one in possession under a deed of an undivided interest, held to be ascribed to that interest as regards adverse possession. *Yarborough v. Whitman*, 50 C. A. 391, 110 S. W. 471.

There was no payment of taxes on land, so as to give title thereto by adverse possession under the five-year statute, where the description in the assessment was of other lands. *Sharpe v. Kellogg*, 53 C. A. 543, 116 S. W. 401.

Payment of taxes by one who has never been in possession will not avail under the statute of five years. *Brunner Fire Co. v. Payne*, 54 C. A. 501, 118 S. W. 602.

A claim of title to land under a deed based on the five-year statute cannot be maintained, where for some of the years making up the period taxes were paid on some undefined part of the land. *Hoencke v. Lomax*, 102 T. 487, 119 S. W. 842.

Where persons in possession of land have paid no taxes thereon, they have obtained no title by five-year limitation. *Barrera v. Guerra* (Civ. App.) 122 S. W. 902.

Title could not be established by adverse possession under the five-year limitation, where claimant and those claiming under her paid no taxes during the period of adverse holding. *Rodriguez v. Priest* (Civ. App.) 126 S. W. 1187.

Payment of taxes on land under a former survey which had been forfeited, after location of the land under a railroad certificate, held insufficient to support a title under the five-year statute. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

Title to land under the five-year limitation was not established where the taxes paid by claimant were on a tract other than that claimed. *Frazer v. Seureau* (Civ. App.) 128 S. W. 649.

A payment of taxes held insufficient as an element of adverse possession, where the land held was not included in that assessed. *Schiele v. Kimball* (Civ. App.) 150 S. W. 303.

**Claim under deed duly registered—In general.**—A bond for title is not a deed under this article. *Castro v. Wurzbach*, 13 T. 128; *Winters v. Laird*, 27 T. 616.

As to the effect of a tax deed to support the plea of limitation under this article, see *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53; *Robson v. Osborn*, 13 T. 298; *House v. Stone*, 64 T. 677; *Meredith v. Coker*, 65 T. 29; *Calder v. Ramsey*, 66 T. 218, 18 S. W. 502; *Berrendo Stock Co. v. Kaiser*, 66 T. 352, 1 S. W. 257.

Tax deeds, void upon their face for want of certainty and falsity of description of the land claimed, are not to be deemed deeds duly registered, and will not support the plea of the statute of limitations of five years. Nor are they evidence of title or color of title to sustain the plea of possession for three years, etc. *Kilpatrick v. Sisneros*, 23 T. 113; *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53.

The fact that a deed does not convey a good title to the land does not prevent it from being available under a five-year statute of limitation. *Hunton v. Nichols*, 55 T. 217.

Possession under a void grant will not support limitation under this article. *Parker v. Bains*, 59 T. 15.

A deed executed by a married woman, in which her husband did not join, it not appearing on the face of the instrument that she was a married woman, will support limitation under this article. *Fry v. Baker*, 59 T. 404.

A deed from a city to a portion of an alley will not pass title thereto, but adverse possession under such deed and payment of taxes for the required time will support the statute of limitations of five years. *Dwyer v. Hosea*, 1 U. C. 596.

Landowners are bound to take notice of all deeds recorded in the county where their land lies, in so far as the boundaries in such deeds may extend, to protect their possessions from encroachment under the five-year statute of limitations. But no one is bound to take notice of things extrinsic of the contents of the deed itself in a case where a stranger claims under a recorded deed that has no connection with the title. *Brokel v. McKechnie*, 69 T. 32, 6 S. W. 623.

It is not necessary that the recorded deed under which possession is held should have been executed by more than one of two persons composing a partnership, he signing the firm name, or that any connection should be shown between the vendor and the original grantee. *Udell v. Peak*, 70 T. 547, 7 S. W. 786.

A party asserting title under limitation of five years must show privity of title and possession under the recorded deed under which the limitation is claimed. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

A deed signed by husband and wife, but not duly acknowledged by the wife, the acknowledgment by the husband being legal, where there is nothing to show otherwise than that the land conveyed was community property, is a sufficient basis for limitation under a recorded deed; and this although the land be the separate property of the wife. *Harris v. Wells*, 85 T. 312, 20 S. W. 68.

A tax deed is admissible in evidence to support the plea of five-year limitation, as well as of claim for improvements made in good faith, without proof of a levy of the tax and the usual prerequisites to a sale for the taxes. *Schleicher v. Gatlin*, 85 T. 270, 20 S. W. 120.

Possession by a grantee in a deed executed by grantors describing themselves as "sole heirs" is adverse to other heirs. *De Leon v. McMurray*, 23 S. W. 1038, 5 C. A. 280.

An instrument conveying an undivided interest in a land certificate not located is not a deed within the meaning of this article. *Masterson v. Todd*, 24 S. W. 682, 6 C. A. 131.

A conveyance by one of several cotenants of the entire tract will support limitation under this article. *Byers v. Carll*, 27 S. W. 190, 7 C. A. 423.

Entry under deeds conveying undivided interest of several tenants in common is not adverse to other cotenants. *Noble v. Hill*, 27 S. W. 758, 8 C. A. 171.

This article is not available to one claiming under a mortgage. *Massie v. Meeks* (Civ. App.) 28 S. W. 44.

Possession under an administrator's deed sufficient. *Halbert v. Martin* (Civ. App.) 30 S. W. 388.

The five-year statute, to divest title by possession under tax deeds, does not begin to run until the deed is filed. *Taylor v. Brymer*, 17 C. A. 517, 42 S. W. 999.

A defendant held to have acquired title under the five-year statute. *Alley v. Bailey* (Civ. App.) 47 S. W. 821.

Adverse possession of land for five years under a tax deed not void on its face, with actual possession by inclosure, is sufficient to support title by adverse possession. *Smith v. Kenney* (Civ. App.) 54 S. W. 801.

A deed of real property in litigation, executed by one not a party to the suit, held sufficient color of title on which to base the operation of the five-year statute. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

A deed held sufficient as a basis for the grantee's claim by adverse possession for five years to a certain strip of land. *Bean v. Whitney*, 25 C. A. 72, 60 S. W. 782.

In trespass to try title the defense of five-year limitation is not established, unless a continuity of claim under a sufficient deed, and record of the deeds forming a chain of title, is shown. *Lackey v. Bennett* (Civ. App.) 65 S. W. 651.

Tax deeds are admissible in support of a plea of five-year limitation, without proof of validity of the sale for taxes. *Gillaspie v. Murray*, 27 C. A. 580, 66 S. W. 252.

Where land is conveyed by a deed absolute in form, but in fact a mortgage, nothing short of adverse possession on the part of the mortgagee, satisfying a requirement of the statute barring actions for land, would vest title in the mortgagee by limitations. *Stafford v. Stafford*, 29 C. A. 73, 71 S. W. 984.

Where one person is in possession of land claiming title to it, but holding under a recorded deed made to an entirely different person, although for the benefit of the person in possession, neither one can compute the time of such possession as a part of the five years. *Weisman v. Thomson* (Civ. App.) 78 S. W. 731, 732.

Any instrument in the form of a deed, not void on its face, satisfies the requirements of the five-year limitation. *Harris v. Bryson & Hartgrove*, 34 C. A. 532, 80 S. W. 105.

Where tax deed was issued to husband during the wife's lifetime, but he did not record the same until after her death, the children of the wife acquired no interest by inheritance from her to the land. By registration of deed and subsequent occupancy of the land for period prescribed by law the husband acquired full title in his own right. *Gafford v. Foster*, 36 C. A. 56, 81 S. W. 63.

Where a deed by a city, conveying an alley to which it had no title, did not appear on its face to be void, it was a sufficient basis for a plea of limitation of five years. *Peden v. Crenshaw* (Civ. App.) 81 S. W. 369.

The statute does not prescribe that the person in possession shall claim under a deed in his own name. A tenant claims land under the deed to his landlord, and the heir claims under the deed to his ancestor, yet the possession of either tenant or heir under such a deed will support a plea of five-year limitation. *Thomson v. Weisman*, 98 T. 170, 82 S. W. 504.

Possession of land by a grantee under a deed which conveyed no title held insufficient to confer title by adverse possession under the five-year statute. *Peden v. Crenshaw*, 98 T. 365, 84 S. W. 362.

Possession of land by a purchaser thereof at a tax sale held not adverse within the five-year statute. *Niday v. Cochran*, 42 C. A. 292, 93 S. W. 1027.

Deed containing defective certificate of acknowledgment held inadmissible to sustain claim of title under five-year limitation. *Hughes v. Wright & Vaughan* (Civ. App.) 97 S. W. 525.

Where a vendee caused the land to be conveyed to a third person to secure an indebtedness, the deed was nevertheless sufficient to constitute color of title to enable the vendee to acquire title under the five-year statute. *Kirby v. Hayden*, 44 C. A. 207, 99 S. W. 746.

A deed from a husband and wife held sufficient to support the grantee's title by limitation of five years, although defectively acknowledged by the wife. *State Nat. Bank of New Orleans v. Roberts* (Civ. App.) 103 S. W. 464.

Evidence of a deed by a remainderman to a husband and wife of property in which the wife had a life interest as her separate property held immaterial on the issue of color of title created by a deed of the husband and wife, void as to the wife because of defects in the wife's acknowledgment. *Kimmey v. Abney* (Civ. App.) 107 S. W. 885.

A patent that is neither title nor color of title is not such an instrument as will support a title under the five-year statute. *Gilbert v. Harris* (Civ. App.) 109 S. W. 392.

While a tax deed will support the plea of limitation, the statute does not begin to run before the expiration of the redemption period. *Beatty v. O'Harrow*, 49 C. A. 404, 109 S. W. 414.

An instrument held not a mere executory contract insufficient as a basis for adverse possession under the five-year statute. *Yarborough v. Whitman*, 50 C. A. 391, 110 S. W. 471.

A deed, the certificate of acknowledgment of which, as recorded, did not state that the grantor was known to the acknowledging officer as the person who signed it, held insufficient to support a claim by adverse possession under the five-year limitation, though the acknowledgment was in fact proper. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

A duly recorded tax deed, regular on its face, is sufficient to support a claim of title under the five-year limitation. *Id.*

Under the five-year statute of limitations, a grantee who under a deed has color of title can only claim adverse possession to the interest conveyed. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

A quitclaim deed is sufficient color of title to support a claim under the five-year statute. *Id.*

A deed held not a mere quitclaim or option to purchase as to three-fourths of the league of land conveyed thereby, but a deed of the whole league, sufficient to support a claim under the five-year limitation, or sufficient, as a memorandum of title, to support a claim under the ten-year limitation. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

The possession of land under a tax deed is not adverse to the owner during the two years within which the land may be redeemed. *Bledsoe v. Haney*, 57 C. A. 285, 122 S. W. 455.

An instrument held a conveyance of land and not a mere quitclaim of the grantor's interest, and was therefore sufficient to sustain a claim of limitations. *Kirby v. Pitchfork Land & Cattle Co.* (Civ. App.) 129 S. W. 1151.

A deed by a widow as the legal representative of her husband, which recites that, in consideration of an advancement to an heir of the part due him, to be deducted from the interest due him as an heir, in the final settlement of the estate, the tract conveyed is inventoried at a specified sum per acre and accepted by the heir as grantee on that valuation, and which grants a tract described, and which contains a general warranty clause, and which provides that, on the failure of title, the heir need not account for the value of the land in the final partition of the estate, is a deed within this article. *Glasscock v. Dimmitt* (Civ. App.) 141 S. W. 822.



Where the grantee under a recorded deed merely held title for the benefit of a company which was the real owner, the company could prescribe by the five-year statute as if the deed stood in its own name. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

A junior patent regularly issued, which conveyed all the title the state then had, if any, would constitute color of title to support a claim under the five-year limitation, not being absolutely void, but only voidable by the senior patentee. *Horton v. Half* (Civ. App.) 147 S. W. 735.

— **Registration.**—When a deed has been properly recorded, the subsequent removal or destruction of the records, without the fault of the party claiming under the deed, cannot prejudice his right. *Fitch v. Boyer*, 51 T. 336. But see article 6784 as to the necessity of recording deeds, etc., when the original record has been destroyed.

The deed evidencing the claim under which the defendant entered must be recorded (*Porter v. Chronister*, 58 T. 53; *Medlin v. Wilkins*, 60 T. 409) in the county where the land is situated (*Adams v. Hayden*, 60 T. 223; *Jones v. Powers*, 65 T. 207; *Cook v. Dennis*, 61 T. 246).

The statute of limitations of five years applies only when the adverse possession has been continuous during the full period of five years, and the deed or deeds under which title is claimed have been registered during the same continuous period. An adverse possession antedating the registration of the deed cannot be estimated in computing the five-year period of limitation. *Harvey v. Cummings*, 68 T. 599, 5 S. W. 513.

Where it is sought to connect the possession of one person with another, an interval of a month before registration of the deed is immaterial. *Jacks v. Dillon*, 25 S. W. 645, 6 C. A. 192.

The five-year statute will not bar the recovery of real property against one claiming under a deed not registered. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

If a grantee in possession of land fails to record his deed in a reasonable time, the adverse possession of his grantor under a registered deed is lost, and the grantee's adverse possession will not begin until his own deed is registered. *Gillum v. Fuqua* (Civ. App.) 61 S. W. 938.

One adversely in possession of land may prescribe under a recorded deed to one who devised the land to him, without having recorded the will. *McLavy v. Jones*, 31 C. A. 354, 72 S. W. 407.

Record of deed held insufficient to support the five-year statute. *Henning v. Wren*, 32 C. A. 538, 75 S. W. 905.

Possession, to avail under five-year statute, must be under a deed duly recorded. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Adverse possession under the five years' statute held not sufficient; defendant's deed being improperly registered. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

Under the facts, adverse possession held to have commenced as to an entire tract from the time that the claimant recorded a deed thereto. *Holland v. Ferris* (Civ. App.) 107 S. W. 102.

A deed by husband and wife held to show on its face that it was a conveyance of the wife's separate estate, so that, her acknowledgment being defective, it was not such a properly registered deed by the husband as would support a title by limitations. *Kimney v. Abney* (Civ. App.) 107 S. W. 885.

The five-year statute does not protect one claiming under a deed from an individual where he does not show the date of the recording of the deed. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13.

Where title was complete in defendant's remote grantor at the latter's death, it was immaterial to defendant's right to claim title by adverse possession that deeds of subsequent grantors were not recorded a sufficient length of time before the commencement of the action to base a claim by limitations thereon. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

Where the record of a married woman's deed conveying her separate property showed that an essential part of the certificate of acknowledgment was omitted, the deed was not "duly recorded" so as to support a plea of title by limitations. *Id.*

Where a deed in the chain of title under which one claims title by adverse possession under the five-year statute has not been duly recorded, the possession essential to constitute title by adverse possession is broken. *Dunn v. Taylor* (Civ. App.) 143 S. W. 311.

Where considerable time has elapsed between the execution and registration of deeds offered in support of a plea of adverse possession, evidence must be offered to explain the delay. *Dunn v. Taylor* (Civ. App.) 147 S. W. 287.

To give title to land under the five-year statute, more than five years' continuous occupancy and use of land under a deed and payment of taxes is insufficient if the deed was not of record full five years. *William Cameron & Co. v. Collier* (Civ. App.) 153 S. W. 1178.

The continuity of possession of land relied on by defendant in an action to recover land under a plea of limitations was interrupted by failure, for more than a year after execution of deeds under which he claims, to record them. *Snow v. Letcher* (Civ. App.) 154 S. W. 355.

The fact that land which defendants held adversely, and on which they paid the taxes, was not registered under the proper abstract number held not to prevent defendants from acquiring an adverse title. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

— **Description of land.**—A deed void upon its face, for want of sufficient certainty in the description of the land it purports to convey, will not support the plea of five-year limitation. *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53; *Kilpatrick v. Sisneros*, 23 T. 113; *Flanagan v. Boggess*, 46 T. 330; *Cantagrel v. Von Lupin*, 58 T. 570; *Murphy v. Welder*, 58 T. 235.

The description in a deed was as follows: "Two hundred acres of land in Hill county, Texas, lying about six miles northeast of Hillsboro, and located by virtue of part of M. E. Atkinson 320 acres certificate." Held, a sufficient description under the five

years' statute; the two hundred acres being the whole of the survey at that place. *Flanagan v. Boggess*, 46 T. 330; *Tarleton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

When a tax deed gives what on its face appears to be a sufficient description of the land conveyed, and there is no evidence developing any latent uncertainty, the authorities do not decide that such a deed does not satisfy the statute of limitations. *Flanagan v. Boggess*, 46 T. 331.

The deed must describe the land with sufficient certainty to identify it. *Murphy v. Welder*, 58 T. 235.

Possession under a recorded deed, which described the land as "all the land" which the vendor owned in H. county, is sufficient, when it appears that the vendor had a recorded deed describing the particular land. *Cantagrel v. Von Lupin*, 58 T. 570.

In order that the five-year statute be invoked, the land described in the deed should coincide with the land held in possession. *Brokel v. McKechnie*, 69 T. 32, 6 S. W. 623.

It is not fatal that the deed describes the land erroneously as to the survey, if the description in other respects, with reference to objects on the ground, fixes its locality. *Udell v. Peak*, 70 T. 547, 7 S. W. 786.

A description of land in a deed otherwise identifying it is not vitiated by a mistake in giving the number of the certificate by which the land was located. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

A deed to a lot in a city or town only conveys the land to the line of the street, and the statute of limitations of five years does not apply where the owner takes and holds adverse possession of a portion of the street adjoining. *Rippetoe v. Low*, 1 U. C. 475.

The deed must, by its own terms, or by reference to some other registered deed, identify the land. *Clark v. Kirby* (Civ. App.) 25 S. W. 1096.

A deed which has a defective description is insufficient on which to base title by limitation. *Newton v. Alexander* (Civ. App.) 44 S. W. 416.

A description in a deed held insufficient basis for adverse possession. *Williams v. Thomas*, 18 C. A. 472, 44 S. W. 1073; *Bruce v. Richardson*, 26 C. A. 615, 64 S. W. 785; *Rountree v. Thompson*, 30 C. A. 595, 71 S. W. 574, 72 S. W. 69.

There can be no adverse possession under deeds which do not describe the land. *Simpson v. Johnson* (Civ. App.) 44 S. W. 1076.

Description of land in a deed held sufficient. *Hill v. Harris*, 26 C. A. 408, 64 S. W. 820; *Club Land & Cattle Co. v. Wall*, 99 T. 591, 91 S. W. 778, 122 Am. St. Rep. 666; *Id.* (Sup.) 92 S. W. 984.

In trespass to try title, a defendant claiming under a deed conveying an undivided half interest in the land held to have acquired title to the half interest by adverse possession. *Club Land & Cattle Co. v. Wall*, 99 T. 591, 91 S. W. 778, 122 Am. St. Rep. 666; *Id.* (Sup.) 92 S. W. 984.

Where the evidence disclosed a privity of holding for a period which would bar plain tiff's right to recover, an objection that certain conveyances in defendant's chain of title did not properly describe the land held immaterial. *Lawder v. Larkin* (Civ. App.) 94 S. W. 171.

Possession of one claiming land under a deed duly registered, and who enters upon and improves or incloses a part of the land embraced in the boundaries specified in his deed, extends to all the land embraced in the true boundaries of such deed. *Davidson v. Equitable Securities Co.* (Civ. App.) 96 S. W. 787.

The description in a deed held such that it could not be considered a deed duly registered under the five-year statute. *Young v. Trahan*, 43 C. A. 611, 97 S. W. 147.

Though there may be a mistake in calls for course and distance in a description of the land, the deed will be sufficient color of title on which to base adverse possession, where the mistake is apparent from the face of the deed, and the intention of the grantor as to the land attempted to be conveyed is obvious. *Moore v. Loggins* (Civ. App.) 114 S. W. 183.

Where defendant took no title under certain deeds, they were available as color of title under the five-year limitation only to the land or interest described. *Kimbell v. Powell*, 57 C. A. 57, 121 S. W. 541.

A deed held to convey lands bounded as therein described so that possession under the deed which was recorded, with payment of taxes, supported a plea of limitations. *Pratt v. Townsend* (Civ. App.) 125 S. W. 111.

A recorded deed held sufficient to support a claim by adverse possession under the five-year limitations, though the block number was incorrectly given in the record. *Eastham v. Gibbs* (Civ. App.) 125 S. W. 372.

Title to land included in the description of a deed could be obtained by adverse use for the proper time, regardless of preceding deeds, or other deeds not referred to therein or of any mistake as to what land was described in the deeds. *Basham v. Stude* (Civ. App.) 128 S. W. 662.

Where the description in a deed, by the assistance of parol evidence, may be located on the ground, the deed will be held sufficient to inaugurate a title under either the five or ten year statute of limitations. *Noland v. Weems* (Civ. App.) 141 S. W. 1031.

A deed, conveying grantor's undivided interest in certain surveys, and reciting that the land is the same as that conveyed by K. to T., sufficiently described the land conveyed, so as to support a claim under the five-year limitation; there being no other surveys of the same number, and the deed from K. to T. being on record. *Clifton v. Creason* (Civ. App.) 145 S. W. 323.

Where grantor only had an undivided interest of 61 acres when he conveyed his "entire interest," the deed would support a claim under the five-year limitation by grantee to only 61 acres. *Id.*

**Forged deed.**—A title cannot be acquired under this article by possession for five years. But a deed conveying a certificate for land which is confessedly void is not a forged deed within the meaning of this statute. *Brown v. O'Brien*, 11 C. A. 459, 33 S. W. 267.

The five-year statute is not available to adverse claimants where they must deign their title through a forged deed. *Logan v. Robertson* (Civ. App.) 83 S. W. 399.

**Presumptions and burden of proof.**—See notes under Art. 3687, Rules 12 and 19.

**Pleading.**—See notes under Title 37, Chapter 3, and Art. 5706.

**Art. 5675. [3343] Ten years' possession, when a bar.**—Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. [Id. sec. 17. P. D. 4621–4624.]

**In general.**—See *Campbell v. Houchin* (Civ. App.) 35 S. W. 753.

An action of trespass to try title to certain lots bought at a sale for taxes due on them was against persons holding them under claim of right. The defendants pleaded the ten-year statute of limitation. Held: (1) That, if the tax deed was valid, and any title passed, it was only such as the real owner of the land had at the time of sale. (2) That such a person stands in relation to persons in possession under claim of right, but with no title, just as the real owner would stand had there been no sale. (3) That, if there had been no tax sale, and the suit had been instituted by the real owner at the time it was, if his right of action would have been barred by the statute of limitation, so would that of the purchaser at tax sale or those holding under him. *Jordan v. Higgins*, 63 T. 150.

That a defendant claimed a pre-emption upon actual residence does not prohibit him from acquiring other lands by possession under the limitation of ten years. *Dawson v. Ward*, 71 T. 72, 9 S. W. 106.

For facts sufficient to show title by ten years' adverse possession, see *Harn v. Smith*, 79 T. 310, 15 S. W. 240, 23 Am. St. Rep. 340.

Sheriff's sale September, 1879, passed title to the purchaser. Suit upon such title against defendants in execution for land sold was filed October 7, 1886. Held, that defendant could not have acquired title by possession within that time against plaintiff holding under the sheriff's sale. *Alston v. Emmerson*, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639.

The proviso to Art. 5674 in regard to forged deeds, etc., does not apply under this article. *Moses v. Dibrell*, 21 S. W. 414, 2 C. A. 457.

Where an heir takes possession under a judgment in partition, the title becomes perfect after a lapse of ten years, without reference to the validity of the judgment as against creditors of the estate. Limitation would commence to run from the date of the judgment and not from the date of a subsequent invalid sale at the suit of creditors. *Hardin v. Clark*, 1 C. A. 565, 21 S. W. 977.

Possession of land by defendant for ten years held insufficient to confer title on him as against plaintiff, who held the record title. *Nolan v. Mundine*, 34 C. A. 606, 79 S. W. 638.

In trespass to try title, held, that the petition should have been held for trial on the merits, and plaintiffs adjudged 160 acres, to be set apart to them so as to include their improvements, under this and the following article. *Parker v. William Cameron & Co.*, 39 C. A. 30, 86 S. W. 647.

Adverse possession and other requisites for the time prescribed are sufficient, though the time did not immediately precede the filing of suit. *Texas & N. O. R. Co. v. Texas Tram & Lumber Co.*, 50 C. A. 182, 110 S. W. 140.

A naked trespasser by entering into actual possession of a part of a large tract, surveying such part, and claiming it to such designated lines, acquired title thereto by limitations. *Texas & N. O. Ry. Co. v. Broom*, 53 C. A. 78, 114 S. W. 655.

Where one in possession of a portion of a survey of land seeks to recover a definite portion of the survey setting out the field notes of his claim, he must prove that he has occupied the land described in his petition for ten years prior to institution of the suit. *Louisiana & T. Lumber Co. v. Kennedy*, 103 T. 297, 126 S. W. 1110.

In trespass to try title, where plaintiffs claimed that the property which they inherited was community property, evidence that their ancestors, who were husband and wife, conveyed certain property, and that as consideration therefor the grantee conveyed the property in controversy to the wife, and that the husband and wife moved onto the property and there resided for ten years as husband and wife, was admissible to show title by the ten-year statute. *Ross v. Martin* (Civ. App.) 128 S. W. 718.

Deeds are unnecessary to support the ten-year statute. *Campbell v. San Antonio Machine & Supply Co.* (Civ. App.) 133 S. W. 750.

A railroad may obtain title under the statute of limitations. *Kingsley v. Kerr* (Civ. App.) 135 S. W. 161.

One in adverse possession of another's land claiming an easement acquires an easement as of right after the continuance of such possession for ten years. *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

To acquire a prescriptive title to land under the ten-year statute, each of the several and statutory requirements must be proved by a preponderance of evidence. *McAllen v. Crafts* (Civ. App.) 139 S. W. 41.

One held to have acquired title under the ten-year statute. *Kansas City Oil & Rice Land Co. v. Ogden* (Civ. App.) 140 S. W. 808.

One who has been in the adverse possession for ten years dating from the accrual of a third person's right of action, at the time of the filing of his application for the purchase of the land as school land and paying the price, acquires title by adverse possession under the ten-year limitation. *Houston Oil Co. of Texas v. McGrew* (Civ. App.) 143 S. W. 191.

A college, incorporated in 1839 by an act of the republic of Texas granting land to trustees, with a right to dispose thereof and use the proceeds for the college, is within this article. *Trustees of College of De Kalb v. Williams* (Civ. App.) 143 S. W. 348.

The "possession" in the ten-year statute means an actual residence on the land, or such cultivation, use, and enjoyment of the same, by such visible and notorious acts of ownership, as will give notice to the owner and others, and such possession may be by tenant. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

**Possession.**—See, also, Arts. 5676, 5680-5682.

In trespass to try title, commenced in 1890, an allegation of title in plaintiff by limitation for a period of more than ten years prior to the filing of the suit was supported by proof of a completed adverse possession between 1870 and 1890. *Travis v. Hall*, 95 T. 116, 65 S. W. 1077, 1078.

The peaceable and adverse possession for ten years of 5 acres, which are inclosed with claim of 160 acres, gives title to 160 acres. *Fischer v. Giddings* (Civ. App.) 74 S. W. 86.

A charge that one's possession for ten years must be visible, distinct, notorious and continued and hostile for the full period of ten years prior to the filing of suit, and actual, open and peaceable and must disseise the owner is harmful and prejudicial. The court should not amplify the terms of the statute. *Logan v. Meads*, 43 C. A. 477, 98 S. W. 212.

One who actually occupies and claims land under fence for ten years gets a good and perfect title. *Davenport v. Bearden*, 49 C. A. 196, 108 S. W. 474.

A charge making recovery dependent on cultivation, use "and" enjoyment in connection with possession is erroneous. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

"Requisites of possession to vest title" defined. *Jones v. Weaver* (Civ. App.) 122 S. W. 619.

"Possession," as contemplated by the ten-year statute, means actual residence on the land and such use and enjoyment of the same by visible and notorious acts of ownership as will give notice to the owner and others. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

A special finding as to how long a certain strip had been inclosed was properly refused, where the court found that all of the land had been in defendants' peaceable and adverse possession since 1886. *Sanders v. Moore* (Civ. App.) 157 S. W. 441.

**Laches and stale demand.**—See notes under Art. 7740 and other particular remedies.

One entitled to recover on note by right of subrogation need not show authority of attorney who indorsed to him. *Sullivan v. Cranz*, 21 C. A. 498, 52 S. W. 272.

Plaintiff held entitled under the evidence to be subrogated to the rights and securities of a prior mortgagee. *Park v. Kribs*, 24 C. A. 650, 60 S. W. 905.

**Art. 5676. [3344] Ten years' possession construed to embrace, what.**—The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument. [Id. P. D. 4624.]

**In general.**—See, also, notes under the preceding article.

Possession of part, see note under Art. 5681.

One sustaining his claim under this section can hold the full statutory number of acres, but if he holds under some recorded memoranda of title he holds only to the extent of the boundary described in the instrument. *Pearson v. Boyd*, 62 T. 541.

The construction placed upon the former law, giving the title to 640 acres without inclosure, etc., is the rule of construction for this article. Under both laws the possessor may hold what he has actually inclosed, though it exceeds the area to which his possession is construed to extend from an occupation of a part only. The present law, as did not the former, makes registration of written memorandum of title other than a deed necessary to make possession co-extensive with the boundaries specified in the memorandum of title. *Craig v. Cartwright*, 65 T. 413, citing *Word v. Drouthett*, 44 T. 369; *Pearson v. Boyd*, 62 T. 541; *Smith v. Garza*, 15 T. 150, 65 Am. Dec. 147; *Moody v. Holcomb*, 26 T. 714; *Melton v. Turner*, 38 T. 81; *Mooring v. Campbell*, 47 T. 37; *Bridges v. Johnson*, 69 T. 716, 7 S. W. 506; *Branch v. Baker*, 70 T. 190, 7 S. W. 808.

Where the improvements are upon two separate and distinct tracts of land adjoining each other, the settler claiming both tracts under the ten-year limitation by virtue of one and the same possession, and he sells out of one tract all that he is entitled to claim by virtue of naked possession, he cannot claim upon the other tract beyond his actual occupancy. *Snow v. Starr*, 75 T. 411, 12 S. W. 673.

In *Schleicher v. Gatlin*, 85 T. 270, 20 S. W. 120, it is held that the occupation of land under the belief that it was vacant will not support the plea of ten-year limitation. A contrary ruling is made in *Converse v. Ringer*, 24 S. W. 707, 6 C. A. 51. In *Cartwright v. Pipes*, 29 S. W. 690, 9 C. A. 309, it is said that the decision in the *Schleicher-Gatlin* Case was right on the facts, but that it is not authority. In *Longley v. Warren*, 11 C. A. 269, 33 S. W. 304, reviewing the former cases, it is held that an occupant of land, erroneously believing it to be vacant public land, may by such occupancy acquire title by adverse possession against the true owner. See *Alexander v. Newton*, 11 C. A. 618, 33 S. W. 305.

A defendant claiming by limitation a tract of less than 160 acres can assert his right to all of it, without apportioning his 160 acres between it and another tract not in dispute. *Durst v. Skillern* (Civ. App.) 45 S. W. 840.

A person showing ten years' peaceable possession of 320 acres prior to 1879 held entitled to judgment. *Simpson v. Johnson*, 92 T. 159, 46 S. W. 628.

One entering on large tract, and taking possession of 160 acres, which he marks off, may acquire title thereto after ten years. *McCarty v. Johnson*, 20 C. A. 184, 49 S. W. 1098.

See this case for facts which show that a party secured complete title to 320 acres by adverse possession for more than ten years prior to the passage of the statute of 1879 after deducting the period in which the statute of limitations was suspended. *Johnson v. Simpson*, 22 C. A. 290, 54 S. W. 308.

A naked trespasser having possession of a part of a tract of vacant land belonging to another claiming and holding same openly and adversely, has by force of the terms of the statute constructive possession of 160 acres, if so much is in the tract. And if he holds the same for ten years his title is perfect. *Nativel v. Raymond* (Civ. App.) 59 S. W. 312.

Defendant in trespass to try title held entitled to the dwelling house, on evidence of adverse possession for 10 years. *Thompson v. Dutton*, 96 T. 205, 71 S. W. 544.

Where there is no monument of title of record, one can claim under naked possession no more than 160 acres of land. *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 260.

Where land was not inclosed, and one actually occupied a part, limitations did not run in his favor as regards the portion not actually occupied, in the absence of a showing that the occupancy and use of the remainder had been exclusive. *Zapeda v. Hoffman*, 31 C. A. 312, 72 S. W. 443.

Where two persons were in possession of 160 acres, claiming the land as pre-emptors, and one inclosed 80 claimed by him and the other inclosed 30 acres of the 80 claimed by him, and no one was in possession of the tract not inclosed, they acquired by ten years' possession title to the whole 160-acre tract. *Price v. Eardley*, 34 C. A. 60, 77 S. W. 418.

The sale of land having divested the then owner of his title and claim under his deed, his subsequent possession was that of a trespasser and as such he could only acquire title to the land actually occupied by him, or if his occupancy extended to less than 160 acres, he could by virtue of the statute have his claim extended to include that amount of land. *Doom v. Taylor*, 35 C. A. 251, 79 S. W. 1088.

An action to try title under the 10-year statute of limitations, in which plaintiff claimed no specific tract out of a section, but only 160 acres out of the same, held not maintainable. *Titel v. Garland*, 99 T. 201, 87 S. W. 1152.

While it is not required that all the land in the peaceable and adverse possession of one who seeks to prescribe under the statute should be actually inclosed or improved, yet there must be peaceable and adverse possession thereof. *Webb v. Lyerla*, 43 C. A. 124, 94 S. W. 1096.

This article became effective September 1, 1879, the time when the revised statutes of 1879 took effect. Persons who went into possession of land in 1861 could not acquire title by the ten-year limitation to more than 160 acres, by virtue of Pasch. Dig. art. 4624, the statute of limitations in Texas having been suspended from January 28, 1861, to March 30, 1870. Excluding the time when the statute was suspended there was not ten years in which to acquire title to more than 160 acres. *Poland v. Porter*, 44 C. A. 334, 98 S. W. 217, 218.

One cannot enter on a survey exceeding 160 acres, and by actual possession of a small part thereof become entitled to select 160 acres out of the larger survey. *Rice v. Goolsbee*, 45 C. A. 254, 99 S. W. 1031.

One held to have acquired title to 160 acres by adverse possession. *Davis v. Receivers of Houston Oil Co.*, 50 C. A. 597, 111 S. W. 219.

Rights of one in adverse possession of a tract, the particular boundaries of which have not been defined by occupancy or claim for the statutory period, stated. *Smith v. Simpson Bank*, 52 C. A. 108, 113 S. W. 568.

Unless one claims under a deed, one does not acquire title under the ten-year statute to land not in actual possession. *Simpson Bank v. Smith*, 52 C. A. 349, 114 S. W. 446.

The rule that a person in actual possession of a few acres is entitled to recover 160 acres only applies where there is an assertion and claim to the 160 acres. *Williams v. Texas & N. O. R. Co.*, 52 C. A. 217, 114 S. W. 877.

When one holding land adversely for ten years without claiming under any monument of title fixing the boundaries of his claim may assert title to 160 acres thereof without showing actual occupancy of the whole, stated. *Vann v. Denson*, 56 C. A. 220, 120 S. W. 1020.

Where the evidence was sharply conflicting as to whether defendant claimed adversely any land beyond his original inclosure, an instruction that the fencing and possession of some 12 acres, in connection with defendant's adjoining tract, did not support a claim under ten-year limitations to the land beyond that fenced, unless such fencing, in connection with defendant's acts with reference to the land, was sufficient to put a reasonably prudent person on notice that defendant claimed title to all the land, was proper. *Hedrick v. Kilgore*, 57 C. A. 47, 121 S. W. 892.

Where the undisputed evidence showed that plaintiff had improvements on, and held possession of, the rear part of the lot, it was not error for the court to state such fact to the jury. *Washam v. Harrison* (Civ. App.) 122 S. W. 52.

Evidence held to show that a survey by an occupant claiming 160 acres of a tract by adverse possession setting off his portion was not a fair partition between the parties. *Louisiana & T. Lumber Co. v. Kennedy*, 103 T. 297, 126 S. W. 1110.

The possession of one claiming adverse possession held to extend to the limits of an entire tract. *Stevens v. Pedregon* (Civ. App.) 140 S. W. 236.

The possession of one actually in possession of land within lines fixed and acknowledged held not subject to extension by construction to other land. *Noland v. Weems* (Civ. App.) 141 S. W. 1031.

That a part of a person's fence and improved land lies in a survey adjoining the one on which he has his residence and the remainder of his improvements held not to prevent his recovery of 160 acres on the section on which he lives. *Houston Oil Co. of Texas v. McGrew* (Civ. App.) 143 S. W. 191.

One in possession of land held to acquire title by adverse possession to 160 acres. *Lutcher v. Grant* (Civ. App.) 143 S. W. 1190.

One who used, cultivated, and enjoyed land peaceably and adversely for ten years acquired title thereto, regardless of the ownership or existence of any fence inclosing the land. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

One who, without deed or recorded memorandum of title, has peaceable and adverse possession of land, claiming title, and cultivating, using, or enjoying the same for ten years, acquires title to 160 acres of the land so held. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

A claim to land described as 160 acres within definite north, east, and west boundaries, leaving the location of the south boundary line only a matter of measurement and describing a tract of 160 acres, is a description sufficient to identify the land claimed. *Griffin v. Houston Oil Co.* (Civ. App.) 149 S. W. 567.

Evidence, in an action to remove cloud and quiet title to 160 acres of land out of a larger tract, based upon the ten-year statute, held to support a finding for plaintiffs for 160 acres, including improvements. *Ball v. Filba* (Civ. App.) 153 S. W. 685.

**Possession under written memorandum of title.**—Constructive possession extends to lands within the boundaries in the deed. But this rule does not obtain against the owner of a senior grant where there is a partial conflict, unless possession of junior grantee extends to that part of his grant within the boundaries of the older grant. *Whitehead v. Foley*, 28 T. 268; *Parker v. Baines*, 65 T. 606; *Turner v. Moore*, 81 T. 209, 16 S. W. 929; *Cook v. Lister*, 15 C. A. 31, 38 S. W. 380.

An intruder holds only to the limits of his actual boundaries. One who enters under a claim or color of title may hold to the boundaries described in the deed under which he claims. *Cantagrel v. Von Lupin*, 58 T. 570.

But he is not affected with notice that an adjoining proprietor has encroached by his fence a few feet over the line, for the purpose of acquiring part of his land under the ten-year statute. It is only where the party who sets up limitation entered under a recorded deed, which on its face discloses a conflict, and assumes to convey title, that the true owner whose land is held adversely is notified of the adverse claim. *Bracken v. Jones*, 63 T. 184.

A purchaser, the calls of whose deed through mistake embraced part of an adjoining survey to which the vendor held no title, occupied the land so included by mistake, but asserted no claim to any portion of such survey, except to the land so occupied by him, until after the expiration of ten years and after he had abandoned possession. His actual and constructive possession being identical, he obtained no title to any portion of such survey except that which was actually and visibly appropriated by him under a claim of right hostile to the claim of the true owner. *Ivey v. Petty*, 70 T. 178, 7 S. W. 798.

Actual possession of a part of a tract of land extends to the boundaries claimed. *Porter v. Miller*, 76 T. 593, 13 S. W. 555, 14 S. W. 334.

A possession of a party entering under a deed of a part of a large tract is sufficient to put the statute in operation as to the entire tract described in the deed, other facts concurring. *Tallaferro v. Butler*, 77 T. 578, 14 S. W. 191.

Actual possession of a part of a tract of land described in deeds on record extends to the whole. *Brown v. O'Brien*, 11 C. A. 459, 33 S. W. 267.

Possession of that part of the land which is indisputably covered by an indefinite deed does not draw to it constructive possession of that part which is in controversy, where for years the grantees asserted no claim to it. *Pope v. Riggs* (Civ. App.) 43 S. W. 306.

A bond for title to land, duly registered and twenty years old, held a sufficient color of title on which to base the defense of limitation under the ten-year statute. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

Where owner of tract, before selling all to defendant's vendor, sold part to plaintiff's vendor, defendant's actual possession of the part not sold to plaintiff did not constructively extend to the latter part. *Beaumont Pasture Co. v. Polk* (Civ. App.) 55 S. W. 614.

One in actual possession of any part of an entire tract, as shown by the deed under which he claims, has constructive possession coextensive with the boundaries designated in his deed. *Bogges v. Allen* (Civ. App.) 56 S. W. 195.

Possession of one tract held constructive possession of adjoining tract, conveyed as part of the same body of land. *Allen v. Bogges*, 94 T. 83, 58 S. W. 833.

Where defendant, under a deed covering land in controversy and adjoining land, enters into possession and actually occupies the adjoining land, claiming the whole, for more than twenty years, his possession should be deemed coextensive with the description in his deed, so as to give defendant title by adverse possession. *Coleman v. Florey* (Civ. App.) 61 S. W. 412.

A tax deed held a sufficient memorandum of title to furnish boundaries in support of a claim of adverse possession. *Kobs v. New York & T. Land Co.* (Civ. App.) 63 S. W. 1087.

Possession under a junior conveyance of a part of the land included in the deed held adverse possession only of the part actually possessed. *Polk v. Beaumont Pasture Co.*, 26 C. A. 242, 64 S. W. 58.

Where plaintiff's husband, acting under a power of attorney from her, sold and executed a deed of her land, the deed, though void as a conveyance, as against her, is sufficient as a memorandum of title. *Williams v. Bradley* (Civ. App.) 67 S. W. 170.

A deed, by mistake including land in its description, held not to interfere with one's acquiring title thereto by the ten-year statute of limitations. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

Plaintiffs in trespass to try title held barred by limitations, defendants having had actual possession of part for ten years, claiming all under a bond for title. *Ellis v. Le Bow*, 96 T. 532, 74 S. W. 528.

Facts held to establish title in a subsequent grantee of land by limitation, as against a prior grantor under an unrecorded deed. *Pierson v. McClintock*, 34 C. A. 360, 78 S. W. 706.

Possession of land by one claiming under a deed held not to extend to the boundaries called for in the deed, so long as the same remains unrecorded. *Doom v. Taylor*, 35 C. A. 251, 79 S. W. 1086.

Compromise of an action relating to a portion of the alley, which defendant claimed under a deed, held not to affect defendant's constructive possession of another portion of the alley. *Peden v. Crenshaw* (Civ. App.) 81 S. W. 369.

Actual possession by the grantee in a deed of a part of the land conveyed gives constructive possession to the extent of the boundaries of the deed. *Id.*

Possession of the east half of a survey held as a distinct tract under one deed describing it alone could not be extended by construction to the boundaries of the west half

of the survey held under another deed. *Broom v. Pearson*, 98 T. 469, 85 S. W. 790, 86 S. W. 733.

A deed together with other deeds held a sufficient memorandum to authorize a recovery by the grantee under the ten-year statute. *State Nat. Bank of New Orleans v. Roberts* (Civ. App.) 103 S. W. 454.

Under Arts. 5675, 5676, a trespasser or "naked possessor" cannot acquire by peaceable and adverse possession more than 160 acres of the land claimed and occupied, but if the occupant takes possession and holds under deed or some memorandum of title duly recorded, his possession will be coextensive with the boundaries specified in the instrument. *Id.*

Though a deed be void as a conveyance and is not title nor color of title under Art. 5672, yet it is admissible in evidence in determining the extent of the disseisin and fixing the limits of the recovery. *Sanders v. Word*, 50 C. A. 294, 110 S. W. 206.

Actual possession of a portion of a tract under a deed calling for all of it, on compliance with other statutory requisites, constitutes possession of the entire tract, except as against the true owner in actual possession of a portion of the land, in which case the claimant's title is limited to the land in his actual possession. *Craver v. Ragon* (Civ. App.) 110 S. W. 489.

One in actual possession under a void grant describing the land may hold and prescribe under the ten-year statute to the extent of the boundaries of the grant. *Harris v. Iglehart*, 52 C. A. 6, 113 S. W. 170.

Where one has possession of a portion of a tract under a recorded deed, the record is notice to all opposing claimants as to the character and extent of his claim, but such record is not notice of any claim to the land, unless the claimant has possession thereof. *Holland v. Nance*, 102 T. 177, 114 S. W. 346.

The grantee under a deed to undivided interests held not to have acquired adverse possession beyond the limits of the deed under the ten-year statute. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

Certain acts by a grantee, improving land upon which he entered under a deed, held sufficient to support title by limitations to the entire tract, whether the deed is considered as a duly registered deed under the five-year limitation, or as a written memorandum of title under the ten-year limitation. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

Actual possession by grantee of part of land covered by deed held not to extend by construction to the rest of it, so as to give title by adverse possession. *Lowry v. McDaniel* (Civ. App.) 124 S. W. 710.

A claimant erected a corral 100 feet square on land, and used it for fourteen years in open, peaceable, and adverse possession, claiming the land to the extent shown by the description in his deed, and using timber thereon for firewood. Held, that there was possession of the whole tract sufficient to create title under the ten-year limitations. *Rodriguez v. Priest* (Civ. App.) 126 S. W. 1187.

One who himself or by a tenant actually resides upon a large tract and claims it for ten years acquires title to 160 acres thereof, including his improvements, or the amount included in his deed if he claims under a deed, irrespective of whether such tract is inclosed. *Frazier v. Seureau* (Civ. App.) 128 S. W. 649.

One's right to acquire title by limitation to more than 160 acres under the ten-year limitation statute is not limited to cases where claim is made under a memorandum of title, as distinguished from a deed. *Surghenor v. Ducey* (Civ. App.) 139 S. W. 22.

The rule that actual possession of any part of land described in a deed gives constructive possession of the whole applied. *Id.*

One who took possession of land under a recorded deed, and paid taxes, and used it for more than ten years as his own, acquired title by adverse possession under the five and ten year limitations. *Horan v. O'Connell* (Civ. App.) 144 S. W. 1048.

Possession of part of a tract of land under a deed held not possession of another part in the peaceable possession of another. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

A possession of land by a grantee ripens into title under the ten-year statute, where such possession continues for ten years and the land is within the limits of a deed under which he claims. *Cole v. Webb* (Civ. App.) 149 S. W. 245.

Description of land claimed by adverse possession held sufficient to identify the land. *Griffin v. Houston Oil Co. of Texas* (Civ. App.) 149 S. W. 567.

Where defendant claimed title by adverse possession, but only proved actual possession of four or five acres, and had no written evidence of title, except a mortgage which did not describe the boundaries, the court should have charged, as requested, that defendant's adverse possession, if any, would not embrace more than 160 acres. *Fulshear v. Deadman* (Civ. App.) 154 S. W. 616.

A tax title to a survey is sufficient to give the grantee the benefit of the principle that actual possession of a part of a tract of land by the owner will be extended to give him constructive possession of the whole and prevent acquisition of title by adverse possession by one having no title beyond the limits of his actual inclosure. *R. W. Wier Lumber Co. v. Conn* (Civ. App.) 156 S. W. 276.

Where a claimant of a defined tract of land leased a defined part thereof, the tenant's actual possession of the leased portion did not give the claimant constructive possession of the whole tract claimed by him. *Id.*

**Pleading.**—See notes under Title 37, Chapter 3, and Art. 5706.

**Art. 5677. [3345] Land surrounded by other lands, etc., peaceable possession of defined.**—A tract of land owned by one person, entirely surrounded by a tract or tracts owned, claimed or fenced by another, shall not be considered inclosed by a fence inclosing the circumscribing tract or tracts, or any part thereof; nor shall the possession by the owner or claimant of such circumscribing land of such interior tract be

the peaceable and adverse possession contemplated by article 5675, unless the same be segregated and separated from the circumscribing land by a fence, or unless at least one-tenth thereof be cultivated and used for agricultural purposes, or used for manufacturing purposes. [Acts 1891, p. 76.]

*In general.*—This article has no application when the land owned by the person is merely adjacent to, and not surrounded by, that claimed and fenced by another. *Green v. Boon*, 14 C. A. 307, 37 S. W. 187; *Cunningham v. Matthews* (Civ. App.) 57 S. W. 1115; *Daughtrey v. N. Y. & T. Land Co.*, 61 S. W. 947.

**Art. 5678. [3346] Same subject.**—Possession of land belonging to another by a person owning or claiming five thousand acres or more of lands inclosed by a fence in connection therewith, or adjoining thereto, shall not be the peaceable and adverse possession contemplated by article 5675, unless said land so belonging to another shall be segregated and separated by a substantial fence from said lands connected therewith or thereto adjoining, or unless at least one-tenth thereof shall be cultivated and used for agricultural purposes, or used for manufacturing purposes, or unless there be actual possession thereof. [Id.]

*In general.*—See, also, notes under Art. 5677.

After the passage of this statute (in 1891) the statute of ten years limitation will not give title to a tract of land included in an inclosure of more than 5,000 acres where there was no separation or segregation of the land claimed from the other tracts, and where there was no actual possession or cultivation of one-tenth of the land claimed. *Flack v. Bremen*, 45 C. A. 473, 101 S. W. 540, 541.

This article does not apply where the five-year statute is in question, but it does apply when ten-year limitation is claimed by such an inclosure as is mentioned. It declares in effect that possession by inclosure of the specified size shall not be deemed the possession essential to ten-year limitation unless the other prescribed things exist. The same possession and claim held sufficient for five years, is made ineffectual for ten years. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 269.

In so far as title under the five years statute is concerned, the size of the inclosure has nothing to do with the question. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

**Art. 5679. [3347] Possession gives full title, when.**—Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims.

*In general.*—A possession which operates a disseisin of the true owner, continued for the period and under the conditions prescribed by the statutes, confers upon the possessor title to the thing possessed. *Craig v. Cartwright*, 65 T. 413. See *Desmuke v. Houston* (Civ. App.) 31 S. W. 198; *Bridges v. Johnson*, 69 T. 714, 7 S. W. 506; *Hand v. Swann*, 1 C. A. 241, 21 S. W. 282.

The execution of a writ of possession against parties bound by the judgment under which it issued in no way affects the right of a party in possession of another part of the grant sued for, and not bound by the judgment, when such party had title to his land by limitation. *Texas Land Co. v. Williams*, 51 T. 51.

A title acquired by ten years' adverse possession is not based on any writing and therefore is not within the statute requiring registration or continued possession. *MacGregor v. Thompson*, 26 S. W. 649, 7 C. A. 32.

A right of way may be established by prescription. *Railway Co. v. Gaines* (Civ. App.) 27 S. W. 266.

One who has acquired title by limitation is not required to give notice thereof by legal proceeding. *East Texas Land & Improvement Co. v. Shelby*, 17 C. A. 685, 41 S. W. 542.

The owner of a dam on a stream acquires a prescriptive right as against the owner of a lower dam who was first in time, the upper dam having been maintained for twenty years. *Cape v. Thompson*, 21 C. A. 681, 53 S. W. 368.

An action to enforce a lien upon land there being no adverse possession is not barred until the debt is barred. Adverse possession for the statutory period would probably preclude a claim for a lien. *Wilcox v. First Nat. Bank*, 93 T. 322, 55 S. W. 317.

The fact that defendant signed an agreement that the land in controversy was not a part of a certain survey held not to defeat his subsequent title by adverse possession for ten years under that survey. *Daughtrey v. New York & T. Land Co.* (Civ. App.) 61 S. W. 947.

The evidence showing adverse possession under the 5 and 10 year statutes of limitation, a verdict for defendants held proper. *Stipe v. Shirley*, 27 C. A. 97, 64 S. W. 1012.

The peaceable continuous adverse possession of land for ten years by one claiming title confers "full title"; that is, all of the title which had emanated from the state vests in the possessor, as against the claim of any and all persons. *Burton's Heirs v. Carroll*, 96 T. 320, 72 S. W. 582.

Adverse possession of land for ten years establishes a title against one whose title is derived from a judgment, though the adverse possessor be the defendant in such judgment. *Pendleton v. McMains*, 32 C. A. 575, 75 S. W. 349.



Right to property adversely occupied held barred by the ten-year statute. *Wiess v. Goodhue* (Civ. App.) 79 S. W. 873.

Where plaintiff and those under whom he claimed title had been in adverse possession for more than ten years, his title was perfect. *Magerstadt v. Lambert*, 39 C. A. 472, 87 S. W. 1068.

Possession held not indispensable to the presumption of a grant in countries where the lands are largely unsettled. *Arthur v. Ridge*, 40 C. A. 137, 89 S. W. 15.

Where a party buys land from a vendor against whom a judgment has been obtained, and properly recorded and indexed in the county where the land lies, and takes and holds possession under "title" or "color of title" adverse to the judgment creditor until limitation has run, he acquires a good title by limitation in spite of the judgment lien obtained by the record of the judgment. *White v. Pingenot*, 49 C. A. 641, 90 S. W. 673, 674.

Whenever any cause of action for the recovery of real estate is barred by any of the statutes of limitation the person having such peaceable and adverse possession shall be held to have full title. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 699.

When the period of limitation has fully run while there is adverse possession of the land, this gives title to the adverse possessor which he may assert against the world. He need not do anything to give notice of such title. *Latta v. Wiley* (Civ. App.) 92 S. W. 438.

The foundation of prescription rests upon an adverse, continuous, uninterrupted use of such a nature as to impart notice to the owner for such a period of time as would raise a presumption of grant, which is ten years. *International & G. N. R. Co. v. Cuneo*, 47 C. A. 622, 108 S. W. 714.

In trespass to try title, defendant held entitled to defend the suit and recover upon its plea of limitation, the evidence failing to show that defendant had sold the property before the beginning of the suit, and it being immaterial whether or not he sold it after the suit was brought. *Texas & N. O. R. Co. v. Texas Tram & Lumber Co.*, 50 C. A. 182, 110 S. W. 140.

Adverse possession, barring trustees in a will, held to bar the devisees in the will also. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

W.'s successors in interest held to have acquired complete title to a part of the land in controversy by adverse possession. *Hayward Lumber Co. v. Bonner*, 56 C. A. 208, 120 S. W. 577.

Title to school lands sold by the state to one who has not paid all of the purchase money and has not obtained patent therefor may be acquired by limitation. *Paterson v. Rector* (Civ. App.) 127 S. W. 561.

The right to acquire title to land by limitation is given by statute, and an agreement between two parties to so acquire such a title is not wrongful or inequitable. *Hammons v. Clwer* (Civ. App.) 127 S. W. 889.

Under this article the holder has as full ownership as can be held under any other character of title. *Clark v. Asbury* (Civ. App.) 134 S. W. 236.

Ten years' adverse possession vests in the holder full title precluding all claims. *Mitchell v. Schofield* (Civ. App.) 140 S. W. 254.

Where adverse possession for the requisite period is shown, the character of possession antecedent thereto is immaterial. *Olcott v. Squires* (Civ. App.) 144 S. W. 314.

Possession, being deemed abandoned, was not sufficient evidence of title against a subsequent possessor. *Adels v. Joseph* (Civ. App.) 148 S. W. 1154.

Where the statute had been fully complied with by ten years' consecutive occupancy of land, title matured; and a failure to thereafter comply with the statute was immaterial. *Tate v. Waggoner* (Civ. App.) 149 S. W. 737.

**Subsequent loss of possession or admissions.**—Where there has been three years' possession under Art. 5672, the title is not affected by subsequent loss of possession. *Spofford v. Bennett*, 55 T. 293.

When the period of limitation has fully run in favor of an adverse possessor of land, it confers title on him which he may assert against the former owner, though his possession ceased after his title by limitation was acquired. *Branch v. Baker*, 70 T. 190, 7 S. W. 808.

An adverse possessor in possession when the period of limitations expired held entitled to plead limitations against the former owner, though such possessor ceased to continue in possession after title was acquired. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

Where one had acquired title by adverse possession, such title was not affected by subsequent acts looking to the acquisition of title from another source or by doubts as to the validity of his title. *Morgan v. White*, 50 C. A. 318, 110 S. W. 491.

Title by adverse possession cannot after its acquisition be defeated by declaration of the heirs of the one who so acquired it that she does not claim the land. *Smith v. Guinn* (Civ. App.) 131 S. W. 635.

Mere verbal relinquishment of a claim to land after title had vested by adverse possession held ineffective. *Cannon v. Producers' Oil Co.* (Civ. App.) 138 S. W. 803.

Where adverse possession had ripened into title, no admission made thereafter by the party having such title as to the nature of her present possession could affect her title. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

One who acquired title by limitations did not, by renting the premises from another and stating that he did not claim them, divest himself of the title acquired. *Louisiana & Texas Lumber Co. v. Stewart* (Civ. App.) 148 S. W. 1193.

One holding adverse possession of land for the statutory period acquires a title thereto which is not lost by a subsequent cessation of his possession. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

Where defendant and those under whom he claimed had acquired title by adverse possession, statements made thereafter, either by him or his predecessors, that during such period they did not assert such a claim as was necessary to mature title would deprive him of the title he had acquired. *Tate v. Waggoner* (Civ. App.) 149 S. W. 737.

Release of rights by person having title by adverse possession held not invalidated by false representation that other squatters had agreed to release their rights. where he

testified that he would have executed it had such representation not been made. *Davis v. Moyer* (Civ. App.) 155 S. W. 962.

**Separate property of wife.**—See notes under Art. 4621.

**Presumption of grant.**—See notes under Art. 3687, Rules 17 and 18.

**Art. 5680. [3348]. "Peaceable possession" defined.**—"Peaceable possession," within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate. [Acts 1841, p. 119, sec. 14. P. D. 4621.]

**In general.**—A statement that one had been in actual continuous possession implies peaceable possession. *East Texas Land & Improvement Co. v. Shelby*, 17 C. A. 685, 41 S. W. 542.

Peaceable possession of land held not broken by mere building of fence thereon by adverse claimant. *Cochran v. Moerer*, 47 C. A. 372, 105 S. W. 1133.

**Interruption by suit.**—See "Decisions Applicable to Subject in General," following this title, §§ 32-52.

Suit must be duly prosecuted to final judgment. *Shields v. Boone*, 22 T. 193; *Chambers v. Shaw*, 23 T. 165; *Highsmith v. Ussery*, 25 T. Sup. 96; *Hughes v. Lane*, 25 T. 356; *Edgar v. Galveston City Co.*, 46 T. 421; *Connoly v. Hammond*, 58 T. 11; *Flanagan v. Pearson*, 61 T. 302; *Bigham v. Talbot*, 63 T. 271.

Limitation is interrupted by suit, and abandonment of the suit will have the same effect as if the suit had never been instituted. *Bigham v. Talbot*, 63 T. 271.

A suit prosecuted to effect against the tenant in possession within ten years from the adverse entry by the landlord breaks the continuity of possession and avoids the defense of ten years' limitation when asserted by the landlord against the holder of the proper title. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

In order to stop the running of limitation by suit there must be a bona fide intention that process should be issued and served on the defendant within a reasonable time. When citation is not issued by reason of the failure of the plaintiff to give a bond for costs or to make an affidavit of his inability to pay or secure costs, limitation continues to run, notwithstanding the fact that the petition has been marked filed. *Ricker v. Shoemaker*, 81 T. 22, 16 S. W. 645. See *Bowles v. Smith* (Civ. App.) 34 S. W. 381.

A suit against a receiver interrupts limitations. *Railway Co. v. McCulloch* (Civ. App.) 24 S. W. 1101.

The statute held not to stop running in defendant's favor until he was actually made a party to a suit for the land. *Cable v. Jackson*, 16 C. A. 579, 42 S. W. 136.

Where parties in possession sue to remove cloud from title, and are defeated, limitations continue to run as against strangers to the suit. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

A continuous adverse possession under the statute can only be interrupted by the bringing of suit. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 37 S. W. 1148, 122 Am. St. Rep. 609.

The running of ten-year limitation in favor of one in adverse possession of land as against the true owner is not interrupted by the foreclosure of a tax lien and a sale thereunder. *Sellers v. Simpson*, 53 C. A. 205, 115 S. W. 888.

Suit against defendants by other parties for the land in controversy held not to affect the running of limitations in favor of defendants as against plaintiff. *Paterson v. Rector* (Civ. App.) 127 S. W. 561.

A sale under execution held not to break the running of the statute of limitations. *Kennon v. Miller* (Civ. App.) 143 S. W. 986.

The mere assertion by the owner of a claim to land adversely held, not made by suit against the adverse holder, will not prevent the statute from running. *Carr v. Alexander* (Civ. App.) 149 S. W. 218.

**Continuity of possession.**—See cases cited under Art. 5682.

When one ceases to have actual possession of land by sale of the improved portion or otherwise, he loses his constructive possession of the remainder. *Chandler v. Rushing*, 38 T. 591.

Possession of land must be unbroken for the full period. *Id.*

One who, being in possession of land, is driven from it by Indians, and resumes possession as soon as it is safe to return, cannot compute the period of his absence under the plea of limitation. *Fitch v. Boyer*, 51 T. 336.

Continuous adverse possession of a pasture is not interrupted by a failure for a time to keep up the fences so as to exclude others from the land. *Gunter v. Meade*, 78 T. 634, 14 S. W. 562.

Where the unimproved part of a tract of land is severed by sale from the improvements, ordinarily the statute ceases to run as to that part. *Tarleton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

The disseisin to support limitation must be continuous and uninterrupted to avail as limitation or prescription. If it be interrupted before the period of prescription has elapsed, prescription is annihilated and must begin de novo. *Cunningham v. San Saba County*, 11 C. A. 557, 32 S. W. 928, 33 S. W. 892.

Occupancy of part of a survey by the true owner interrupts adverse possession as to all of the survey not actually occupied by the adverse claimant. *Freedman v. Bonner* (Civ. App.) 40 S. W. 47.

The fact that defendant's predecessors, on whose adverse possession he relies did not divide the land claimed when they partitioned their real estate does not prove an abandonment of their claim. *Id.*

Evidence held sufficient to support the finding of continuous occupation. *Spicer v. Henderson* (Civ. App.) 43 S. W. 27.

Temporary vacancy for a short while, when it was clear that there was no intent to abandon possession, will not stop the running of the statute. *Collier v. Couts* (Civ. App.) 45 S. W. 485.

A finding that a defendant had not acquired title to realty by limitation is not error, where the evidence shows breaks in his possession. *Boyd v. Miller*, 22 C. A. 165, 54 S. W. 411.

An interruption of seven years in the possession of one claiming real property under the statute held fatal to his claim. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

Title by adverse possession is not given by the occupation of land for eight years, after which the occupant removes therefrom, and only manages the land for his mother, who owns a life estate therein, during the remainder of the statutory period. *Anderson v. Carter*, 29 C. A. 240, 69 S. W. 78.

In a country where much of the lands are unoccupied, continued possession is not indispensable to a presumption of a grant from the exercise of acts of ownership. *Ortiz v. State* (Civ. App.) 86 S. W. 45.

Where land claimed by adverse possession was vacant for an entire year during the period, such vacancy deprived the possessor of the right to count the time previously elapsing as a part of the period of limitation. *Wilson v. Nugent* (Civ. App.) 91 S. W. 241.

In trespass to try title, evidence of prior possession of land by defendant's predecessor in title held insufficient to authorize a judgment for defendant, in absence of proof of possession of the particular tract in controversy. *Cook v. Spencer* (Civ. App.) 91 S. W. 813.

Breaks in the occupancy of tenants of defendant, relying on adverse possession, held to break the continuity of the possession. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

The necessity of the continuous use of land to create title by adverse possession held not affected by the difficulty of procuring tenants. *Id.*

The uses to which land was put may be considered, in determining whether the intervals between the occupancy of different tenants was only such as might be considered as reasonably required for a change of tenants. *Id.*

An instruction as to adverse possession making a continued actual possession of the premises by defendant necessary to his recovery held proper. *Ragon v. Craver* (Civ. App.) 127 S. W. 1087.

A peaceable and exclusive possession taken and held under a claim of title confers title, but an abandoned possession does not have such effect in favor of him who held possession and then abandoned it, nor in favor of others seeking to avail themselves of such possession. *Kirby v. Boaz*, 103 T. 525, 131 S. W. 533.

If there was a break in the possession and occupancy of a part of a tract claimed by adverse possession, such possession was not sufficient to confer title to the whole tract. *Wm. M. Rice Institute v. Goolsbee* (Civ. App.) 134 S. W. 397.

Facts held to show continuous possession by occupant of land so as to confer title by adverse possession. *Bayle v. Norris* (Civ. App.) 134 S. W. 767.

Evidence held sufficient to show that defendant's father abandoned his occupancy and use of a survey before defendant's adverse claim to any part thereof. *Griffin v. Houston Oil Co. of Texas* (Civ. App.) 149 S. W. 567.

Generally, continuity of possession of an adverse claimant is not broken by the attornment of his tenant to another without his knowledge or consent; but the rule does not apply when the attornment is to the owner of the property, and was obtained by him without any notice that the person in possession, who attorns, is holding under one claiming adversely to him. *Louisiana & T. L. Co. v. Alexander* (Civ. App.) 154 S. W. 233.

The continuity of possession of land relied on by defendant in an action to recover land under a plea of limitations was interrupted by failure, for more than a year after execution of deeds under which he claims, to record them. *Snow v. Letcher* (Civ. App.) 154 S. W. 355.

Questions for jury.—See notes under Title 37, Chapter 13.

**Art. 5681. [3349] "Adverse possession" defined.**—"Adverse possession" is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Cited, *Hedrick v. Kilgore*, 57 C. A. 47, 121 S. W. 892.

In general.—By possession is meant either an actual residence on the land, or such cultivation, use or enjoyment of the same by visible, notorious acts of ownership as would give notice to the owner and others of the adverse possession of the land. *Kimbro v. Hamilton*, 28 T. 560.

Possession of lands must be actual, continuous, visible, notorious, distinct and hostile. *Chance v. Branch*, 58 T. 490; *Bracken v. Jones*, 63 T. 184; *Cantagrel v. Von Lupin*, 58 T. 570; *Parker v. Baines*, 65 T. 605; *Richards v. Smith*, 67 T. 610, 4 S. W. 571; *Dutton v. Thompson*, 19 S. W. 1026, 85 T. 115; *Donlon v. Lyons* (Sup.) 15 S. W. 578; *Brymer v. Taylor*, 23 S. W. 635, 5 C. A. 103; *Mhoon v. Cain*, 77 T. 316, 14 S. W. 24; *Beaumont Lumber Co. v. Ballard* (Civ. App.) 23 S. W. 920; *Hartman v. Huntington*, 11 C. A. 130, 32 S. W. 562.

To set the statute of ten-year limitation in operation, the possession must be an actual, visible appropriation of the land for the full period of ten consecutive years, under claim of right adverse to the true owner. *Beall v. Evans*, 1 C. A. 443, 20 S. W. 945.

The following instruction was held to be contrary to the above article: "What will in law constitute actual, visible and adverse possession is not susceptible of a definition, but must depend on the facts in evidence in each particular case, whether or not plaintiffs have had such possession." *Preston v. Hilburn* (Civ. App.) 44 S. W. 698.

In trespass to try title, a judgment by limitations, because of possession during a period in which no cause of action existed, is not warranted. *Sparks v. Hall*, 29 C. A. 177, 67 S. W. 916.

The rights of one who has acquired a title to lands cannot be barred by lapse of time, unaccompanied by adverse possession. *Lochridge v. Corbett*, 31 C. A. 676, 73 S. W. 96.

Possession of land, warranting a recovery in trespass to try title against one entering without title, must be actual, and must be so clearly defined as to give the claimant exclusive dominion over the property. *Lynn v. Burnett*, 34 C. A. 335, 79 S. W. 64.

An unlawful diversion of water to nonriparian lands by an upper owner under claim of right will ripen into title by limitations as against lower owners. *Clements v. Watkins Land Co.*, 36 C. A. 339, 82 S. W. 665.

Occupancy, use and inclosure held to confer title by adverse possession, under the ten-year statute, to a strip of land along a dedicated, but practically unused, street. *City of Houston v. Finnigan* (Civ. App.) 85 S. W. 470.

A showing of adverse possession for the statutory period of a portion of a lot does not authorize a recovery without evidence showing what portion of the lot was occupied adversely. *Wiley v. Bargman* (Civ. App.) 90 S. W. 1116.

Where the occupants claimed by adverse possession, that they occupied the property as a community homestead was no defense. *Breath v. Flowers*, 43 C. A. 516, 95 S. W. 26.

Actual possession, use, and enjoyment of land do not constitute adverse possession. *Earnest v. Lake*, 45 C. A. 463, 101 S. W. 479.

"Adverse possession" defined. *Holland v. Ferris* (Civ. App.) 107 S. W. 102.

As to what constitutes adverse possession, each case must be governed by the circumstances surrounding it. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

Definition of adverse possession held correct. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

It is only when a defendant is in possession of land shown to be plaintiff's property that he need invoke limitations to protect his possession. *Weston v. Meeker* (Civ. App.) 109 S. W. 461.

Elements of adverse possession stated. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

The court held to have properly defined adverse possession. *Texas & N. O. Ry. Co. v. A. G. & J. C. Broom*, 53 C. A. 78, 114 S. W. 655.

The owner of land can perfect title to adjoining land by limitations, where the facts show a distinct possession under an open hostile claim. *Id.*

One claiming adverse possession under a junior title overlapping an older survey must show an actual and visible appropriation of at least some part of the junior survey. *Lake v. Earnest*, 53 C. A. 555, 116 S. W. 866, 869.

Sufficiency of adverse possession to give title by limitation stated. *Downs v. Powell*, 54 C. A. 119, 116 S. W. 873.

Adverse possession sufficient to ripen into title must be adverse, peaceable, and continuous for ten years. *Louisiana & T. Lumber Co. v. Kennedy* (Civ. App.) 119 S. W. 884.

One who had never been in possession of the land, nor paid taxes on it, held not entitled to maintain trespass to try title against one who had paid taxes for sixteen years, under a claim of title, and held it adversely for five years, cultivating and improving it, though the latter is unable to show that the person under whom he claims was the person named in the bounty warrant for the land. *Kirby v. Boaz* (Civ. App.) 121 S. W. 223.

Where the court assumed that defendants' title was sufficient to sustain the three-year limitations and charged the statute, and the jury found that they had not held possession for three years, defendants were not injured by failure to charge the five and ten year limitations, since the character of possession necessary was the same under either statute. *Houston Oil Co. v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

Possession to vest title must be actual, continuing, visible, notorious, distinct, hostile, full, and open. *Jones v. Weaver* (Civ. App.) 122 S. W. 619.

Issuing a power of attorney to sue generally for lands held not an assertion of a claim adverse to that under a lost deed. *Masterson v. Harrington* (Civ. App.) 145 S. W. 626.

To sustain a plea of limitations, defendant was bound to show adverse, continuous, and unbroken occupancy of the land for the required period. *Snow v. Letcher* (Civ. App.) 154 S. W. 355.

Persons having exclusive possession, under claim of title, for seven years held entitled to sue for damages to abutting lot by construction and operation of railroad in public street. *Beaumont & G. N. R. Co. v. Yarbrough* (Civ. App.) 156 S. W. 252.

**Actual and visible appropriation.**—The fact that defendant paid taxes on land, used firewood from it, kept people from trespassing, and built hog pens on it, and used it as a ranch for his cattle and horses, but had made no other inclosure, or ever lived on or occupied the land, is not evidence of adverse possession. *Sellman v. Hardin*, 58 T. 86.

Casual and incomplete possession of land, evidenced by grazing stock on it, and constructing and fencing around a tank of water, is not sufficient. *Murphy v. Welder*, 58 T. 235. See *Richards v. Smith*, 67 T. 610, 4 S. W. 571; *Pendleton v. Snyder*, 24 S. W. 363, 5 C. A. 427, as to continuous possession.

The mere occupancy of land by grazing live stock upon it, without substantial inclosures or permanent improvements, is not sufficient to support a plea of limitation under our statute. *Fuentes v. McDonald*, 85 T. 132, 20 S. W. 43; *Whitehead v. Foley*, 28 T. 291, adhered to. *Tarleton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

Where more land is inclosed by a vendee than his deed calls for, and his vendee buys with reference to the inclosure, though his deed contains the same description as that of his vendor, his claim may become adverse. *Hand v. Swann*, 1 C. A. 241, 21 S. W. 282.

Possession not shown by a fence partially destroyed. *Tarrant Co. Ass'n v. Kit*, 10 C. A. 685, 31 S. W. 1080.

Exclusive actual possession is not acquired by setting posts a great distance apart, along the boundary of the land claimed. *Freedman v. Bonner* (Civ. App.) 40 S. W. 47.

Grazing cattle on uninclosed land is not sufficient possession to support the statute. *Vineyard v. Brundrett*, 17 C. A. 147, 42 S. W. 232.

Where adverse possession of pasture land is based on a fence, it must be sufficiently substantial to support reasonable protection against cattle. *Sharrock v. Ritter* (Civ. App.) 45 S. W. 156.

Cutting timber is not possession of such a character as will support a plea of limitations. *Soape v. Doss*, 18 C. A. 649, 45 S. W. 387.

An owner must be held to know his own boundaries but an encroachment so slight that it may have readily occurred through mistake, and which does not actually appropriate any substantial part of a large tract of land and which is evidenced only by a fence, is not such actual, visible appropriation as is required. *McAdams v. Moody* (Civ. App.) 50 S. W. 628.

One who has open, continuous, and notorious possession for over ten years, and who claimed the land, held to have acquired title by adverse possession, though the defendant allowed adjoining owners to cultivate a part of its right of way, and did not consider such use adverse unless so notified. *Texas & P. Ry. Co. v. Maynard* (Civ. App.) 51 S. W. 255.

Where a railroad track was constructed on land without permission of the owner, and remained there for ten years, but the use of the property for railroad purposes continued for only about six years, there was no such adverse possession as would entitle the railroad to hold the right of way by limitations. *Galveston & W. Ry. Co. v. Kinkead* (Civ. App.) 60 S. W. 468.

Partial inclosure of a large tract of land held not an actual and visible appropriation of the land. *Polk v. Beaumont Pasture Co.*, 26 C. A. 242, 64 S. W. 58.

The maintenance of a cemetery held to be an open, visible and notorious adverse possession. *City of El Paso v. Ft. Dearborn Nat. Bank*, 96 T. 496, 74 S. W. 21.

The fact that during the time of possession of land fences erected by the party in possession are allowed to be down for a short time in certain places does not operate to break his possession so as to interrupt the running of limitations. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937.

That a river on one side of land at times went dry held not as a matter of law to show want of adverse possession. *Dunn v. Taylor*, 42 C. A. 241, 94 S. W. 347.

That a portion of the land in controversy was wholly inclosed by water barriers held not to deprive defendant's possession of its effect to confer title by adverse possession under both the five and ten year limitations. *Loring v. Jackson*, 43 C. A. 306, 95 S. W. 19.

Purchaser of land residing thereon and cutting and selling timber on adjacent land held not to have acquired title to such adjacent tract by limitations. *Perry v. Stevens*, 44 C. A. 108, 97 S. W. 1075.

To constitute adverse possession, the party occupying the land must in some way appropriate the same to some purpose to which it is adapted, and mere occupancy without any evidence of an intention to appropriate the land will not support the statute. *Nona Mills Co. v. Wright*, 101 T. 14, 102 S. W. 1118.

An inclosure of land held insufficient to show adverse possession. *McDonald v. McCrabb*, 47 C. A. 259, 105 S. W. 238.

Though actual and substantial inclosure of land is conclusive evidence of possession, adverse possession may be shown where the land is not inclosed. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

It is not essential to an adverse claim that cultivation, use, and enjoyment be shown as only one of the three is required. *Hirsch v. Patton*, 49 C. A. 499, 108 S. W. 1015.

The occasional cutting of wood and pasturing of stock on uninclosed land by one claiming by adverse possession was not such actual possession and occupancy as would affect the constructive possession of the true owner. *Haynes v. Texas & N. O. R. Co.*, 51 C. A. 49, 111 S. W. 427.

The fact that land was inclosed held not sufficient use of the land to constitute adverse possession. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

The mere fact that a river, used as a barrier on one side of land, fenced on the other sides, was not a perfect barrier against stock, was not conclusive against the claim of possession of the land. *Id.*

One continuously occupying for fifteen years land marked off by him and cultivating it in part held to acquire adverse possession thereto. *Texas & N. O. Ry. Co. v. A. G. & J. C. Broom*, 53 C. A. 78, 114 S. W. 655.

To acquire an easement of way over lands of another by adverse possession for over ten years, the adverse possession must have been of a way within definite lines. *Sassman v. Collins*, 53 C. A. 71, 115 S. W. 337.

The inclosure of land without use is not sufficient to constitute adverse possession. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

If improvements, such as building houses, opening fields, etc., made by defendant's grantor on land, claimed by defendant by the adverse possession of such grantor, were located on the land claimed, it was immaterial on what particular part of the land they were located. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

In trespass to try title, in which one of defendants claimed by adverse possession of his remote grantor, evidence held to show the use and occupation of the land claimed by such grantor for over fifty years under an open and notorious claim to the whole tract, extending from a river to a certain road. *Rodriguez v. Priest* (Civ. App.) 126 S. W. 1187.

Where an inclosure consists partly of fences and partly of natural objects, it is for the jury to determine whether such inclosure gave sufficient notoriety of a claim of ownership to such tract, and, where a tract was fenced on three sides and the fourth side abutted on a stream and the entire tract was used as a pasture, it was for the jury to decide whether the inclosure was sufficient so as to establish adverse possession under the ten-year limitations, if an inclosure were necessary. *Frazer v. Seureau* (Civ. App.) 128 S. W. 649.

The occasional sale of shell from a shell bank on the land claimed held not such adverse possession as to support a claim of title by limitations. *Allen v. Clearman* (Civ. App.) 128 S. W. 1140.

Merely fencing land without actually using it in some manner is not such actual possession as will ripen into title. *Hermann v. Fenn* (Civ. App.) 129 S. W. 1139.

That one cut timber off of land and exercised acts of ownership over it held not a sufficient possession to mature into a title by limitation. *Davis v. George* (Civ. App.) 136 S. W. 505.

Mere occasional grazing is not sufficient, but continued cultivation is sufficient, as well as any visible and notorious acts evidencing an intention to claim ownership and pos-

session, and an inclosure is only an act indicative of possession and claim of ownership. *Stevens v. Pedregon* (Civ. App.) 140 S. W. 236.

Where the land comprised two cultivated fields, it was only necessary that one of the fields be cultivated in each year in order to maintain adverse possession of the whole tract. *Trueheart v. Graham* (Civ. App.) 141 S. W. 231.

Occasional cutting of timber and pasturing of cattle in an inclosure, containing the land in controversy with other lands, without proof of cultivation, continuous use, or enjoyment, held insufficient to show title by adverse possession. *Noland v. Weems* (Civ. App.) 141 S. W. 1031.

One occupying land adversely for ten years held to acquire title by adverse possession, regardless of the ownership or existence of any fence inclosing the land. *Cook's Hereford Cattle Co. v. Barnhart* (Civ. App.) 147 S. W. 662.

Where the occupants, claiming adversely, performed the necessary cultivation and used and enjoyed the land so as to indicate adverse possession, it was not material that for part of the time one of them was under age and both resided with their father on other land. *R. W. Wier Lumber Co. v. Conn* (Civ. App.) 156 S. W. 276.

**Entry on land.**—Possession under an inferior title will operate a disseisin of the holder of the superior title to the extent of the inferior, unless the holder of the superior title is in actual possession of some part of the land covered by his title. *Craig v. Cartwright*, 65 T. 413.

The constructive possession of land is terminated by the entry of the holder of the senior title. *Parker v. Baines*, 65 T. 609; *Evitts v. Roth*, 61 T. 84; *Hull v. Woods* (Civ. App.) 25 S. W. 458; *Duncan v. Matula* (Civ. App.) 26 S. W. 638.

The constructive possession of the real owner of land is not disturbed until the owner of a junior survey takes actual possession of some part of the conflict. *Parker v. Baines*, 65 T. 605; *Peyton v. Barton*, 53 T. 298; *Frisby v. Withers*, 61 T. 143; *Turner v. Moore*, 81 T. 206, 16 S. W. 929; *Roach v. Fletcher*, 11 C. A. 225, 32 S. W. 585; *Hartman v. Huntington*, 11 C. A. 130, 32 S. W. 562.

The elder title of a prior grantee draws to it the seisin of the entire tract covered thereby. The party claiming under a junior grant may, by taking actual possession, dispossess the prior grantee to the extent of the second grant. But upon actual possession being taken by the prior grantee, the adverse holding of the trespasser becomes limited to his actual inclosure and improvements. *Parker v. Baines*, 65 T. 605; *Evitts v. Roth*, 61 T. 81; *Frisby v. Withers*, 61 T. 134; *Whitehead v. Foley*, 28 T. 289; *Horton v. Crawford*, 10 T. 382; *Cunningham v. Frandtzen*, 26 T. 38; *Cantagrel v. Von Lupin*, 58 T. 570; *Anderson v. Jackson*, 69 T. 346, 6 S. W. 575.

One holding deed to land in constructive possession of another held to acquire adverse possession only to the portion which he holds in actual possession. *Zimmerman v. Kennedy* (Civ. App.) 52 S. W. 642.

Where an entry is made on land with permission of the owner, possession will be presumed to be permissive until distinctly repudiated by some hostile act shown to have been brought to the knowledge of the owner. *Meurin v. Kopplin* (Civ. App.) 100 S. W. 984.

Whatever the original character of an entry on land believed to be vacant, but in fact the property of an individual, with intent to acquire title from the state, the possession may subsequently become adverse as against the individual. *Hoencke v. Lomax*, 102 T. 487, 119 S. W. 842.

Where plaintiff's right to the land in controversy was made to depend on his adverse possession after forcible entry and detainer proceedings, whether his original entry was in the exercise of a supposed pre-emption right was immaterial. *Louisiana & T. Lumber Co. v. Kennedy* (Civ. App.) 119 S. W. 834.

If the real owner is in actual possession at the time of the entry of another claiming the land without title, the true owner is only ousted to the extent of the actual possession and occupation by inclosure for the full required period of limitation of the person so claiming. *Ragon v. Craver* (Civ. App.) 127 S. W. 1087.

When the real owner is in possession of land, one holding an inferior title is restricted to his actual possession. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

There is a presumption at all times in favor of the true owner, and he is deemed by law to have possession coextensive with his title, unless actually ousted by the personal occupation of another, so that, whenever such occupation ceases, the title again draws to it the possession and restores the seisin of the owner, and a subsequent entry, even by the same wrongdoer and under the same claim of title, constitutes a new disseisin, from the date of which the statute takes a fresh start. *Id.*

**Possession as notice.**—See, also, cases under subdivision 2, *supra*.

Possession by a tenant is constructive notice of his landlord's unrecorded deed. *Watkin v. Edwards*, 23 T. 443; *Hawley v. Bullock*, 29 T. 216; *Mullins v. Wimberly*, 50 T. 466; *Mainwarring v. Templeman*, 51 T. 212; *League v. Snyder*, 23 S. W. 825, 5 C. A. 13.

The owner of land is chargeable with notice of its locality and boundaries, and the meaning and locality of every adverse settlement, and cannot set up his ignorance of the claim of right of an adverse occupant to defeat limitation. *Brownson v. Scanlan*, 59 T. 222.

When a possessor holds under written muniments of title, which the law does not require to be registered, or notice of given in some particular way as a condition on which the holding will be held sufficient to sustain limitation, the effect of an open, visible, substantial possession, such as an owner or one holding under him is alone entitled to, operates as notice to the owner of whatever claim the possessor asserts. *Craig v. Cartwright*, 65 T. 413.

Limitation not interrupted by temporary breaks in the inclosure, if enough is seen to give notice. *Williams v. Rand*, 30 S. W. 509, 9 C. A. 631.

Possession of land is notice of the claim under which it is held. *Allison v. Pitkin*, 11 C. A. 655, 33 S. W. 293.

Where land was bounded on three sides by water, and on the fourth by a fence erected by the adjoining owner, held, that the fact that an occupant of the premises main-

tained such fence was not notice to the true owner of an adverse claim. *Vineyard v. Brundrett*, 17 C. A. 147, 42 S. W. 232.

Where the holder of the equitable title caused the legal title to be placed in a third person, the mere fact of the former's occupancy would not notify one dealing with the third person that the possession was hostile to the legal title. *Montague County v. Meadows* (Civ. App.) 42 S. W. 326.

Testimony that the land in suit was generally known to be the land of claimant, offered to show that a claim of adverse possession was notorious, was properly excluded. *Preston v. Hilburn* (Civ. App.) 44 S. W. 698.

Failure of public to fence passway over mountain held not to prevent its use being notice to the owner of the land. *Hall v. City of Austin*, 20 C. A. 59, 48 S. W. 53.

Where acts done on land give notice of an adverse claim, accompanied by actual possession exclusive in character, limitations run in favor of the adverse possessor from the time occupancy commenced, whether the land be inclosed or not. *Zepeda v. Hoffman*, 31 C. A. 312, 72 S. W. 443.

Evidence held sufficient to show notice of plaintiffs' adverse possession. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

The mere occupancy of a tract of wild land for camping and hunting purposes did not constitute such adverse possession as would notify the owner that his land was being claimed. *Nona Mills Co. v. Wright*, 101 T. 14, 102 S. W. 1118.

Possession of land to be adverse must be of that character which would notify the owner of the intention of the occupant of the land to appropriate it to his own use. *Id.*

Where it is the custom to use a river as a barrier on the side of inclosures, a tract of land is sufficiently inclosed to give notice of an adverse holding if it is fenced on all sides except along such river. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.

Where a tenancy at will was created merely for the purpose of allowing the tenant's cattle and horses to graze upon the land, and a third person entered upon and used the land with the consent and under the right of the tenant, the grazing of the third person's cattle and horses on the land held not of itself sufficient notice to the landlord of adverse possession by such person. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

In order to acquire title by adverse possession, claimant's holding must be such as is reasonably calculated to put the true owner on notice that his title is being contested by an adverse claimant. *Craver v. Ragon* (Civ. App.) 110 S. W. 489.

Where one claimed land used as a pasture by adverse possession, and showed that the land was inclosed on three sides by a fence, and on the fourth by a river, evidence that the river above and below was generally used as a barrier for pastures held admissible to indicate to the owner that the land was appropriated and used by others. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

Where one had never lived on a 160-acre tract, and only cultivated a few acres thereof in connection with a larger tract adjacent thereto, his possession was insufficient to notify the owner of an adverse claim thereto. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

One who entered upon land under a duly recorded deed thereto, and held it adversely to the world, need not otherwise repudiate the title of others claiming the land, or notify them of his claim of title, in order to set limitations running. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

The possession of a purchaser was not so visible and notorious that it could be notice to the owner, and could ripen into title by adverse possession. *Jones et al. v. Weaver et al.* (Civ. App.) 122 S. W. 619.

An encroachment on the land of another, which does not appropriate some substantial portion of the land sufficient in extent to give notice to the owner of an adverse claim to the land, will not support a plea of limitation. *Bartine v. McElroy* (Civ. App.) 123 S. W. 1174.

Possession of land held such as to constitute an ouster and notice thereof to others, notwithstanding their nonresidence and actual ignorance. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

If the statute begins to run so as to sustain a claim of adverse possession, it will not be interrupted on the ground that a subsequent purchaser had no notice of the facts setting it running. *Eastham v. Gibbs* (Civ. App.) 125 S. W. 372.

Evidence held to show the use and occupation of the land claimed by defendant's grantor for over 50 years under an open and notorious claim to the whole tract, extending from a river to a certain road. *Rodriguez v. Priest* (Civ. App.) 126 S. W. 1187.

Possession held not sufficiently notorious to support a claim by adverse possession. *Bender v. Brooks*, 103 T. 329, 127 S. W. 168, Ann. Cas. 1913A, 559.

That a tract was fenced on three sides and was bounded on the fourth side by a bayou held notice that the possessor claimed all the land within such boundaries. *Frazer v. Seureau* (Civ. App.) 128 S. W. 649.

The registration of a deed held not notice of possession, so as to support a claim by adverse possession. *Lynch v. Lynch* (Civ. App.) 130 S. W. 461.

A second wife's continued possession of land, acquired during a first marriage, after the husband's conveyance thereof to her, held not to start the statute against his children by his first marriage, until notice that she was claiming under the deed. *Id.*

The extent of the encroachment on land held to determine its sufficiency as notice of an adverse claim to land not actually occupied. *Wm. M. Rice Institute v. Goolsbee* (Civ. App.) 134 S. W. 397.

Certain acts and records held notice of an adverse claim. *Hill v. Collier* (Civ. App.) 135 S. W. 1084.

The encroachment rule, with reference to occupancy of land along a division line, did not apply, where defendants had inclosed, occupied, and used the land in controversy for more than 25 years, and their possession was open and notorious. *Cannon v. Producers' Oil Co.* (Civ. App.) 138 S. W. 803.

Where a grantee and his grantor occupied for more than ten years, under claim of ownership, a tract inclosed by a fence, except where a marsh and bayou served as a barrier against stock, and the parties claimed the land as bounded by lines of a survey on the ground, the grantee acquired title under the 10-year limitation against one having

notice of the claim, though the field notes in the patent for the tract placed it elsewhere. *Kansas City Oil & Rice Land Co. v. Ogden* (Civ. App.) 140 S. W. 808.

Ordinarily title by limitations may be acquired without reference to whether the real owner has notice of the doing of those things which under the statute matures the title by limitations. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

Where one who held an entire tract of land under color of title actually used and cultivated part of the tract for the statutory period, his adverse title to the whole is established, such possession being an encroachment sufficient to give notice to the owner. *Wm. Cameron & Co. v. Cuffie* (Civ. App.) 144 S. W. 1024.

A recorded deed to a portion of a tract of land, together with the grantors' continued possession of the remainder of the tract, was notice to a cotenant of the grantors that they were asserting adverse claim to the entire tract, and made their possession open, notorious, and adverse as to the cotenant. *Carr v. Alexander* (Civ. App.) 149 S. W. 218.

Plaintiffs were presumed to know the true location of their boundaries and were bound to take notice of the inclosure of a part of their lands. *Sanders v. Moore* (Civ. App.) 157 S. W. 441.

**Possession of part.—See Art. 5676.**

The actual possession of a subdivision of a large tract of land does not extend to other subdivisions owned by different persons. *Peyton v. Barton*, 53 T. 298; *Bunton v. Cardwell*, 53 T. 412; *Parker v. Baines*, 65 T. 605; *Turner v. Moore*, 81 T. 206, 16 S. W. 929; *Faison v. Primm* (Civ. App.) 34 S. W. 834.

Where, in an action to try title to 35 acres, defendant showed adverse possession of a tract of 5 or 6 acres thereof, but did not identify such tract, so that it could be described in the judgment, a judgment for plaintiff for the whole 35 acres should not be reversed. *Wilcoxson v. Howard*, 26 C. A. 281, 62 S. W. 802.

When the fence of an adjoining owner extended into and inclosed 35 acres of a tract of 207 acres, occupation of such 35 acres for ten years does not constitute adverse possession of, and give title to, the 207-acre tract. *Hall v. Clountz*, 26 C. A. 348, 63 S. W. 941.

Where, in trespass to try title, the only possession shown for a certain period was of distinct parts of the land, aggregating less than the entire tract, and no parcel is identified, a judgment for title by limitation is not warranted. *Sparks v. Hall*, 29 C. A. 177, 67 S. W. 916.

Where the unimproved part of a tract of land is severed by sale from the improved part, limitations, based on occupancy of the improved part, ceases to run. *Kirkpatrick v. Tarlton*, 29 C. A. 276, 69 S. W. 179.

The maintenance of a cemetery on part of a tract claimed under color of title held to be constructive adverse possession of the whole tract. *City of El Paso v. Ft. Dearborn Nat. Bank*, 96 T. 496, 74 S. W. 21.

Where the owner of a tract is in possession of a part of the land, he has constructive possession of the whole tract as against an adverse claimant of the part not occupied by such owner. *Peden v. Crenshaw*, 98 T. 365, 84 S. W. 362.

The principle that an owner in actual possession of a portion of land, claiming title to the whole, has the constructive possession of all the land, held not applicable where an intruder claims land against another. *Morris v. Jacks* (Civ. App.) 96 S. W. 637.

Where plaintiff and defendant each claimed title to land by limitations, and each was in actual possession of a part only, claiming title as against the other to the whole by constructive possession, neither acquired title as against the other to any of the land which was not in his actual possession. *Id.*

Plaintiff held to have had constructive possession of land within the true boundary lines of the survey only. *Davidson v. Equitable Securities Co.* (Civ. App.) 96 S. W. 787.

Certain actual adverse possession of part of a tract of land held to constitute constructive possession of the whole tract. *Ridgell v. Atherton* (Civ. App.) 107 S. W. 123.

Entry upon part of the land by the true owner, by tenants, held to give him constructive possession of the entire tract except as inclosed by adverse holders, and such entry was sufficient to stop their adverse possession of land not inclosed. *Haynes v. Texas & N. O. R. Co.*, 51 C. A. 49, 111 S. W. 427.

Adverse possession of land extends to the entire tract claimed, unless a part thereof is in the actual possession of another during some of the period of limitation. *Thacker v. Wilson* (Civ. App.) 122 S. W. 938.

The possession of one actually in possession of land within lines fixed and acknowledged held not subject to extension by construction to other land. *Blaske v. Settegast* (Civ. App.) 123 S. W. 220.

Plaintiff held to have had actual possession of three of the quarter sections of a section, and constructive possession of the whole section, except such part of the remaining quarter as defendant actually occupied. *Thompson v. Texas & N. O. R. Co.* (Civ. App.) 123 S. W. 616.

Evidence of possession of a small portion of a tract held not sufficient on which to base an adverse claim to the entire tract. *Bartine v. McElroy* (Civ. App.) 123 S. W. 1174.

Adverse possession held sufficient to create title to the whole of a tract under the ten-year limitations. *Rodriguez v. Priest* (Civ. App.) 126 S. W. 1187.

Where one perfects title to a tract by limitations through adverse possession of only a part thereof, he may rely upon such title obtained by possession of such part in suing for the unoccupied part, though title to the occupied part was not put in controversy. *Basham v. Stude* (Civ. App.) 123 S. W. 662.

Where an original survey, previous to commencement of the possession within it, had been subdivided, held, no title by adverse possession could be acquired outside the subdivision to which actual possession was confined. *Mayhan v. McManus* (Civ. App.) 130 S. W. 881.

Possession of a part of a 160-acre tract held sufficient to raise the issue of notice to the owner of adverse claim to the whole thereof. *Wm. M. Rice Institute v. Goolsbee* (Civ. App.) 134 S. W. 397.



An owner of land in possession of part held to have constructive possession of the entire tract, save that in the actual possession of a trespasser. *Sanders v. Thompson Bros. Lumber Co.* (Civ. App.) 139 S. W. 1004.

Defendant held to have acquired title to an entire survey by adverse possession; his possession of part being constructive possession of the whole. *Long v. Thompson & Tucker Lumber Co.* (Civ. App.) 140 S. W. 501.

Plaintiff, establishing a right to 160 acres of a larger tract, held entitled to have that area surveyed out of the larger tract. *Louisiana & Texas Lumber Co. v. Kennedy* (Civ. App.) 142 S. W. 989.

Where one and his ancestors asserted ownership to 150 acres, adjoining a survey on which they lived, and they cleared about 50 acres of the land and cultivated the same, and such acts of ownership continued for over ten years, title to 150 acres was acquired by limitations. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

**Hostile character of possession.**—See cases under "Claim of right," infra.

Occupying land under belief that it was vacant, with intent to obtain title from the state, is not adverse possession. It is not necessary that the owner be known in case of occupancy under claim of ownership. *Schleicher v. Gatlin*, 85 T. 270, 20 S. W. 120; *Norton v. Collins*, 20 S. W. 1113, 1 C. A. 272; *L. & H. Blum Land Co. v. Rogers*, 11 C. A. 184, 32 S. W. 713. A contrary ruling is made in *Converse v. Ringer*, 6 C. A. 51, 24 S. W. 705.

Limitation does not run until possession of land is adverse. *Oury v. Saunders*, 24 S. W. 341, 5 C. A. 310. Evidence is admissible to explain the character of the possession. *Waller v. Leonard* (Civ. App.) 34 S. W. 799.

Possession is adverse although it was taken and held under a mistaken belief that the land so held was public land. *Converse v. Ringer*, 24 S. W. 705, 6 C. A. 51.

An agreement to surrender possession of land is evidence that possession is not adverse. *Eldridge v. Parish*, 25 S. W. 49, 6 C. A. 35; *Mhoon v. Cain*, 77 T. 316, 14 S. W. 24; *Railway Co. v. Wilson*, 83 T. 157, 18 S. W. 325; *Warren v. Frederichs*, 83 T. 384, 18 S. W. 750.

Irrigation company held not to have been in adverse possession of lands of one of its members or of easement therein, its possession being permissive. *Toyaho Creek Irr. Co. v. Hutchins*, 21 C. A. 274, 52 S. W. 101.

Defendant's possession need not only be adverse to plaintiff who is asserting title. *Beaumont Pasture Co. v. Polk* (Civ. App.) 55 S. W. 614.

Where land is purchased as the separate property of a wife, and is jointly occupied by her and her husband, his continued occupancy after her death, without denying the right of her children therein, will not cause limitations to run against them. *Dyer v. Pierce* (Civ. App.) 60 S. W. 441.

Where a widow and child were in adverse possession of land, and she married, an agreement by the husband with the true owner to purchase stopped the running of limitations in favor of the widow and child. *Texas & N. O. R. Co. v. Speights*, 94 T. 350, 60 S. W. 659.

Where plaintiff's grantor was in possession of land under a claim of ownership for ten years, the adverse character of such possession was not affected by plaintiff's afterwards consenting to a survey, or by what he said as to his views of where the true line was situate. *Mann v. Schueling* (Civ. App.) 68 S. W. 292.

Where a husband conveyed his homestead to his wife for a consideration moving from her separate estate, his possession of the premises thereafter was not adverse to her. *Hunter v. Magee*, 31 C. A. 304, 72 S. W. 230.

The naked possession of land, to give occupant title by adverse possession, must be adverse to the entire world, including the supposed owner. *Flewellen v. Randall*, 32 C. A. 361, 74 S. W. 49.

Purchase of land from a certain person held not recognition of an adverse title in a third person on the part of the purchasers. *Pendleton v. McMains*, 32 C. A. 575, 75 S. W. 349.

A wife cannot acquire title to her husband's lands by adverse possession during the continuance of the marriage relation where he has abandoned her without cause. *Cervantes v. Cervantes* (Civ. App.) 76 S. W. 790.

Possession of land is adverse to the true owner under the ten-year statute, though under the erroneous belief that it is vacant land. *Price v. Eardley*, 34 C. A. 60, 77 S. W. 416.

Claim of title by adverse possession held defeated by proof of acknowledgment of superior title of another. *Weisman v. Thomson* (Civ. App.) 78 S. W. 728.

An instruction requiring adverse possession to be hostile to the claim of plaintiffs and all others held erroneous. *Whitaker v. Thayer*, 38 C. A. 537, 86 S. W. 364.

Persons in possession of land which they believe belongs to the state held mere squatters, and not in adverse possession thereof. *Id.*

That complainant permitted defendant to move complainant's cabin some 20 or 30 feet, in order that defendant might sell certain adjoining land, held insufficient to establish, as matter of law, that complainant did not claim adversely to defendant. *West v. Webster*, 39 C. A. 272, 87 S. W. 196.

Person entering land believing it to be vacant, and holding hostile to all except the state, held to acquire title by limitation, if holding is for requisite time. *Village Mills Co. v. Manley*, 42 C. A. 420, 94 S. W. 102.

A person who enters upon land with the knowledge that he has no title and that another has, but with the intention to occupy it in hostility to all the world, and does so occupy it openly and visibly, is in adverse possession, and if he so holds it for ten years he acquires title by limitation. *Link v. Bland*, 43 C. A. 519, 95 S. W. 1110, 1111.

Possession of a party to a partition agreement which acknowledged the existence of a locative interest in the land outstanding in H., and the possession of a grantee of such party, held in subordination to such interest and not adverse. *Surghenor v. Tallaferro* (Civ. App.) 98 S. W. 648.

Where testator held possession of a strip of land in controversy under an agreement with plaintiff, mere lapse of time of itself held insufficient to make testator's possession adverse. *Crosby v. First Presbyterian Church of El Paso*, 45 C. A. 111, 99 S. W. 584.

If one claims land against the world, the statute is set in motion, but if he merely claims it tentatively, subject to the result of inquiry as to whether it is within his boundaries, the claim is not adverse. *Wiess v. Goodhue*, 46 C. A. 142, 102 S. W. 793.

The plea of adverse possession presented as a defense to an action to recover real estate held not based alone on lapse of time, but an assertion of title in defendant, which may be the basis of affirmative relief against any claimant. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

A party taking possession of land under the mistaken belief that it is vacant, with intent to acquire title under the homestead laws, may acquire title by ten years' adverse possession. *Morgan v. White*, 50 C. A. 318, 110 S. W. 491.

The adverse possession of devisees of community property as against the widow of testator held not to be destroyed by their acceptance of a deed from her. *Frey v. Myers* (Civ. App.) 113 S. W. 592.

Persons cannot acquire a passway by prescription by holding for the statutory period where they were holding it as a way of necessity, except for a time less than the statutory period. *Sassman v. Collins*, 53 C. A. 71, 115 S. W. 337.

The use of a passway across the land of another in common with others of the general public is not sufficient to create a prescriptive right to the way, though it be used for the prescriptive period. *Id.*

The use of a way over the land of another is not deemed adverse where the way is also used by the owner of the land; the use by those other than the owner being presumed to be with the owner's consent, and not adverse. *Id.*

The right to a passway by prescription would be lost by changes in position of the way before limitation had run, though the change were made by agreement of the parties. *Id.*

Possession of land may be adverse as against the true owner, though the possessor believes that the land is public domain and expects to buy it from the state. *Sellers v. Simpson*, 53 C. A. 205, 115 S. W. 888.

A woman in possession of and claiming land as the wife of a man to whom the title was conveyed does not have such adverse possession as will confer a right on her. *Hayworth v. Williams*, 102 T. 308, 116 S. W. 43, 132 Am. St. Rep. 879.

The adverse possession of vacant lands, believing them to be state lands, held not affected by the fact that it was private property. *Hoencke v. Lomax*, 55 C. A. 189, 118 S. W. 817.

A husband's possession of land by reason of the marital relation is not adverse to the wife. *Watkins v. Watkins* (Civ. App.) 119 S. W. 145.

One entering and holding land under the belief that it is vacant public land, with the intention of acquiring title from the state, is not holding adversely to the true owner. *Jones v. Weaver* (Civ. App.) 122 S. W. 619.

Possession of land in controversy taken by W. held subordinate to D., and was therefore available to continue D.'s possession to establish title by the ten-year statute of limitations. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

Occupancy of land under mistaken belief that it is public land and with intention to pre-empt held not adverse to owner. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

A possession taken and held under the mistaken belief that the land is public domain, with the purpose of acquiring it from the state by complying with the law, held insufficient to show that the possession is hostile to any one. *Smith v. Jones*, 103 T. 632, 132 S. W. 469, 31 L. R. A. (N. S.) 153.

Under the statutes a claim to land may be only such as is involved in a mere maintenance of possession of and the exercise of dominion over the land, provided there is present the attitude of hostility and exclusiveness toward the true owner. *Id.*

To establish title by adverse possession, the possession must have been hostile for the whole period of the statute. *Rushing v. Lanier* (Civ. App.) 132 S. W. 528.

One in adverse possession of another's land claiming an easement acquires an easement as of right after the continuance of such possession for ten years. *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

Proof that a landowner, on rebuilding a fence, agreed to surrender the land in controversy inclosed therein to plaintiff whenever demanded, did not show that she had not previously been claiming the land adversely. *Cannon v. Producers' Oil Co.* (Civ. App.) 133 S. W. 803.

An agreement held not to constitute an acknowledgment of title interrupting running of limitations. *Surghenor v. Ayers* (Civ. App.) 139 S. W. 28.

Where plaintiff in a suit for land secured possession of the same under a writ of sequestration, and held the same for 10 years until plaintiff's suit was dismissed for want of prosecution, that holding did not ripen into a prescriptive right as the land was in custodia legis. *McAllen v. Crafts* (Civ. App.) 139 S. W. 41.

That R. and G., when they sought to acquire certain land, believed it to be public land, and intended to obtain it by pre-emption, could not affect R.'s right by adverse possession after purchasing the rights of G. *Trueheart v. Graham* (Civ. App.) 141 S. W. 281.

Entry held not by permission, but such that title by adverse possession could be acquired without repudiation of a permissive possession and a claim under right. *Lutcher v. Grant* (Civ. App.) 143 S. W. 1190.

In trespass to try title, evidence held to show the hostile possession of defendants and their grantors for more than ten years. *Wm. Cameron & Co. v. Cuffie* (Civ. App.) 144 S. W. 1024.

A permissive possession does not ripen into title by adverse possession, unless such possession has been repudiated so as to convey notice of an adverse claim followed by possession thereunder for ten years. *Ferrell v. Delano* (Civ. App.) 144 S. W. 1039.

The joint use of a party wall is not an adverse use by one of the parties of the land of the other. *Fewell v. Kinsella* (Civ. App.) 144 S. W. 1174.

Where one in the possession of land of another sells it as his own, he asserts title in himself hostile to the owner's title, sufficient to ripen into title by limitation, though he has previously stated that he was not claiming the land, but desired to buy from the

owner. *Louisiana & T. Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 147 S. W. 604.

Permissive use of a road or way across uninclosed land does not ripen into a right, however long existing. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

An easement of way can only be acquired by express grant or by implied grant as a way of necessity or by prescription or limitation. *Williams v. Kuykendall* (Civ. App.) 151 S. W. 629.

To establish a way by prescription, there must be an adverse user of the same against the owner. *Id.*

Where land, constituting the separate property of a husband, was occupied by himself and wife as his homestead, her possession thereof after his death, either in person or by a tenant renting it temporarily, was not adverse to a grantee of a child of the parties. *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

A possession, to be adverse, must be hostile to the true owner, and there must be a coincident intention to claim title; and, where one claimed only to the true line between his property and adjacent premises, there was no adverse holding except to the true line. *Shaw v. Windham* (Civ. App.) 155 S. W. 636.

One claiming only a right to be on the land as a licensee, and not a right to or in the land, is not holding adversely to the owner. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

**Claim of right.**—See cases under "Hostile character of possession," supra.

Possession, with the exercise of such rights as pertain to the owner alone, is sufficient in the absence of evidence indicating that it is held in subordination to the title of the real owner. *Craig v. Cartwright*, 65 T. 413.

Occupation by successive parties with occasional cultivation for the term of ten years, without claim of ownership, will not support the plea of ten-year limitation. *For-sod v. Golson*, 77 T. 666, 14 S. W. 232.

Possession obtained under a belief that all claims against the land in favor of an estate have been paid, and continued open and notorious for fifteen years, constitutes title by adverse possession. *Smith v. Pate*, 91 T. 596, 45 S. W. 6.

That adverse possession was under mistaken belief that land was covered by deed held immaterial. *Jayne v. Hanna* (Civ. App.) 51 S. W. 296.

The fact that defendant asserted title to land as a part of a particular survey held not to defeat the adverse character of his possession, though the land in fact was not a part of that survey. *Daughtrey v. New York & T. Land Co.* (Civ. App.) 61 S. W. 947.

In trespass to try title, held error to refuse to charge that failure of the true owner to evict a trespasser is not evidence that he had abandoned title. *Lackey v. Bennett* (Civ. App.) 65 S. W. 651.

Where defendant in 1902 filed a verified petition to enjoin plaintiff from doing work on a certain street, alleging said street had been dedicated to the public and used for more than 30 years, he was not in a position to claim title to the street under the statute. *Heard v. Connor* (Civ. App.) 84 S. W. 606.

Where a wife claimed certain lots as her separate property, and denied her husband's community interest, her occupancy of the property held to vest her with title by adverse possession as against her husband's heirs. *Heidelberg v. Behrens* (Civ. App.) 85 S. W. 1029.

An acknowledgment of an intent to purchase by person in possession of land held fatal to a claim of adverse possession, if made within the limitation period. *Whitaker v. Thayer*, 38 C. A. 537, 86 S. W. 364.

Assertion that another is the owner of land held not abandonment of all claim to the land, so as to preclude the one making the assertion from relying on adverse possession by tenant. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609.

Admission of nonclaim made by party in possession held not to affect the adverse character of his possession as to premises not within the scope of the admission. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937.

Where a person in possession admitted that he did not claim the property, his possession did not become adverse until the giving of actual or constructive notice of a change in the character of his possession. *Id.*

One who took and held possession of land under a mistaken belief that it extended to a certain fence held to have acquired title. *Logan v. Meade*, 43 C. A. 477, 98 S. W. 210.

Defendant held not entitled to claim adverse possession of a narrow strip of land along the boundary line between his land and plaintiff's, and inclosed by defendant, where prior to the ten-year bar they employed a surveyor to run the line, and defendant did not then reserve his claim to hold to plaintiff's fence, including such strip. *McDonald v. McCrabb*, 47 C. A. 259, 105 S. W. 238.

Statement of interest acquired by adverse possession where one takes possession for himself and another without understanding with the other. *Frey v. Myers* (Civ. App.) 113 S. W. 592.

Possession, to be adverse, must be with the intent to claim the land occupied. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, *Id.*

In trespass to try title, in which defendant claimed by the adverse possession of his grantor, entry upon the land under a deed, and making improvements thereon, held to show prima facie that such possession and use were based upon the deed, and a claim of title to the entire tract thereunder. *Merriman v. Blalack*, 57 C. A. 270, 122 S. W. 403.

To make possession adverse, it must be such as to unmistakably indicate an assertion of claim of exclusive ownership in the occupant. *Bender v. Brooks*, 103 T. 329, 127 S. W. 168, Ann. Cas. 1913A, 559.

The statute, declaring that land must be held under a claim of right inconsistent with and hostile to the claim of another, refers to a claim of the possessor when he is holding only for himself, and a claim to satisfy the statute may be only such as is involved in a mere maintenance of possession of and the exercise of dominion over the land, provided there is present the attitude of hostility and exclusiveness towards the true owner; but the facts must give rise to the inference of a claim or an attitude of that character where

there is no color or claim of title. *Smith v. Jones*, 103 T. 632, 132 S. W. 469, 31 L. R. A. (N. S.) 153.

Where a party has purchased a tax title, and has had possession of the premises purchased for the period necessary to perfect title, the fact that after getting a tax title he bought out the interests or claims of some of the former owner's heirs does not prevent his title from being adverse to them, as he could buy his peace without admitting their title. *Houston Oil Co. v. Davis* (Civ. App.) 132 S. W. 808.

The failure of one in possession of land to make a claim against a railroad company when it built a line across such land was not necessarily sufficient to defeat his right to hold it under a claim of limitations, though his purpose was to conceal the fact of his claim to the land. *Fleming v. Mistletoe* (Civ. App.) 133 S. W. 923.

An agreement for partition of land, reciting an unsettled claim by the heirs of a third person, and providing that one of the partners would settle with the heirs, so that the other would receive his allotment clear, was not such acknowledgment of the heirs' title as to prevent running of limitations against them. *Surgeur v. Ayers* (Civ. App.) 139 S. W. 28.

Where one took possession of land inclosed by a fence which included a strip belonging to an adjacent owner, believing he took possession of his own land, continued in possession for ten years, claiming it as his own and living on it held, that he acquired title by adverse possession, as against the objection that his possession was by mistake. *Arnold v. Evans* (Civ. App.) 140 S. W. 497.

Vendor and purchaser.—See cases under "Vendor and purchaser," cited under Art. 5682.

When the vendee repudiates the contract with his vendor, his possession becomes adverse. *Cook v. Knott*, 28 T. 85. And see *Walker v. Emerson*, 20 T. 706, 73 Am. Dec. 207; *Estes v. Browning*, 11 T. 237, 60 Am. Dec. 238; *Browning v. Estes*, 3 T. 462, 49 Am. Dec. 760.

When both the vendor and vendee are in possession of land, the possession, so far as it affects third parties, is with him who has title. *Cameron v. Romele*, 53 T. 238.

Where the land conveyed is public land, to which the vendor has no title, the vendee, on discovering that the land is vacant, is not bound to surrender or abandon possession, but may appropriate the land himself. *Howard v. McKenzie*, 54 T. 171, citing *Cravens v. Brooke*, 17 T. 268; *Jennings v. De Cordova*, 20 T. 508; *Spier v. Laman*, 27 T. 205; *Wheeler v. Styles*, 28 T. 243; *Rodgers v. Dally*, 46 T. 583. And see *Young v. O'Neal*, 54 T. 544.

A., by deed of gift, conveyed to his children and their heirs land with warranty of title, reserving the right to manage and control, etc., during his life. The possession of the grantees was the possession of the grantor, and limitation did not run in favor of the grantees. *Bombarger v. Morrow*, 61 T. 417.

Possession under an executory contract is not adverse until the relation of vendor and vendee is repudiated by one of the parties within the knowledge of the other. *Pearson v. Boyd*, 62 T. 541; *Roosevelt v. Davis*, 49 T. 463; *Johnson v. Newman*, 43 T. 628; *Howard v. McKenzie*, 54 T. 171.

Possession by virtue of an executory contract with one who himself claims under a like contract from the patentee is not adverse to that of the patentee till the latter repudiates his contract by selling to other parties, in which case possession under the executory contract becomes adverse to that of the second vendee. *Pearson v. Boyd*, 62 T. 541, citing *Roosevelt v. Davis*, 49 T. 463; *Keys v. Mason*, 44 T. 144. And see *Craig v. Cartwright*, 65 T. 413.

That the grantor in a deed remained in possession acknowledging the title to be in the grantee does not show adverse possession. *Nichols v. Nichols*, 79 T. 332, 15 S. W. 272; *L. & H. Blum Land Co. v. Rogers*, 11 C. A. 184, 32 S. W. 713.

A vendee entering upon land under an executory title holds by consent, and cannot plead limitation until he shows a repudiation of the contract under which he entered. *Smith v. Lee*, 82 T. 124, 17 S. W. 598.

Mere possession by vendor or an entry by consent, is not sufficient to support limitation. *Evans v. Berlocher*, 83 T. 612, 19 S. W. 158; *Stanley v. Schwalby*, 85 T. 348, 19 S. W. 264; *Murphy v. Welder*, 58 T. 235.

Grantors in a deed imperfectly describing the land conveyed are not required to bring suit for land that the deed erroneously purports to convey, until the grantees assert some claim thereto. *Pope v. Riggs* (Civ. App.) 43 S. W. 306.

A vendee in possession under a deed which reserves a vendor's lien holds in subordination to the title of the vendor until he repudiates the same. *Smith v. Pate* (Civ. App.) 43 S. W. 312.

Facts held to show adverse possession on the part of a purchaser as against the vendor. *Durst v. Skillern* (Civ. App.) 45 S. W. 840.

Possession under deed reserving lien is not adverse to vendor. *Shotwell v. McCardell*, 19 C. A. 174, 47 S. W. 39.

A purchaser in possession of land held to have repudiated his contract, and, the period of limitation having expired, he was entitled to the land by adverse possession. *McManus v. Matthews* (Civ. App.) 55 S. W. 589.

Grantor in deed held not to have acquired title by adverse possession as against grantee of portion of tract conveyed. *Woods v. Texas Land & Loan Co.* (Civ. App.) 67 S. W. 155.

Parties holding land under a deed reserving a vendor's lien cannot plead as limitations against those deriving title from a decree foreclosing the lien the time the land was held under such deed prior to the foreclosure. *Henry v. McNew*, 29 C. A. 288, 69 S. W. 213.

Where a person went into possession under a contract to purchase, and delivered possession to defendant, who claims adversely to the owner, the time such person was so in possession cannot be included in the ten-year limitations. *Thompson v. Dutton* (Civ. App.) 69 S. W. 641.

Where the parties in trespass to try title claimed from common source, and both failed to connect themselves with the source, plaintiff, having had possession, held entitled to show limitations as against the title remaining in the person who had attempted to convey to him. *Estes v. Turner*, 30 C. A. 365, 70 S. W. 1007.

A vendee, holding under a deed reserving a vendor's lien, could not retain adverse possession without repudiating his vendor's title and giving the latter actual or constructive notice thereof. *Runge v. Gilbough* (Civ. App.) 87 S. W. 832.

Execution and record of a deed by a vendee of land, subject to a vendor's lien to a third person, held not constructive notice to the vendor of the vendee's repudiation of his title. *Id.*

Possession and claim of land under an executory contract of purchase held not such adverse possession as if continued would bar an entry under the statute. *Wilson v. Nugent* (Civ. App.) 91 S. W. 241.

Where defendants entered under a deed, evidence held to support a judgment for defendants based on possession and repudiation of the grantor's title. *Evans v. Jackson*, 41 C. A. 277, 92 S. W. 47.

Purchase by party claiming title by limitations held a circumstance tending to show a recognition of the vendor's title. *Hughes v. Wright & Vaughan* (Civ. App.) 97 S. W. 525.

A purchaser, or one claiming under him entering into possession of land under a contract of purchase, held a tenant at sufferance, and, so long as the title of the vendor is recognized, limitations do not run against the vendor. *Glenn v. Rhine*, 53 C. A. 291, 115 S. W. 91.

A purchaser, taking possession of land under a contract of sale, cannot, without repudiation of the title of his grantor, hold adversely against him. *Tipton v. Tipton*, 65 C. A. 192, 118 S. W. 842.

Where a deed purported to convey an entire tract, and not an undivided interest, and the grantee took open and notorious possession of the whole, claiming it as his own, inclosed and improved it, and paid taxes thereon from 1883 to 1907, he and his heirs had a valid title to the whole tract by adverse possession. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

A grantee held to acquire title by adverse possession. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

The possession of the grantee of land incumbered by a vendor's lien held not inconsistent with the recognition of the legal title in the vendors, so that he could not claim against them by adverse possession. *Atteberry v. Burnett* (Civ. App.) 130 S. W. 1023.

Possession by a purchaser and his grantee held not adverse to the heirs of the vendor, retaining a vendor's lien for the price, until they repudiate the title under the vendor. *Lumpkin v. Story* (Civ. App.) 134 S. W. 298.

Although the rule that the possession of a vendee under an executory contract is that of the vendor applies where a link in the title of a person claiming adverse possession is an executory contract, a purchaser without actual knowledge of the existence of a vendor's lien may acquire title by adverse possession as against the lienor, where the lienor had notice of the purchaser's adverse claim, and purposely concealed from him the existence of the lien. *Burnett v. Atteberry*, 105 T. 119, 145 S. W. 582.

Where one in possession of land of another sells it as his own, he asserts title in himself, hostile to the owner's title, sufficient to ripen into title by limitation, though he had previously stated that he was not claiming the land, but desired to buy from the owner. *Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 147 S. W. 604.

A vendor, remaining in possession after deed by himself or his tenants, claiming the land as his own, without notice other than the possession, may acquire title by limitations as against his purchaser. *Dickey v. Forrester* (Civ. App.) 148 S. W. 1181.

**Landlord and tenant.**—See cases cited under "Landlord and tenant" under Art. 5682.

A tenant cannot begin to secure a prescriptive right until he renudiates the tenancy and gives his landlord notice thereof. *Flanagan v. Pearson*, 61 T. 302.

The possession by a tenant of the owner of a part of a larger tract with defined boundaries will not extend beyond the tract held by him as tenant. *Craig v. Cartwright*, 65 T. 413; *Texas Land Co. v. Williams*, 51 T. 61; *Read v. Allen*, 63 T. 158.

When a possessor acknowledges himself the tenant of another, his possession in his own right ceases, not only against the person to whom he attorns, but against the true owner. *Robinson v. Bazoon*, 79 T. 524, 15 S. W. 585.

Inclosure and cultivation of a small part of a tract of land under a lease of the whole tract, held to constitute actual possession of the whole. *Tarleton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

Possession is not adverse between landlord and tenant so long as the relation exists, and though it was previously adverse. *O'Connor v. Dykes* (Civ. App.) 29 S. W. 920.

Notice of the tenant's adverse possession must be brought home to the landlord before the statute will begin to run in favor of tenant. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

A finding of actual possession by tenants of separate undescribed parcels of land, not stating the duration thereof, held not to show adverse possession of the whole of two grants in question, barring action therefor. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Declaration of heirs held not to constitute a repudiation of title of the lessor of their intestate, under whom they had entered. *Huntington v. Matfield* (Civ. App.) 55 S. W. 361.

A party cannot establish title to land by adverse possession, where he has occupied it as a tenant for the claimant and those through whom the latter claims. *Balles v. Dolch* (Civ. App.) 60 S. W. 267.

Where defendant claimed title to a park and lake, to which a city asserted title by dedication, an attempt by defendant to rent the property of the city held a sufficient recognition of the city's title to prevent the running of the statute prior to that time. *Gillean v. City of Frost*, 25 C. A. 371, 61 S. W. 345.

A judgment in claimant's favor, although by agreement, against a tenant, stops the running of the statute in the landlord's favor. *Anderson v. Wynne*, 25 C. A. 440, 62 S. W. 119.

Deed of a tenant's interest held not to make his grantee an adverse possessor as against the landlord. *Bruce v. Richardson*, 26 C. A. 615, 64 S. W. 785.

The statute does not begin to run in favor of a tenant until he repudiates his tenancy. *New York & Texas Land Co. v. Dooley*, 33 C. A. 636, 77 S. W. 1030.

Where ten-year limitations were raised in trespass to try title, held to authorize admission of a parol lease from plaintiff to show occupancy as tenant. *Bonner v. Bonner*, 34 C. A. 348, 78 S. W. 535.

In an action to recover leased premises, explanation of an answer claimed to constitute an assertion of adverse title by the lessee held to destroy any right to recover on such answer which might have otherwise existed. *Wildey Lodge*, No. 21, I. O. O. F., v. *City of Paris* (Civ. App.) 81 S. W. 99.

A judgment in favor of plaintiffs in trespass to try title held not to render defendant's subsequent possession the less adverse by reason of his failure to serve notice of his repudiation of an alleged tenancy relation existing by virtue of such judgment. *Thomson v. Welsman*, 98 T. 170, 82 S. W. 503.

Attornment by tenant to a stranger, or negotiations to lease from the stranger, held not to affect the sufficiency of the landlord's possession to meet the requirements of limitations. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609.

Limitations held not to run in favor of a tenant who purchased the land at tax sale against its landlord until notice to the latter of its repudiation of the tenancy. *Bryson & Hartgrove v. Boyce*, 41 C. A. 415, 92 S. W. 820.

The relation of landlord and tenant being once established, limitation will not run against the title of the landlord in favor of the tenant until the tenant publicly disclaims his tenancy. The tenant's purpose to disclaim tenancy must be brought home to the landlord in some way. The disclaimer must be open, continued, notorious, and adverse so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the landlord. The landlord's knowledge that the tenant was holding adversely need not be proven beyond all doubt, but stronger and clearer proof is required in some cases than in others. Merely because the landlord neglects to disturb the tenant's possession the latter acquires no permanent rights. The acts and conduct of the tenant or of one holding under him relied upon as evidence of abandonment of the tenant relation and adverse holding must be positive and unequivocal and inconsistent with the permissive use originally derived from the former landlord. Where the character of the tenant's possession is so limited and uncertain as to afford a fair presumption that the tenant did not claim the title, it is proper ground for saying it was not notice to the landlord of adverse possession. In trespass to try title against one who was in possession with the consent and under the right of the original tenant, evidence held insufficient to show notice to the landowner of an abandonment of the tenancy relation and an adverse claim by defendant so as to entitle the latter to the protection of the statute. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

Where one claiming to be in adverse possession of lands accepts a lease from the owner, his possession ceases to be adverse. *Hermann v. McIver*, 51 C. A. 270, 111 S. W. 766.

A plea of adverse possession, being addressed to an entire league of land, was not sustained by proof of occupancy by tenants under leases of undefined parcels. *Houston Oil Co. of Texas v. Kimball* (Civ. App.) 114 S. W. 662.

The continuity of adverse possession of a passway over land of another was broken where the person claiming the way by prescription held the servient estate for part of the period as a tenant of the owner. *Sassman v. Collins*, 53 C. A. 71, 115 S. W. 337.

There having been nothing to show a repudiation of the relation of landlord and tenant, held, the tenant could not acquire title against the landlord by adverse possession. *Emporia Lumber Co. v. Tucker*, 103 T. 547, 131 S. W. 408.

Execution of a lease by one in possession of land as the lessee, if there is false representation, held not to start the running of limitations in favor of the named lessor. *Lumpkin v. Woods* (Civ. App.) 135 S. W. 1139.

At any time before the ten-year limitation is completed for title by adverse possession, the husband may change the character of the possession by acknowledging occupancy as a tenant, whether such title would have been separate or community property. *Burrell v. Adams*, 104 T. 183, 135 S. W. 1156.

Where an occupant of land signed an instrument acknowledging himself as plaintiff's tenant, at a time when it broke the continuity of his ten-year possession, held, under the evidence, that neither he nor his heirs could claim by limitation. *Id.*

A charge held to properly submit the issue of an acknowledgment of tenancy, interrupting adverse possession. *Houston Oil Co. of Texas v. McGrew* (Civ. App.) 143 S. W. 191.

It is immaterial whether tenants held under a written or a verbal lease to make their holding available to the lessor as an adverse possession. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

Where one in possession was notified of another's claim, and then executed an instrument whereby he agreed to purchase the land, and acknowledged that he held the same as tenant of the owner, the use and occupancy must be deemed to have been in subordination to the rights of the owner. *Bennett v. Louisiana & Texas Lumber Co* (Civ. App.) 148 S. W. 1189.

Adverse possession under the ten-year statute of limitations may be by tenant. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

Where land, constituting the separate property of a husband, was occupied by himself and wife as his homestead, her possession thereof after his death, either in person or by a tenant renting it temporarily, was not adverse to a grantee of a child of the parties. *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

In an action wherein the wife claimed land by adverse possession, a lease taken by the husband from the other claimant was properly admitted as evidence that the wife had not held adversely, though the evidence conflicted whether the husband had then abandoned the wife. *Smith v. Adoue & Lobit* (Civ. App.) 154 S. W. 258.

Where a claimant of a defined tract leased a defined and separate portion thereof, the tenant's actual possession of the leased portion did not give the claimant constructive possession of the whole tract claimed by him. *R. W. Wier Lumber Co. v. Com* (Civ. App.) 156 S. W. 276.

Where one claiming land under the statutes of five and ten year limitation was in possession under a lease, his possession was not adverse to the landlord. *Whitman v. Aldrich* (Civ. App.) 157 S. W. 464.

**Tenants in common.**—One in possession under a deed conveying a designated portion of a survey cannot plead limitation against the owner of an undivided interest therein under an older deed from the common vendor, the second purchaser having notice of the same. *Saunders v. Silvey*, 55 T. 46.

No limitation will run in favor of a tenant in common in possession against his cotenant until after notice that the possession is adverse is brought home to him. *Moody v. Butler*, 63 T. 210.

Where a tenant in common recognizes his cotenant's right, his possession then ceases to be adverse, however hostile it may previously have been. *House v. Williams*, 16 C. A. 122, 40 S. W. 414.

Possession of tenant in common is not adverse until cotenants have notice of his intent to repudiate their claims. *Gist v. East*, 16 C. A. 274, 41 S. W. 396.

Where one owning an undivided half interest in land conveyed the same, and afterwards the purchaser bought the interest of two of the persons owning the other undivided half interest, held, that the purchaser's possession was not shown to be adverse against the owners whose interests were not so purchased. *Wright v. Odell* (Civ. App.) 42 S. W. 322.

Occupancy of homestead of decedent by his widow, without repudiating title of children by a former wife, held insufficient to show adverse possession. *Clemons v. Clemons* (Civ. App.) 45 S. W. 199.

A deed of partition executed by a tenant in possession of property, in pursuance of a division agreed on between him and the grantee of a cotenant, shows that his prior possession was not adverse to the rights of his cotenant. *Illg v. De la Luz Garcia* (Civ. App.) 45 S. W. 857.

Long-continued possession under claim of ownership, and nonassertion of claim by the other tenant, where all the parties are dead, held to show repudiation of claim of such cotenant. *Illg v. Garcia*, 92 T. 251, 47 S. W. 717.

Where parol partition was made by two owners in common, possession of portion of one tract set apart to one owner is not possession of the tract set apart to other. *Bayne v. Denny*, 21 C. A. 435, 52 S. W. 983.

A co-owner of property, who is holding it adversely to the other tenants, cannot insure the property and charge the cotenants with a portion of the premiums. *Gilroy v. Richards*, 26 C. A. 355, 63 S. W. 664.

Possession of land of a decedent by one of her heirs held not adversary as against the other heirs. *Newcomb v. Cox*, 27 C. A. 583, 66 S. W. 338.

Occupancy of realty by a son (inheriting his mother's community interest), payment of taxes, and making improvements held not sufficient to show an ouster of his cotenant. *Madison v. Matthews* (Civ. App.) 66 S. W. 803.

No joint tenancy held to have existed between defendant in a judgment whereby title to land was obtained, and the plaintiff, so as to prevent limitations running in favor of defendant remaining in possession. *Pendleton v. McMains*, 32 C. A. 575, 75 S. W. 349.

A tenant in common, holding land adversely to his cotenant, is properly charged with the value of the use of the premises. *Stephens v. Hewitt* (Civ. App.) 77 S. W. 229.

Adverse possession of an entire survey under color of title from 1866 to 1884 held sufficient to bar the right of a tenant in common not under disability. *Broom v. Pearson*, 98 T. 469, 85 S. W. 790, 86 S. W. 733.

Suit brought by one cotenant within the limitation period held not to inure to the benefit of his cotenants. *Cobb v. Robertson*, 99 T. 133, 86 S. W. 746, 87 S. W. 1148, 122 Am. St. Rep. 609.

The possession of one cotenant is not adverse to other cotenants, unless the possessor gives notice to the other cotenants of his adverse claim, or does some act which clearly indicates his adverse claim, of which the others have notice or of which they should take notice. *Keith v. Keith*, 39 C. A. 363, 87 S. W. 384.

Act of tenant in common in appropriating rents and profits to herself held not to deprive her cotenants of their rights. *Mecaskey v. Morris*, 40 C. A. 390, 89 S. W. 1085.

A deed held none the less an act of ouster or repudiation of the cotenancy because of its mention of an heir not signing, where it purported to convey the whole estate. *Naylor & Jones v. Foster*, 44 C. A. 599, 99 S. W. 114.

Where G. and his sister held title to land in controversy as heirs of their ancestor, a conveyance of the entire tract by G. did not oust his sister or her successors in interest, whose rights could be barred only by one of the statutes of limitation of suits for the recovery of land. *Kirby v. Hayden*, 44 C. A. 207, 99 S. W. 746.

Possession of one tenant in common asserting an exclusive right to the land under a deed conveying the same to him by specific description held adverse to his cotenants. *Morgan v. White*, 50 C. A. 318, 110 S. W. 491.

Under the facts, held, a tenant in common acquired title by adverse possession against a cotenant. *Frey v. Myers* (Civ. App.) 113 S. W. 592.

A purchaser of an interest of an heir in a tract of land of a deceased ancestor held not to hold the possession adversely to the other heirs, unless notice was brought home that he claimed the entire tract. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

Possession of a specific part of a tract of land under a deed held notice to the occupant's cotenants of the larger tract that he is holding adversely. *Toole v. Renfro*, 52 C. A. 482, 114 S. W. 450.

Where a wife died in 1877, and willed half the community property to her husband, adverse possession to such land, begun in 1878, will run against the husband's community interest, and continue to run unaffected by his death. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

The claim of a tenant in common of certain property held barred by limitations. *Williamson v. Williamson*, 53 C. A. 503, 116 S. W. 370.

Possession by one claiming property under title to himself and another which is held adversely to every other person for the required time inures to the benefit of the cotenant not in actual possession. *Myers v. Frey*, 102 T. 527, 119 S. W. 1142.

Though a daughter took possession of property for herself and her minor brother claiming it adversely against their mother, the daughter's possession would not inure to the benefit of her brother where he at all times recognized his mother's interest in the property, and did not know that his sister was claiming for him. *Id.*

Sufficiency of proof of adverse possession as against a stranger and against a tenant in common compared. *Honea v. Arledge*, 56 C. A. 296, 120 S. W. 508.

Partitioning of land by certain cotenants among themselves ignoring another cotenant held to constitute an ouster and start the running of limitations as against him. *Id.*

A wife's adverse possession of property conveyed to her husband under a tax deed, held to inure to the benefit of the community; and, even if an unexecuted order for partition of the property, made upon the granting of a divorce, operated to prevent title to the whole tract from vesting in the community by virtue of her adverse possession, she acquired title to one-half of the tract under the tax deed. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

A surviving husband conveyed community real estate, and all the subsequent vendees claiming under him dealt with the land without any recognition of rights on the part of the deceased wife's heirs, paying taxes, etc. Held, that the possession of those claiming under the husband was an ouster of the heirs of the wife, and they could not claim to have been in joint possession as tenants in common with those claiming under the husband's conveyance. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

The statute does not run in favor of a tenant in common holding the community property until some act is done repudiating the relation with the cotenants. *Wingo v. Rudder*, 103 T. 150, 124 S. W. 899.

Circumstances held to tend to show notice to defendant's cotenant of defendant's adverse possession of the whole tract so as to start limitations running against the cotenant. *Eastham v. Gibbs* (Civ. App.) 125 S. W. 372.

Tenants in common, who are at all times ready and willing to recognize the right of a cotenant out of possession, cannot interpose the bar of the statute to an action by the cotenant for partition. *Wrighton v. Butler* (Civ. App.) 128 S. W. 472.

An action by tenant in common against a trespasser inures to the benefit of his cotenants and is not an act indicating possession adverse to his cotenants. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

Defendants in trespass to try title, being cotenants with the plaintiff, held not to have acquired title against the plaintiff under the five and ten year statute of limitations. *Id.*

A cotenant in possession held to have acquired her cotenant's interest by adverse possession. *Yealock v. Yealock* (Civ. App.) 141 S. W. 842.

An instruction in trespass to try title that, if plaintiff recognized defendant's interest in the land and was not holding adversely to him, he was entitled to recover, held proper. *Id.*

In a suit for partition between cotenants, held, that the defense of limitation could not be made. *Schrivver v. Taylor* (Civ. App.) 143 S. W. 231.

Mere possession of land and payment of taxes, etc., by one cotenant held not to raise a presumption of an adverse claim to the land, though known by the other cotenant. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

An agreement by one cotenant with another to assume the management of the joint property held to inure to the benefit of successive owners of the property until expressly repudiated. *Id.*

Limitations held not to begin to run against a cotenant or his successors until they had actual notice of the claim of ownership of the tenant in possession. *Id.*

Payment of taxes by one tenant in common is not adverse to the interests of his cotenants, being construed as for the joint benefit of all of them. *Montgomery v. Trueheart* (Civ. App.) 146 S. W. 284.

Evidence in partition between tenants in common held not to show that defendant's holding of the land was adverse to plaintiff, so as to give him title under a plea of stale demand. *Id.*

Deed by a tenant in common pending partition to one who did not intervene, but remained in possession after judgment, held sufficient basis for a claim of adverse possession. *Rosborough v. Cook* (Civ. App.) 148 S. W. 1120.

Deeds, whereby the grantors undertook to convey to others at least one-half of the entire tract of land sought to be recovered, were admissible in evidence as tending to show that grantors intended their possession to be adverse to every one, including their cotenant. *Carr v. Alexander* (Civ. App.) 149 S. W. 218.

Possession and assertion of exclusive ownership may be so notorious and long continued as to constitute notice to a cotenant of adverse possession, though there is no actual notice thereof given the cotenant. *Id.*

Evidence, in an action to recover land, held sufficient to show ouster of a cotenant and to establish an open, notorious, and adverse possession sufficient to establish title in plaintiffs under the ten-year limitation. *Id.*

A tenant in common, who is in possession, cannot acquire title as against the cotenant, unless the latter had notice of the adverse claim; but, to prove notice, it is not always necessary to show that the cotenant had actual knowledge of the adverse claim. *Dillard v. Cochran* (Civ. App.) 153 S. W. 662.

The execution of a deed by a tenant in common and its recording by the grantee who took open and adverse possession thereunder, and paid the taxes, was notice to the other cotenant of the assertion of an adverse claim. *Robles v. Robles* (Civ. App.) 154 S. W. 230.

Where one of the cotenants of timber land cut merchantable timber and sold the same, recognizing the interest of its cotenant, the fact that it took a deed to the whole of the land, paid all the taxes, and executed mortgages thereon did not constitute an ouster so as to render it liable to the cotenant for the manufactured value of the lumber. *De Witz v. Saner-Whiteman Lumber Co.* (Civ. App.) 155 S. W. 980.

The plea of limitations is not available to parties who have been in possession as tenants in common with the claimants of adverse interests. *Whitman v. Aldrich* (Civ. App.) 157 S. W. 464.



**Persons in fiduciary relations.**—See Decisions Applicable to Subject in General, §§ 29, 30, following this title.

In case of resulting trust, so long as the trust relation is admitted and there is no adverse holding by the trustee or any one claiming under him, no lapse of time will bar the cestui que trust. In cases of constructive trust, which is born of fraud, and which presupposes from its beginning an adverse claim of right on the part of the trustee by implication, the statute will commence to run from the period at which the cestui que trust could have indicated his right by action or otherwise. *Cole v. Noble*, 63 T. 432, citing *Hunter v. Hubbard*, 26 T. 547; *Anderson v. Stewart*, 15 T. 285; *Carlisle v. Hart*, 27 T. 350; *Grumbles v. Grumbles*, 17 T. 472; *McKin v. Williams*, 48 T. 89. See, also, *Smith v. Fly*, 24 T. 345, 76 Am. Dec. 109; *Kennedy v. Baker*, 59 T. 150; *Phillips v. Holman*, 26 T. 276; *McMasters v. Mills*, 30 T. 591; *Eborn v. Zimpelman*, 47 T. 503, 26 Am. Rep. 315; *Wingate v. Wingate*, 11 T. 430; *Tinnen v. Mebane*, 10 T. 246, 60 Am. Dec. 205; *Turner v. Smith*, 11 T. 620; *Brown v. Guthrie*, 27 T. 610; *Hudson v. Wheeler*, 34 T. 356; *Robertson v. Wood*, 15 T. 1, 65 Am. Dec. 140; *Redding v. Redding*, 15 T. 249; *Fisk v. Wilson*, 15 T. 430; *Hodges v. Johnson*, 15 T. 570; *Connolly v. Hammond*, 51 T. 635; *Murchison v. Payne*, 37 T. 305.

Limitation will not run in favor of one who holds title to land in his own name under a resulting trust in favor of another until he repudiates such trust, and notice of such repudiation to the cestui que trust is shown. *Cooper v. Lee*, 75 T. 114, 12 S. W. 483.

In trespass to try title, where it did not appear that an agent asserting a claim to the land had repudiated his agency, the statute of limitations did not apply. *Richardson v. Bruce* (Civ. App.) 75 S. W. 835.

Children held to acquire title by adverse possession to land taken possession of by their father for them, where he had conveyed the land to another in trust for the children and in fraud of his creditors. *Coke & Reardon v. Ikard*, 39 C. A. 409, 87 S. W. 869.

If a person held title to land in trust for a county; his possession would not be adverse, so as to start the statute, until there was a repudiation of the trust. *Bell County v. Felts* (Civ. App.) 122 S. W. 269.

Where an agent is in actual possession and control of land, his agreement not to hold adversely, during the pendency of a suit, is sufficient to suspend the running of limitations. *Ellwood v. Stallcup*, 57 C. A. 343, 122 S. W. 906.

Where before purchasing land a purchaser contracted to acquire title and convey to another on payment of the purchase price, he has no right on the premises beyond those of a stranger so long as the agreement remains in force, and his subsequent entry and assumption of hostile possession were not essentially a breach of the trust, except as indicating a refusal to convey, but a naked trespass. *Hoffman v. Buchanan*, 57 C. A. 368, 123 S. W. 168.

Limitations do not run in favor of a party while he holds the property for another. *Makey v. Dryden* (Civ. App.) 128 S. W. 633.

One to whom land was conveyed for life by afterwards selling it for its full value repudiated any trust in her under the deed conveying the life estate, so as to put her grantors upon notice that absolute title was claimed, so as to make limitations begin to run upon the subsequent vendee entering and taking possession. *Horan v. O'Connell* (Civ. App.) 144 S. W. 1048.

Where father and son agreed to buy land jointly, and the son paid one-half of the first payment, and the father fraudulently procured the erasure of the son's name from the deed, the father could not acquire title against the son by limitations, in the absence of actual notice to the son that he was claiming adversely. *Weatherford v. Weatherford* (Civ. App.) 153 S. W. 353.

Where suit was brought to recover land by virtue of an equitable title based on a constructive trust impressed thereon by alleged fraudulent acts of the defendant, only those statutes of limitation affecting actions for the recovery of realty were applicable. *Nuckols v. Stanger* (Civ. App.) 153 S. W. 931.

**Life tenant and remainderman.**—Limitation does not run against the remainderman during the life of the holder of a life estate. *Cook v. Caswell*, 81 T. 678, 17 S. W. 385; *Govan v. Bynum*, 17 C. A. 180, 43 S. W. 319.

Limitations do not begin to run against a remainderman to deprive him of title, in favor of the grantee of a life tenant, until the death of the tenant. *Morris v. Eddins*, 18 C. A. 38, 44 S. W. 203.

The statute began to run against children holding subject to the life estate in their father in one-third of the land at the time the estate was cast, and not at death of life tenant since, although they had no right of possession during the life estate, they could recover as against strangers as to the entire estate. *McConnico v. Thompson*, 19 C. A. 539, 47 S. W. 537.

Limitations held not to run against partition of homestead among children, so long as it is occupied by surviving wife. *McAnulty v. Ellison* (Civ. App.) 71 S. W. 670.

The possession of the grantee of a life tenant does not become adverse to the remainderman until the life tenant's death. Adverse possession of an entire tract, under a conveyance by the owner's widow of her dower interest therein, relates only to the life estate conveyed, and terminates therewith. *Beaty v. Clymer*, 32 C. A. 322, 75 S. W. 540.

Limitations do not run in favor of one in possession of land as against the remainderman during the life of the life tenant. *Kesterson v. Bailey*, 35 C. A. 235, 80 S. W. 97; *Meurin v. Kopplin* (Civ. App.) 100 S. W. 984; *Phillips v. Palmer*, 56 C. A. 91, 120 S. W. 911.

The possession of land by a stranger held adverse against the life tenant and remainderman, giving each a right of action on the beginning of the adverse possession. *Elcan v. Childress*, 40 C. A. 193, 89 S. W. 84.

A remainderman whose title to part of a tract of land had been barred by limitations held entitled to claim the remainder after a life estate therein, where the right to the remainder was not barred. *Schnabel v. McNeill* (Civ. App.) 110 S. W. 558.

Where testator devised to his wife an estate in land which was to terminate on her remarriage, and the widow for herself and as independent executrix of the estate of testator executed a deed to the land, limitations did not begin to run against an action by the heirs to recover the land from the purchaser until the remarriage of the widow. *Harling v. Shelton* (Civ. App.) 114 S. W. 389.

The possession of a life tenant is not adverse to the remainderman and cannot ripen into a prescriptive title. *Lovenberg v. Mellen* (Civ. App.) 144 S. W. 317.

Where a surviving husband conveyed land constituting community property in 1867, and it passed by various conveyances to defendants, an action by heirs of the deceased wife in 1908, based upon the title which descended to them under the statute, was not barred under the doctrine of stale demand. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

**Payment of taxes.**—For payment of taxes under the five year statute, see notes under Art. 5674.

The payment of taxes on vacant lands by one who has not the legal title thereto is evidence of an assertion of title, but is not equivalent to possession. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892, 68 S. W. 721.

Although payment of taxes is not necessary under the ten-year statute, failure to have the land assessed and pay taxes held to weaken a claim of adverse possession. *Hunter v. Malone*, 49 C. A. 116, 108 S. W. 709.

In determining whether defendant's possession of a few acres of a tract of land was an adverse possession of the whole, the jury are entitled to consider the fact of his failure to pay taxes on the land. *Harris v. Wagnon* (Civ. App.) 148 S. W. 606.

Where one segregated 60 acres from a larger tract by a purchase thereof and abandoned actual occupancy of the remainder, on which he failed to pay taxes, his occupancy of the 60 acres cannot be construed to extend to the remainder, so as to give title by adverse possession. *Cook v. Southern Pine Lumber Co.* (Civ. App.) 149 S. W. 716.

One fencing a tract in 1882, and thereafter continuously using the land for grazing cattle for nearly 30 years and paying all the taxes, held to acquire title by limitations. *Unknown Heirs of Criswell v. Robbins* (Civ. App.) 152 S. W. 210.

**Evidence.**—See, also, preceding notes under this article.

Evidence held insufficient to show adverse possession. *Settegest v. O'Donnell*, 16 C. A. 56, 41 S. W. 84; *Hodges v. Robbins*, 23 C. A. 57, 56 S. W. 565; *Benavides v. Molino* (Civ. App.) 60 S. W. 260; *Watts v. Bruce*, 31 C. A. 347, 72 S. W. 258; *Logan v. Robertson* (Civ. App.) 83 S. W. 395; *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937; *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4; *Fischer v. Giddings*, 43 C. A. 393, 95 S. W. 33; *Mann v. Hossack* (Civ. App.) 96 S. W. 767; *Texas & N. O. R. Co. v. Haynes*, 44 C. A. 272, 97 S. W. 849; *Wright v. Nona Mills Co.* (Civ. App.) 98 S. W. 917; *White v. Eavenson*, 46 C. A. 158, 101 S. W. 1029; *Nona Mills Co. v. Wright*, 101 T. 14, 102 S. W. 1118; *Mars v. Morris*, 48 C. A. 216, 106 S. W. 430; *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265; *Davis v. Adams* (Civ. App.) 129 S. W. 150.

Evidence held insufficient to avoid the statute of limitations. *Lumkins v. Coates* (Civ. App.) 42 S. W. 550.

Evidence held sufficient to show adverse possession. *McCarty v. Johnson*, 20 C. A. 184, 49 S. W. 1098; *Sparks v. Hall*, 29 C. A. 177, 67 S. W. 916; *Mann v. Schueling* (Civ. App.) 68 S. W. 292; *Mayer & Schmidt v. Wooten*, 46 C. A. 327, 102 S. W. 423; *Daniels v. Murray*, 47 C. A. 19, 103 S. W. 425; *Jones v. Creech* (Civ. App.) 108 S. W. 975; *Weston v. Meeker*, 109 S. W. 461; *Texas & N. O. R. Co. v. Texas Tram & Lumber Co.*, 50 C. A. 182, 110 S. W. 140; *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265; *Smith v. Simpson Bank*, 52 C. A. 108, 113 S. W. 568; *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129; *Hoencke v. Lomax*, 55 C. A. 189, 118 S. W. 817; *Kirby v. Hayden* (Civ. App.) 125 S. W. 993; *Hermann v. Fenn*, 129 S. W. 1139; *Wright v. Giles*, 129 S. W. 1163; *Long v. Thompson & Tucker Lumber Co.*, 140 S. W. 501; *Louisiana & Texas Lumber Co. v. Stewart*, 148 S. W. 1193; *Gibson v. Oppenheimer*, 154 S. W. 694.

Finding that defendant had been in possession of land in controversy since 1895 held justified by the evidence. *Petrucio v. Gross* (Civ. App.) 47 S. W. 43.

Testimony held to sustain finding that defendant's possession was not adverse to plaintiff. *Mass v. Bromberg*, 28 C. A. 145, 66 S. W. 468.

Evidence held sufficient to support the court's conclusion that defendant's occupancy was not adverse. *Cruse v. Richards* (Civ. App.) 100 S. W. 205.

Evidence in an action of trespass to try title held to show that the action was not barred by the ten-year statute. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

In trespass to try title, evidence held to warrant finding of jury on the issue of adverse possession. *Cochran v. Moerler*, 47 C. A. 372, 105 S. W. 1138.

Certain evidence held not to establish adverse possession as against the heirs of the deceased ancestor. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

Evidence held not conclusive on the question of adverse possession. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

Evidence held not to show such adverse possession by one claiming under a junior title overlapping an older survey as will give him title. *Lake v. Earnest*, 53 C. A. 555, 116 S. W. 865.

Evidence held to warrant a finding that plaintiff intended to hold adverse possession of 160 acres of the land in controversy, including his improvements. *Louisiana & T. Lumber Co. v. Kennedy* (Civ. App.) 119 S. W. 884.

A grantee in a deed held to have acquired a valid title to the entire tract by adverse possession. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

Evidence held to sustain a finding against a claim of adverse possession. *Henderson v. Louisiana & Texas Lumber Co.* (Civ. App.) 128 S. W. 671.

Evidence of occupancy and use of land in controversy and of a claim to all the land within an inclosure held to justify a conclusion that the occupant's possession was adverse. *Cannon v. Producers' Oil Co.* (Civ. App.) 138 S. W. 803.

Evidence held to sustain a finding that occupancy under which title by adverse possession is claimed began in 1852 or 1853. *Cook v. Houston Oil Co. of Texas* (Civ. App.) 154 S. W. 279.

Evidence held to support a finding that a defendant did not acquire title by adverse possession under the ten-year statute. *Shaw v. Windham* (Civ. App.) 155 S. W. 636.

— **Presumptions, burden of proof and admissibility of evidence.**—See notes under Art. 3687, Rules 5, 12, 19.

**Instructions and questions for jury.**—See notes under Art. 1970, 1971.

**Art. 5682. [3350] Possession may be held by different persons.**—Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.

**Tacking successive possessions.**—See cases cited under Art. 5680.

One claiming an undivided half interest in a lot went into possession, recognizing B., his vendor, the claimant of the other half, as tenant in common, he holding adversely to all others; having afterwards purchased B.'s interest, he continued in possession as before of the entire lot. Held, that his possession, as against a third party claiming an adverse title to the half interest purchased from B., could be added to the period of possession from his entry up to the date of the deed to him from B. *Terrell v. Martin*, 64 T. 121.

Instruction excluding plaintiff's right to tack the possession of the land in controversy by her tenant to that of her brother, if any, who held for her benefit, held erroneous. *Travis v. Hall*, 37 C. A. 143, 83 S. W. 425.

Certain occupancies under adverse possession tacked. *City of Houston v. Finnigan* (Civ. App.) 85 S. W. 470.

Where the running of limitations is interrupted, the periods prior and subsequent to the interruption cannot be tacked, to make out title by adverse possession. *Lawless v. Wright*, 39 C. A. 26, 86 S. W. 1039.

One relying on title by adverse possession held required to show facts from which the conclusion of continuity of the possession of successive possessors might be deduced. *Dunn v. Taylor*, 102 T. 80, 113 S. W. 265.

Where successive possessions are tacked to establish adverse possession for the period of the statute, the fact that the prior possessor held under a mistake as to his right to possession held immaterial. *Williams v. Texas & N. O. R. Co.*, 52 C. A. 217, 114 S. W. 877.

Where plaintiff, in trespass to try title to a named tract of land, claims by adverse possession through his predecessors in title, that one of the former owners did not know the exact boundaries of the land he held is not material, where he claimed and held the tract as such. *Bennette v. Collins*, 54 C. A. 16, 116 S. W. 618.

Evidence held insufficient to show that defendant's predecessors in title held the land under adverse claim of right. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

Evidence held not to show a present gift of the land to W., but only a promise to make such gift by deed in the future, the land in the meantime to belong to D., so that W.'s continued possession was D.'s possession for the purpose of establishing D.'s title by ten-year limitation as described in D.'s deed. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

One occupying land under a claim of right held not entitled to tack his possession prior to a conveyance of his right to a conveyance afterwards held by him in computing the period of possession. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

Adverse possession of claimant and his predecessors in claim held continuous, so as to sustain his claim of title. *Davis v. Adams* (Civ. App.) 129 S. W. 150.

A widow claiming land held by her husband under a tax deed will be presumed to claim under that deed. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

Evidence held insufficient to show that defendant's remote grantor within the period of the statute claimed to hold adversely. *Rushing v. Lanier* (Civ. App.) 132 S. W. 528.

The possession of the holder of a headright certificate sufficient to supply a predicate for the presumption of a retransfer by a purchaser of the certificate cannot be tacked to the possession by one not claiming through the holder, but through a third person having no title from the holder or from any other source. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

A person and his assigns claiming title under a settler and holding adverse possession for fifteen years of 100 feet of the 200 feet of land granted to a railroad for a right of way acquired title by adverse possession. *Ft. Worth & D. C. Ry. Co. v. Western Stockyards Co.* (Civ. App.) 151 S. W. 1172.

**Privity of estate.**—Where the defendant relies on ten years' possession, he must show privity between himself and those whose possession he claims. *Truehart v. McMichael*, 46 T. 222; *Henderson v. Beaton*, 1 U. C. 17.

The plea of ten years is not sustained when the adverse occupancy of different persons is relied on, unless the defendant can show privity between himself and others on whose possession he relies. *Dotson v. Moss*, 58 T. 152; *Forsod v. Golson*, 77 T. 666, 14 S. W. 232.

Where, under a plea of five-year limitation, possession is claimed under different titles, and the requisite term of occupancy has elapsed under neither, but the possession under one title must be tacked to that under another in order to make out the five years, a privity must be shown between the various titles under which possession is claimed, or its continuity would be broken, and the statute of five years will not avail on the claim. *Brownson v. Scanlan*, 59 T. 222; *Medlin v. Wilkins*, 60 T. 409; *Cook v. Dennis*, 61 T. 246.

A naked trespasser in possession may set up in his defense an outstanding title acquired by a third party by limitation to defeat an action instituted by one whose title was lost by limitation. Privity of claim or of possession is important only when it becomes necessary to tack the possession of two or more to give adverse possession for the period requisite to perfect limitation. *Branch v. Baker*, 70 T. 190, 7 S. W. 808.

The continuity of possession is broken when held by one not in privity with the party asserting title by limitation. *Warren v. Frederichs*, 76 T. 647, 13 S. W. 643.

Evidence held to show privity of estate so as to tack possession. *Bateman v. Jackson* (Civ. App.) 45 S. W. 224.

Privity of possession between parties holding adversely for more than ten years can be shown by parol evidence in order to establish title by possession for the requisite period. *Johnson v. Simpson*, 22 C. A. 290, 54 S. W. 308.

Parol sale between adverse claimants of land held to show sufficient privity to en-

title the latter to cumulate the possession of both. *McManus v. Matthews* (Civ. App.) 55 S. W. 589.

In trespass to try title, evidence offered by defendant showing occupancy by various persons for the requisite period for obtaining title by adverse possession, but failing to show any privity of such persons with defendant, will not support a judgment sustaining defendant's claim of title by limitations. *Moore v. Loggins* (Civ. App.) 114 S. W. 183.

Evidence held to sustain a finding that plaintiff's predecessors in title each held the land adversely, and that there was a privity between them, and that the land held adversely was the same land as that in dispute. *Bennette v. Collins*, 54 C. A. 16, 116 S. W. 618.

Where title by adverse possession is to be sustained by the successive possession of several holders, the evidence of privity between them must be competent and clear. Evidence held insufficient. *Rushing v. Lanier* (Civ. App.) 132 S. W. 523.

**Vendor and purchaser.**—See cases under "Vendor and purchaser," cited under Art. 5681.

One who entered under a deed to himself, duly recorded, may tack his own possession to that of his vendor, who also entered and held under a deed duly registered. *Cook v. Dennis*, 61 T. 246.

When the purchaser under an executory contract enters into possession of the land, his possession is adverse as against all except his vendor, or one standing in a similar relation to him as the vendor by privity of contract. *Barrett v. McKinney* (Civ. App.) 93 S. W. 240.

The possession of land by the vendee is not the possession of his vendor as against one who enters possession after the sale. *Kirby v. Boaz* (Civ. App.) 121 S. W. 223.

A possession taken by a purchaser under a deed reserving a lien to secure the purchase money notes is available to the vendor as against an adverse claimant. *Kirby v. Boaz*, 103 T. 525, 131 S. W. 533.

One claiming the title of a vendor held not entitled to rely on the possession taken by the purchaser and subsequently abandoned by him to the holder of the adverse title. *Id.*

Where the privity between an occupant of land and a third person was that of vendor and purchaser, the latter was entitled to the benefit of the adverse possession by the occupant. *Campbell v. San Antonio Machine & Supply Co.* (Civ. App.) 133 S. W. 750.

Where a possessor sells his land and remains in possession claiming it, he breaks the possession essential to establish title by adverse possession. *Dunn v. Taylor* (Civ. App.) 143 S. W. 311.

**Landlord and tenant.**—See cases cited under "Landlord and tenant" under Art. 5681.

A person who has occupied land, using, cultivating and claiming it as his own, without title, color of title or deed, may continue his possession by his agent, tenants or lessee, whether the lease be by parol or in writing. *Cochrane v. Faris*, 13 T. 850.

A tenant repudiating his attornment cannot tack his possession as tenant either with his previous or subsequent possession. *Robinson v. Bazoon*, 79 T. 524, 15 S. W. 585.

Where one, with color of title to the whole tract, fenced and put a tenant in possession of part, and they used the rest for grazing, held, that such continuous adverse possession was shown as to support a plea of limitations. *Puryear v. Friery*, 16 C. A. 316, 40 S. W. 446.

Evidence held to sustain a finding that an occupancy by a tenant constituted adverse possession. *Neyland v. Texas Yellow Pine Lumber Co.*, 26 C. A. 417, 64 S. W. 696.

Tenant's possession of land held insufficient to show constructive possession on part of landlord. *William Carlyle & Co. v. Pruett*, 37 C. A. 384, 84 S. W. 372.

A landlord cannot claim title by limitation through a tenant, unless he was a tenant for the full statutory period. The tenant's occupancy must be exclusive. *Wiley v. Bargman* (Civ. App.) 90 S. W. 1116. Evidence held to show that defendant's predecessor held and used the land as a tenant in recognition of plaintiff's title, and not adversely. *Buford v. Wasson*, 49 C. A. 454, 109 S. W. 275.

Where a landlord claimed under a grant, the tenant's possession of a part of the land extended the landlord's claim of adverse possession to the boundaries of the grant. *Harris v. Iglehart*, 52 C. A. 6, 113 S. W. 170.

A tenant, having acquired title from his landlord, held entitled to assert the rights of possession acquired by the landlord. *Id.*

Where the boundaries of a lot were clearly marked, possession of plaintiff, through his tenants, of a part of the lot, perfected title by limitation to the well-defined limits of the whole lot. *Washam v. Harrison* (Civ. App.) 122 S. W. 52.

Where a landlord is in adverse possession through a tenant, his possession is not destroyed by the tenant's attornment to a stranger. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Where plaintiffs had possession through tenants, a hiatus between the tenants' abandonment without notice to plaintiffs and defendants' entry held not to establish plaintiffs' abandonment of their possessory rights. *Id.*

In order to establish title by limitations to a league of land by the possession of tenants, there must be possession by the tenants or those claiming under them of the entire league in the name of the claimant. Even if the tenant agreed to hold possession for one claiming title thereto, there was no title by limitations, through such tenant, where the evidence did not show continued possession of the tenant or of persons claiming under him, acknowledging the title of the claimant and exercising the right of possession of the entire league. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

Where decedent executed an instrument by which he acknowledged that he held lands as tenant of plaintiffs' predecessor in title, and that the land belonged to him, and it was uncontradicted that the land described in such instrument was the same land as that sued for, such proof destroyed any legal claim of title in B. by limitation, and it was therefore error to submit to the jury whether B. acknowledged himself tenant for A. *Adams v. Burrell* (Civ. App.) 127 S. W. 581.

Plaintiff's predecessor's possession of land through tenants inures to plaintiff's benefit on a claim of title by adverse possession. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

Evidence held to establish continuous possession sufficient to confer title by adverse possession. *Bayle v. Norris* (Civ. App.) 134 S. W. 767.

One claiming land under the ten-year statute of limitations can predicate his right thereto on the possession of one holding as his tenant. A tenant could not defeat the right of his landlord holding adversely, by an attempted attornment to another. *Combs v. Stringer* (Civ. App.) 142 S. W. 668.

Continuity of possession of an adverse claimant is broken by the attornment of his tenant to the owner of the property obtained by him, without any notice that the person in possession, who attorns, is holding under one claiming adversely to him. *Louisiana & Texas Lumber Co. v. Alexander* (Civ. App.) 154 S. W. 233.

**Decedent and heirs and representatives.**—Heirs may tack their possession to that of the ancestor, so as to complete the term of occupancy required by the statute. *Olive v. Bevil*, 55 T. 423.

The possession of the real estate by an executor held not a break in the possession of land as between ancestor and devisee, being authorized by Arts. 3233, 3235. *McLavy v. Jones*, 31 C. A. 354, 72 S. W. 407.

One adversely in possession of land which has been set apart to her in partition of the estate of an ancestor may prescribe under deed to the ancestor, without there having been a record of the probate order. *Id.*

Possession of land by plaintiff's ancestor held not such as to confer title by adverse possession. *Veatch v. Gray*, 41 C. A. 145, 91 S. W. 324.

Under the statute relating to survival of actions, time of adverse possession relied on as defense in trespass to try title held measurable back from the commencement of the action, even as to heirs of deceased plaintiff. *Upson v. Campbell* (Civ. App.) 99 S. W. 1129.

Title by inheritance held a sufficient link in a chain of title to sustain a plea of limitations. *Kennon v. Miller* (Civ. App.) 143 S. W. 986.

**Art. 5683. [3351] Right of the state not barred, etc.**—The right of the state shall not be barred by any of the provisions of this chapter, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any part or portion of any road, street, sidewalk or grounds which belong to any town, city or county, or which have been donated or dedicated for public use to any such town, city or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city or county in this state; provided, this law shall not apply to any alley laid out across any block or square in any city or town. [*Id.* secs. 15–17. P. D. 4622–4624. Acts 1887, p. 28.]

See, also, notes at end of title.

**State.**—Limitations do not run against the state's right to set aside a patent obtained by fraud. *State v. Burnett* (Civ. App.) 59 S. W. 599.

Limitations do not run in favor of one in possession of land, as against the state. *Zepeda v. Hoffman*, 31 C. A. 312, 72 S. W. 443.

Limitations do not run against the state. *Lawless v. Wright*, 39 C. A. 26, 86 S. W. 1039.

Adverse possession of land forfeited to state for nonpayment of interest on price held thereby interrupted, and the state can sell the land, in view of Art. 5423, providing for its reversion. *Id.*

A college, though designed for a public corporation, to be employed as a medium through which the republic was to exercise some of its governmental functions, was not within this article; and the title of the college to the land granted to it might be lost by adverse possession. *Trustees of College of De Kalb v. Williams* (Civ. App.) 143 S. W. 348.

**Claimant under purchase from state.**—See *Houston Oil Co. v. McGrew* (Civ. App.) 143 S. W. 191.

Land legally surveyed under location of a valid land certificate is segregated from the mass of public domain; the equitable title is thereby vested in the owner of the certificate, against which the statute of limitations will run in favor of an adverse occupant claiming the land. *Udell v. Peak*, 70 T. 547, 7 S. W. 786.

Land was bought from the state in 1877. It was patented in 1889. In such case, as the purchaser could maintain trespass to try title for the land upon his contract with the state, the statute of limitation would run against such purchaser in favor of one in adverse possession before the patent issued for the land. *Dutton v. Thompson*, 85 T. 115, 19 S. W. 1026.

While limitation does not run against the state (*Campbell v. McFadden*, 9 C. A. 379, 31 S. W. 436), it will run in favor of an occupant of public lands against one claiming under purchase from the state (*Parker v. Brown*, 80 T. 555, 16 S. W. 262).

Limitations do not run against a purchaser of state land so as to confer title by adverse possession while the title is still in the state, and the purchaser has merely a right to acquire title upon compliance with the terms of the purchase. *Dooley v. Maywald*, 18 C. A. 386, 45 S. W. 221.

The period of adverse possession of school lands between the application to purchase and the issue of the patent may be included in the ten-year limitation prescribed by statute. *Thompson v. Dutton* (Civ. App.) 69 S. W. 641.

A grantee of a purchaser of school lands paying one-fortieth of the price in cash is

in the attitude of the state, and no limitation can be pleaded against him. *Hamman v. Presswood* (Civ. App.) 120 S. W. 1052.

Where defendants, in adverse possession of land, had not been in possession for ten years when the state instituted suit to foreclose its lien for unpaid taxes, so that they were not proper parties to such action, they were still bound by the judgment, though not served with notice, and hence were not entitled to hold the land as against the purchaser from the state and those claiming under him. *Patton v. Minor*, 103 T. 176, 125 S. W. 6.

Title by limitation may be acquired to unpatented school lands sold by the state. *Paterson v. Rector* (Civ. App.) 127 S. W. 561.

**United States.**—As no action can be maintained against the government, no limitation would run in its favor against the owner of land occupied by the United States. *Stanley v. Schwalby*, 85 T. 348, 19 S. W. 264.

Limitations run in favor of the United States. *City of El Paso v. Ft. Dearborn Nat. Bank*, 96 T. 496, 74 S. W. 21.

**County.**—In the absence of statutory prohibition, limitation will run in favor of or against a county. *Caldwell County v. Harbert*, 63 T. 321, 4 S. W. 607.

The statute of limitation cannot be invoked as a defense in actions by a county acting as the representative of sovereignty, such as an action to establish county boundaries. *Marsalis v. Garrison* (Civ. App.) 27 S. W. 929, citing *Coleman v. Thurmond*, 56 T. 514; *Railway Co. v. Travis County*, 62 T. 16.

Limitations run against counties, unless otherwise provided. *Ward v. Marion County*, 26 C. A. 361, 62 S. W. 557, 63 S. W. 155.

Under the express provisions of the constitution, adverse possession or limitations is not available against the title of a county to lands granted to it for educational purposes. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1056.

In an action by a city against a county to recover certain land, facts held to show that the county was entitled to exclusive possession for the purposes for which the land was dedicated by adverse possession for more than 10 years. *City of Victoria v. Victoria County* (Civ. App.) 94 S. W. 368.

Facts held to show acquisition of title to county land by limitations. *Hardin County v. Nona Mills Co.* (Civ. App.) 112 S. W. 822.

No claim of possession subsequent to the dedication of the site by a town to a county for county buildings can reduce or increase the dedicated area. *City of Victoria v. Victoria County* (Civ. App.) 115 S. W. 67.

Where a county holds the superior title to land no adverse occupancy or possession can ripen into a right under the statutes of limitation for the recovery of land. In such a case limitation will not run against the county. *Bell County v. Felts* (Civ. App.) 120 S. W. 1072.

Under Const. art. 7, § 6, and Paschal's Dig. art. 3470, on a recovery by a county of such land in trespass to try title, defendant is not entitled to compensation for the improvements made by him, as his remedy is to purchase the land. *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**City.**—A railway company, continuing in the undisturbed possession for over 20 years of land belonging to a city, under an ordinance of the city, held to acquire an easement to such lands. *Board of School Trustees of City of San Antonio v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 67 S. W. 147.

**Roads and streets.**—Prior to the act of 1887 there was no statutory inhibition from a person acquiring title by limitation to land upon which a street or road had been established. *Ostrom v. City of San Antonio*, 77 T. 345, 14 S. W. 66.

Rights might have grown up if the street had been occupied adversely to the purposes for which it was dedicated for a sufficient length of time before this statute was passed (in 1887), but there was no adverse occupation until long after the street had been formally accepted by the city. This article prevented that adverse possession from ripening into a title. *Krause v. City of El Paso* (Civ. App.) 101 S. W. 832.

This statute does not affect the right of a party to acquire title by limitation to the fee in a street. One can bring suit to recover the fee in a street without being joined by the city in which is the street, and adverse possession for ten years would invest him with the title to the fee (in the street) subject to the right of the city to the use of the property as a street. *Cocke v. Texas & N. O. Ry. Co.*, 46 C. A. 363, 103 S. W. 409.

Title by limitation to land over which a street has been established could not be acquired against a city after July 4, 1887. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

Title cannot be acquired to any public road or street by limitation (since 1887, when this article was passed), against any county or town or city. Nor could limitation have commenced to run before the act was passed, before the streets were laid off or dedicated to public use. *Perry v. Ball*, 52 C. A. 134, 113 S. W. 591, 592.

**Grounds.**—The statute may be relied upon in a suit by a county to recover lands which were not acquired or used for public purposes. The words "road," "street" and "sidewalk" do not include all real estate, and the word "grounds" applies only to such real estate as was dedicated to or intended for public use. *Johnston v. Liano County*, 15 C. A. 421, 39 S. W. 995.

A deed to defendant held not sufficient to set in operation the statute as against the rights of a city to use the property as a public park. *Gillean v. City of Frost*, 25 C. A. 871, 61 S. W. 345.

A lake can be dedicated to public use, and is comprehended under the term "grounds" used in the statute. *Gillean v. City of Frost*, 25 C. A. 371, 61 S. W. 348.

**Alley.**—Title to an alley in a city can be acquired by limitation. *Folsom v. City of McGregor* (Civ. App.) 30 S. W. 846.

**Art. 5684. [3352] Does not run against infants, etc.**—If a person entitled to commence suit for the recovery of real property, or to make

any defense founded on the title thereto, be at the time such title shall first descend or the adverse possession commence—

1. Under the age of twenty-one years; or,
2. Of unsound mind; or,
3. A person imprisoned; the time during which such disability shall continue shall not be deemed any portion of the time limited for the commencement of such suit, or the making of such defense; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this chapter; provided, that limitation shall not begin to run against married women until they arrive at the age of twenty-one years; and, further, that their disability shall continue one year from and after July 29, 1895, and that they shall have thereafter the same time allowed others by the provisions hereof; and, further, that this article shall in no way affect suits then pending, and all such suits shall be tried and disposed of under the law then in force. [Acts 1841, p. 109, secs. 14-17. P. D. 4621-4624. Amend. 1895, p. 35.]

See Art. 5708.

**In general.**—Where one of two tenants in common is under some disability which prevents the running of limitation against him, the other tenant is not protected from the effect of limitation, and in such case the party under disability and not barred can recover only his own moiety. *Stovall v. Carmichael*, 52 T. 383.

A trust which is exempted from the operation of the statute of limitations must be a mere creature of equity, exclusively cognizable within its jurisdiction, and must also be a subsisting, continued and acknowledged trust. *Hightower v. Hester*, 4 App. C. C. § 57, 15 S. W. 415.

Where the defendant has never repudiated his obligation to the plaintiff, there is no limitation to a suit on a contract made by the defendant to buy and locate land certificates for the plaintiff with money received from him for that purpose. *White v. Afleck*, 1 U. C. 78.

Limitation which begins to run against an ancestor is not estopped in favor of the heir either by minority or coverture. *Moody v. Moeller*, 72 T. 635, 10 S. W. 727, 13 Am. St. Rep. 839; *Harris v. Wells*, 85 T. 312, 20 S. W. 68.

The only heir of an intestate conveyed land of the deceased and his grantee took possession. The heir brought suit attacking the validity of the administration. Held, that limitation ran against the administrator in favor of the party claiming under the heir during the pendency of such suit. *Bowen v. Kirkland*, 17 C. A. 346, 44 S. W. 189.

**Minors.**—A minor becomes of age on the day preceding his twenty-first birthday. *Ross v. Morrow*, 85 T. 172, 19 S. W. 1090, 16 L. R. A. 542.

A person is not entitled to a prescriptive right in the use of a road as against persons not sui juris. *City of Austin v. Hall*, 93 T. 591, 57 S. W. 563.

Evidence held to support the reply of minority to a plea of limitations. *Halliday v. Lambright*, 29 C. A. 226, 68 S. W. 712.

Will construed, and held not to vest a husband with the legal title to land devised by the wife to their children, and hence limitations did not run against such children's right to recover the property during their minority. *Wiess v. Goodhue*, 98 T. 274, 83 S. W. 178.

Limitations do not run in favor of one in possession of land against a minor. *Meurin v. Kopplin* (Civ. App.) 100 S. W. 984.

In order for a claim of adverse possession to prevail against one who was a minor at the commencement of the possession, the adverse possession must continue for the requisite period after the minor becomes of age. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

Limitations do not begin to run against the owner of land until he becomes of age. *Louisiana & T. Lumber Co. v. Lovell* (Civ. App.) 147 S. W. 366.

Where land of infants was in the continuous adverse possession of one and those claiming under him for twenty-four years, ten of which were after removal of the disability of infancy, title was acquired under the ten-year statute, which began to run against the infants on the removal of disability. Where the agent of infants was in actual possession of land asserting an adverse claim, the fact that he received a third person's application to purchase a different tract of the infants did not affect his right to perfect his title by limitations. *Louisiana & T. Lumber Co. v. Southern Pine Lumber Co.* (Civ. App.) 147 S. W. 604.

The fact that a party took possession of and set up a claim to land for his own benefit while a minor, but with his father's permission to acquire the land for himself, would not prevent him from acquiring title to the land by limitation. *Griffin v. Houston Oil Co. of Texas* (Civ. App.) 149 S. W. 567.

Where occupants of land cultivated the same and claimed it adversely, it was not material that one of them was not of age at the time the adverse possession began, and that both resided on other land with their father a portion of the time. *R. W. Wier Lumber Co. v. Conn* (Civ. App.) 156 S. W. 276.

**Persons of unsound mind.**—The statute does not run against a person of unsound mind. *Moore v. City of Waco*, 85 T. 206, 20 S. W. 61.

Limitations held not to begin to run against one's right to recover land when actual possession is taken by others, if he is then insane. *Kaack v. Stanton*, 51 C. A. 495, 112 S. W. 702.

Possession under a claim of title which begins after the owner has been adjudged a lunatic cannot ripen into title by limitations. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

**Married women.**—Where plaintiff's husband, acting under her power of attorney, sold and conveyed her land in 1872, and died in 1889, and she did not sue to recover the land from such purchaser, who had had continual possession, until four years after the act of 1895 made limitations applicable to married women, her action was barred. *Williams v. Bradley* (Civ. App.) 67 S. W. 170.

Limitations held not admissible against defendant; she having been a married woman until within less than three years before the action. *Estes v. Turner*, 30 C. A. 365, 70 S. W. 1007.

Where defendants in trespass to try title went into possession during the coverture of the owner of the land, limitations did not begin to run in their favor until termination of the coverture. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Where action was commenced by married woman over sixty years old on December 2, 1902, to try title to real estate which had been in adverse possession of defendants for more than five years it was barred. *Broom v. Pearson* (Civ. App.) 81 S. W. 753.

Where action was begun December 2, 1902, by heirs of a deceased married woman, who would then, if living had been fifty-six years old, to recover real estate, adverse possession of which had been held by defendant for more than five years, it was barred. *Id.*

Where two cotenants were married women, limitations could only be established against them by proof that the statute commenced to run before their respective marriages, or that the bar had operated since the passage of the statute abolishing the disability of coverture. *Broom v. Pearson*, 98 T. 469, 85 S. W. 790, 86 S. W. 733.

Where land was unoccupied till defendant H. purchased a portion in 1879, when the holder of the legal title was a married woman, and so continued till her death in 1894, and suit was brought to recover the land by her heirs in 1901, refusal to charge that defendants had title under the ten-year limitation held proper. *Hymen v. Holyfield* (Civ. App.) 87 S. W. 722.

Limitations held to have run against the right of children of a former owner of certain land to recover the same, but not so as to such owner's widow except as to a portion of the tract. *Surghenor v. Taliaferro* (Civ. App.) 98 S. W. 648.

In an action brought in 1902, adverse possession held not sufficient under the ten-year statute owing to plaintiff's coverture. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

Limitations run against a married woman's right to recover a community homestead conveyed by her husband in hostility to her homestead rights. *Sanders v. Word*, 50 C. A. 294, 110 S. W. 205.

Coverture subsequent to the beginning of adverse possession does not interrupt it. *Hoencke v. Lomax*, 55 C. A. 189, 118 S. W. 817.

Title to land cannot be acquired by adverse possession as against a married woman. *Whittaker v. Thayer* (Civ. App.) 123 S. W. 1137.

The statute began to run against a female minor owner of land held adversely by another when she married. *Louisiana & G. Lumber Co. v. Lovell* (Civ. App.) 147 S. W. 366.

Evidence in trespass to try title held not to show that a minor against whom limitations were claimed to have run married as late as June 1, 1895, so as to start the running of limitations from that date. *Id.*

The rule that the statute begins to run against a female minor from her marriage was changed by the amendment of 1895, which provides that limitations shall not begin to run against married women until they become twenty-one years old. This applies to trespass to try title, wherein defendants rely on a judgment foreclosing a vendor's lien. *Gibson v. Oppenheimer* (Civ. App.) 154 S. W. 694.

**When amendment of 1895 took effect.**—This article was amended by the act of April 1, 1895, without an emergency clause. (24th Leg., p. 35.) The legislature adjourned April 30, 1895. This law did not take effect until 1896. Its effect was not retroactive, but limitation would run only from the end of the year after the passage of the act. *Anderson v. Wynne* (Civ. App.) 62 S. W. 121.

The language "after the passage of this act," used in the amendment of this article, means after the act took effect, which was ninety days after the adjournment of the session of the legislature at which the act was passed. *Shook v. Läufer* (Civ. App.) 100 S. W. 1046.

**Decisions prior to amendment of 1895.**—Construing this article in connection with *Kelley v. Whitmore*, 41 T. 647, *Simonton v. Mayblum*, 59 T. 7, and *Smith v. Uzzell*, 61 T. 221, held, that the law which suspends the operation of the statutes of limitation as against the wife during coverture has no application to suits involving the homestead when it is claimed as the separate property of the husband or as part of the community estate. In either case the right of the wife to maintain an action during coverture in her own name exists. (This case distinguished from *Simonton v. Mayblum*, 59 T. 7, and *Smith v. Uzzell*, 61 T. 221.) An exception in favor of the wife, who sets up claim to the homestead merely as such, cannot be engrafted on the statutes of limitation by the courts; and the fact that the husband, in alienating the property, has acted in hostility to her claim, will not suspend the operation of the statute as against one in possession claiming under deed. *Hussey v. Moser*, 70 T. 42, 7 S. W. 606.

Limitation does not run against one claiming an estate in remainder, who was under coverture when the property was wrongfully sold by the tenant in possession. *Rogers v. Trevathan*, 67 T. 406, 3 S. W. 569.

Limitation runs against the wife where the homestead, not her separate property, has been conveyed by the husband and abandoned by both. *Hussey v. Moser*, 70 T. 42, 7 S. W. 606; *Cuellar v. Dewitt*, 24 S. W. 671, 5 C. A. 568.

A purchase of land by a married woman will not stop the running of the statute of limitation in favor of a person holding adverse possession when it had begun to run before her purchase. *Johnson v. Schumacher*, 72 T. 334, 12 S. W. 207.



By the Revised Statutes the indefinite equitable defense of stale demand was eliminated from our law, and instead of meeting such a plea with excuses it should be met with legal exceptions; as, for example, coverture or infancy. *Storer v. Lane*, 1 C. A. 250, 20 S. W. 852.

Where a married woman conveys land which is her separate property, by deed in which her husband does not join, limitation will not run against her and in favor of the purchaser while she remains married. *Fox v. Brady*, 1 C. A. 590, 20 S. W. 1024.

Limitation runs against a female minor from the date of her marriage. *Smith v. Powell*, 23 S. W. 1109, 5 C. A. 373.

When the homestead belongs to the community estate and has been abandoned by the husband and wife, and has been conveyed by the husband, acting in direct hostility to the homestead rights of the wife, the statute of limitations runs against the wife. *Cuelar v. Dewitt*, 24 S. W. 671, 5 C. A. 568, citing *Kelley v. Whitmore*, 41 T. 647; *Simonton v. Mayblum*, 59 T. 7; *Smith v. Uzzell*, 61 T. 220.

Limitation does not run against an action to correct a deed brought by the party in possession. *Payne v. Ross*, 10 C. A. 419, 30 S. W. 671.

A statute as to land cannot run against a woman until she has become of age, or until she marries. *Taylor v. Brymer*, 17 C. A. 517, 42 S. W. 999.

Cause of action arose while a female was under twenty-one years of age. Held that, under Rev. St. 1879, art. 2471, upon her marriage she ceased to be a minor and the statute of limitations commenced to run. *Grayson v. Lofland*, 21 C. A. 503, 52 S. W. 121.

DECISIONS RELATING TO SUBJECT IN GENERAL

Highway by prescription.—See notes at end of Title 119, Chapter 1.  
 Laches and stale demands.—See notes under Trespass to Try Title, Art. 7740, and other particular subjects.

CHAPTER TWO

LIMITATION OF PERSONAL ACTIONS

<p><b>Art.</b>                  5685. Actions to be commenced in one year.                  5686. Survival of causes of action.                  5687. Actions to be commenced in two years.                  5688. What actions barred in four years.                  5689. On bond of executor, etc.                  5690. All other actions barred, when.                  5691. All foreign judgments barred.                  5692. Actions for specific performance.                  5693. Time in which power of sale may be exercised.</p>	<p><b>Art.</b>                  5694. Rights under vendor's lien barred, when.                  5695. Contracts of extension, how made and construed.                  5696. Judgments shall be revived, when.                  5697. On motion for not returning execution.                  5698. On action of forcible entry, etc.                  5699. On action to contest a will.                  5700. In case of forgery, etc., action accrues, when.</p>
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**Article 5685. [3353] Actions to be commenced in one year.—**There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterward, all actions or suits in courts of the following description:

1. Actions for malicious prosecution or for injuries done to the character or reputation of another by libel or slander.

2. Actions for damages for seduction, or breach of promise of marriage. [Act Feb. 5, 1841, sec. 1. Act Feb. 2, 1860, sec. 1. Amended Acts 1897, p. 12.]

**Subdivision 1.—**The term "malicious prosecution," as used in this article, refers to a criminal proceeding, and not to a prosecution as involved in a civil action. *Bear Bros. v. Marx*, 63 T. 298.

Limitations begin to run against an action for malicious prosecution from the time the prosecution ends. *Von Koehring v. Witte*, 15 C. A. 646, 40 S. W. 63.

Action for destroying plaintiffs' business by false representations held not governed by the one-year limitation. *Brown v. American Freehold Land Mortg. Co. of London*, 97 T. 599, 80 S. W. 985, 67 L. R. A. 195.

**Subdivision 2.—**When there is no dispute as to the fact that the promise of marriage was made within one year before filing suit, the court properly refused to charge upon the issue made by the plea of limitation. *Daggett v. Wallace*, 75 T. 352, 13 S. W. 49, 16 Am. St. Rep. 908.

An action for breach of marriage promise is brought in time, if brought within one year from the breach. *Huggins v. Carey* (Civ. App.) 149 S. W. 390.

**Amendment of 1897.—**This article, before it was amended by the act of 1897, applied to an action for damages for mental anguish caused by failure to deliver a telegram. *Bear v. Marx*, 63 T. 298; *Martin v. Telegraph Co.*, 26 S. W. 136, 6 C. A. 619; *Kelly v. Western Union Telegraph Co.*, 17 C. A. 344, 43 S. W. 532. So of an action for damages by a passenger against a railway company for carrying him beyond his destination and putting him off the train at a distance from the station at which he should have been allowed to leave. *Railway Co. v. Roemer*, 1 C. A. 191, 20 S. W. 843.

The act of 1897 changes the limitation then existing and to this extent is an amendment of this article, and must be construed with reference to the general provisions of the statutes of limitation. The act of 1897 went into effect August 20, 1897. Where an injury occurred on August 19, 1897, the one-year statute applied. *Voight v. G. W. T. & P. Ry. Co.* (Civ. App.) 59 S. W. 578.

**Art. 5686. [3353a] Survival of cause of action.**—Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health or to the reputation, or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such cause of action shall have accrued; but, in the case of the death of either or both, such cause of action shall survive to and in favor of the heirs and legal representatives of such injured party and against the person, receiver or corporation liable for such injuries and his legal representatives; and so surviving, such cause may be thereafter prosecuted in like manner and with like legal effect as would a cause of action for injuries to personal property. [Acts 1895, p. 143.]

**In general.**—The fact that one on whom personal injuries were inflicted brought action therefor before his death will not cause the action to survive in favor of his wife. *Mexican Cent. Ry. Co. v. Goodman*, 20 C. A. 109, 48 S. W. 778.

After a husband's death, the wife may continue suit brought by him for injuries to her. *Id.*

Where, pending an action for personal injuries to a married woman, her husband dies intestate, the widow may prosecute the suit in her own name as survivor, where there was no administration upon the husband's estate nor any necessity therefor. *St. Louis S. W. Ry. Co. of Texas v. Carwile*, 28 C. A. 208, 67 S. W. 160.

The terms of this statute only permit the survival of the cause of action when the personal injuries do not result in death. *Ellyson v. I. & G. N. Ry. Co.*, 33 C. A. 1, 75 S. W. 869.

Where one sues for damages for personal injuries and dies pending the suit, if death resulted from the injuries, the heirs and representatives of deceased cannot recover, but if death resulted from some other cause, they can recover for the injuries. *International & G. N. Ry. Co. v. Ellyson*, 43 C. A. 45, 94 S. W. 910.

A woman who in good faith married a man in ignorance of the fact that he had a wife living, and lived with him until his death in ignorance of such fact, is entitled to enforce a cause of action for injuries to the man which did not result in his death. *Ft. Worth & R. G. Ry. Co. v. Robertson*, 55 C. A. 309, 121 S. W. 202.

**Elements of damage.**—The cause of action mentioned in this article does not abate with the death of the injured party, but suit can be brought by his heirs after his death. They can recover for the physical pain and mental anguish which the injured party suffered up to the time of his death. *Gulf, C. & S. F. Ry. Co. v. Moore*, 28 C. A. 603, 68 S. W. 560, 561.

The term "personal injuries" is broad enough to include mental suffering. It is upon this theory that damages for mental suffering are recoverable at all. *W. U. Tel. Co. v. Kauffman* (Civ. App.) 107 S. W. 631.

The statute authorizes a recovery of all damages which the injured party, if living, could recover, so that the widow and children of one maliciously prosecuted could recover damages for injury to his feelings, etc., as well as to his reputation. *Missouri, K. & T. Ry. Co. of Texas v. Groseclose* (Civ. App.) 134 S. W. 736.

**Burden of proof.**—See notes under Art. 3786, Rule 12.

**Assignment of cause of action.**—Causes of action for personal injuries survive and may be sold and transferred, the same as would causes of action for injuries to personal property, and where a person conveys a half interest in his claim for damages, in consideration of services rendered and to be rendered to collect the same he can not revoke the power granted without the consent of the grantee in the power. *Railroad Co. v. Miller*, 21 C. A. 609, 53 S. W. 709.

An interest in a cause of action for personal injuries is assignable before suit is brought to recover for such injuries, and the party liable for the injuries with notice of the assignment is bound. *Galveston, H. & S. A. Ry. Co. v. Ginther*, 96 T. 295, 72 S. W. 167.

A party injured by a railway company can assign an interest in the claim to his attorneys in consideration of services to be rendered in the case before suit is filed, without complying with Art. 6833, but to hold the company liable where it afterwards makes a settlement with the injured party, the burden is on the assignees of the interest to show that the company had notice of the assignment. *G., C. & S. F. Ry. Co. v. Eldredge*, 35 C. A. 467, 80 S. W. 556.

**Injury without jurisdiction.**—The only right which a wife has to damages to the person of her husband after his death arises by virtue of the statute, and a statute which gives a right of action for a tort in derogation of the common law, or a right unknown to the common law, can have no extra territorial force. *Railroad Co. v. Goodman*, 20 C. A. 109, 48 S. W. 778.

**Decisions prior to Acts 1895, p. 143.**—A husband sued the city of Austin for damages for personal injuries caused by alleged neglect on the part of the city to keep a street in proper repair. Pending the suit plaintiff died. The widow sought to revive the suit. Held, that the suit abated upon the husband's death. *Ritz v. City of San Antonio*, 1 C. A. 455, 20 S. W. 1029.

This statute has no effect on a cause of action which had abated, according to the rule of the common law before it took effect. *Fitzgerald v. W. U. Tel. Co.*, 15 C. A. 143, 40 S. W. 421.

When an injury occurred prior to the passage of the act, which resulted in death after the enactment, the death of the injured person did not abate the suit. *City of Marshall v. McAllister*, 18 C. A. 159, 43 S. W. 1043.

**Art. 5687. [3354] Actions to be commenced in two years.**—There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions of trespass for injury done to the estate or the property of another.

2. Actions for detaining the personal property of another, and for converting such personal property to one's own use.

3. Actions for taking or carrying away the goods and chattels of another.

4. Actions for debt where the indebtedness is not evidenced by a contract in writing.

5. Actions upon stated or open accounts, other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents. In all accounts, except those between merchant and merchant, as aforesaid, their factors and agents, the respective times or dates of the delivery of the several articles charged shall be particularly specified, and limitations shall run against each item from the date of such delivery, unless otherwise specially contracted.

6. Action for injury done to the person of another.

7. Action for injury done to the person of another where death ensued from such injury; and the cause of action shall be considered as having accrued at the death of the party injured. [Act Feb. 5, 1841, p. 163, sec. 1. Act Feb. 16, 1852, p. 128, sec. 1. P. D. 4604. Amended Acts 1897, p. 12.]

Cited, *Elder, Dempster & Co. v. St. Louis S. W. Ry. Co. of Texas*, 105 T. 628, 154 S. W. 975, cited under Art. 5687, subd. 1.

See Decisions Applicable to Subject in General, § 30, following this title.

**Subdivision 1.**—The claim against a county for damages to land from its unlawful use as a highway is barred in two years from the time of its actual use by the road overseer or hands in opening up or working same. *Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941.

As to the limitation of an action for injuries caused by the breaking of a dam, see *Railway Co. v. Graham*, 12 C. A. 54, 33 S. W. 576; *Railway Co. v. Anderson*, 79 T. 427, 15 S. W. 484, 23 Am. St. Rep. 350; *Railway Co. v. Davis* (Civ. App.) 29 S. W. 483; *Lyles v. Railway Co.*, 73 T. 95, 11 S. W. 782; *Railway Co. v. Schofield*, 72 T. 499, 10 S. W. 575; *Rosenthal v. Railway Co.*, 79 T. 327, 15 S. W. 268.

An action against a telegraph company to recover the toll paid for a message which was not delivered involves an injury to the estate. *Kelly v. Western Union Tel. Co.*, 17 C. A. 344, 43 S. W. 532.

The limitations of two and four years held not to preclude owner of land from recovering damages occasioned to the remainder of a tract of land from the occupancy of a portion by defendant railroad. *Galveston & W. Ry. Co. v. Kinkead* (Civ. App.) 60 S. W. 468.

Action for damages for permanent injury to real property by reason of diversion of surface water is barred after two years from the time the damage occurred. *Tietze v. International & G. N. R. Co.*, 35 C. A. 136, 80 S. W. 124.

Action of an adjoining property owner, against a commercial railroad, for damages caused by the operation of a railroad in a street in front of his premises, held to have accrued more than two years prior to the institution of the suit, and was, therefore, barred. *Houston, O. L. & M. P. Ry. Co. v. Grossman* (Civ. App.) 89 S. W. 312.

Facts held sufficient to sustain defendant's burden of proof of limitations in a suit by an adjoining property owner for damages caused by the maintenance of defendant's commercial railroad in the street in front of his premises. *Id.*

Where the construction of an embankment gives rise to a permanent nuisance, the cause of action for damages arises upon its construction, and is barred by limitation after two years. *Brown v. Texas Cent. R. Co.*, 42 C. A. 392, 94 S. W. 134.

An action begun in 1904 for damages to property caused by the construction of an embankment and switch track in 1903 is not barred by limitation. *Houston & T. C. R. Co. v. Barr*, 44 C. A. 571, 99 S. W. 437.

A claim for cutting timber on land belonging to interveners held barred by the two-year statute of limitations. *Kirby v. Hayden*, 44 C. A. 207, 99 S. W. 746.

Where a railway embankment becomes a nuisance only at intervals, held the cause of action arises upon receipt of each injury, and successive actions may be brought for each injury as it occurs, and that an action for such injury would not be barred for two years thereafter. *International & G. N. R. Co. v. Kyle* (Civ. App.) 101 S. W. 272.

Where, in trespass to try title, the original petition claimed only damages resulting from the unlawful ejectment and the withholding of possession, a claim for damages resulting from cutting timber, set up in an amended petition filed more than two years after the accrual of the right to damages, was barred. *Kirby v. Hayden* (Civ. App.) 125 S. W. 993.

Where the work of constructing a railroad in a street in front of plaintiff's property was not completed until within two years prior to the commencement of the suit, plaintiff's right to recover damages was not barred. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

Even though failure of a carrier to deliver freight received for transportation gave the shipper a cause of action for trespass, or for conversion within subdivisions 1 and 2, limitations do not begin to run so long as the carrier promises to search for the goods and deliver them if found, and if not found to pay damages. *Davies v. Texas Cent. R. Co.* (Civ. App.) 133 S. W. 295.

The word "trespass" includes all tortious acts amounting to a transgression of the rights of another as to his property, but there must be some act done; and a mere failure to perform an act which one owes to another is insufficient, and the failure of a carrier to deliver freight received for transportation is not a trespass. *Id.*

That a railroad company has been operated for more than two years does not preclude an adjoining landowner from recovering for nuisances maintained within two years before suit, arising from the method of operating trains. *Passons v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 137 S. W. 435.

Where a landlord on shares brought an action for injuries to growing crops, but the tenant was not made a party plaintiff until after the expiration of two years after the injury, the action of the tenant was barred. *Trinity & B. V. Ry. Co. v. Doke* (Civ. App.) 152 S. W. 1174.

Where a city's direct invasion of abutting property by drainage ditches is of a permanent character and its continuance is necessarily injurious, compensation for damages may be fully recovered at once; but, where the injury is continuous and progressive from the date that damages to the property began, suit could be maintained for damages therefor within two years prior to filing of the writ. *City of Houston v. Merkel* (Civ. App.) 153 S. W. 385.

In trespass to try title to land wrongfully appropriated by a railroad company for its right of way, no damages can be recovered for more than two years back, being barred by the two-year statute. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

In trespass to try title to land occupied by a railroad, where the railroad by cross-action sought condemnation of the right of way, upon which issue alone the case was submitted, the two or four year limitation did not apply to the right of the owner to compensation for damages to the remainder of the land. *Chicago R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

Subdivision 2.—See Decisions Applicable to Subject in General, § 30, following this title.

The fact that a debt which a pledge, with the right of possession, is made to secure is barred by the statute of limitations constitutes no defense to an action by the pledgee against another for the wrongful conversion of the property, the pledgee having a special property in the thing pledged. *Hudson v. Wilkinson*, 61 T. 606.

A married woman claiming personal property as her separate estate, and holding adverse possession for more than two years after the death of her husband, is protected by limitation against an action by a creditor of the husband for its conversion. *Young v. Willis*, 63 T. 388.

The limitation of two years applies to an action to recover damages on account of the seizure and sale of property under an attachment wrongfully sued out. The cause of action accrues when the property is seized under the writ. *Woods v. Huffman*, 64 T. 98.

A promissory note or other evidence of indebtedness, or a land certificate, is personal property. If the owner of a certificate elect to treat its adverse possession as a conversion, and seeks to recover its value, he must bring his action within two years from its accrual. His failure to do so does not bar his right to recover that to which the paper evidenced his title, nor can it confer such right upon another. *Barker v. Swenson*, 66 T. 407, 1 S. W. 117; *Harvey v. Cummings*, 68 T. 605, 5 S. W. 513; *Harvey v. Carroll*, 72 T. 63, 10 S. W. 334; *Boone v. Miller*, 73 T. 557, 11 S. W. 551.

Under subdivisions 2 and 3 of this article, the right to recover personal property is barred by two years' adverse possession. Such bar concludes the owner's right, and vests title in the holder of the property. After title has passed by such adverse possession, the fact that the property came into the possession of the former owner without claim by him of ownership would have no effect upon the right of the owner by right of the adverse possession. *Connor v. Hawkins*, 71 T. 582, 9 S. W. 684.

Limitation commences at the time of wrongful conversion of money collected by a bank, and is barred in two years. *National Bank v. Bernard* (Civ. App.) 30 S. W. 580.

Limitation in favor of an agent collecting money does not run until notice to the principal. *Bonner v. McCreary* (Civ. App.) 35 S. W. 197.

An action for the unauthorized sale of mortgaged chattels is within this article. *Greer v. Gill*, 13 C. A. 380, 35 S. W. 328.

Action for goods lost in transit is barred in two years. *Galveston, H. & S. A. Ry. Co. v. Clemons*, 19 C. A. 452, 47 S. W. 731.

Limitations held to have barred defendant's answer impleading a third party for conversion. *Mutual Life Ins. Co. v. Garland*, 23 C. A. 380, 56 S. W. 551.

A suit for conversion, brought within two years, is not barred by laches. *Texarkana Water Co. v. Kizer* (Civ. App.) 63 S. W. 913.

This article is broad enough to cover every detention or conversion of personal property. The only essential ingredient is that it is adverse to the title sued on. And if it is adverse it would be defeating the intent of the statute to permit an inquiry into the legality of its origin. If the possession has been adverse for two years preceding the institution of the suit it is a bar. If one in good faith purchases personal property that has been stolen without knowledge of this fact, and the property is used openly, and there is

no concealment, two years' adverse possession of such property gives the innocent purchaser a good title. *Luter v. Hutchinson*, 30 C. A. 511, 70 S. W. 1014, 1015.

Cause of action against carrier for conversion of goods held to accrue, so that limitations run from time of delivery of goods to carrier. *Hooks v. Gulf, B. & K. C. Ry. Co.* (Civ. App.) 97 S. W. 516.

An action by the creditor of a corporation against the purchaser of its assets, based on the conversion of its property, is barred by the two-year statute, which runs from the date of the purchase. *Clevenger v. Galloway & Garrison* (Civ. App.) 104 S. W. 914.

Plaintiff's right to recover against a bank for an alleged conversion of a special bank deposit held barred by the two-year limitation. *Prosser v. First Nat. Bank* (Civ. App.) 134 S. W. 781.

An action against a carrier for nondelivery of goods is one for conversion, so that the two-year limitation applies, notwithstanding the petition alleges a breach of contract. *R. W. Williamson & Co. v. Texas & P. Ry. Co.* (Civ. App.) 138 S. W. 807.

An action against the initial carrier held barred by the two-year limitation. *Missouri, K. & T. Ry. Co. v. Harris* (Civ. App.) 133 S. W. 1085.

An action against a connecting carrier for injuries to freight held not barred by the two-year limitation. *Id.*

A cause of action in favor of a chattel mortgagee for conversion accrued when property was applied to other claims in the absence of excusable ignorance on his part. *Beaumont Rice Mills v. Port Arthur Rice Milling Co.* (Civ. App.) 141 S. W. 349.

Where a buyer in a conditional contract did not consent to the seller's assumption of control over the goods, and renting them to third persons before the maturity of any installment of the price, the cause of action for the seller's conversion accrued at that time; and an action not brought within two years was barred. *Roberson v. Withers* (Civ. App.) 152 S. W. 1160.

Subdivision 3.—See *Connor v. Hawkins*, 71 T. 582, 9 S. W. 684, cited under subdivision 1, *supra*.

Subdivision 4.—See Decisions Applicable to Subject in General, §§ 23-28, following this title.

In a suit to recover back a portion of a tax claimed to be illegally assessed, it was held that plaintiffs did not have the right to bring their suit at any time within two years to recover back that portion of the tax claimed to be illegal. *Galveston County v. Gorham*, 49 T. 279.

An action of deceit in misrepresenting the number of acres in certain land sold to plaintiff is barred in two years from date of sale. *Bass v. James*, 83 T. 110, 18 S. W. 336.

Where a city took possession of a system of waterworks under an invalid contract, an action to recover their value or their possession was held to be barred in two years. *Water Co. v. Cleburne*, 1 C. A. 580, 21 S. W. 393.

Damages recoverable for a breach of a verbal contract are a debt, an action on which is barred in two years. *Walter A. Wood M. & R. Mach. Co. v. Hancock*, 4 C. A. 302, 23 S. W. 384.

The word "debt" used in this article is not restricted to its technical or common-law meaning, but includes any open, unliquidated claim for money. A tax levied by a city is within this article. *O'Connor v. Koch*, 29 S. W. 400, 9 C. A. 586.

A suit for the breach of a verbal contract must be brought within two years thereafter. *Harrison v. City of Sulphur Springs* (Civ. App.) 35 S. W. 744.

An improvement certificate given by a city to a sewer contractor is not founded on the written contract between the city and the contractor, and hence an action thereon is barred under the two-year statute. *Glover v. Storrie*, 18 C. A. 6, 43 S. W. 1035.

Action against purchaser of land verbally assuming as part of the consideration a mortgage thereon is barred after two years. *Beitel v. Dobbin* (Civ. App.) 44 S. W. 299.

Where a note was presented by the surety as a claim against the estate of the principal, which claimant as surety had been compelled to pay, held that the claim was a cause of action on an implied promise and barred by the two-year statute. *Miers v. Beterton*, 18 C. A. 430, 45 S. W. 430.

Held, that the two-year statute of limitations could not be pleaded as a bar against the recovery of delinquent taxes. *Abney v. State*, 20 C. A. 101, 47 S. W. 1043.

See the facts of this case for circumstances under which it is held that the right of a person who has paid money under circumstances entitling him to subrogation in the enforcement of a vendor's lien is barred by the two-year limitation, because the right is not evidenced by a contract in writing. *Darrow v. Summerhill*, 93 T. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

Where a claim is founded on a judgment, the two-year statute of limitation is no bar. *Mills v. Terry*, 22 C. A. 277, 54 S. W. 780.

Action by a receiver against a distributee of fund, for reimbursement for liability in respect to same, is barred after two years. *First Nat. Bank v. Cohen* (Civ. App.) 55 S. W. 530; *Damon v. Adams*, *Id.*

A sale of goods held not in writing, and hence an action for the price was barred after two years. *Voelcker v. McKey* (Civ. App.) 60 S. W. 798.

Where plaintiffs paid a draft drawn on them by defendants, whereby defendants became liable for the amount, plaintiff's cause of action was not on the draft, but was an implied promise to pay, and hence was barred by the two-year limitation. *Dwight v. Matthews* (Civ. App.) 60 S. W. 805.

An action against a co-obligor on a note for contribution is barred, where not brought within two years from the time payment of the note was made. *Reed v. Sieckenius* (Civ. App.) 65 S. W. 487.

An action to recover a deduction of the price of land sold for a gross deficiency in quantity held barred after two years from the completion of the sale. *Sibley v. Hayes*, 30 C. A. 61, 71 S. W. 404.

A holding over for a third term held under an implied contract, and not under the written lease, and hence an action for rent accrued was subject to the two-year limitation. *Roller v. Zundelowitz*, 32 C. A. 165, 73 S. W. 1070.

An action based on the implied obligation of a landlord to repair a part of the

building not under the control of the lessee is barred by the two-year limitation. *Houston Saengerbund v. Dunn*, 41 C. A. 376, 92 S. W. 429.

An action for services held barred after two years. *Dietrich v. Heintz*, 44 C. A. 602, 99 S. W. 417.

In an action for a debt founded on a written contract, the four-year statute applies, but, where the debt is not founded upon a written contract, the two-year statute bars the action. *Fidelity & Casualty Co. v. Callahan & Graham* (Civ. App.) 104 S. W. 1073.

The two-year statute held applicable to an action to recover on a verbal agreement to refund purchase money on satisfactory proof of barrenness of an animal sold. *Williamson v. Heath*, 49 C. A. 254, 108 S. W. 983.

An action against real estate brokers for deceit in selling land is an action for a "debt," and must be brought under this article, and not under Art. 5690. *Gordon v. Rhodes & Daniel*, 102 T. 300, 116 S. W. 41, 42.

Damages for deceit practiced in the sale of land is a debt within the meaning of this subdivision. *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1027.

Suit upon a liquor dealer's bond to recover penalty for its violation is an action for debt not evidenced by a contract in writing, and is barred in two years. *Hillman v. Gallagher* (Civ. App.) 120 S. W. 505.

A cause of action for money advanced to defendant as a loan by way of a part payment on land, was barred in two years after the payment was made, in absence of a trust in the land resulting from such payment. *Erp v. Meachem* (Civ. App.) 130 S. W. 230.

The two-year limitation governs the right of action of a junior lienor for breach of an oral agreement to discharge a prior lien, whereby it was subsequently foreclosed by the promisor and bought in and thereafter transferred to a purchaser without notice of the agreement so that the junior lien was lost. *Hampshire v. Greenes* (Civ. App.) 130 S. W. 665.

The two-year limitation applies to an action for fraud and deceit; but an action begun within two years after the discovery of the fraud is not barred. *Coleman v. Ebeling* (Civ. App.) 138 S. W. 199.

A surety's right of action for reimbursement is not on the original debt, but on an implied promise arising out of the relation of the parties, and is barred in two years. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

A cause of action in favor of the intestate against defendant, because defendant received \$650, arose as soon as such sum was placed to the credit of defendant and his partner on the books of the bank; and an action thereon was barred in two years, and a parol promise, made after the expiration of the two years, to pay the claim was not sufficient, under Art. 5705, to renew the obligation. *Penick v. Castles* (Civ. App.) 144 S. W. 297.

An action on an implied warranty of suitability for the purpose for which goods are purchased under a contract in writing is within the two-year limitation. *Kirwan v. Alamo Iron Works* (Civ. App.) 155 S. W. 986.

**Subdivision 5.**—See Decisions Applicable to Subject in General, § 29, following this title.

See, also, Title 37, Chapter 13.

The second sentence of this subdivision was article 3355 in Sayles' Civil Statutes.

Notes and accounts barred by limitation are not a valid and legal set-off against an existing debt. This rule does not apply to running accounts between merchant and merchant. *Holliman v. Rogers*, 6 T. 98; *Lowe v. Dowbarn*, 26 T. 508; *Ney v. Rothe*, 61 T. 374; *Howard v. Randolph*, 73 T. 459, 11 S. W. 495; *Campbell v. Park*, 11 C. A. 455, 33 S. W. 754.

When there are mutual accounts not between merchant and merchant, their factors or agents, of which some of the items have been due more than two years before the commencement of the suit, such items are barred by limitation, notwithstanding there may be other items in the account not within the bar of the statute. *Lowe v. Dowbarn*, 26 T. 507. Citing *Pridgen v. Hill*, 12 T. 374; *Pridgen v. McLean*, 12 T. 420. And see *Hassler v. Kay*, 1 App. C. C. § 665; *Winn v. Bryant*, 1 App. C. C. § 809.

Where the plaintiff was a merchant, but the defendant was not a merchant, and the items of his account were not strictly credits given to the plaintiff, but were payments made on his own account, the dealings are not accounts between merchant and merchant. *May v. Pollard*, 28 T. 677.

The term "open account" is used in contradistinction to a "stated account," wherein the account is closed by an assent to its correctness by the party charged. The fact that a balance is shown in an account and claimed in a suit does not make it less an open account. *Whittlesey v. Spofford*, 47 T. 13.

The statute of limitations has no application to payments or to charges in accounts which might legitimately be considered as payments. *Hassler v. Kay*, 1 App. C. C. § 666, citing *Beardsley v. Hall*, 9 T. 119; *Williams v. Bradbury*, 9 T. 487; *Ware v. Bennett*, 18 T. 794.

Where there is a continuous account consisting of many items, if no appropriation of payments to specific items is made by either party, they will be applied in accordance with the priority of dates of the items of account. If no specific appropriation of payments be made by either party until rights of third parties holding under the debtor had been created of such a character as to authorize against him their enforcement, the creditor cannot so appropriate payments made by the debtor as to affect such rights, if, by a different appropriation, they can be protected. *Willis v. McIntyre*, 70 T. 34, 7 S. W. 594, 8 Am. St. Rep. 574.

As to limitation between partners, see *Morris v. Nunn*, 79 T. 125, 15 S. W. 220; *Henry v. Roe*, 83 T. 446, 18 S. W. 806; *Waterworks Co. v. Maury*, 72 T. 112, 12 S. W. 166; *McGuire v. Bidwell*, 64 T. 43; *Regan v. Bonham*, 4 App. C. C. § 66, 15 S. W. 502.

An open account must be mutual and current, and not merely showing a sale on one side and a credit of money upon the other. *Richardson v. Vaughan*, 86 T. 95, 23 S. W. 640; *Guichard v. Superville*, 11 T. 522; *Leavitt v. Gooch*, 12 T. 96; *Judd v. Sampson*, 13 T. 20; *May v. Pollard*, 28 T. 679; *Cohen v. Schwartz* (Civ. App.) 32 S. W. 820.

The statute is not affected by a local custom as to the maturity of accounts. *Smyth v. Walton*, 24 S. W. 1084, 5 C. A. 673.

As to effect of a recovery on a part of an open account, see *Anderson v. Rogge* (Civ. App.) 28 S. W. 106.

When mutual debts are open accounts they mutually extinguish each other, although an action on some of the items is barred by limitation. But an account barred by limitation cannot be offset in an action on a promissory note. *Campbell v. Park*, 11 C. A. 455, 33 S. W. 754.

A suit upon an account payable April 24, 1892, was filed on April 24, 1894. It was held that the suit was not barred by limitation. The day upon which the debt became due is excluded in the reckoning of time. *Geistweidt v. Mann* (Civ. App.) 37 S. W. 372.

An amount due on an account stated is barred by limitations after two years. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

Subdivision 6.—Subdivisions 6 and 7 of this article were formerly subdivisions 1 and 4 of Rev. St. 1879, art. 3202. They are transferred to this article pursuant to the provisions of chapter 14 of the Acts of 1897.

Limitation runs against an action for personal injuries to a married woman, as the husband has the right to sue. *Rice v. Railway Co.*, 27 S. W. 921, 8 C. A. 130.

The act of March 4, 1897, worked a repeal of the former legislation and extended the period to the terms of two years as to causes of action then existing. *Voigt v. G. W. T. & P. Ry. Co.*, 94 T. 357, 60 S. W. 659.

Subdivision 7.—See notes under subdivision 6. See *Nelson v. Galveston, H. & S. A. R. Co.*, 78 T. 621, 14 S. W. 1021, 11 L. R. A. 391, 22 Am. St. Rep. 81.

Where an action by the wife and children of a decedent for his death was begun within six months after his death, and an amended petition, filed more than two years after his death, alleged for the first time the existence of his mother, and demanded a recovery for her benefit, limitations barred the right of the mother, but did not bar the right of the wife and children. *Paris & G. N. Ry. Co. v. Robinson* (Civ. App.) 127 S. W. 294.

One guilty of negligence causing the death of a person may not escape the payment of full damages because one of the persons entitled to sue did not institute an action until limitations had run against it. *Id.*

**Art. 5688. [3356] What actions barred in four years.**—There shall be commenced and prosecuted within four years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

1. Actions for debt where the indebtedness is evidenced by or founded upon any contract in writing.

2. Actions for the penalty or for damages on the penal clause of a bond to convey real estate.

3. Actions by one partner against his co-partner for a settlement of the partnership accounts, or upon mutual and current accounts concerning the trade of merchandise between merchant and merchant, their factors or agents; and the cause of action shall be considered as having accrued on a cessation of the dealings in which they were interested together. [Act Feb. 5, 1841, p. 163, sec. 1. P. D. 4604.]

Subdivision 1.—See Decisions Applicable to Subject in General, §§ 23–28, following this title.

Estoppel to plead limitation, see notes, § 17, following this title.

There is no technical distinction between actions and suits, and debt and damages, at common law. *Robinson v. Varnell*, 16 T. 382.

The action of an accommodation acceptor against a drawer is founded upon the contract in writing. *Sublett v. McKinney*, 19 T. 438; *Walters v. G., H. & S. A. R. R. Co.*, 1 App. C. C. § 756. And it is immaterial that the acceptance is verbal. *Walters v. G., H. & S. A. R. R. Co.*, 1 App. C. C. § 755.

The payee of a promissory note who indorses it, and afterward takes it up, has a remedy upon the note, and not upon an account for money paid to the use of the maker. *Williams v. Durst*, 25 T. 667, 78 Am. Dec. 548.

When the goods are sold on the written order of defendant promising payment therefor, the written order is the ground and foundation of the action. *Page v. Payne*, 41 T. 143.

The payment of a note by a surety is not, as between himself and the principal, an extinguishment of the same, and his right of action against the principal is upon the note, and not upon the implied assumpsit. *Tutt v. Thornton*, 57 T. 35. Citing *Holliman v. Rogers*, 6 T. 91. And see *Rush v. Bishop*, 60 T. 177.

An action for debt is given for the recovery of a sum certain, or that may be rendered certain, due the plaintiff, without regard to the manner in which the obligation is incurred. *Davidson v. Mo. Pac. Ry. Co.*, 3 App. C. C. § 173.

The resolutions of a company formed to take over a railroad were reduced to writing, signed by the president and secretary of the company, with the seal of the company, a copy of which, attested and signed by the secretary, was delivered to the vendor, and by him placed on record. The resolution constituted a contract in writing, within the meaning of Art. 5688, on which an action might be brought at any time within four years thereafter. *Railway Co. v. Gentry*, 69 T. 625, 8 S. W. 98.

An action for the value of goods delivered on a written order is within this article. *Light Co. v. Electric Co.* (Civ. App.) 26 S. W. 310.

An action on a written promise to pay an account is not barred until four years. *Willard v. Guttman* (Civ. App.) 43 S. W. 901.

Where agent, under authority derived from written correspondence, took charge of

realty, and was to receive commission for a sale, and the owners sold the land, the agent's claim for services would not be barred until four years after sale. *Stringfellow v. Elsea* (Civ. App.) 45 S. W. 418.

The enforcement of mechanics' liens held not barred by four-year limitation, where a renewal note payable in five years, including additional indebtedness, was taken. *Myers v. Humphries* (Civ. App.) 47 S. W. 812.

An action by the client to recover moneys not accounted for by his attorney under a written contract is not governed by the two-year statute. *Sanborn v. Plowman*, 20 C. A. 484, 49 S. W. 639.

Notes executed in October, 1892, and due in three and four years, held not affected by limitation, where suit was commenced in September, 1899. *Noel v. Clark*, 25 C. A. 136, 60 S. W. 356.

A written order for goods, containing a promise to pay therefor, is a contract of sale, and hence the four-year statute applies. *Voelcker v. McKay* (Civ. App.) 61 S. W. 424.

Suit on a note executed September 23, 1890, payable three years thereafter, not brought until November 3, 1897, held barred by the four-year limitation. *Schneider v. Sanders*, 26 C. A. 169, 61 S. W. 727.

Where a note matured November 2, 1890, and the time of paying a balance thereon was extended to November, 1893, a suit instituted on the note in August, 1897, was not barred. *Shaw v. Western Land & Live Stock Co.* (Civ. App.) 62 S. W. 941.

An action on a written instrument held barred after four years. *Tinsley v. Ardrey*, 26 C. A. 561, 64 S. W. 803.

A vendor's lien note is barred by the four-year statute. *Garner v. Black*, 95 T. 125, 65 S. W. 376.

A claim for attorney's fees, as provided in a note, held barred by limitations, if not prosecuted within four years after the maturity of the note. *Nease v. James*, 31 C. C. A. 151, 72 S. W. 87.

Evidence held to show that plaintiff did not pay the note for the maker, but bought it, so that his cause of action was governed by the limitation as to notes, and not as to loans. *Ashburn v. Evans* (Civ. App.) 72 S. W. 242.

An action by a commission merchant to recover, the difference between the price at which certain corn sold and the amount of drafts drawn by the shipper, attached to the bill of lading, held based on a written obligation, and was therefore within the four-year statute of limitations. *F. Groos & Co. v. Brewster*, 34 C. A. 140, 78 S. W. 359.

Under the facts held that in an action to foreclose a mortgage the controlling limitation was that applicable to suits on written contracts, and not that applicable to judgments. *Brown v. Cates*, 99 T. 133, 87 S. W. 1149.

A suit by a city attorney to recover commissions earned under an ordinance fixing his salary and fees was not founded on a written contract, so as to be governed by the four-year statute. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

An action by a lessee against the purchaser of the premises for his failure to repair the same as required by the written lease executed by the vendor is an action founded on a contract in writing. *Houston Saengerbund v. Dunn*, 41 C. A. 376, 92 S. W. 429.

Where a widow, as qualified survivor of the community, contracted for the extension of certain notes securing a community debt, they were not barred by limitations until more than four years after the date to which they were extended. *Dashiell v. W. L. Moody & Co.*, 44 C. A. 87, 97 S. W. 843.

An indebtedness for a premium upon a written policy of insurance issued upon a written application held to be founded upon a written contract, although no promise was expressed in the policy or application. *Fidelity & Casualty Co. v. Callahan & Graham* (Civ. App.) 104 S. W. 1073.

The limitation of four years held applicable to a suit on the official bond of a judge to recover fees illegally collected by him. *Lane v. Delta County* (Civ. App.) 109 S. W. 866.

A debt evidenced by warrants issued by a de facto municipal corporation is a debt evidenced by an instrument in writing, and is not barred by the two-year statute. *City of Carthage v. Burton*, 51 C. A. 195, 111 S. W. 440.

A claim of a cotenant for services rendered under an express contract held subject to limitations. *Rosamond v. Rosamond*, 56 C. A. 173, 120 S. W. 520.

An action against an agent for rent collected by him under a written assignment of rent and a power of attorney to collect the same is based on a contract in writing, and is not an action for money received; hence the two-year limitation does not apply. *Dowlen v. C. W. Georgs Mfg. Co.* (Civ. App.) 125 S. W. 931.

An action on a note brought more than four years after its maturity is barred. *Cotulla v. Urbahn* (Civ. App.) 126 S. W. 13.

Action on certain coupons of county bonds held barred by limitations. *Rockwall County v. Roberts County*, 103 T. 406, 128 S. W. 369.

This article applies to an action on a liquor dealer's bond for selling liquor to a minor, the cause of action being both "evidenced by and founded on a contract in writing." *Hillman v. Gallagher*, 103 T. 427, 128 S. W. 899.

A written lease is a written obligation, and, when passing to a third person by a conveyance of the land by the lessor, an action by the grantee for rents subsequently accruing is on the written obligation and is not barred in two years. *Vogel v. Zuercher* (Civ. App.) 135 S. W. 377.

Where notes were extended by agreement for a definite period and four years had not elapsed from the time of the last extension of each note, to the time of the maker's death, none of the notes were barred. *Matthews v. Towell* (Civ. App.) 138 S. W. 169.

An action against railroads on a written contract to carry freight to a foreign port is governed by the four, and not the two, year limitation. *St. Louis, S. F. & T. Ry. Co. v. Birge-Forbes Co.* (Civ. App.) 139 S. W. 3.

An action on a married woman's note for borrowed money, valid because borrowed for the benefit of her separate estate, was not barred until four years after the maturity of the note. *Blair v. Teel* (Civ. App.) 152 S. W. 878.

A bill of lading executed by a carrier is a "contract in writing" within this article. *Elder, Dempster & Co. v. St. Louis S. W. Ry. Co. of Texas*, 105 T. 628, 154 S. W. 975. See, also, *Davies v. Texas Cent. R. Co.* (Civ. App.) 133 S. W. 295.



The words "actions for debt," as used in Arts. 5687, 5688, include suits brought to recover money for breach of a contract in writing, without regard for the technical distinction between debt and damages. *Elder, Dempster & Co. v. St. Louis S. W. Ry. Co. of Texas*, 105 T. 628, 154 S. W. 975.

An action founded on warranties contained in a written contract is within the four-year limitation. *Kirwan v. Alamo Iron Works (Civ. App.)* 155 S. W. 986.

**Subdivision 3.**—See Decisions Applicable to Subject in General, § 29, following this title.

Accounts mentioned must be mutual, open and current. When a statement of the account is made the account is no longer current, and limitation begins to run as to the balance due. *Guichard v. Supervelle*, 11 T. 522; *Handel v. Macdonell (Civ. App.)* 25 S. W. 133.

A note given by agreement between merchant and merchant, not in the payment of a debt, but to evidence a credit in their dealings with each other, and as a convenient basis for further credit, will be subject only to the statutory bar applied to the account. *McGuire v. Bidwell*, 64 T. 43.

When the nature of a suit originally brought between partners for an accounting is changed by an amendment in which there was a prayer for specific judgment, limitation will run as against the items set up in the amendment up to the date of its filing. *Santleben v. Froboese*, 17 C. A. 636, 43 S. W. 571.

An agreement by a partner to pay into the firm's earnings the commissions earned by him as county treasurer is against public policy and void. *Id.*

An account in mutual current trade between merchant and merchant is not barred by limitation in less than four years. *Willard v. Guttman (Civ. App.)* 43 S. W. 901.

Two-year limitation does not bar a counterclaim on a suit on a note growing out of a partnership settlement. *Peel v. Giesen*, 21 C. A. 334, 51 S. W. 44.

Limitation does not begin to run until cessation of dealings in which the parties were interested together, and where the dealings were between one firm and another firm acting as its factor, they were between merchant and merchant, and the four-year Statute applies. *Dwight v. Mathews*, 94 T. 533, 62 S. W. 1053.

A petition in an action by a partner for the settlement of partnership accounts held to show the running of limitations from the time of a certain sale. *Bluntzer v. Hirsch*, 32 C. A. 585, 75 S. W. 326.

Where a surviving partner is sued by the heirs of the deceased partner for a debt due the firm in an individual capacity and for an amount of firm debts collected by him, the claims are claims between partners to which the four-year limitation applies. *Wylie v. Langhorne*, 45 C. A. 618, 101 S. W. 527.

**Art. 5689. [3357] On bond of executor, administrator or guardian.**—All suits on the bond of any executor, administrator or guardian shall be commenced and prosecuted within four years next after the death, resignation, removal or discharge of such executor, administrator or guardian, and not thereafter. [Act March 20, 1848. Act Aug. 9, 1876, p. 102, sec. 42. P. D. 1375, 3923.]

**In general.**—Limitation does not begin to run in favor of a guardian or of the sureties on his bond upon the death of his ward, but runs only from the time when an order of court has been entered of record declaring the resignation, removal or discharge of such guardian. *Marlow v. Lacy*, 68 T. 154, 2 S. W. 52.

Liability of sureties of guardian of minor wards, receiving funds in 1890, held barred in suit in 1899. *Allen v. Stovall (Civ. App.)* 62 S. W. 87.

The statute does not begin to run until the guardian is discharged. *Allen v. Stovall*, 94 T. 618, 63 S. W. 866, 64 S. W. 777.

An action against a surety on a guardian's bond is barred in two years after the ward attains his majority. *Freedman v. Vallie (Civ. App.)* 75 S. W. 322.

The death of an executor or administrator severs the relation between him and the estate theretofore existing and therefore it is not within the jurisdiction of the county court sitting in probate to determine the amount due from the deceased executor or administrator to the estate. *McClellan v. Mangum*, 33 C. A. 193, 75 S. W. 841.

This article has no application to proceedings under Art. 4269 to compel a guardian to file his final account, though the bondsmen become parties in opposition thereto. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

A guardian of an insane person having misappropriated funds of the ward, action was commenced on his bond a year after his death, and final judgment against the surety was affirmed three years later and two years after the death of the ward. Held, that action by the surety, commenced soon afterwards, based on subrogation to the right of the ward's estate, against the persons who, with notice of their trust character, received such funds from the guardian in satisfaction of his personal obligation to them, was not barred. *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

**Art. 5690. [3358] All other actions barred, when.**—Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued, and not afterward.

**In general.**—See Decisions Applicable to Subject in General, §§ 33, 38-44, following this title.

When no judgment has been in fact rendered against the sureties on a replevin bond, a suit to substitute a new bond in place of the original, which has been lost, and to obtain a judgment of forfeiture upon it, would be subject to the limitation of four years. *Poland v. Henry*, 64 T. 542.

The provisions of this article have been applied to equitable as well as to legal actions for which other provision is not made. *Blount v. Bleker*, 13 C. A. 227, 35 S. W. 863, and cases cited.

A suit by creditors against an assignee to whom an assignment has been made for the benefit of creditors to recover from him property of assignors unlawfully acquired by him, is an equitable action, and not within Art. 5687, but is within Art. 5690. *McCord v. Nabours*, 101 T. 494, 109 S. W. 913, 111 S. W. 144.

**Meaning of "action."**—A proceeding to supply, restore, and reinstate a judgment and record destroyed by fire, under Arts. 6778, 6779, is subject to this article. *Phelan v. Wiley*, 2 App. C. C. § 735.

Limitation interposed to a petition for bill of review after four years from date of judgment is properly sustained. *Bowling v. Blum* (Civ. App.) 52 S. W. 97.

The "every action" in this article does not mean the demand by the probate court of the guardian for a final accounting of his transactions about the estate of his ward during the ward's minority. The accounting "for final settlement" by the probate court arises from the trust relation of guardian and is within and under the control and power of the probate court. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 156.

See Art. 4269.

The word "action" means the prosecution of some demand in a court of justice, including all proceedings taken in such a court to fix a right given either by statute or substantive law, and therefore included a proceeding to correct a clerical error in a judgment previously rendered in the same court. *Rogers v. Waggoner* (Civ. App.) 149 S. W. 561.

A proceeding by scire facias to correct a judgment, the entry of which omitted to show that it was against a certain party for a certain sum, is not an "action" to correct a judgment within this article. *Coleman v. Zapp*, 105 T. 491, 151 S. W. 1040.

**Actions for recovery of real estate.**—See Decisions Applicable to Subject in General, § 21, following this title.

This article does not apply to an action by a lessee of the right to a mine, etc., to recover possession when the owner had unlawfully entered and had taken possession. *Benavides v. Hunt*, 79 T. 383, 15 S. W. 396.

This statute considered at length, and cases cited as to what character of action may be considered an action for the recovery of real estate. *McCampbell v. Durst*, 15 C. A. 522, 40 S. W. 315.

Where there were irregularities in the sale of the lands by a guardian of which the minor had notice at his majority, an action four years thereafter to recover such land therefor is barred. *Stroud v. Hawkins*, 28 C. A. 321, 67 S. W. 534.

One who has the equitable title to land can maintain such action for recovery as might have been maintained if he had the complete legal and equitable title. The fact that one sets out the facts which constitute his cause of action does not change the character of suit. It is as much an action for the recovery of real estate as if it had been in the form of trespass to try title. An action for recovery of real estate does not come within this article. *Stafford v. Stafford*, 96 T. 106, 70 S. W. 76.

In suit to recover land sold for taxes, limitations as to suits for land held applicable. *Green v. Robertson*, 30 C. A. 236, 70 S. W. 345.

In trespass to try title, held, that the only limitation applicable to plaintiff's cause of action was that relative to actions to recover real property. *Craig v. Harless*, 33 C. A. 257, 76 S. W. 594.

In trespass to try title suit, defendant pleaded specially his chain of title. Plaintiff by replication alleged that one of the deeds in defendant's chain was made in fraud of creditors and void, and set out facts to prove this, and also notice of the fraud to all subsequent purchasers, including defendant. Defendant excepted to plaintiff's supplemental petition (or replication) on the ground that more than four years had elapsed since date of alleged fraudulent deed was executed and that plaintiff's attack of the deed was barred by this statute, and the trial court and court of civil appeals sustained the exception, supreme court reverses the case because it is a suit to recover land, and not an action to set aside a fraudulent deed, and that this article expressly excepts this kind of an action. *Rutherford v. Carr*, 99 T. 101, 87 S. W. 816.

Four-year limitation held not applicable to trespass to try title, to recover land on payment of vendor's lien, such an action not being equivalent to one for specific performance. *Mason v. Bender* (Civ. App.) 97 S. W. 715.

A suit to recover certain land by virtue of an alleged trust resulting from the holder of the legal title for plaintiff's benefit held within the general statute of limitations, and not barred by the four-year statute. *Bell County v. Felts* (Civ. App.) 120 S. W. 1065.

An interest in land held barred only by limitations affecting suits of trespass to try title. *Sherman v. Pickering*, 56 C. A. 633, 121 S. W. 536.

In trespass to try title to recover land in possession of another, no limitation is available except that which affects the right to recover real estate. *Hoffman v. Buchanan*, 57 C. A. 368, 123 S. W. 168.

Where a deed of land was a mortgage, and the equitable title remained in the grantor, so that he could sue for a recovery of the land, a suit by him for a cancellation of the deed and for an accounting was in effect an action to recover the land, so that limitations as to actions for real estate applied, and not the four-year statute. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

The four-year limitation held not to apply to trespass to try title. *Watson v. Harris* (Civ. App.) 130 S. W. 237.

In trespass to try title, where defendants disclaimed any right or title to the "land," held, that a plea of the statute of limitations as to personal property was without application to a house standing thereon. *Fidelity Cotton Oil & Fertilizer Co. v. Martin* (Civ. App.) 136 S. W. 533.

An action of trespass to try title, in which plaintiff relied on an equitable title, would be barred in four years after the cause of action accrued. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

In a suit to recover land pursuant to an alleged constructive trust, only those statutes of limitation as affect actions to recover realty were applicable. *Nuckols v. Stanger* (Civ. App.) 153 S. W. 931.

By its express terms the four-year statute does not apply to actions to recover real estate. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

In trespass to try title to land occupied by a railroad, where the railroad by cross-action sought condemnation of the right of way, upon which issue alone the case was submitted, the two or four year limitation did not apply to the right of the owner to compensation for damages to the remainder of the land. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

**Rescission or cancellation.**—See *Kennon v. Miller* (Civ. App.) 143 S. W. 986.

This article applies to an action for rescission of a contract consummated in fraud. *Cooper v. Lee*, 75 T. 114, 12 S. W. 483; *Evans v. Goggan*, 23 S. W. 854, 5 C. A. 129.

A suit to avoid a fraudulent sheriff's sale of land may be brought within four years. *Garvin v. Hall*, 83 T. 295, 18 S. W. 731.

A suit to avoid a deed for fraud is barred under this article in four years. *Railway Co. v. Titterington*, 84 T. 218, 19 S. W. 472, 31 Am. St. Rep. 39.

A suit to set aside a sale under a judgment by one claiming under an older judgment is barred in four years after the sale. *Brackenridge v. Cobb*, 21 S. W. 1034, 85 T. 448.

A suit to have a patent canceled is within the purview of this statute. *Wynne v. Kennedy*, 11 C. A. 693, 33 S. W. 298.

Action to set aside administrator's sale of land held within the four-year statute. *McCampbell v. Durst*, 15 C. A. 522, 40 S. W. 315.

An action to cancel a deed alleged to have been procured by fraud comes under this article. *Groesbeck v. Crow*, 91 T. 74, 40 S. W. 1028.

The four-year statute held not to apply to a petition to recover land sold under a trust sale, on the ground that the deed made by the trustee was void. *Chandler v. Peters* (Civ. App.) 44 S. W. 867.

Creditors' suit to set aside fraudulent conveyance held barred in four years from the time creditors by reasonable diligence might have discovered fraud. *Vodrie v. Tynan* (Civ. App.) 67 S. W. 680.

A suit by judgment creditors, more than four years after recovery of their judgments, to have lands previously conveyed to his daughter declared the property of the debtor, is barred by this article. *Gans v. Marx*, 25 C. A. 497, 61 S. W. 527.

The four-year limitation does not apply to an action by a corporation to recover land conveyed by its president, who had no authority to make such conveyance, although the petition asks cancellation of the deed. *Aransas Pass Harbor Co. v. First Nat. Bank*, 28 C. A. 372, 67 S. W. 906.

Action to rescind and recover damages for fraud in inducing lease of cotton press held governed by four-year limitation. *American Cotton Co. v. Frank Helerman & Bro.*, 37 C. A. 312, 83 S. W. 845.

An action to cancel a release for personal injuries on the ground that the settlement was fraudulently obtained held not barred by the two-year limitation. *Texas & P. Ry. Co. v. Jowers* (Civ. App.) 110 S. W. 946.

The right of a purchaser, rescinding the contract of purchase on the ground of the fraud of the broker, to sue the broker, held barred by the four-year limitation. *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1023.

In trespass to try title, plaintiffs were precluded from asserting invalidity of a deed executed by their mother for fraud and want of consideration, where the four-year limitation had run. *Cook v. Houston Oil Co. of Texas* (Civ. App.) 154 S. W. 279.

**Reformation or correction of instrument.**—The right of a party to have a certificate of acknowledgment corrected in a legal proceeding is barred by the limitation of four years. *Starnes v. Beitel*, 20 C. A. 524, 50 S. W. 202.

In trespass to try title, defendant held, under the four-year statute, precluded from a correction of a certificate of acknowledgment of a wife in a deed under which defendant claimed from a husband and wife. *Kopke v. Votaw* (Civ. App.) 95 S. W. 15.

An action of trespass to try title, requiring for the relief sought the showing that the premises were by mistake included in a deed, is, in effect, one for correction of deed, and is therefore barred under this article. *Sanborn v. Crowds Bros. & Co.* (Civ. App.) 99 S. W. 445.

See Art. 4648.

In actions to correct acknowledgments, the four-year statute held simply to exclude parol proof after the limitation had run, and then only in case it is invoked. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

Evidence offered to correct certificate to a married woman's acknowledgment of a deed held not admissible four years after the deed was made. *Kimmey v. Abney* (Civ. App.) 107 S. W. 885.

An equitable action to correct mistakes in field notes in deeds to a party's predecessors in title would be barred by the four-year limitation. *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581.

A suit for the correction of an alleged misdescription in the deeds is within this article. *Mounger v. Daugherty* (Civ. App.) 138 S. W. 1070.

A suit to correct or reform a deed is not an action to recover real estate, though the relief, when granted, may serve as the foundation for its recovery, and must therefore be brought within four years. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

The running of limitations against a grantee's right of action to correct a mistake in a deed was not interrupted by his sale of the land. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

A suit to correct a mistake in a deed must be brought within four years after the mistake was discovered, or after it should have been discovered by exercise of reasonable care. *Id.*

**Trusts.**—An action against a trustee for failure to execute a trust is barred in four years. *Fuller v. O'Neal*, 82 T. 417, 18 S. W. 479, 481.

A trust could not be enforced after twenty-four years from the time it had been repudiated. *McClure v. Bryant*, 18 C. A. 141, 44 S. W. 3.

A suit which seeks to establish a lost deed of trust constitutes an action within the meaning of this article. It is not one for the recovery of land, but is one for which no period of limitation is prescribed on the statutes and is subject to the bar of four years. *Farmers' Loan & Trust Co. v. Beckley*, 93 T. 267, 54 S. W. 1027.

Suit under Art. 4279 is subject to the four-year statute of limitations. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 901.

Where the suit is not to recover real estate but an equitable action to recover stock of an assigned corporation unlawfully acquired by the assignee, and its dividends, no other period of limitation is applicable to it, therefore the four-year period must be applied. *McCord v. Nabours*, 101 T. 494, 109 S. W. 917, 918, 111 S. W. 144.

Vacation and reformation of judgments.—Equity will always refuse relief to stale demands when a party has slept upon his rights for a great length of time. One whose land has been conveyed under a voidable judgment against him cannot, when chargeable with notice of the adverse deed and in possession of the evidence on which he relies to set aside the judgment, wait for ten years, and then maintain a suit to clear his title of the adverse claim. *Walet v. Haskins*, 68 T. 418, 4 S. W. 596, 2 Am. St. Rep. 501.

Proceedings to correct a misdescription in a decree of partition entered prior to May 21, 1871, and brought August 29, 1883, are brought too late. *Milan County v. Robertson*, 47 T. 239; *Connolly v. Hammond*, 51 T. 647; *Murchison v. White*, 54 T. 85; *Tevis v. Armstrong*, 71 T. 59, 9 S. W. 134.

Where a judgment debtor for more than four years neglects to present a petition to annul the judgment, it is properly refused on a plea of limitations. *Bowling v. Blum* (Civ. App.) 52 S. W. 97.

An action to set aside a judgment discharging a guardian and to compel him to file his final account must be brought within four years. *Stewart v. Robbins*, 27 C. A. 188, 65 S. W. 901.

An equitable proceeding brought to reform and amend a judgment must be instituted within four years. If it is grounded on fraud or mistake he must be up and doing using reasonable diligence to discover the fraud or mistake which gives the right of action, and when discovered institute and prosecute his suit without unreasonable delay, otherwise his remedy in equity will be cut off by his own laches. *McLane v. San Antonio Nat. Bank* (Civ. App.) 68 S. W. 65, 66.

While a judgment on record affirmatively showing service may in a direct proceeding be attacked, and shown to be void because of a want of service or appearance in fact, yet there is no reason why in such a case the action would not be barred at the expiration of four years, after the existence of the judgment was discovered or by the use of reasonable diligence might have been discovered. *Foust v. Warren* (Civ. App.) 72 S. W. 406, 407.

Suit to set aside judgment obtained by fraud is barred in four years. *Watson v. Texas & P. Ry. Co.* (Civ. App.) 73 S. W. 830.

A suit to procure the setting aside of a judgment against plaintiff for delinquent taxes and the sale of land thereunder is controlled by this article. *State v. Dashiell*, 32 C. A. 454, 74 S. W. 781.

A direct proceeding to vacate a judgment rendered on publication service on account of fraud is not barred until four years after the fraud is or should have been discovered, and should be brought under this article and not under Art. 2026. *Rose v. Darby*, 33 C. A. 341, 76 S. W. 800.

A suit to set aside a judgment held barred by limitations. *Warren v. Foust*, 36 C. A. 69, 81 S. W. 323.

A judgment rendered by consent in trespass to try title held not subject to vacation for fraud by one of the parties more than four years after its rendition. *Hamilton v. Blackburn*, 43 C. A. 153, 95 S. W. 1094.

Notwithstanding the four-year bar, the probate court may review and set aside such of its orders as have been procured by fraud; the action therefor being direct and brought in time after the timely discovery of the fraud. *Locust v. Randle*, 46 C. A. 544, 102 S. W. 946.

A bill of review to set aside a judgment for fraud and to set aside sales of land thereunder is barred only after four years. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

In an action by heirs, etc., to set aside an order of the county court approving a claim against the estate, evidence held to sustain a finding that the claim was barred by limitations when presented. *Bloom v. Oliver*, 56 C. A. 391, 120 S. W. 1101.

An equitable suit to prevent the enforcement of an unjust judgment is not barred until after four years. *Wolf v. Sahm*, 55 C. A. 564, 120 S. W. 1114, 121 S. W. 561.

Action on judgment.—Under Arts. 2387, 3717, the cause of action on a judgment on which execution had been issued within the twelve months would not accrue until ten years after the issuance of the last valid execution, and the four-year limitations will start to run at that time, under this article, rather than under Art. 5696. *Gale Mfg. Co. v. Dupree* (Civ. App.) 146 S. W. 1048.

In view of Arts. 2387, 3717, a judgment on which execution has not been issued within twelve months after rendition becomes a dormant judgment after a lapse of ten years, and is within this article, and so is a cause of action within the purview of Art. 5702. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

A void judgment for delinquent taxes has no legal effect, and the running of limitations will not give it any validity. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

Action to remove cloud from title.—A right of action to remove a cloud from the title is a continuing right, and is not barred by the four-year limitation. *Pannell v. Askew* (Civ. App.) 143 S. W. 364.

When statute begins to run.—See Decisions Applicable to Subject in General, following this title.

See, also, *Foust v. Warren* and *Rose v. Darby*, cited supra, under "Vacation and reformation of judgments."

A sheriff cannot be called on by the plaintiff in attachment to deliver attached property until such plaintiff has obtained judgment against the debtor in attachment, and

and therefore until such time limitation will not run in sheriff's favor as against a suit by such plaintiff for damages caused by the sheriff's taking an insufficient claimant's bond, whereby the attached property is lost. *Jacobs v. Shannon*, 1 C. A. 395, 21 S. W. 386.

Action by an assignee of county warrants, who was director and stockholder in assignor more than four years after his attorney obtained knowledge, while attorney for the assignor, that the county had repudiated the warrants, held barred by limitation. *Presidio County v. Shock*, 24 C. A. 622, 60 S. W. 287.

A creditors' bill to subject land conveyed by a judgment debtor, alleged by the bill to have been conveyed to defraud creditors, must be brought within four years from the date of recording the judgment abstract by virtue of which the creditor claims a lien. *Gans v. Marx*, 25 C. A. 497, 61 S. W. 528.

An action to set aside and annul a voidable deed, and recover the land conveyed thereby, is barred four years after the law charges notice of the deed. *Rutherford v. Carr* (Civ. App.) 84 S. W. 660.

**Art. 5691. [3359] Actions on foreign judgments barred, when.—**Every action upon a judgment or decree rendered in any other state or territory of the United States, in the District of Columbia, or in any foreign country, shall be barred, if by the laws of such state or country such action would there be barred, and the judgment or decree be incapable of being otherwise enforced there; and, whether so barred or not, no action against a person who shall have resided in this state during the ten years next preceding such action shall be brought upon any such judgment or decree rendered more than ten years before the commencement of such action.

**Art. 5692. [3360] Actions for specific performance.—**Any action for the specific performance of a contract for the conveyance of real estate shall be commenced within ten years next after the cause of action shall have accrued, and not afterward.

**Historical.**—Prior to the adoption of the Revised Statutes, which took effect July 24, 1879, there was no statute prescribing the time within which an action for specific performance of a contract for the conveyance of real estate should be brought. *Taylor v. Campbell*, 59 T. 315.

This article applied to suits on contracts made prior to the adoption of the Revised Statutes. *Campbell v. McFadden*, 31 S. W. 436, 9 C. A. 379.

**In general.**—A vendor of land by executory contract, where default is made in paying the purchase-money, has ordinarily the right to rescind the contract and recover the land, or convey it to a third party. *Estes v. Browning*, 11 T. 247, 60 Am. Dec. 238; *Secrest v. Jones*, 21 T. 121; *Scarborough v. Arrant*, 25 T. 129. But such right must be exercised within a reasonable time. *Tom v. Wollhoefer*, 61 T. 277; *Moore v. Giesecke*, 76 T. 543, 13 S. W. 290; *Phillips v. Herndon*, 78 T. 378, 14 S. W. 857, 22 Am. St. Rep. 59.

The owner of a land certificate, after having conveyed a part of a survey under it, lifted and relocated it without the knowledge of his grantee and obtained a patent in his own name. The equity of the first grantee was barred in ten years. *Abernathy v. Stone*, 81 T. 430, 16 S. W. 1102.

This article applies to equitable as well as legal rights. *Sheldon v. Sternberger* (Civ. App.) 25 S. W. 333; *Chamberlain v. Boon*, 74 T. 659, 12 S. W. 727; *Boon v. Chamberlain*, 82 T. 480, 18 S. W. 655.

This article has reference to suits for the specific performance of contracts to convey land. *Galbraith v. Howard*, 11 C. A. 230, 32 S. W. 803.

Where the instrument sued on is insufficient to convey land, but is only an executory contract to convey, the ten-year limitation will apply. *Laguere v. Farrar*, 25 C. A. 404, 61 S. W. 954.

Defendants, in the undisputed possession of land, claiming under decree for specific performance of a contract and partition, with recognition by plaintiffs, cannot be deprived of their equitable title by limitations applicable to suits for mere specific performance. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

On an issue of limitations, evidence held sufficient to show breach more than ten years before the bringing of the action. *Bateman v. Ward* (Civ. App.) 93 S. W. 508.

Art. 5692, limiting the time for suing for specific performance of a contract to convey land, does not apply to an action of trespass to try title for the recovery of the land pursuant to a bond for the conveyance. *Wright v. Riley* (Civ. App.) 118 S. W. 1134.

A bond for title when the purchase price has been paid operates to convey to the grantee an equitable title, and an action of trespass to try title against the grantor can be maintained on such equitable title. The bond is a species of title to the land. The action is not for specific performance, and this article does not apply. *Id.*

Suit on a contract to convey made in March, 1900, was not barred when brought April 29, 1907. *Gamble v. Martin* (Civ. App.) 129 S. W. 336.

**Stale demand.**—See Decisions Applicable to Subject in General, §§ 32-43, following this title.

As to the doctrine of stale demand applied to equitable claims to land growing out of executory contracts, see *Hodges v. Johnson*, 15 T. 570; *Holman v. Criswell*, 15 T. 394; *Williams v. Talbot*, 16 T. 1; *Carlisle v. Hart*, 27 T. 350; *Hanks v. Enloe*, 33 T. 624; *Bell v. Warren*, 39 T. 106; *Reed v. West*, 47 T. 240; *McKin v. Williams*, 48 T. 89; *Titus v. Johnson*, 50 T. 224; *Lewis v. Cole*, 60 T. 341; *Meyer v. Andrews*, 70 T. 327.

7 S. W. 814; *Wilson v. Simpson*, 68 T. 306, 4 S. W. 839; *Campbell v. McFadin*, 71 T. 23, 9 S. W. 133; *Browning v. Pumphrey*, 81 T. 163, 16 S. W. 870; *Chamberlain v. Boon*, 74 T. 659, 12 S. W. 727; *Dull v. Blum*, 68 T. 299, 4 S. W. 489.

As to staleness of a demand for an enforcement by plaintiff of a resulting trust, see *Mayes v. Manning*, 73 T. 43, 11 S. W. 136; *Montgomery v. Noyes*, 73 T. 203, 11 S. W. 138.

The plea of stale demand does not bar an action for specific performance commenced in ten years. *Robinson v. Thompson* (Civ. App.) 52 S. W. 117; *Hazzard v. Morrison* (Civ. App.) 130 S. W. 244.

**Art. 5693. Time in which power of sale may be exercised.**—No power of sale conferred by any deed of trust or any mortgage on real estate heretofore executed, or that may hereafter be executed, shall be enforced after the expiration of four years from the maturity of the indebtedness secured thereby, and any sale under such power after the expiration of such time shall be void, and such sale may be enjoined and the lien created in such mortgages or deeds of trust shall cease to exist four years after the maturity of the debt secured thereby. Provided, if several obligations are secured by said mortgage or deed of trust, the same may be enforced at any time prior to four years after the note or obligation last maturing has matured and may be enforced as to all notes or obligations not then barred by the four years statute of limitations. [Acts 1905, p. 334, sec. 1. Acts 1913, p. 250, sec. 1, amending Art. 5693, Rev. St. 1911.]

**Historical.**—Rev. Civ. St. 1911, art. 5693 (Act 1905, p. 334, sec. 1), read: "No power of sale conferred by deed of trust or mortgage on real estate executed after July 14, 1905, shall be enforced after the expiration of ten years from the maturing of the indebtedness secured thereby; and any sale under such power after the expiration of such time shall be void, and such sale may be enjoined."

**Decisions prior to Rev. Civ. St. 1911.**—See Decisions Applicable to Subject in General following this title.

In an action for debt the statute of limitations affects the remedy only; it does not deprive the creditor of a remedy when he had provided by contract to enforce through a trustee the payment of his claim without the assistance of the courts, and consequently sale of property may be made under a deed of trust, although an action on the debt secured thereby is barred by limitation. *Fievel v. Zuber*, 67 T. 275, 3 S. W. 273; *Goldfrank v. Young*, 64 T. 432; *Wood v. Welder*, 42 T. 409; *Grigsby v. Peak*, 57 T. 147; *Jordan v. Peak*, 38 T. 429; *Stewart v. Mackey*, 16 T. 57, 67 Am. Dec. 609; *Chipman v. McKinney*, 41 T. 78; *Sprague v. Ireland*, 36 T. 655; *Blackwell v. Barnett*, 52 T. 331; *Hemphill v. Watson*, 60 T. 682; *Scott v. Rhea*, 5 T. 258; *Smith v. Montes*, 11 T. 24; *Scott v. Rhea*, 21 T. 703; *Cunningham v. Frandtzen*, 26 T. 34; *Pearson v. Burditt*, 26 T. 157, 80 Am. Dec. 649; *Moody v. Holcomb*, 26 T. 714; *Erhard v. Hearne*, 47 T. 469; *Craig v. Cartwright*, 65 T. 413.

A junior mortgagee, whose mortgage is expressly made subject to a prior mortgage, cannot defeat the prior mortgage by a plea that the latter claim is barred by limitation. *Park v. Prendergast*, 23 S. W. 535, 4 C. A. 566.

Power of sale may be enforced though recovery on the note is barred by limitations. *Dimmit County v. Oppenheimer* (Civ. App.) 42 S. W. 1029.

Limitation does not run against heirs or devisees until they had knowledge that a deed absolute upon its face was a mortgage, notwithstanding their ancestor knew the fact. *Rice v. Ward*, 92 T. 704, 51 S. W. 844.

A judgment sustaining defendant's plea of limitations in an action on notes, with foreclosure of a trust deed, does not deprive plaintiff of a right to foreclose under the power of sale. *Lee v. British & American Mortg. Co.*, 25 C. A. 481, 61 S. W. 134.

Whether limitations have run against a note secured by deed of trust is immaterial, where the trustee only seeks to exercise the power conferred in the deed of trust by selling the property. *Peacock v. Cummings*, 34 C. A. 431, 78 S. W. 1002.

Sale under trust deed held not barred by limitations, though debt secured is barred. *Brinkerhoff v. Goree*, 35 C. A. 142, 79 S. W. 592.

Where right of action on a note was barred by four-year limitation, payee held not entitled to foreclose lien of trust deed given to secure the note. *Stone v. McGregor*, 99 T. 51, 87 S. W. 334.

Where a trust deed contains a power of sale, that the debt was barred by the four-year statute does not affect the power to sell, though in a proceeding in court to foreclose such a plea would prevail. In a suit to enjoin the foreclosure of a trust deed under a power, the three, five and ten year limitations are not available, as they apply only to the claim for land. *Williams v. Armistead*, 41 C. A. 35, 90 S. W. 925.

Payment of the debt secured by a trust deed held not a condition precedent to the right to interpose the defense of limitations to foreclosure. *Taylor v. Williams* (Civ. App.) 105 S. W. 837.

The right to foreclose a trust deed lien held not barred by limitations until the debt secured by the deed is barred. *Pinckney v. Young* (Civ. App.) 107 S. W. 622.

A plea that a note secured by a deed of trust executed in 1900 was barred by limitation was a good defense to a prayer for foreclosure of the deed of trust. Though the mortgage debt and a suit to foreclose were barred by limitations, the trustee might exercise the power of sale. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

Limitation of plaintiff's right to redeem land as a junior lienholder ran from the

expiration of a reasonable time to foreclose his lien after maturity of his debt, if such period for foreclosure terminated before a sale to him under his deed of trust executed in 1893. *Gamble v. Martin* (Civ. App.) 129 S. W. 387.

**Art. 5694. Rights under vendor's lien barred, when.**—The right to recover any real estate by virtue of a superior title retained in any deed of conveyance heretofore or hereafter executed, or in any vendor's lien note or notes heretofore or hereafter executed, given for the purchase money of such real estate, shall be barred after the expiration of four years from the maturity of such indebtedness, and if suit is not brought for recovery of such real estate, or for the foreclosure of the lien to secure such note or notes within four years from the date of the maturity of such indebtedness, or if suit is not brought within such time for the recovery of the land by the original vendor, or his transferee, or for the foreclosure of the lien given to secure such notes, the purchase money therefor shall be conclusively presumed to have been paid in any suit to recover such land or to enforce a lien thereon, and the lien reserved in any such notes and deeds conveying the land shall cease to exist four years after the note or notes have matured, provided the lien reserved in such note or notes may be extended as provided in section 5695 of this chapter and provided, if several obligations are secured by said deed of conveyance, the same may be enforced at any time prior to four years after the note or obligation last maturing has matured and may be enforced as to all notes not then barred by the four years statute of limitations. [Acts 1905, p. 334, sec. 2. Acts 1913, p. 250, sec. 2, amending Art. 5694, Rev. St. 1911.]

Persons to whom bar is available, see notes, § 56, following this title.

**Historical.**—Rev. Civ. St. 1911, art. 5694 (Acts 1905, p. 334, sec. 2) read: "When a vendor's lien is retained to secure purchase money in any sale of real estate after July 14, 1905, the right to recover such real estate by virtue of the superior title retained shall be barred after the expiration of ten years from the maturity of the debt; and if suit is not brought for recovery of such real estate within such term, the purchase money shall be conclusively presumed to have been paid."

**In general.**—See Decisions Applicable to Subject in General following this title.

Where a vendor brought suit to recover the land, and not to collect a note reserving a vendor's lien for the balance of the price, nor to foreclose the lien, it was not material that an action on the note or to foreclose the lien would have been barred by limitations. *Miller v. Linguist* (Civ. App.) 141 S. W. 170.

The fact that any cause of action on the vendor's express promise to make good any shortage in the amount of land conveyed was barred by limitations did not bar the purchaser's right to maintain an action as for money had and received for land falsely represented to exist. *Yates v. Buttrill* (Civ. App.) 149 S. W. 347.

Where a vendor's lien is expressly retained in the deed, or a contemporaneous mortgage is given, the legal title remains with the vendor, and he may recover the land, though the purchase-money notes are barred by limitation. *Woodward v. Ross* (Civ. App.) 153 S. W. 158.

Where a vendor of land held a note for the purchase price in trust, as to the excess above a specified price per acre, for himself and for his broker who effected the sale, limitations did not begin to run in the vendor's favor against the broker, until the former repudiated such trust to the latter's knowledge. *Campbell v. Shifflett* (Civ. App.) 154 S. W. 664.

**Decisions prior to Rev. Civ. St. 1911.**—The transfer of a note, payable to bearer and secured by the vendor's lien, as collateral to secure a less sum than the note so transferred, carries with such transfer the lien and also the right to priority of payment out of the sum realized on such collateral, and the security therefor. *White v. Downs*, 40 T. 225.

If a vendor transfers the notes, he no longer has any title in the land, superior or otherwise; nor does the superior title pass to the assignee or transferee, though the vendor's lien does, and the statute of limitations of four years will apply. *Baker v. Compton*, 52 T. 252; *Cassiday v. Frankland*, 1 U. C. 538; *Harrison v. McMurray*, 71 T. 122, 8 S. W. 612; *Hamblen v. Felts*, 70 T. 132, 7 S. W. 834; *Stephens v. Mathews' Heirs*, 69 T. 341, 6 S. W. 567; *Lundy v. Pierson*, 67 T. 233, 2 S. W. 737; *Nass v. Chadwick*, 76 T. 572, 13 S. W. 383; *McCamlly v. Waterhouse*, 80 T. 341, 16 S. W. 19; *Moore v. Glass*, 25 S. W. 128, 6 C. A. 368.

Where there is a lien reserved in a deed or notes, or there is a contemporaneous mortgage, the vendor may recover the land, although the notes are barred by limitation. *McKelvain v. Allen*, 58 T. 383; *Lundy v. Pierson*, 67 T. 233, 2 S. W. 737; *Hamblen v. Felts*, 70 T. 133, 7 S. W. 834; *Kauffman v. Brown*, 83 T. 45, 18 S. W. 425; *Barber v. Hoffman* (Civ. App.) 37 S. W. 769.

A personal judgment upon a note, which is a lien on lands for unpaid purchase money, preserves the lien, so that if a suit be brought to revive the same and have it declared a lien on the land, though more than four years have elapsed from the maturity of the note to the institution of the second suit, the bar of limitation will not apply. The note which holds the lien having been merged in the first judgment, no limitation as to the lien can apply as long as the judgment remains a subsisting and valid claim against a debtor. *Slaughter v. Owens*, 60 T. 668.

The vendee in an executory contract who has not paid the purchase money cannot hold the land as against his vendor, although an action for the debt is barred by limitation. *Adkins v. Harn* (Civ. App.) 23 S. W. 28. See *Mitchell v. Allen*, 69 T. 70, 6 S. W. 745.

Where deed reserves vendor's lien, limitation does not run against a purchaser of the vendor's interest, though the note is barred until vendee repudiates title. *Johnson v. Lockhart*, 16 C. A. 32, 40 S. W. 640.

A lien held not barred, though the note which it secured was barred. *Columbia Ave. Saving-Fund Safe-Deposit, Title & Trust Co. v. Roberts* (Civ. App.) 41 S. W. 111.

The right to sue for the price and foreclose an equitable lien for the price of land, no express lien having been reserved, is barred by the lapse of nearly thirty years of time. *Bearrow v. Wright*, 17 C. A. 641, 43 S. W. 902.

Art. 5690 did not apply in a case brought to foreclose a vendor's lien because by Art. 5688 suits upon written contracts were required to be brought within four years after the cause of action had accrued and by Art. 5705 the bar was permitted to be avoided by a written acknowledgment of the claim. The statute which applied to an action to recover the debt applied also to the enforcement of the lien, and while the debtor could by his acknowledgment restore both, where he still owned the property affected by the lien, he could not by such acknowledgment restore the lost lien on property which had ceased to be his through his conveyance of it to another. *Flewellen v. Cochran*, 19 C. A. 499, 48 S. W. 39.

Where a note is given for the price of land, and a vendor's lien is retained, the superior title of the vendor survives the destruction of the note's vitality by limitations. *Dittman v. Iselt* (Civ. App.) 52 S. W. 96.

The holder of a vendor's lien note cannot plead limitation to the recovery of another note secured by an equal lien on the land. *Columbia Avenue Fund, etc., Trust Co. v. Strawn*, 93 T. 48, 53 S. W. 342.

An assignee of a note given for the price of land secured by a vendor's lien held not entitled to subject the land to its payment after it is barred by limitations. *Farmers' Loan & Trust Co. v. Beckley*, 93 T. 267, 54 S. W. 1027.

An action brought to enforce a vendor's lien in 1897, is not barred where judgment for the purchase price was obtained in 1885, and execution issued thereon within twelve months, followed by an alias in 1889. *Wilcox v. First Nat'l Bank*, 93 T. 322, 55 S. W. 320.

In an action to recover land, or, in the alternative, to foreclose a vendor's lien thereon, a successful plea of limitations as to the lien notes, interposed by defendant, entitled the plaintiff to a judgment for recovery of the land. *Efron v. Burgower* (Civ. App.) 57 S. W. 306.

Though an assignee of a vendor's lien note barred by the statute cannot recover on the note, yet, if he acquire the vendor's legal title, he may recover the land in like manner as the vendor could if he retained the note. A purchaser of land may waive the plea of limitations as to the original purchase-money note by renewing the same. *Jackson v. Bradshaw*, 24 C. A. 30, 57 S. W. 878.

Where real property on which a vendor's lien is reserved in the purchase-money notes is sought to be recovered after the default of the vendee, the plaintiff may show that the notes have not been paid, even though they are barred by limitations. *Ellis v. Hannay* (Civ. App.) 64 S. W. 684.

A vendor, having a superior title to the property conveyed by reason of having reserved a vendor's lien in the purchase-money notes, may convey such interest, even though the notes are barred by limitations. *Id.*

Where a vendor's lien is reserved in purchase-money notes, trespass to try title will lie after the default of the vendee, though the notes are barred by limitations. *Id.*

Where, in action on vendor's lien note, defense of limitations was made, plaintiff held entitled to recover the land. *Finks v. Abeel*, 33 C. A. 567, 77 S. W. 650.

Suit for possession of land purchased under trust held not barred by limitations, which have run against the debt. *Brinkerhoff v. Goree*, 35 C. A. 142, 79 S. W. 592.

That notes given for the price of land had become barred by limitations held no defense to a suit by the vendor's administrator to recover the land for nonpayment of the price. *Smith v. Owen*, 43 C. A. 411, 97 S. W. 521.

Where a note given for the purchase price of land, containing no reservation of a vendor's lien, is barred by limitations, the vendor or holder of the note has no longer any claim on or interest in the land. *Lalrd v. Murray* (Civ. App.) 111 S. W. 780.

Laches is no defense to a suit to set aside a sale on foreclosure of a vendor's lien brought within the period of limitations. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

The administrator of the assignee of a vendor's lien note held entitled, on the nonpayment of the note and on limitations being pleaded, to recover the land. *Atteberry v. Burnett*, 52 C. A. 617, 114 S. W. 159.

A vendor suing on his note and for a foreclosure of the vendor's lien may, on limitations being invoked, rescind the contract, and sue for and recover the land. *Id.*

Where limitations are pleaded against purchase-money notes secured by a vendor's lien, plaintiff may change the cause of action, rescind the contract of sale, and recover the land. *Lumpkin v. Story* (Civ. App.) 134 S. W. 298.

**Art. 5695. Contracts of extension, how made and construed; proviso.**—When the date of maturity of either debt referred to in either of the foregoing articles is extended, if the contract of extension is signed and acknowledged as provided for in the law relating to the execution of deeds of conveyance by the party or parties obligated to pay such indebtedness as extended and filed for record in the county clerk's office in the county in which the land is situated, the lien shall continue and be in force until four years after maturity of the notes as provided in such extension, the same as in the original contract and the



lien shall so continue for any succeeding or additional extension so made and recorded. The date of maturity set forth in the deed of conveyance or deed of trust or mortgage or the recorded renewal and extension of the same shall be conclusive evidence of the date of maturity of the indebtedness therein mentioned. Provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendors lien notes reserved in deeds of conveyance which were executed prior to July 14, 1905, and which are more than four years past due at the time this Act takes effect as shown by the original mortgage, deed of trust or conveyance, or last record extension shall have twelve months after this Act takes effect within which they may obtain such record extension as hereinbefore provided for, or bring suit to enforce the liens securing them if same are valid obligations when this Act takes effect and if such debt is not so extended of record, or suit is not brought within such time, the right to extend such debt of record, or bring suit to enforce such liens shall be forever barred; and provided that the owners of all notes secured by deeds of trust or other liens and the owners of all vendors lien notes reserved in deeds of conveyance which were executed subsequent to July 14, 1905, shall have four years after this Act takes effect within which they may obtain such recorded extension as herein provided for, or bring suit to enforce the liens securing them if same are valid obligations and not already barred by the four years statutes of limitation when this Act takes effect, and if such debt is not extended of record, or suit is not brought within such four years or four years after they mature, they shall be forever barred from the right to extend such debt of record, or bring suit to enforce the lien securing the same, and further provided if any such obligations executed subsequent to July 14, 1905, were barred by the four years statute of limitation on the 30th of June, 1913, the owners thereof shall have four years within which to bring suit to enforce the lien securing the same; and providing those owning the superior title to land retained in any deed of conveyance or his transferee and those subsequently acquiring such superior title by transfer, shall have twelve months after this Act takes effect within which to bring suit for the land if their claim to the land is not otherwise invalid and unless such suit is brought within twelve months after this Act takes effect, they shall be forever barred from bringing suit to recover the same. [Acts 1905, p. 334, sec. 3. Acts 1913, S. S., p. 39, sec. 1, amending Art. 5695, Rev. St. 1911, as amended by Acts 1913, p. 250, sec. 3.]

**Art. 5696. [3361] Judgment shall be revived, when.**—A judgment in any court of record within this state, where execution has not issued within twelve months after the rendition of the judgment, may be revived by scire facias or an action of debt brought thereon within ten years after the date of such judgment, and not after. [Act Feb. 5, 1841, sec. 2. P. D. 4608.]

**When judgment is barred.**—See cases cited under Art. 5690, "Action on judgment."

A judgment is barred by limitation after the expiration of ten years from the date when the last execution thereon issued. Its period of dormancy has no influence in fixing the date when the statute begins to run. *Willis v. Stroud*, 67 T. 516, 3 S. W. 732; *Millican v. Ware*, 84 T. 308, 19 S. W. 475; *Low v. Felton*, 84 T. 378, 19 S. W. 693; *McKinnon v. McGown* (Civ. App.) 29 S. W. 696; *Central Coke Co. v. Southern Nat. Bank of New York*, 12 C. A. 334, 34 S. W. 383. See *Cole v. Terrell*, 71 T. 549, 9 S. W. 668; *Richardson v. Harrison*, 25 S. W. 438, 6 C. A. 661.

It seems that where an attack is not upon a judgment, but only upon the subsequent proceedings taken in making a sale under it, ten years would be allowed within which proceedings might be taken; but if the attack is against the judgment, only two years would be allowed. *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

Where execution has issued within one year after the judgment it will not become dormant within ten years thereafter. *Davis v. Beall* (Civ. App.) 50 S. W. 1086.

The issuance of a writ of garnishment does not prevent a judgment from becoming barred by the statute of limitations. *Shields v. Stark* (Civ. App.) 51 S. W. 540.

Where execution has been sued out within twelve months from the date of the judgment, an action upon it will not be barred until the lapse of ten years from the date of the last execution or the last act of diligence. *Wilcox v. First Nat. Bank*, 93 T. 322, 55 S. W. 320.

The judgment is not barred until the lapse of ten years from the issuing of the last execution, when the first execution was issued within twelve months from the date of the judgment. *Stevens v. Stone*, 94 T. 415, 60 S. W. 960, 86 Am. St. Rep. 361.

An execution is sufficient for its purpose, although returned without a levy by order of plaintiff. *Pfeuffer v. Werner*, 27 C. A. 288, 65 S. W. 889.

Although one is not a party to a suit in partition, yet if he accepts the provisions of the decree in so far as same establish a lien on lands described to secure the payment of his debt, this acceptance gives him the right to enforce such lien, and such lien being established by the judgment of a court is not barred either by the two or four year statutes of limitation, but is within the ten year statute, which is applicable to judgments. *Stone v. McGregor* (Civ. App.) 84 S. W. 401.

**Foreign judgment.**—A foreign judgment, though revived by scire facias in the foreign jurisdiction, is barred in Texas by a lapse of more than ten years; it appearing that the defendant was a citizen of Texas during the running of the statute. *Collin County Nat. Bank v. Hughes* (Civ. App.) 154 S. W. 1181.

**Revival of judgment.**—See *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338, cited under Art. 5702.

Action to revive dormant judgment, entered on appeal by supreme court, may be maintained in court from which appeal was taken, though judgment of supreme court was not entered on the minutes of the trial court. *Carothers v. Lange* (Civ. App.) 55 S. W. 580.

It is not necessary, in scire facias proceedings to revive a judgment, that any petition accompany the writ. *Polnac v. State*, 46 Cr. R. 70, 80 S. W. 381.

The four-year statute of limitation does not apply to an action of scire facias to revive a judgment. Such action may be brought within ten years from date of judgment. *Henry v. Red Water Lumber Co.*, 46 C. A. 179, 102 S. W. 749.

Statutory limitation does not apply to scil. fa. for entry of a judgment nunc pro tunc and to revive the same. *Coleman v. Zapp* (Civ. App.) 135 S. W. 730.

Where judgment creditors sought to enter a judgment nunc pro tunc and revive the same, held, that the relief sought should not be denied on the ground of laches or for any other reason. *Id.*

A judgment may be revived by scire facias, or other appropriate proceedings, unless the right is barred by limitations. *Gale Mfg. Co. v. Dupree* (Civ. App.) 146 S. W. 1048.

— **Joinder of causes.**—See notes under Art. 1827.

— **Venue.**—See notes under Art. 1830.

— **Process.**—See notes under Arts. 1864 and 1869.

— **Parties.**—See notes following Title 37, Chapter 5.

— **Pleading.**—See notes under Art. 1827, §§ 45, 170, and Art. 1824, § 3.

— **Evidence.**—See notes under Art. 3687, Introductory, § 50.

— **Judgment.**—See notes under Art. 1994, § 64.

**Art. 5697. [3362] On motion for returning execution.**—Where execution has issued and no return is made thereon, the party in whose favor the same was issued may move against any sheriff or other officer and his sureties for not returning the same within five years from the day on which it was returnable, and not after. [*Id.* P. D. 4608.]

**Art. 5698. [3363] On the action of forcible entry, etc.**—No action of forcible entry or forcible detainer, as provided for by law, shall be prosecuted at any time after two years from the commencement of the forcible entry or detainer.

**Art. 5699. [3364] On actions to contest a will.**—Any person interested in any will which shall have been probated under the laws of this state may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward. [Act Aug. 9, 1876, p. 94, sec. 3.]

Cited, *Golden v. Walker* (Civ. App.) 153 S. W. 683.

**In general.**—Under this article any person interested in a will probated under the laws of this state may institute suit in the proper court for testing the validity thereof within four years after such will shall have been admitted to probate and not afterwards. This proceeding must be commenced in the county court in which the will was admitted to probate. *Franks v. Chapman*, 61 T. 576; *Id.*, 60 T. 46; *Heath v. Layne*, 62 T. 686.

**Art. 5700. [3365] In case of forgery, etc., action accrues, when.**—Any heir at law of the testator, or any other person interested in his estate, may institute suit in the proper court to cancel a will for forgery or other fraud within four years after the discovery of such forgery or fraud, and not afterward. [*Id.* sec. 3.]

## CHAPTER THREE

### GENERAL PROVISIONS

<p>Art. 5701. Suspension of during late war. 5702. Time of temporary absence not counted. 5703. Death of owner stops limitation, until. 5704. Death of person, etc., against whom, etc. 5705. Acknowledgment must be in writing. 5706. Limitation must be pleaded, etc. 5707. Presumption of death, etc., when, etc. 5708. No limitation against infants.</p>	<p>Art. 5709. Action against immigrant barred, when, etc. 5710. Debts incurred prior to removal of person to this state. 5711. One disability not tacked to another. 5712. Claims barred under pre-existing laws, etc. 5713. No agreement to shorten period of limitation valid. 5714. Limitation of notice of claim for damages.</p>
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**Article 5701.** [3366] **Suspension during late war.**—The laws of limitation of civil suits in this state shall be considered as suspended during the late civil war, commencing on the twenty-eighth day of January, 1861, and ending on the thirtieth day of March, 1870; but nothing herein shall be held to revive any cause of action heretofore barred. [Const., art. 16, sec. 18.]

**Suspension during war.**—The validity of the several provisions suspending the statute of limitations during the civil war has been recognized in the following cases: *Maloney v. Roberts*, 32 T. 136; *Haddock v. Crocheron*, 32 T. 276, 5 Am. Rep. 244; *Waters v. Waters*, 33 T. 50; *Bender v. Crawford*, 33 T. 745, 7 Am. Rep. 270; *Rivers v. Washington*, 34 T. 267; *Andrus v. Randon*, 34 T. 536; *Dwight v. Overton*, 35 T. 390; *Moseley v. Lee*, 37 T. 480; *Bentinck v. Franklin*, 38 T. 458; *Wood v. Welder*, 42 T. 396; *Kennedy v. Briere*, 45 T. 305; *Lewis v. Davidson*, 51 T. 251; *Goldfrank v. Young*, 64 T. 432.

The suspension of the statute of limitation during the Confederate war will be taken notice of, without it being pleaded as an exception to the running of the statute. *Maverick v. Flores*, 71 T. 110, 8 S. W. 636.

Possession commenced in 1857, though not continued between 1862 and 1868, is continuous under the above article if resumed in 1868, and held until 1879. *Collier v. Coutts* (Civ. App.) 45 S. W. 485.

This article in connection with Pasch. Dig. arts. 4631 and 4631a, and Const. 1869, art. 12, § 43, does not have the effect, where there has been an abandonment during the war, of taking adverse possession before the war with that after. *Collier v. Coutts*, 92 T. 234, 47 S. W. 525.

Possession of land by a party after suspension of limitations by the civil war held immaterial, where he had held for a sufficient time to prescribe the owner's title before such suspension. *Harris v. Iglehart*, 52 C. A. 6, 113 S. W. 170.

Occupancy of land, prior to 1870 and during the suspension of the statutes of limitation by reason of the civil war, is not to be considered in determining whether the claimant has occupied the land for the requisite period. *Moore v. Loggins* (Civ. App.) 114 S. W. 183.

**Art. 5702.** [3367] **Time of temporary absence not counted.**—If any person against whom there shall be cause of action shall be without the limits of this state at the time of the accruing of such action, or at any time during which the same might have been maintained, the person entitled to such action shall be at liberty to bring the same against such person after his return to the state, and the time of such person's absence shall not be accounted or taken as a part of the time limited, by any of the provisions of this title. [Act Feb. 5, 1841, sec. 22. P. D. 24.]

**In general.**—Absence from the state of the maker of a vendor's lien note suspends the statute as well against the lien as against the indebtedness; nor can a purchaser from the vendee with notice avoid the lien by limitation while the debt and lien are valid against the original vendee. *Falwell v. Henig*, 78 T. 278, 14 S. W. 613.

This article applies to real as well as personal actions. *Huff v. Crawford*, 89 T. 214, 34 S. W. 606.

Absence from state of subsequent grantee of land does not suspend statute, where right depends on enforcement of judgment against immediate grantee. *Miller v. Anders*, 21 C. A. 72, 51 S. W. 897.

Where no execution has been issued on a judgment within twelve months from its rendition, and none can be issued because of the inhibition of Art. 3717, and the judgment can only be revived under *scire facias* provided by Art. 5696, the judgment is a cause of action within the purview of this article. *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

A judgment on which execution has been issued is not a cause of action within the purview of this article; for, even though the judgment debtor be without the state and leave no property therein, execution may be issued and the judgment be kept alive and is efficacious as a second judgment. *Id.*

The operation of limitations as to an action to try title, as well as to personal actions, is suspended during the absence of the defendant from the state. *Tate v. Waggoner* (Civ. App.) 149 S. W. 737.

**Absence at time of accrual of cause of action.**—In a suit for reimbursement by a surety who did not pay the debt until after his principal had become a resident of another state, the absence of the principal from the state of Texas held not to suspend the statute of limitations. *Habermann v. Heidrich* (Civ. App.) 66 S. W. 106.

Where surety on note does not pay it until maker becomes resident in another state, limitations will not be suspended by reason of the latter's absence from the state. *Habermann v. Heidrich* (Civ. App.) 66 S. W. 795.

Where the first of a number of notes of which defendant had assumed the payment fell due February 1, 1891, at which time the maker, who was also a defendant, was absent from the state, and continued absent until the fall of 1893, suit brought January 27, 1896, was not barred by the four-year limitation. *Liner v. J. B. Watkins Land Mortg. Co.*, 29 C. A. 187, 68 S. W. 311.

Where, after the accrual of a cause of action, defendant came into the state openly and publicly, under circumstances affording plaintiff reasonable opportunity, by ordinary diligence, to obtain personal service, the time defendant remained in the state must be counted in his favor in determining the running of limitations, whether plaintiff had actual knowledge of defendant's presence or not. *Glenn v. McFaddin* (Civ. App.) 143 S. W. 234.

Since an action to revive a judgment did not accrue until the judgment had become dormant, where at the time the debtor had left the state, his nonresidence did not suspend limitations against a proceeding to administer his estate in Texas after an action to revive was barred. *Jaffray Realty Co. v. Solomon's Estate* (Civ. App.) 157 S. W. 170.

**Departure after accrual of cause of action.**—This article includes each departure from the state and the whole time of the defendant's absence; that is, to render the bar effective, the debtor must remain in the state for the full period of time prescribed by the law. *Fisher v. Phelps*, 21 T. 551; *Phillips v. Holman*, 26 T. 276.

Where the debtor left Texas before the debt had been due four years, the running of the statute was suspended during his absence. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

Where a person resides in the state at the time of the accrual of an action against him, and then permanently removes from the state, the running of limitation is suspended until he returns to the state. *Bemis v. Ward*, 37 C. A. 481, 84 S. W. 291.

Where the debtor has absented himself from the state on two occasions, each for the period of two or three months, the period of both absences must be excluded from the computation in making up the four years necessary to bar the action. *Id.*

Where it is shown that the maker of a note leaves the state before the paper is barred and from that time on is not a resident of the state, it is sufficient to stay the running of the statute of limitation. *Dignowity v. Sullivan*, 49 C. A. 582, 109 S. W. 429.

A statute of limitations governing actions for injury to employes held not to affect rights of an employe suing in Texas for injury in New Mexico, in the absence of a certain showing. *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852.

**Nonresidence.**—If a non-resident debtor is in this state openly and publicly, under circumstances which permitted personal service of process, the aggregate time so spent in this state is available in completing the term of limitation. *Montgomery v. Brown*, 28 S. W. 834, 9 C. A. 127.

It is the settled law of this state that the provisions of the statute of limitations in regard to absent defendants do not apply to persons who were non-residents of the state at the time the cause of action accrued, and so remained. *Lynch v. Ortleib*, 30 S. W. 545, 37 T. 590; *Huff v. Crawford*, 38 T. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763; *Cotton v. Rand* (Civ. App.) 29 S. W. 682. Citing *Snoddy v. Cage*, 5 T. 106; *Love v. Doak*, 5 T. 343; *Moore v. Hendrick*, 8 T. 253; *Ayres v. Henderson*, 9 T. 540; *Fisher v. Phelps*, 21 T. 556; *Phillips v. Holman*, 26 T. 278; *Falwell v. Hening*, 78 T. 278, 14 S. W. 613.

This article does not apply where a non-resident was within the state at the time of taking possession of land by his agent. *Wilson v. Daggett*, 88 T. 375, 31 S. W. 618, 55 Am. St. Rep. 766; *Id.* (Civ. App.) 31 S. W. 717.

A non-resident cannot invoke the Texas statute of limitations relating to the recovery of land, although he had tenants in possession of the land and had paid all taxes thereon. *Beale's Heirs v. Johnson*, 45 C. A. 119, 99 S. W. 1046, 1047.

In an action to correct a certificate of acknowledgment to a deed, the nonresidence of the parties did not prevent the running of the statute of limitations whether such action could have been brought and jurisdiction over defendants therein obtained in the state or not. *Veeder v. Gilmer*, 103 T. 458, 129 S. W. 595.

**Corporations.**—The absence of the officers of a corporation created in this state, and carrying on its business here, beyond the state, is not the absence of the corporation itself. *Sherman v. B. B. B. & C. R. R. Co.*, 21 T. 349.

A foreign corporation doing business in this state and subject to suit here may plead the statute of limitations to an action on a debt. *Thompson v. T. L. & C. Co.* (Civ. App.) 24 S. W. 856.

**Art. 5703. [3368] Death of owner, etc., shall stop limitation until, etc.**—In case of the death of any person in whose favor there may be cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; then and in that case the said law of limitation shall only cease to run until such qualification. [Act Feb. 16, 1852, sec. 3. P. D. 4607.]

See *Moody v. Moeller*, 72 T. 635, 10 S. W. 727, 13 Am. St. Rep. 839; *Thompson v. Jones*, 77 T. 626, 14 S. W. 222.

In general.—When the statute of limitations begins to run against one who, before its bar is complete, dies, leaving minor heirs, it is only suspended for twelve months after his death, unless administration is begun before that time, and continues to run against his heirs, who are not protected by minority against its operation. *Grimes v. Watkins*, 59 T. 133.

When a decedent before his death transferred in blank a note payable to himself, limitation is not suspended by his death. *Davis v. Dixon*, 61 T. 446.

Money due an estate having a proper representative becomes barred by the statute of limitations. The statute will not be suspended by the disability of the heir, if the representative of the estate had a right of action. *Rindge v. Oliphint*, 62 T. 682, citing *Thomas v. Greer*, 6 T. 377.

This article applies to real and personal actions. *Hendricks v. Huffmeyer* (Civ. App.) 27 S. W. 777.

In trespass to try title, begun by the grandchildren of a deceased, claiming the interest of their mother, where it appears that the children's mother was a minor or married woman up to the time of her death, and no administration of her estate had ever been had the statutes of five and ten year limitations will not begin to run against them until twelve months after her death. *Hasseldenz v. Dofflemyre* (Civ. App.) 45 S. W. 830.

The running of the statute of limitation is interrupted for twelve months though no administration is necessary on decedent's estate. *Carter v. Hussey* (Civ. App.) 46 S. W. 270.

Limitation held not to run against a cause of action accruing to an estate of a decedent, after his death, until the expiration of one year. *William J. Lemp Brewing Co. v. La Rose*, 20 C. A. 575, 50 S. W. 460.

Adverse possession while title to land is in executors can be set up as a defense in action by the devisees. *Matthews v. Darnell*, 27 C. A. 181, 65 S. W. 890.

Under the statute, death of the owner of land suspends for one year after the death, or until an executor or administrator shall have qualified, the running of limitations in favor of one in possession of the land. *Meurin v. Kopplin* (Civ. App.) 100 S. W. 984.

**Art. 5704. [3369] Death of person, etc., against whom, etc.**—In case of the death of any person against whom there may be a cause of action, the law of limitation shall cease to run against such cause of action until twelve months after such death, unless an administrator or executor shall have sooner qualified according to law upon such deceased person's estate; then and in that case the said law of limitation shall only cease to run until such qualification. [Id. sec. 2. P. D. 4606.]

Cited, *Spiller v. Hollinger* (Civ. App.) 148 S. W. 338.

In general.—As to creditors, executors and administrators are only trustees by construction, and as between them and the estate represented by the executor or administrator, the statutes of limitation run. *Smith v. Gillette*, 59 T. 86, citing *Tinnen v. Mebane*, 10 T. 246, 60 Am. Dec. 205; *Parker v. Cater*, 8 T. 318.

An assignment under the statute for the benefit of creditors does not suspend limitation. *Meusebach v. Half*, 77 T. 185, 13 S. W. 979.

The article does not apply when the person in whom the right of action vests takes charge of the estate without administration. *Scofield v. Douglass* (Civ. App.) 30 S. W. 817.

This article applies to actions for the recovery of land. *Wynne v. Parke* (Civ. App.) 32 S. W. 726.

This statute applies to real as well as personal actions. *Morgan v. Baker* (Civ. App.) 40 S. W. 27; *Groesbeck v. Crow*, 91 T. 74, 40 S. W. 1028. See *McCampbell v. Durst*, 15 C. A. 522, 40 S. W. 315; *Huff v. Crawford*, 88 T. 368, 30 S. W. 546, 31 S. W. 614, 53 Am. St. Rep. 763.

An action against a surviving wife to cancel a deed on the ground of fraud on the part of the deceased husband, otherwise barred within four years, there having been no administration on the estate, might be brought within five years. *Groesbeck v. Crow*, 91 T. 74, 40 S. W. 1028.

Foreclosure of a mortgage to secure a debt against an estate is not barred by limitations, where it does not appear that administration has closed. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Meaning of "cause of action."—"Cause of action" includes all cases in which there are demands against the person at the time of his death, whether they had so matured at the time as to entitle holders to institute and maintain actions against the deceased or not. It includes an unsatisfied judgment not dormant at death of a defendant. *Low v. Felton*, 84 T. 378, 19 S. W. 693.

See, also, *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

**Art. 5705. [3370] Acknowledgment must be in writing.**—When an action may appear to be barred by a law of limitation, no acknowledgment of the justness of the claim made subsequent to the time it became due shall be admitted in evidence to take the case out of the operation of the law, unless such acknowledgment be in writing and signed by the party to be charged thereby. [Act Feb. 5, 1841, sec. 12. P. D. 4617a.]

Form and requisites of acknowledgment in general.—The acknowledgment must be express, specific and unconditional. *Coles v. Kelsey*, 2 T. 541, 47 Am. Dec. 661; *Mitchell v. Clay*, 8 T. 443; *McDonald v. Grey*, 29 T. 80. See *Thurmond v. Trammell*, 28 T. 371, 91 Am. Dec. 321; *Thompson v. T. L. & C. Co.* (Civ. App.) 24 S. W. 586; *Robinson v. Munroe* (Civ. App.) 25 S. W. 53; *Reynolds Iron Works v. Mitchell* (Civ. App.) 27 S. W. 608.

An acknowledgment must show that the debt is due, either in whole or part, and must be unqualified. *Smith v. Fly*, 24 T. 345, 76 Am. Dec. 109; *Mitchell v. Clay*, 8 T. 443; *Coles v. Kelsey*, 2 T. 641, 47 Am. Dec. 661. See *Cohen v. Shwarts* (Civ. App.) 32 S. W. 820.

An offer by a debtor in writing to pay the principal, but repudiating the interest of the debt, was held to be an acknowledgment of the justice of the principal. *McDonald v. Grey*, 29 T. 80. An offer to compromise does not suspend limitation. *Goldstein v. Gans* (Civ. App.) 32 S. W. 185.

See statement of case for a letter which was held not to contain such an acknowledgment of indebtedness, and such new promise as would remove the bar of the statute of limitation. *Gathright v. Wheat*, 70 T. 740, 9 S. W. 76.

Letters held to evidence an admission of indebtedness and a promise to pay. *Wheatley v. Nipper* (Civ. App.) 42 S. W. 777.

A written request for extension of time, and written notice of payment of interest, held to remove bar of limitations. *Clayton v. Watkins*, 19 C. A. 133, 47 S. W. 810.

A note given for interest due on a note after it would have otherwise been barred is admissible to show recognition by the maker of an indorsement on the note acknowledging the debt and promising its payment. *Martin v. Somervell County*, 21 C. A. 308, 52 S. W. 566.

Evidence held sufficient to show an extension of one year of note about to be barred as consideration for acknowledgment taking debt out of statute. *Id.*

A written acknowledgment of an existing debt in consideration of an extension is sufficient to take the debt out of the statute. *Id.*

Right to except to authority of county officer to take acknowledgment taking claim out of statute of limitations held waived, where not raised in the court below. *Id.*

A letter containing an unqualified admission of liability, and showing no unwillingness to pay, takes claim out of the statute. *Burnett v. Munger*, 23 C. A. 278, 56 S. W. 103.

Statements in letters held sufficient to take an action without the bar of the statute. *Acers v. Acers*, 22 C. A. 584, 56 S. W. 196.

In a suit on municipal notes, limitation on the original debts funded thereby is to be computed up to the date that they were funded by the issue of other notes. *City of Tyler v. L. L. Jester & Co.*, 97 T. 344, 78 S. W. 1058.

Defendant's letter to plaintiff held an acknowledgment of the debt, and a new promise to pay it, taking it out of the statute. *O'Neill v. Ellis* (Civ. App.) 78 S. W. 1083.

Acknowledgment of debt in mortgage held sufficient to revive right of action on note due a third party, barred by limitations. *Hahl v. Ellwood*, 34 C. A. 642, 79 S. W. 829.

Letters written to the payee of a note by the maker and signed by him held such acknowledgments as to take the debt out of the statute. *Vogelsang v. Taylor* (Civ. App.) 80 S. W. 637.

A letter held not to revive a compromise agreement entered into for the execution of a note, but to be an acknowledgment of the indebtedness evidenced by the note. *Robertson v. Warren*, 45 C. A. 584, 100 S. W. 805.

An agreement between parties held not to affect the running of limitations against a right of action. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

An acknowledgment must import an acknowledgment of the debtor's present liability; an acknowledgment of the original justness of the claim being insufficient. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

A writing, signed by defendant, agreeing to pay interest at 10 per cent. on debts and premiums paid on certain insurance by plaintiff, held not to constitute a sufficient acknowledgment. *Id.*

A written acknowledgment of a debt must be clear and unequivocal, and neither qualified by conditions or limitations. *Id.*

Where there are several claims against the same debtor, a general acknowledgment will not take any of them out of the statute, but, if there is only one transaction, a reference to the debt is sufficient as to its identity. *Cotulla v. Urbahn*, 104 T. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345.

**New promise.**—An alleged promise to pay when thereunto requested is not supported by a promise to pay in two years from date. *Hunt v. Wright*, 13 T. 649.

If a new promise be made conditional, or depend upon facts to be settled, the plaintiff must prove a compliance with such conditions, or the happening of the events upon which he relies. *Leigh v. Linthecum*, 30 T. 100. See *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

Where the word "Renewed," signed by the defendant, is indorsed on the back of the note, its legal effect is the same as if its maker had executed a new note. *Oppenheimer v. Fritter*, 1 App. C. C. § 373.

A new promise to pay a claim which is otherwise barred by which the promisor agrees to pay "if I owe it," does not relieve the claim from the operation of the statute. *Meyer v. Andrews*, 70 T. 327, 7 S. W. 814; *Henry v. Roe*, 83 T. 446, 18 S. W. 806.

A debtor on open account wrote to his creditor, November 14, 1882, in reference to the debt, saying: "I will, if I am ever able, pay it." The amount of the debt at the date of the letter was established, and it was also shown that in October, 1885, the debtor had acquired and owned an amount of money more than sufficient to pay his debts, including the account. In December, 1885, he was sued on the written conditional promise. Held: (1) The existence of the original debt being shown, and the reference made to it in the letter being established, the claim was not barred by limitation, but the right of action accrued on the written promise at the time when the defendant first had the ability to pay. (2) The plaintiff was not bound to show that the defendant continued to be able to pay, after showing that such ability once existed. (3) The fact that the defendant, after being able to pay, invested his money in a homestead, could not defeat the plaintiff's right of action. *Lang v. Caruthers*, 70 T. 718, 8 S. W. 604.

Where notes are given in part payment for land conveyed by quitclaim deed, and the vendee takes and retains possession of the land, a subsequent promise by the vendor to procure a patent is sufficient consideration for a new promise by the vendee to pay the notes, so as to give the vendor a right of action on the new promise, even after suit on the notes is barred. *Heisch v. Adams*, 81 T. 94, 16 S. W. 790.

Letters not containing promise to pay held ineffectual to revive a debt. *Crawford County Bank v. Henry* (Civ. App.) 41 S. W. 201.

Where a debt is barred, and is renewed, the new contract constitutes the debt, and the old debt is a sufficient consideration therefor. *Interstate Building & Loan Ass'n v. Goforth*, 94 T. 259, 59 S. W. 871.

Sale and delivery and indorsement of writing obligatory after the statute of limitations had run against it held a new contract, removing the bar of the statute so far as the indorser's liability was concerned. *Conly v. Hampton* (Civ. App.) 87 S. W. 1171.

No recovery can be had upon a promise to pay a note barred by limitations where the statute at the time of the action would also defeat recovery on the new promise. *Hall v. Jennings* (Civ. App.) 104 S. W. 489.

A letter written by a debtor held to be a sufficient new promise to remove the bar. *Western Casket Co. v. Estrada* (Civ. App.) 116 S. W. 113.

Since the plea of usury is personal to the one alleging it, one acknowledging and agreeing to pay a usurious note barred by limitations could only claim the advantage of the usury law from the time she agreed to pay the note; her agreement being a new promise. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

The action is on the new promise, and the original indebtedness serves only to show the consideration. *Cotulla v. Urbahn*, 104 T. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345.

In order to take a case out of the statute on the ground of new promise, such new obligation must either evidence an express promise to pay the debt or an unequivocal acknowledgment of its justness, when the law will imply a promise to pay it. *Id.*

The discharge of a barred debt is a sufficient consideration for a new promise. *Jackson v. Stone* (Civ. App.) 155 S. W. 960.

**Requirement of writing.**—In actions for the recovery of personal property, evidence of verbal acknowledgment by the defendant of the plaintiff's title to the property may be sufficient for the purpose of showing that his claim and possession were not adverse to the plaintiff. When the evidence clearly shows an adverse holding by the defendant, for the period sufficient for the statute of limitations to become available as a defense, an acknowledgment of title in plaintiff, unaccompanied by evidence of intention or willingness to submit thereto, will not defeat the bar of the statute. *Thurmond v. Trammell*, 23 T. 371, 91 Am. Dec. 321.

Four-year limitation does not bar a note, where there is a written acknowledgment of its justness before it was barred. *Montague County v. Meadows*, 21 C. A. 256, 51 S. W. 556.

An acknowledgment, signed for the maker by another at his request, is sufficient. *Martin v. Somervell County*, 21 C. A. 308, 52 S. W. 556.

Acknowledgment made after a debt is due must be in writing. *Wells v. Moor*, 42 C. A. 47, 93 S. W. 220.

A writing signed by defendant agreeing to pay interest at 10 per cent. on debts and premiums paid on certain insurance by plaintiff held not to constitute an acknowledgment of the debt sufficient to take it out of the statute. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

A parol promise held insufficient. *Penick v. Castles* (Civ. App.) 144 S. W. 297.

**Acknowledgment or promise—To whom made.**—A promise to pay a debt appearing to be within the bar of limitation, made to a stranger, will not relieve the claim from the bar. *City of Houston v. Jankowskie*, 76 T. 368, 13 S. W. 269, 18 Am. St. Rep. 57.

An agreement between a mortgagor and mortgagee to extend the time of payment of the debt secured by a first mortgage, when made after the creation of a junior incumbrance, deprives the junior incumbrancer of the defense of limitation. *Johnson v. Lasker Real Estate Ass'n*, 21 S. W. 961, 2 C. A. 494.

An admission of liability by a garnishee held not an admission to his creditor, so as to stop limitations from running against the debt. *Holland v. Shannon* (Civ. App.) 84 S. W. 854.

Parol evidence held inadmissible to show that a general written acknowledgment to a third person was intended to revive defendant's debt to plaintiff then barred by limitations. *Cotulla v. Urbahn*, 104 T. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345.

— **By whom made.**—The allowance of a claim made by an executor before it is barred implies a distinct promise to pay in due course of administration. It does not follow that an executor may not suspend the operation of the statute before the bar is complete. *Howard v. Johnson*, 69 T. 658, 7 S. W. 522; *Park v. Prendergast*, 23 S. W. 535, 4 C. A. 566.

An executrix who is sole legatee and devisee may waive the statute. *Suhre v. Benton* (Civ. App.) 25 S. W. 822.

An independent executrix has power by her promise to suspend the statute before the debt is barred. *Daniel v. Harvin*, 10 C. A. 439, 31 S. W. 421, citing *Howard v. Johnson*, 69 T. 655, 7 S. W. 522; *Park v. Prendergast*, 23 S. W. 536, 4 C. A. 566; *Suhre v. Benton* (Civ. App.) 25 S. W. 822.

A debtor can toll the statute by written acknowledgment of debt so as to continue the lien thereon after assignment of property charged with the lien, where acknowledgment is made before bar of statute has operated. *Flewellen v. Cochran*, 19 C. A. 499, 48 S. W. 39.

Where by a deed a vendor's lien is retained to secure a purchase-money note, and an agreement is entered into, before limitations have run, between the owner of the land and the holder of the note, to extend the time of payment, the statute is thereby stayed, and the lien preserved, even as against a subsequent purchaser of the land. *Bangs v. Crebbin*, 29 C. A. 385, 69 S. W. 441.

Renewal notes, executed by an independent executor, sued on within four years after maturity, on payment being refused, held not barred by the statute of limitations. *Altgelt v. Alamo Nat. Bank* (Civ. App.) 79 S. W. 582.

A power of attorney given a guardian of minor children construed, and held to limit his authority to such acts as he could perform as guardian. *Stone v. McGregor*, 99 T. 51, 87 S. W. 334.

An administrator cannot charge the estate by acknowledging a debt of decedent barred by limitations; it being his duty to plead the statute. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

**Estoppel.**—See "Estoppel to rely on limitation," post.

Where, prior to the expiration of limitations, defendant importuned plaintiff not to sue, agreeing that he would not plead limitations, held, that defendant was estopped to plead the statute. *Smith v. Dupree* (Civ. App.) 140 S. W. 367.

**Part payment.**—A payment of a part of the debt does not avoid the bar of the statute. *Meusebach v. Half*, 77 T. 185, 13 S. W. 979.

When a number of notes mature at different times, and provision is made in the contract that, if default is made in payment of some, all become due, in case default is made to pay the prescribed number, at once limitation begins to run against all the notes, and it is not stayed by partial payments after maturity and oral promises to pay. *San Antonio R. E. B. & L. Ass'n v. Stewart*, 94 T. 441, 65 S. W. 666, 86 Am. St. Rep. 864.

Indorsement on note, acknowledging part payment, extending the note, and signed by makers, held to take case out of statute. *Carter v. Johnson* (Civ. App.) 90 S. W. 701.

Where defendant had credited by agreement plaintiff's account on certain indebtedness of plaintiff to defendant, he could not afterwards claim that plaintiff's account was barred by limitations. *Lowry v. Smith*, 42 C. A. 112, 94 S. W. 450.

**Revival of debt as revival of lien or other security.**—Renewal of note secured by mortgage before limitations had run held to have renewed the mortgage lien. *Eastham v. Patty*, 29 C. A. 473, 69 S. W. 224.

Recitals in a conveyance by the grantor to a holder of a vendor's lien note executed by him held sufficient to revive the debt and the lien on the land. *Austin v. Lauderdale* (Civ. App.) 83 S. W. 413.

The acknowledgment of a note barred by limitations by one not a party to the note held not to revive an implied lien on land to secure payment of the note. *Vinson v. Whitfield* (Civ. App.) 133 S. W. 1095.

A mortgage, given when an earlier mortgage was barred, held not subordinated to the earlier mortgage by its being renewed. *Moore v. Porter* (Civ. App.) 133 S. W. 426.

**Art. 5706. [3371] Limitation must be pleaded, etc.**—The laws of limitation of this state shall not be made available to any person in any suit in any of the courts of this state, unless it be specially set forth as a defense in his answer. [Act Feb. 16, 1852, sec. 5. P. D. 4629.]

**Pleading statute as defense.**—As to amendment of pleadings, see Decisions Applicable to Subject in General, § 45, following this chapter.

Defenses by warrantor in trespass to try title, see notes under Art. 7735.

It may be doubted whether a plea of the five-year statute which nowhere contains an allegation that defendants claimed under a deed registered, or that they paid the taxes for the requisite time, would be sufficient to sustain a judgment based upon this statute, although no exception was made to it. *L. & M. Co. v. Bridgeman*, 1 C. A. 383, 21 S. W. 141.

A plea of limitation of five years of adverse possession held sufficient. *Montague County v. Meadows* (Civ. App.) 42 S. W. 326.

Where there is no plea of limitations, it cannot be proved. *Kalteyer v. Wipff* (Civ. App.) 49 S. W. 1055.

Where a plea of limitations alleged possession "for a period more than ten years next before commencement of the suit," held, the time was not limited to ten years immediately preceding the suit. *Hennessy v. Savings & Loan Co.*, 22 C. A. 591, 55 S. W. 124.

Where the complaint did not raise the issue of limitation, such question was not in issue, though raised by the evidence. *Lang v. Henke*, 22 C. A. 490, 55 S. W. 374.

Where limitations are not specially pleaded as a bar to a cause of action, the question is waived, and cannot be raised on appeal. *Boyd v. Ghent* (Civ. App.) 61 S. W. 723.

A petition in an action to recover real estate from mortgagee wrongfully in possession held a sufficient allegation of limitations to raise such defense against a claim of defendant for a reformation of a trust deed to establish title by a prior sale thereunder which was not according to the terms of the deed. *Galloway v. Kerr* (Civ. App.) 63 S. W. 180.

The pleading and evidence in an action of trespass to try title held to entitle defendant to a decree establishing a title acquired by adverse possession as to part of the land, though he had not pleaded adverse possession as to any specific portion of a larger tract, including the land in question, but only as to the entire tract. *Smith v. Abadie*, 29 C. A. 60, 67 S. W. 925.

Where, in an action on a note, defendant pleaded limitations, and plaintiff filed a replication alleging a written contract extending the time of payment and reducing the rate of interest, to which no answer or exception was filed, the plea of limitations to the original cause of action did not apply to or affect the new cause of action so set up. *Bangs v. Crebbin*, 29 C. A. 385, 69 S. W. 441.

A plea of limitations for 160 acres only of the land sued for, this being claimed on a naked possession, is insufficient; it not describing the land. *Giddings v. Fischer*, 97 T. 184, 77 S. W. 209.

In an action on a note, a plea of limitations held sufficient. *Evans v. Jackson*, 41 C. A. 277, 92 S. W. 47.

Where an attorney employed to sue on a note fraudulently stated to his client that such action had been commenced and judgment obtained, the client upon discovering the fraud held justified in bringing suit upon the note before bringing action for the fraud, though limitations had run against the note, since such defense might have been waived by failure to plead. *Shuttleworth v. McGee*, 47 C. A. 604, 105 S. W. 823.

The admission of evidence of limitation without being pleaded held not error. *Dunn v. Taylor* (Civ. App.) 107 S. W. 952.



One relying upon limitation must plead it specifically. *Williams v. Keith* (Civ. App.) 111 S. W. 1056; *Perry v. Ball*, 52 C. A. 134, 113 S. W. 588.

Where it was pleaded that the cause of action accrued more than thirteen years before suit, its sufficiency cannot be called in question for the first time on a writ of error. *Schneider v. Schneider* (Civ. App.) 118 S. W. 789.

Acts 1905, p. 35, c. 29, allowing persons claiming the right to purchase or lease any school lands one year to assert their right, is a statute of limitations, and cannot be availed of as a defense, unless specially pleaded under the express provisions of this article. *Tillman v. Erp* (Civ. App.) 121 S. W. 547.

Sufficiency of pleading and proof where defendant in trespass to try title claims part of the land by adverse possession under Art. 5676. *Louisiana & Texas Lumber Co. v. Stewart* (Civ. App.) 130 S. W. 199.

That the statute may be availed of, it must be pleaded in defense. *Pecos & N. T. R. Co. v. Crews* (Civ. App.) 139 S. W. 1049.

A plea of limitations for less than 160 acres need not describe by metes and bounds the land claimed, though where the tract claimed contains more than 160 acres, and there is no written memorandum of title, claimant must accurately describe the 160 acres to which he is restricted. *Stevens v. Pedregon* (Civ. App.) 140 S. W. 236.

A plea of limitation in trespass to try title when coupled with a prayer for affirmative relief becomes an affirmative plea of title and will support a judgment for recovery of the land. *Jones v. Wagner* (Civ. App.) 141 S. W. 280.

Where defendant corporation, sued in the wrong name, voluntarily answered to the merits, it could not, when plaintiff corrected such misnomer, plead that the action was barred. *Forbes Bros. Teas & Spice Co. v. McDougle, Cameron & Webster* (Civ. App.) 150 S. W. 745.

In a suit of trespass to try title for damages incident to the trespass, to revoke a power of attorney fraudulently procured, and for the value of timber disposed of under such power, the two-year statute of limitations against the claim for damages to the land, is not available to defendant, if not pleaded. *William Cameron & Co., Inc., v. Collier* (Civ. App.) 153 S. W. 1178.

On a case being reversed, it will not also be rendered merely because the cause of action will be barred on another trial if the statute be taken advantage of as a defense. *Bagley v. Brack* (Civ. App.) 154 S. W. 247.

Demurrer or exception as raising defense.—See, also, notes at end of Title 37, Chapter 2.

In the absence of a special exception to a petition to set aside a sale of intestate's land to pay debts, an allegation that the debts were barred by limitations held sufficient. *Smart v. Panther*, 42 C. A. 262, 95 S. W. 679.

Defense of limitations held presentable by special exceptions where petition shows on its face that it is barred. *Schutz v. Burges*, 50 C. A. 249, 110 S. W. 494.

A judgment for defendant will not be affirmed, because an exception to the petition as barred by limitations, which was not ruled on by the trial court, was well taken. *Holland v. Western Bank & Trust Co.*, 56 C. A. 324, 118 S. W. 218, 119 S. W. 694.

Defensive matter to plea of limitations.—See notes under Art. 1828.

Set-off or counterclaim.—When a suit is filed, the statute of limitations stops running against all valid existing claims in set-off. *Walker v. Fearhake*, 22 C. A. 61, 52 S. W. 629.

A plea in reconvention in an action by a city for taxes held insufficient for failing to show whether any part of defendant's claim was barred by limitations. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

In an action on a contract, where defendants' claims against plaintiff were unliquidated, they did not extinguish pro tanto the claim sued on, for a set-off is not effected, as a matter of law, where it is for unliquidated damages; and hence limitations continued to run against such claims, despite the action, until pleaded. *Nelson v. San Antonio Traction Co.* (Civ. App.) 142 S. W. 146.

Matters of defense, though pleaded in the form of a set-off or counterclaim, may be set up at any time before trial, without being subject to the running of the statute during the pendency of the action. *Id.*

Anticipating defense in petition.—See notes under Art. 1827.

On appeal from justice's court.—When limitation is not pleaded in the justice's court, it cannot be pleaded on appeal. *Pickett v. Edwards* (Civ. App.) 25 S. W. 32.

That the petition filed in the county court on appeal from a justice does not aver when the account sued on was due does not justify its dismissal on the ground that it was barred by limitations, in the absence of special exceptions raising the objection. A general demurrer to such petition does not reach such defect. *Threadgill v. Shaw* (Civ. App.) 130 S. W. 707.

Stale demand.—Plaintiffs, suing for land, failing to plead stale demand to facts alleged in the answer, cannot avail themselves of facts which would show laches in the assertion of an equitable title. *Hensel v. Kegans*, 79 T. 347, 15 S. W. 275.

Stale demand must be pleaded. *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794.

Burden of proof.—See notes under Art. 3687.

Trespass to try title.—As to the defense of limitation and the form of pleas, see *Taliaferro v. Butler*, 77 T. 578, 14 S. W. 191; *Church v. Waggoner*, 78 T. 200, 14 S. W. 581.

The statute of limitations must be pleaded. *Compton v. Seley* (Civ. App.) 27 S. W. 1077; *McKamey v. Thorp*, 61 T. 648; *Scarborough v. Alcorn*, 74 T. 358, 12 S. W. 72; *Kauffman v. Brown*, 83 T. 41, 18 S. W. 425; *Mayer v. Manning*, 73 T. 43, 11 S. W. 136.

Where a party would rely on a title accruing by virtue of limitations, he must plead it. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

Limitation cannot be shown under the plea of not guilty, but must be pleaded specially. *Stevens v. Stoner* (Civ. App.) 54 S. W. 934.

This article does not apply to the allegations in the petition in trespass to try title, but is confined by its terms to the defense in the answer. *Benavides v. Molino* (Civ. App.) 60 S. W. 261.

A plaintiff in trespass to try title, claiming title through the operation of the statute of limitations, must specially plead such title. *Erp v. Tillman*, 103 T. 574, 131 S. W. 1057.

In trespass to try title and for damages for injury to the land, the two-year statute of limitations held not available to defendant if not pleaded. *William Cameron & Co. v. Collier* (Civ. App.) 153 S. W. 1178.

Where plaintiff in trespass to try title relies on a limitation title, he must plead it. *Cook v. Houston Oil Co.* (Civ. App.) 154 S. W. 279.

**Pleading limitation against debt against enforcement of security.**—The beneficiary of a policy, transferred by the insured in payment of his debt, could not plead limitations against the debt as a defense to the creditor's right to recover an amount equal to the debt and interest, etc., on the insured's death, without first tendering the debt, interest, etc. *Harde v. Germania Life Ins. Co.* (Civ. App.) 153 S. W. 666.

**Art. 5707. [3372] Presumption of death when, etc.**—Any person absenting himself beyond sea or elsewhere for seven years successively shall be presumed to be dead, in any cause wherein his death may come in question, unless proof be made that he was alive within that time; but an estate recovered on such presumption, if in a subsequent action or suit the person presumed to be dead shall be proved to be living, shall be restored to him who shall have been evicted, and he may moreover demand and recover the rents and profits of the estate during such time as he shall be deprived thereof, with lawful interest. [Act Feb. 5, 1841, sec. 10. P. D. 23.]

**Presumption of death.**—Hearsay evidence, see Art. 3687, Rule 35. Sufficiency of evidence, see Art. 3687, Rule 12, § 215.

The absence of a person beyond the sea or elsewhere for seven years successively, without having been heard from, authorizes the presumption that he is dead. Art. 5707.

Parties presented themselves in Texas in 1822 as man and wife, and were so reputed until the death of the husband in 1827. The man was previously married in Ohio in 1809, and in 1818 separated from his wife, who shortly after disappeared and was not heard from during the four years preceding the husband's immigration to Texas. Held, that the presumption existed that the first wife was dead, and the second marriage, although illicit in its commencement, was rendered valid by the presumed death of the first wife. *Yates v. Houston*, 3 T. 433.

A woman having been separated from her husband five years, again married. But one witness had heard of the first husband since the separation, and there was no evidence that she had any knowledge of his existence. Held, that the burden of proof was upon the person impeaching the second marriage to show that the first husband was living at the time of its celebration. *Lockhart v. White*, 18 T. 102.

The common law does not indulge in any presumption of survivorship or death by reason of age or sex, when two or more persons are lost in a common disaster. *Paden v. Briscoe*, 81 T. 563, 17 S. W. 42.

Evidence held admissible to rebut the presumption of death. *Nehring v. McMurray* (Civ. App.) 45 S. W. 1032.

There is no presumption that a man presumed to be dead left a surviving wife, child, or children. *Nehring v. McMurray* (Civ. App.) 53 S. W. 381.

This article does not apply where no absence from the state of Texas is shown. The application for and grant of letters of administration are not proof of death in a collateral inquiry. *Twiner v. Sealock*, 21 C. A. 594, 54 S. W. 358.

Mere lapse of time since a person was last heard from is insufficient to prove death, in the absence of a statute. *Id.*

The common law does not indulge in any presumption of survivorship or death by reason of age or sex, when two are lost in a common disaster. *Males v. Sovereign Camp, Woodmen of the World*, 30 C. A. 184, 70 S. W. 108.

Absence of person from state and taking up residence in a known place elsewhere, followed by period of seven years in which he is not heard from, held not to raise presumption of death. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

In trespass to try title, where the record fails to show anything concerning a grantor after the execution of a deed by him in 1860, his death might be presumed from the length of time elapsed. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, *Id.*

**Art. 5708. [3373] Limitation shall not run against infants, etc.**—If a person entitled to bring any action other than those mentioned in chapter one of this title be at the time the cause of action accrues, either—

1. Under the age of twenty-one years;
2. A married woman;
3. Of unsound mind; or
4. A person imprisoned; the time of such disability shall not be deemed a portion of the time limited for the commencement of the action; and such person shall have the same time after the removal of his disability that is allowed to others by the provisions of this title.

See Art. 5634.

**Historical.**—Section 14 of article 12 of the constitution of 1869 provided that married women, infants and insane persons should not be barred of their rights of property by adverse possession, or law of limitation, of less than seven years from and after the removal

of their respective legal disabilities. In *Grigsby v. Peak*, 57 T. 142, it was held that the constitution of 1869 took effect on the 30th of March, 1870. In *Peak v. Swindle*, 68 T. 242, 4 S. W. 478, it was held that the constitution became operative when ratified by the vote of the people, at the election held on the last day of November and the three first days of December, 1869. The constitution of 1869 was suspended by the constitution of 1876, which took effect April 18, 1876.

A legislative suspension of the statutes of limitation will not enable one who was an infant before and during the period of such suspension, when the adverse possession began, and who was a feme covert when the operation of the statute was restored, to avoid the effect of limitation on account of such coverture. The purpose of article 12, section 43 of the constitution of 1869 was to prevent the suspended period from being taken into account in the computation of the time required by the statute to bar an action, and not to restore a disability already removed. *Ragsdale v. Barnes*, 68 T. 504, 5 S. W. 68.

**Infants.**—After the appointment of an administrator the statute of limitations on claims due the estate will not be prevented from running by the disability of the heir. *Rindge v. Oliphint*, 62 T. 682.

The only cases in which it has been held that the statutes of limitation ran against a minor cestui que trust, in favor of a stranger, have been those in which the legal title to the property was vested in the trustee. *Hanks v. Crosby*, 64 T. 483; *Lacy v. Williams*, 8 T. 182.

In an action on an indorsed note, payable one day after date, appearing to be barred by limitation, the defendant by special exception alleged that the action was barred. By amendment plaintiff alleged that at the date of the execution and transfer of the note plaintiff was a minor. The exception was overruled and judgment rendered for the plaintiff upon the pleadings. *Grounds v. Sloan*, 73 T. 662, 11 S. W. 898.

The exceptions of coverture and infancy in the statute of limitations apply to damages against a county for opening and using a public highway over the lands of such parties. *Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941.

Limitation of an action to disaffirm a deed executed by a minor, see *Hieatt v. Dixon* (Civ. App.) 26 S. W. 263.

Limitations do not run against an action until the minor becomes of age. *Hampton v. Hampton*, 29 S. W. 423, 9 C. A. 497.

An infant having an equitable interest only in a debt is barred by the statute of limitation; otherwise if the legal title is vested in the infant or cast upon him by operation of law. *McAdams v. McAdams*, 10 C. A. 653, 32 S. W. 87.

An action to set aside an order in probate, for the sale of real estate 18 years after it was made, but within a year after the plaintiff became of age, is not barred. *Kalteyer v. Wipff*, 92 T. 673, 52 S. W. 63.

A bill to review the proceeding in a guardianship can be brought by the minors before the expiration of two years after reaching their maturity. *Miller v. Miller*, 21 C. A. 382, 53 S. W. 362.

A judgment against a minor, rendered on plea of statute of limitations, when the party representing the minor was not her guardian, will be set aside on the minor's showing a cause of action and defense to the statute of limitations. *Stephens v. Hewett*, 22 C. A. 303, 54 S. W. 301.

Infant, two years after attaining majority, held entitled to sue heirs to recover his share of the property retained by them on division of property. *Middleton v. Pipkin* (Civ. App.) 56 S. W. 240.

The bringing of an action by the next friend of a minor, and the dismissal thereof, held not to cause limitations to commence to run against a subsequent suit on the same cause of action, since it does not remove the disability. *Galveston, H. & S. A. Ry. Co. v. Washington*, 25 C. A. 600, 63 S. W. 538.

The bringing of an action by a father as next friend for an injury to his son does not create the relation of guardian and ward, so as to start the running of limitations against the minor. *Id.*

Where minor has received personal injury he has two years after the removal of his disability of minority within which to bring suit for damages on account of said injury. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough*, 29 C. A. 194, 68 S. W. 198.

A bill of review to set aside a judgment must be brought within two years after the majority of plaintiff, who was a minor when his right of action accrued. *Ferguson v. Morrison* (Civ. App.) 81 S. W. 1240.

Two-year statute of limitation held no bar to action for recovery of value of infant's land wrongfully sold to innocent purchaser. *Schneider v. Sellers*, 98 T. 380, 84 S. W. 417.

In a suit to set aside a judgment obtained against plaintiff during his minority, held that the four-year statute of limitation was not applicable, but plaintiff was bound to use reasonable diligence in bringing suit after his majority. *Johnson v. Johnson*, 38 C. A. 385, 86 S. W. 1023.

The disability of an heir arising from his infancy cannot avail him where limitations ran against his ancestor. *Sanders v. Word*, 50 C. A. 294, 110 S. W. 205.

The statute does not run against minor heirs on the right of action against an independent executrix, even if knowledge of defendant's adverse claim to the property is brought home to them in time. *Japhet v. Pullen* (Civ. App.) 133 S. W. 441.

**Married women.**—See, also, *Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941, cited supra under "Infants."

This exception in favor of a married woman applies in all cases. *T. & P. R. R. Co. v. Gwaltney*, 2 App. C. C. § 685.

Limitation will not run during marriage against the right of the wife to recover damages for the wrongful seizure and forced sale of her property protected from forced sale by statute. *Alsop v. Jordan*, 69 T. 300, 6 S. W. 831, 5 Am. St. Rep. 53.

Where a woman is under the disability of coverture the statute of limitation does not begin to run against her until the removal of the disability. *Harrison v. City of Sulphur Springs* (Civ. App.) 50 S. W. 1064.

Limitations do not run against a married woman during coverture. *Crouch v. Crouch*, 30 C. A. 288, 70 S. W. 595.

Under Art. 5690 and this article, an action to reform a deed was not barred, where the land involved was the separate property of plaintiff, a married woman. *Harry v. Hamilton* (Civ. App.) 154 S. W. 637.

**Marriage of female infant.**—When a female minor marries, she becomes, in contemplation of law, of full age. *Parish v. Alston*, 65 T. 194.

The marriage of a female infant put the statute of limitations running as to an action existing in her favor. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

**Persons of unsound mind.**—It is error in a suit brought on behalf of a person of unsound mind to sustain a plea of limitation, the plaintiff's disability appearing in the pleadings. *Killfoyl v. Moore* (Civ. App.) 45 S. W. 1024.

Limitation could not run against plaintiff's right to set aside a judgment and certain sales thereunder for fraud, while plaintiff was a lunatic, nor until his sanity was restored. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

**Persons imprisoned.**—One is "a person in prison" where under arrest and in custody of the sheriff. *Lasater v. Waites* (Civ. App.) 67 S. W. 518.

**Stale demand.**—Coverture will defeat the plea of stale demand when pleaded against an equitable right asserted by a married woman. *Reed v. West*, 47 T. 248; *Hill v. Moore*, 85 T. 335, 19 S. W. 162. *Hall v. Wootters*, 54 T. 231, and *Barker v. Swenson*, 66 T. 407, 1 S. W. 117, adhered to. *Id.*

A married woman asserted by suit an equitable claim to land, and in reply to defendant's plea of laches and stale demand pleaded her coverture. The cause of action accrued first to her ancestor in his lifetime, and, by analogy to the statute of limitation which prohibits the tacking of disabilities, laches did not at his death then cease to be imputed to her because of her coverture. *Land & Cattle Co. v. Ward*, 1 C. A. 307, 21 S. W. 128.

Infancy and coverture are a sufficient answer to a plea of stale demand. *Griffin v. Towns* (Cr. R.) 25 S. W. 968; *Reed v. West*, 47 T. 248; *Hill v. Moore*, 85 T. 336, 19 S. W. 162; *Robinson v. Kampman*, 24 S. W. 529, 5 C. A. 605.

**Art. 5709. [3374] Action against immigrant barred, when.**—No action shall be brought against any immigrant of the state to recover a claim which was barred by the law of limitations of that state or country from which he emigrated; nor shall any action be brought to recover money from an immigrant who was released from its payment by the bankrupt or insolvent laws of the state or country from which he emigrated. [*Id.* sec. 13. P. D. 4618.]

**Art. 5710. [3375] Debts incurred prior to removal of person to this state.**—No demand against any person who shall hereafter remove to this state, incurred prior to his removal, shall be barred by the statute of limitation until he shall have resided in this state for the space of twelve months; provided, that nothing in this article shall be construed to affect the provisions of the preceding article. [*Id.* sec. 4. P. D. 4620.]

**Art. 5711. [3376] One disability not tacked to another.**—The period of limitation shall not be extended by the connection of one disability with another; and, when the law of limitation shall begin to run, it shall continue to run, notwithstanding any supervening disability of the party entitled to sue or liable to be sued.

**In general.**—Minority cannot be tacked to coverture, and the saving of the statute is only to those to whom the right first accrues. *Hunton v. Nichols*, 55 T. 217; *Parish v. Alston*, 65 T. 194.

Limitation which begins to run against an ancestor is not stopped in favor of the heir either by minority or coverture. *Moody v. Moeller*, 72 T. 635, 10 S. W. 727, 13 Am. St. Rep. 839; *Howard v. Stubblefield*, 79 T. 1, 14 S. W. 1044; *Jackson v. Houston*, 84 T. 622, 19 S. W. 799.

Where land is held adversely the running of the statute will not be interrupted by the coverture of a married woman to whom it is conveyed. *Mexia v. Lewis*, 21 S. W. 1016, 3 C. A. 113.

Limitation against minor heirs of a deceased minor begins to run immediately on the latter's death. *Best v. Nix*, 25 S. W. 130, 6 C. A. 349.

Where adverse possession against a female begins during her minority, limitations begin to run against her, under the rule forbidding the tacking of disabilities, upon her marriage. *York v. Hutcheson*, 37 C. A. 367, 83 S. W. 895.

The disability of minority cannot be tacked on to the disability of coverture of the ancestor of the minors. *Elcan v. Childress*, 40 C. A. 193, 89 S. W. 84.

Where a married woman, entitled to sue to recover real estate, died leaving minor heirs while the cause of action existed, such heirs were not entitled to plead the disability of infancy as an additional suspension of the statute. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

Where the right of action accrues during the life of a married woman the statute begins to run at her death and is not interrupted by the minority of her heirs. Minority and coverture cannot be tacked. *Laird v. Murray* (Civ. App.) 111 S. W. 782.

Coverture cannot be tacked to minority. *Louisiana & T. Lumber Co. v. Lovell* (Civ. App.) 147 S. W. 366.

**Art. 5712. [3377] Claims barred under pre-existing laws, etc.**—No one of the provisions of this title shall be so construed as to revive any claim which is barred by pre-existing laws; and all claims against which limitation under said laws had commenced to run shall be barred by the lapse of time which would have barred them had those laws continued in force; provided, the said time be shorter than that by which they would have been barred by the other articles of this title.

*In general.*—When a period of limitation is shortened, reasonable time must be allowed after the law goes into effect to bring suits upon actions which are not then barred. *Wright v. Hardie*, 32 S. W. 885, 88 T. 653.

The statutes of limitations apply to claims against which limitation had begun to run before their adoption only when they prescribe a shorter period of limitation than did the old law. *Voigt v. Gulf, W. T. & P. Ry. Co. (Civ. App.)* 59 S. W. 578.

See Art. 5687.

**Art. 5713. [3378] No agreement shortening period of limitation valid.**—It shall be unlawful for any person, firm, corporation, association or combination of whatsoever kind to enter into any stipulation, contract, or agreement, by reason whereof the time in which to sue thereon is limited to a shorter period than two years. And no stipulation, contract, or agreement for any such shorter limitation in which to sue shall ever be valid in this state. [Acts 1891, p. 20, sec. 1.]

*In general.*—A reasonable limitation of an action for breach of a contract made in 1890 for the transportation of freight might be fixed by agreement of parties, but a limitation of forty days was held unreasonable. *Railway Co. v. Hume*, 24 S. W. 915, 6 C. A. 653, citing *Railway Co. v. Trawick*, 68 T. 314, 4 S. W. 567, 2 Am. St. Rep. 494; *Railway Co. v. Garrett*, 24 S. W. 354, 5 C. A. 540.

A contract providing that a suit for damages must be brought within fourteen days is void. *Railway Co. v. Williams (Civ. App.)* 32 S. W. 225.

A stipulation in a contract for carriage of cattle that suit be brought within forty days for damage to them held unreasonable. *Gulf, C. & S. F. Ry. Co. v. Stanley*, 89 T. 42, 33 S. W. 109.

A provision in a contract of shipment requiring suits for injuries to the shipment to be brought within a specified time was waived, where the carrier attempted to settle a suit for such injuries brought after expiration of the time. *St. Louis & S. F. R. Co. v. Dysart (Civ. App.)* 130 S. W. 1047.

A stipulation in a contract for the carriage of freight that, unless suit is brought within two years of the accrual of the cause of action, it shall be barred, is valid. *Texas & P. R. Co. v. Langbehn (Civ. App.)* 150 S. W. 1188.

*Interstate commerce.*—The statute applies to interstate shipments. *G., C. & S. F. Ry. Co. v. Eddins*, 7 C. A. 116, 26 S. W. 161; *Railway Co. v. Carter*, 9 C. A. 677, 29 S. W. 565; *Reeves v. Railway Co.* 11 C. A. 514, 32 S. W. 920; *M. K. & T. Ry. Co. v. Withers*, 10 C. A. 506, 40 S. W. 1073; *Armstrong v. G., H. & S. A. Ry. Co.*, 92 T. 117, 46 S. W. 33.

This article applies to actions growing out of contracts for interstate commerce. *G., H. & S. A. Ry. Co. v. Johnson (Civ. App.)* 29 S. W. 428. See, also, *Gulf, C. & S. F. Ry. Co. v. Eddins*, 7 C. A. 116, 26 S. W. 161.

*Foreign contract.*—What law governs, see Decisions Applicable to Subject in General, § 1, following this chapter.

By this statute the provision in a contract limiting the time within which suit must be brought to a shorter period than two years, if the contract were a Texas contract, would be invalid, even if it were a contract for an interstate shipment. As the provision in the contract only affects the remedy, and is contrary to the law of this state, it will not be enforced in a suit brought within this state, though the contract may be legal in Arkansas, where it was entered into. *St. L. I. M. & S. Ry. Co. v. Hambrick (Civ. App.)* 97 S. W. 1074. See cases cited under Art. 5714.

*Insurance policy.*—When a delay in commencing suit, as stipulated in a policy of insurance, has been fraudulently caused by the defendant, the stipulation will be disregarded. *Life Ass'n v. Tolbert (Civ. App.)* 33 S. W. 295.

This article invalidates a stipulation in an insurance policy limiting the time in which suit may be brought to six months. *German Ins. Co. v. Luckett*, 12 C. A. 139, 34 S. W. 173. See Art. 4742.

Under Art. 4830, exempting fraternal benefit associations from the provisions of the insurance law, unless they be expressly designated therein, the holder of a certificate of such an association is, in accordance with this article, entitled to two years in which to bring his action thereon, notwithstanding a provision in the certificate fixing a shorter time. *International Travelers' Ass'n v. Bosworth (Civ. App.)* 156 S. W. 346.

*City charter.*—A city may by a special charter be authorized to prescribe the time within which suit against it may be brought. *City of Dallas v. Young (Civ. App.)* 28 S. W. 1036.

**Art. 5714. [3379] Notice of claims for damages; rule as to.**—No stipulation in any contract requiring notice to be given of any claim for damages as a condition precedent to the right to sue thereon shall ever be valid, unless such stipulation is reasonable; and any such stipulation fixing the time within which such notice shall be given at a less period than ninety days shall be void, and, when any such notice is re-

quired, the same may be given to the nearest or to any other convenient local agent of the company requiring the same; provided, that no stipulation in any contract between a person, corporation or receiver operating railroad, or street railway, or interurban railroad, and an employé or servant requiring notice of a claim by an employé or servant for damages for injury received to the person, or by a husband, wife, father, mother, child or children of a deceased employé for his or her death, caused by negligence as a condition precedent to liability, shall ever be valid. In any suit brought under this and the preceding article it shall be presumed that notice has been given, unless the want of notice is especially pleaded under oath. [Amended Acts 1907, p. 241, sec. 1.]

**Meaning of notice.**—Filing of suit and service of citation is not giving notice within the meaning of this article. *Telegraph Co. v. Ferguson* (Civ. App.) 27 S. W. 1048; *Telegraph Co. v. McKinney*, 2 App. C. C. § 647.

**Meaning of stipulation.**—Where the sender of a telegraph message telephoned it to the company's agent, and no mention was made of a stipulation as to notice, such unknown provision was not binding as part of the contract or as a regulation of the company. *Western Union Telegraph Co. v. Douglas*, 104 T. 66, 133 S. W. 877.

**Time for giving notice.**—A stipulation in a contract of carriage requiring notice within one day after delivery of the property held void. *St. Louis S. W. R. Co. v. Hays*, 13 C. A. 577, 35 S. W. 476.

It is lawful for the shipper and carrier to enter into a contract, provided it is reasonable, requiring a notice, not less than 90 days after injury, of the presentation of a claim for damages, and upon failure to do so the suit will be barred. *Houston & T. C. Ry. Co. v. Maves*, 44 C. A. 31, 97 S. W. 319.

A stipulation in a contract for the transmission of a message that the telegraph company will not be liable for damages where the claim therefor is not presented within sixty days after the filing of the message for transmission is void, and a sworn answer setting up the stipulation is of no effect. *Western Union Telegraph Co. v. Douglass* (Civ. App.) 124 S. W. 488.

A stipulation in a bill of lading requiring notice of the claim be given "before the expiration of" ninety days from accrual of the claim contravenes this article. *St. Louis & S. W. R. Co. of Texas v. Brass* (Civ. App.) 133 S. W. 1075.

The ninety-day period should be computed from the time the cause of action arose; and hence a stipulation in a contract for the transmission and delivery of a telegram, that notice of a claim for damages must be made within ninety days after the message is "filed with the company for transmission," was void, both as requiring the filing of notice before the expiration of ninety days from the date of the company's default, and also as giving less than ninety days, by requiring that notice shall be filed "within" that period. *Taber v. Western Union Telegraph Co.*, 104 T. 272, 137 S. W. 106, 34 L. R. A. (N. S.) 185, reversing (Civ. App.) 127 S. W. 268. See, also, *Baldwin v. Western Union Tel. Co.* (Civ. App.) 33 S. W. 890; *Western Union Tel. Co. v. Vanway*, 54 S. W. 414; *Smith v. International & G. N. R. Co.*, 138 S. W. 1074; *Texas & P. Ry. Co. v. Langbehn*, 150 S. W. 1188.

Statement of how, for, and when provision in a contract of shipment that the carrier shall give notice of claim of damages in a certain time is applicable and binding. *Pecos & N. T. Ry. Co. v. Crews* (Civ. App.) 139 S. W. 1049.

**Reasonable time—How determined.**—Question for jury, see notes under Art. 1971, § 145.

The provision in a contract not having required the notice to be given in less than ninety days, the court was not authorized to declare the same unreasonable and void, as a matter of law, on demurrer. *St. L. & S. F. Ry. Co. v. Honea* (Civ. App.) 84 S. W. 268.

Where a message received for transmission and delivery by a telegraph company, under a contract requiring notice of damages within ninety days from the filing of the message, was received by the sendee three days after it was filed, the stipulation left only eighty-seven days within which to give notice, so that it was unreasonable as a matter of law. *Western Union Telegraph Co. v. Smith* (Civ. App.) 130 S. W. 622.

Whether a stipulation is unreasonable, when the time provided for is not less than ninety days, is a question of fact to be determined by the evidence in the particular case. *Id.*

**Interstate commerce.**—The statute making invalid the provision in the contract of a telegraph company that the company shall not be liable for failure to deliver the message unless notified of the claim for damages within sixty days is void under the constitution of the United States so far as it applies to messages sent into and received from another state. *Western Union Telegraph Company v. Burgess* (Civ. App.) 43 S. W. 1033.

The requirement in a contract that notice of claim for damages be given within less than ninety days is invalid in a shipment of goods from this state to another state, as well as in a state shipment. *Armstrong v. G., H. & S. A. Ry. Co.*, 92 T. 117, 46 S. W. 33.

This article does not violate the provision of the constitution of the United States empowering congress to regulate commerce among the several states. *Burgess v. Western Union Telegraph Co.*, 92 T. 125, 46 S. W. 794, 71 Am. St. Rep. 833.

A provision in the contract of a telegraph company, seeking to avoid its liability if a claim is not presented in sixty days, is void, though the message was sent to another state. *Western Union Telegraph Co. v. Lovely* (Civ. App.) 52 S. W. 563.

A provision for notice of claim for injury in a live stock transportation contract is not violative of the federal act of June 29, 1906, regulating interstate commerce, nor inapplicable because the particular shipment involved interstate commerce. *Chicago, R. I. & G. Ry. Co. v. Rich* (Civ. App.) 138 S. W. 223.

Under the Carmack amendment of the interstate commerce act, a stipulation of a contract of shipment requiring notice in writing of any damages sustained held sufficient—

ly compiled with by giving notice to a connecting carrier. *Chicago, R. I. & G. Ry. Co. v. Linger* (Civ. App.) 156 S. W. 298.

Where a carrier prior to the institution of a suit for damages did not refuse payment because notice was not given within ninety days, as required by the contract of shipment, and made no objection to the form or contents of a notice given to a connecting carrier, it waived that provision of the contract. *Id.*

**Foreign contract.**—See cases cited under Art. 5713. See, also, Decisions Applicable to Subject in General, § 13, following this chapter.

See also *Western Union Telegraph Co. v. Ashley* (Civ. App.) 137 S. W. 1165; *Missouri, K. & T. Ry. Co. of Texas v. Godair Commission Co.*, 39 C. A. 298, 87 S. W. 871.

A contract between a master and servant, made in Indian Territory, provided that in case of injury to the servant he would give notice in writing of his claim for damages at a place in Kansas within thirty days, and if he failed to give said notice a suit to recover said damages would be barred. Held that the validity of the stipulation, in an action in Texas, was governed by the law of Indian Territory. *Chicago, R. I. & P. Ry. Co. v. Thompson*, 100 T. 185, 97 S. W. 459, 7 L. R. A. (N. S.) 191, 123 Am. St. Rep. 798, reversing 41 C. A. 459, 93 S. W. 702. See, also, *St. Louis, I. M. & S. Ry. Co. v. Hambreck* (Civ. App.) 97 S. W. 1072.

In an action against a carrier for injuries to a shipment of live stock, evidence held not to justify a finding that a contract requiring notice of claim for damages within a specified time, entered into where such contracts are valid if reasonable and supported by a valid consideration, was not executed in consideration of a reduction of freight rates, or that it was not fairly made. *St. Louis, I. M. & S. Ry. Co. v. Franklin* (Civ. App.) 129 S. W. 181.

This article has no application to a written contract, made in Alabama for the transmission of a telegram to a Texas point, requiring notice of claim for damages for failure or delay in delivery to be filed within sixty days, such a stipulation being valid in Alabama, whose laws must govern. *Western Union Telegraph Co. v. Douglass*, 104 T. 66, 133 S. W. 877.

**Insurance companies.**—A stipulation that suit must be brought within one year from date of loss, is valid, but is waived by an agreement within the year that the insurer shall not take advantage of delay pending an investigation as to the loss. *Insurance Co. v. Lacroix*, 45 T. 158; *Id.*, 35 T. 249. A provision in a policy requiring suit to be brought within a certain time is waived when the insurer by its conduct induces the insured to believe that payment would be made without suit, and for that reason suit is not brought within the prescribed time. *St. Paul F. & M. Ins. Co. v. McGregor*, 63 T. 399.

A stipulation in a policy requiring a suit for loss, etc., to be brought within a period less than two years, is void. *German Ins. Co. v. Luckett*, 12 C. A. 139, 34 S. W. 173.

A clause in an accident insurance policy requiring notice to be given of claim for damages within less than ninety days is void, and the policy will be construed as though no time was specified. *Maryland Casualty Co. v. Hudgins*, 72 S. W. 1048. See, also, *Ætna Life Ins. Co. v. Griffin* (Civ. App.) 123 S. W. 432.

Under this article a provision of a casualty policy requiring notice of the injury to be given within ten days would be void; Art. 4733 providing that the general laws relating to corporations shall apply to accident insurance companies so far as pertinent and not conflicting with that act. *Royal Casualty Co. v. Nelson* (Civ. App.) 153 S. W. 674. See cases cited under preceding article, "Insurance policy."

Notice of injury given to the local agent of a casualty company was sufficient. *Id.*

**Amendment of 1907.**—The amendment consisted of the insertion of the proviso.

The amendment cannot be construed to apply to a stipulation in a contract of employment entered into before the act took effect since such a construction would violate the state and federal constitutions. *Missouri, K. & T. Ry. Co. of Texas v. Hudgins* (Civ. App.) 127 S. W. 1183.

**Notice not required.**—Where plaintiff's cattle were not carried to their destination by defendant railroad or delivered to any other carrier, or mixed with other cattle, but were killed in a wreck on defendant's road, notice of claim for loss was not required under a stipulation in the contract of shipment obligating the shipper to notify the conductor or agent of the carrier on whose line the injury occurred before the cars left such carrier's line or before the stock was mingled with other stock, etc. *Missouri, K. & T. R. Co. of Texas v. Harriman Bros.* (Civ. App.) 128 S. W. 932.

**Withdrawal of claim.**—Where a notice of claim was furnished within the time limited, was accepted and acted on by defendant, and served its purpose, and defendant thereafter repudiated liability, the taking of such notice by plaintiff from defendant's agent did not constitute a withdrawal of the claim. *Missouri, K. & T. R. Co. of Texas v. Harriman Bros.* (Civ. App.) 128 S. W. 932.

**Pleading and burden of proof.**—The burden is on the railway company to show breach of stipulation to give notice of claim for damages. To authorize proof of that fact and overcome presumption existing under the statute, it is absolutely essential that the plea setting up the stipulation in question must be sworn to. Until this is done the want of notice of claim for damages is not in issue. *St. L. & S. F. Ry. Co. v. Honea* (Civ. App.) 84 S. W. 268.

Where a paragraph of defendant's answer setting up a clause of the contract of shipment requiring notice to be served within ninety-one days was sworn to, but a subsequent paragraph alleging failure to give the notice was not sworn to, it would be presumed that the notice was given. *International & G. N. R. Co. v. Williams* (Civ. App.) 129 S. W. 847.

**Limitation of common-law liability by notice, etc., in violation of Art. 708.**—The stipulation in the contract for shipment of cattle, to be performed partly without the state, that, as a condition precedent to one's right to recover damage for loss or injury of said stock, he would give notice in writing of his claim therefor to some officer of the company, or its nearest station agent, before removing said stock from the place of destination or the place of delivery, to him, and before said stock should be mingled with other stock, is valid; but see next paragraph. A verbal notice to the superintendent of the stockyard or the conductor of the train is sufficient. *T. C. R. R. Co. v. Morris*, 1

App. C. C. § 374; Mo. Pac. Ry. Co. v. Harris, 1 App. C. C. § 1257; Mo. Pac. Co. v. Scott, 2 App. C. C. § 324; Tex. P. Ry. Co. v. Scrivener, 2 App. C. C. § 330; T. & P. Ry. Co. v. Hamm, 2 App. C. C. § 496.

In all the foregoing cases the contract of carriage was to be performed partly without the limits of this state, and those cases are therefore not within the provisions of the statute. When the contract of carriage is to be wholly performed within this state, a stipulation requiring notice of damages, etc., is within the inhibition of the statute and void. G. C. & S. F. R. R. Co. v. Maetze, 2 App. C. C. § 634.

A contract requiring that a shipper should give notice in writing of his claim for damages for loss or injury to live stock, before they are removed from their place of destination and mingled with other stock, is a limitation of the liability of the carrier at common law. A limitation of the common-law liability of a carrier for the proper delivery of articles to a point beyond the limits of this state, to be recognized, must be reasonable. The failure to show in the pleading that the carrier had an officer or agent so situated that the contract to give notice was reasonable was fatal on demurrer. It is doubtful whether such a contract, which fails by its terms to specify who is the officer or agent to whom notice shall be given, when the carrier is a corporation and the cattle to be delivered in a distant state, should ever be sustained. Mo. Pac. R. R. Co. v. Harris, 67 T. 166, 2 S. W. 574.

Where stock is shipped over several lines a stipulation in the contract that notice in writing of damages, must be given to officers of an intermediate line, before removed from the car in which it was transported is a limitation on the liability of the carrier at common law, and hence unenforceable. Notice, of which no complaint was made, was given to terminal company. M. K. & T. Ry. Co. v. Allen, 39 C. A. 236, 87 S. W. 169.

See note to Art. 707.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

- I. Nature, validity and construction of limitations in general.
  1. What law governs.
  2. Limitation as against state or municipality.
  3. — Limitations not available to delinquent taxpayer.
  4. Persons who may rely on limitation.
  5. Estoppel to rely on limitation.
  6. Meaning of action or suit.
- II. Computation of period of limitation.
  - (A) *Accrual of right of action or defense.*
    7. Causes of action in general.
    8. Title to or possession of real property.
    9. Title to or possession of personal property.
    10. Contracts in general.
    11. Covenants and conditions.
    12. Instruments for payment of money.
    13. Implied contracts.
    14. Continuing contracts.
    15. Severable contracts and installments.
    16. Accounts.
    17. Torts.
    18. Reimbursement or indemnity from person ultimately liable.
    19. Liabilities created by statute.
    20. Equitable actions and remedies.
  - (B) *Performance of condition, demand and notice.*
    21. Conditions precedent in general.
    22. Demand.
    23. Notice.
    24. Leave to sue.
  - (C) *Ignorance, mistake, trust, fraud and concealment of cause of action.*
    25. Ignorance of cause of action.
    26. Mistake as ground for relief.
    27. Fraud as a ground for relief—In general.
    28. Discovery of fraud.
29. Existence of trust—In general.
30. Repudiation or violation of trust.
31. Concealment of cause of action.
  - (D) *Pendency of legal proceedings or stay.*
    32. Suspension or stay in general.
    33. Pendency of action or other proceeding.
    34. Pendency of appeal.
    35. Stay of proceedings.
    36. Suspension of statute of limitations.
  - (E) *Commencement of action or other proceeding.*
    37. Mode of computation of time limited.
    38. Proceedings constituting commencement of action—In general.
    39. Issuance and service of process.
    40. Want of jurisdiction.
    41. Defects as to parties.
    42. Defects or irregularities in pleadings or other proceedings.
    43. Intervention or bringing in new parties.
    44. Effect as to persons not parties.
    45. Amendment of pleadings—In general.
    46. Amendment restating original cause of action.
    47. Amendment introducing new cause of action.
    48. Amendment affecting form of action or relief.
    49. Defenses in general.
    50. Set-offs and counterclaims.
    51. New action after nonsuit or dismissal.
    52. Presentation of claim against estate of insolvent or bankrupt.
- III. Operation and effect of bar by limitation.
  53. Nature and extent of bar.
  54. Bar of debt as affecting security.
  55. Actions and other remedies barred.
  56. Persons to whom bar is available.
  57. Persons barred.
  58. Waiver of bar.

#### I. NATURE, VALIDITY AND CONSTRUCTION OF LIMITATIONS IN GENERAL

1. What law governs.—Pre-existing laws, see Art. 5712.

"Foreign contracts," see notes under Arts. 5713, 5714.

The time of limitation on contracts depends upon the law of the state in which the action is brought. Tilliard v. Hall, 11 C. A. 381, 32 S. W. 864.

Note executed in Missouri by citizen of Texas sought to be enforced in Texas held not entitled to benefit of statute of limitations of Missouri. Washington Life Ins. Co. v. Gooding, 19 C. A. 490, 49 S. W. 123.

Liability created by a statute limiting time for its enforcement cannot be enforced in foreign jurisdictions after that time. Rule that liability must be enforced within prescribed time in foreign jurisdictions held not affected by fact that defendant railroad,



invoking rule, was incorporated in another state. *Ross v. Kansas City S. R. Co.*, 34 C. A. 586, 79 S. W. 626. The law of the forum governs as to limitations, except where statutes creating the liability extinguish the cause of action, if suit is not brought within a prescribed time. In an action under the statutes of another state for causing death, held, that the law of the forum governed as to limitations. *St. Louis & S. F. R. Co. v. Sizemore*, 53 C. A. 491, 116 S. W. 403. Law governing limitations on an action for personal injury to an employe held the law of the forum and not of the place of injury. *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852.

The statute of limitations of Texas may not be invoked against title to lands emanating from Texas, while the boundary between United States and Mexico, as observed by the political authorities, left the land in Mexico. *Reese v. Cobb* (Civ. App.) 135 S. W. 220.

**2. Limitation as against state or municipality.**—See, also, notes under Art. 5683.

Limitation held to run against a city. *Grandjean v. City of San Antonio* (Civ. App.) 38 S. W. 337.

A city held to have a reasonable time after a law of limitation takes effect in which to bring suit for taxes, though barred under the limitation prescribed by the charter at the time it took effect. *Link v. City of Houston*, 94 T. 378, 59 S. W. 566.

Limitations held not to run against an action by a county to recover the purchase price of school lands (Const. art. 7, § 6). *Delta County v. Blackburn*, 100 T. 51, 93 S. W. 419.

Limitations do not run against the state unless so expressly enacted. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 918. Limitations do not run against the state, unless the statute makes a specific exception. The defense of stale demand is purely equitable, and is not available in an action at law for a debt by the state for expenses incurred in maintaining a lunatic at an asylum. *Luder's Adm'r v. State* (Civ. App.) 152 S. W. 220.

Limitations would not run against a right of action by the state to compel a railroad company to construct its road through a county seat within three miles of its line, as required by Const. art. 10, § 9. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**3. — Limitations not available to delinquent taxpayer.**—See Art. 7662.

**4. Persons who may rely on limitation.**—Absence or nonresidence affecting running of statute, see Art. 5702. Existence of trust as affecting running of statute, see post, §§ 29, 30. Persons to whom bar is available, see post, § 56.

Rights of the various parties determined, where certain defendants, as against plaintiffs, had acquired title by limitations. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

A suit against the railroad commission held a suit against the state within the statute of limitations. A suit against the railroad commission to enjoin it from enforcing its orders is not barred by limitations. The duty of the railroad commission to enforce rules held a continuing duty within the statute of limitations. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

**5. Estoppel to rely on limitation.**—Estoppel to rely on new promise, see notes under Art. 5705. Estoppel by failure to plead, see Art. 5706. Waiver of bar, see post, § 58.

By pleading title under a deed, and seeking equitable relief, grantee was estopped from pleading limitations to a count for damages for failure to execute the consideration. *San Antonio & A. P. Ry. Co. v. Gurley*, 92 T. 229, 47 S. W. 513.

A railroad company is estopped from pleading the four-year limitation to defeat an action of damages where it failed to put in a switch which it obligated to do as a consideration for land granted it and which land it took possession of. *Id.*

A taxpayer held not estopped to plead limitations in an action by a city to recover taxes. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

Delay held not to estop one who had released another from liability for injuries from rescinding the release at any time within the period of limitations. *Galveston, H. & S. A. Ry. Co. v. Cade* (Civ. App.) 93 S. W. 124.

The right to repudiate a settlement of a claim for personal injuries may be lost by a delay short of the period prescribed for the limitation of the action for the injuries. *Galveston, H. & S. A. Ry. Co. v. Cade*, 100 T. 37, 94 S. W. 219.

Heirs of the purchaser of premises subject to a trust deed held not estopped from setting up limitations to the right of the creditor to sell in accordance with the terms of the trust deed. *Taylor v. Williams* (Civ. App.) 105 S. W. 337.

Where the failure of a contractor to perform its contract is urged against its prayer for equitable relief, the contractor is not entitled to rely on a plea of limitations. *United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Civ. App.) 112 S. W. 447.

A disclaimer by a defendant, in a suit for land, held not to estop him, in a subsequent suit by a third party, from asserting the defense of limitations. *Webb v. Cole*, 56 C. A. 185, 120 S. W. 945.

Defendant, by requesting and obtaining an indulgence, and promising not to plead limitations, held estopped to plead them. *Smith v. Dupree* (Civ. App.) 140 S. W. 367.

Defendant held estopped from claiming that it was not sued until the filing of an amended petition after the expiration of the period of limitation. *Weatherford, M. W. & N. W. Ry. Co. v. Crutcher* (Civ. App.) 141 S. W. 137.

Defendants held estopped to assert the one-year statute against an action to recover school lands. *Hanna v. Atchison* (Civ. App.) 141 S. W. 190.

**6. Meaning of action or suit.**—See, also, note under Arts. 5688, 5690, 5704.

The words "action" and "suit," as used in statutes of limitation requiring every action or suit to be brought within a stated time, are generally synonymous. *Whitfield v. Burrell*, 54 C. A. 567, 118 S. W. 153.

## II. COMPUTATION OF PERIOD OF LIMITATION

### (A) *Accrual of Right of Action or Defense*

**7. Causes of action in general.**—A claim for fees, for attendance as a witness, accrues against the party by whom he is subpoenaed as soon as the services have been

rendered (*Flores v. Thorn*, 8 T. 377), and will be barred in two years (*Flores v. Thorn*, 8 T. 377); at least where he has failed to obtain a certificate from the clerk (*Crawford v. Crain*, 19 T. 145).

Accrual of a cause of action within the statute of limitations defined. *Port Arthur Rice Milling Co. v. Beaumont Rice Mills*, 105 T. 514, 143 S. W. 926, 148 S. W. 283, 150 S. W. 884, 152 S. W. 629.

8. Title to or possession of real property.—Acquisition of title by adverse possession, see Chapter 1.

Limitations held not to run against heirs until after their intestate's death, where they could not have maintained an action prior thereto. *Wilson v. Fields* (Civ. App.) 50 S. W. 1024.

See note under Art. 5682, "Decedent and heirs and representatives."

When land is sold under tax foreclosure, limitations do not begin to run against the prior owner until the two years within which he could redeem have expired. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 74.

A purchaser of school land held to acquire the land by filing an application to purchase and paying the price, so that his right of action against an adverse claimant accrued at that time. *Houston Oil Co. of Texas v. McGrew* (Civ. App.) 143 S. W. 191.

9. Title to or possession of personal property.—A landlord's possession of a safe left on his premises and retained by him as security for rent held not to be such as would give him title by limitations. *Myar v. El Paso Grocery Co.* (Civ. App.) 63 S. W. 337; *Woodward v. San Antonio Traction Co.* (Civ. App.) 95 S. W. 76.

10. Contracts in general.—See, also, notes under Arts. 5687, 5688.

The right of action of a clerk, whose employment was by the month, accrues at the expiration of each month. *Davis v. Lemon*, 1 App. C. C. § 290.

A cause of action against an attorney for failure to institute a suit on a promissory note until an action was barred by limitation did not accrue until such bar. *Fox v. Jones*, 4 App. C. C. § 30, 14 S. W. 1007.

Under a contract for future services limitation does not run until services are rendered. *Montgomery v. Brown* (Civ. App.) 31 S. W. 1084.

Limitation will not run against attorneys entitled to 10 per cent of a judgment which has been collected by the judgment creditor, until the attorneys are notified of the collection. *Cobb v. First National Bank of Decatur*, 91 T. 226, 42 S. W. 770.

Limitation does not run against a committee who guaranteed a railroad subscription against other guarantors for contribution until the railroad is constructed, the company settled with and an opportunity given to adjust equities between guarantors. *Mateer v. Cockrill*, 18 C. A. 391, 45 S. W. 751.

Where a person received a grant of school lands from a county, under a voidable conveyance, in consideration of services rendered, the statute did not begin to run against his claim against the county until the county repudiated the sale and began suit for its recovery. *Club Land & Cattle Co. v. Dallas County*, 26 C. A. 449, 64 S. W. 372.

Where a member of a beneficial association is wrongfully expelled, limitations begin to run against his action to recover premiums paid by him at the time of expulsion. *Supreme Council Catholic Knights of America v. Gambati*, 29 C. A. 80, 69 S. W. 114.

Contract of agency held terminated in 1892, so that suit for breach of contract brought in 1904 was barred by limitations. *Hollingsworth v. Young County*, 40 C. A. 590, 91 S. W. 1094.

An obligation of one to pay to another a specified sum when able to do so is not due until he becomes able, and limitations do not commence to run until then. *Ruzoski v. Wilrodt* (Civ. App.) 94 S. W. 142.

Limitations held to begin to run against a vendee's right to enforce a bond for title binding the vendors to make title when the land was surveyed and divided, when it appeared that the vendors did not intend to survey or divide it. *Abercrombie v. Shapira* (Civ. App.) 94 S. W. 392.

Limitations held to have commenced to run against a buyer's right of action and counterclaim for a breach of warranty of a gasoline engine when the engine was installed. *Fairbanks, Morse & Co. v. Smith* (Civ. App.) 99 S. W. 705.

No cause of action could accrue on an agreement to pay any balance remaining after the proceeds of a sale of land were credited on a note until sale was made and balance ascertained, and it is from that time the statute runs. *Robertson v. Warren*, 45 C. A. 584, 100 S. W. 805.

The right of action for the price of logs in a stream sold under a contract held not to accrue until after the lapse of a reasonable time after the delivery to the buyer to allow for measuring them. *Southern Pine Lumber Co. v. Wm. Cameron & Co.*, 45 C. A. 350, 101 S. W. 488.

Grantor's right of action against a grantee for failure to discharge a mortgage held not to accrue until foreclosure. *Gregory v. Green* (Civ. App.) 133 S. W. 481.

In an action against an attorney for breach of a contract to faithfully prosecute certain suits for plaintiff, limitation did not begin to run until the suits were tried and determined. *Kruegel v. Porter* (Civ. App.) 136 S. W. 801.

In an action for breach of a contract to pay off a mortgage indebtedness on two lots, in consideration of the conveyance of one of them, limitations did not begin to run until the lot retained was sold on foreclosure. *Green v. Gregory* (Civ. App.) 142 S. W. 999.

Time of accrual of cause of action for breach of contract by maker of note to hold his comaker harmless from liability thereon stated. *Polk v. Seale* (Civ. App.) 144 S. W. 329.

A cause of action by a broker for commissions, accrues when a sale is finally consummated. *Anderson v. Crow* (Civ. App.) 151 S. W. 1080.

Where a debtor transferred a life insurance policy to his creditor in payment of the debt, the creditor having no other insurable interest in his life, limitations did not begin to run against the creditor's claim until the policy became payable on the insured's death. *Harde v. Germania Life Ins. Co.* (Civ. App.) 153 S. W. 666.

11. Covenants and conditions.—See, also, notes under Arts. 5687, 5688.

Limitation begins to run against an action upon a covenant of warranty from the time of its breach. *Eustus v. Cowherd*, 23 S. W. 737, 4 C. A. 343.

The cause of action on a covenant of warranty does not arise until the breach thereof by the warrantor, and the statute of limitation on the covenant does not begin its course until the bringing of the action. *Alvord v. Waggoner* (Civ. App.) 29 S. W. 797, citing *Jones' Heirs v. Paul's Heirs*, 59 T. 41; *Eustis v. Cowherd*, 4 C. A. 343, 23 S. W. 737.

Where a grantor who has no title gives a deed of general warranty, limitation does not run in his favor till his grantee's title is assailed by the assertion of a good title. Where a grantee in a warranty deed has himself conveyed part of the land with warranty, he can recover of his grantor as to the part which he has conveyed till he has satisfied his grantee's claim; his grantee having a right of action on the warranty against him and his grantor. *Alvord v. Waggoner*, 88 T. 615, 32 S. W. 872, reversing *s. c.* (Civ. App.) 29 S. W. 797.

The statute does not begin to run upon the implied covenant against incumbrances until the land is sold under judgment of foreclosure. *Seibert v. Bergman*, 91 T. 411, 44 S. W. 63.

The four years in which to sue for breach of warranty of title to real estate begins to run when a judgment is rendered against the warrantee. *Herr v. Rodriguez* (Civ. App.) 50 S. W. 487.

Till the final determination of a suit in favor of the owner of a paramount title against a covenantee and his warrantors, the covenantee has no cause of action on his warranty. *Sievert v. Underwood* (Cr. App.) 124 S. W. 721.

Limitations begin to run against a bond given by an employé conditioned on his accounting for all moneys received by him when the contract of employment is terminated. *Wharton v. Fidelity Mut. Life Ins. Co. of Philadelphia* (Civ. App.) 156 S. W. 539.

#### 12. Instruments for payment of money.—See, also, notes under Arts. 5688, 5705.

Where the payee of a promissory note, who indorses it, afterwards pays and takes it up, the statute would commence to run from the time when the note became due and payable, and this rule applies to an accommodation indorser. In the case of an accommodation acceptor of a bill of exchange, it has been held that the statute begins to run from the time of payment. *Williams v. Durst*, 25 T. 667, 78 Am. Dec. 548; *Tutt v. Thornton*, 57 T. 35; *Rush v. Bishop*, 60 T. 177.

Limitations on a note given in settlement of a partnership held not suspended by the existence of another partnership between the parties. *Gresham v. Harcourt* (Civ. App.) 50 S. W. 1058.

That the lien on a partner's interest to secure a note to his copartner could not be enforced when the note fell due does not prevent limitations from running thereon. *Gresham v. Harcourt*, 93 T. 149, 53 S. W. 1019.

Limitations on a contract demand against the county begins to run in favor of the county from the time of the maturity of such demand, and not from the time of the rejection by the county commissioners' court. *Noel Young Bond & Stock Co. v. Mitchell County*, 21 C. A. 638, 54 S. W. 284.

The extension of the time of the payment of a promissory note or other chose in action, based upon a valuable consideration, for a definite period, is a new contract against which limitations do not run until the end of the period of such extension. *Mathews v. Towell* (Civ. App.) 138 S. W. 169.

#### 13. Implied contracts.—See, also, notes under Art. 5687.

Though a parol contract for the conveyance of land for services to be rendered may not be enforced, an action may be maintained to recover the value of the services performed under it. When the services extend during a period which would ordinarily bar the claim for their value, yet if they are rendered in good faith, and the owner of the land accepts the benefit conferred by them, without disaffirmance of the parol contract, limitation will not begin to run against an action to recover their value until the renunciation of the agreement. *Stevens v. Lee*, 70 T. 279, 8 S. W. 40.

Limitations begin to run, against the right to recover money paid under a void contract, from the time of payment. *Rayner Cattle Co. v. Bedford*, 91 T. 642, 44 S. W. 410.

Ignorance of the invalidity of a contract held not to toll the statute, as to recovering back payments that had been made on the contract. *Id.*

In an action for contribution between joint obligors, held, that limitations did not begin to run against payments in excess of one's share until such a time as the equities of all the obligors could be fully adjusted. *Mateer v. Cockrill*, 18 C. A. 391, 45 S. W. 751.

Limitations held not to run against an assignee's right to recover premiums paid by him on an assigned policy until the death of the insured. *Stevens v. Germania Life Ins. Co.*, 26 C. A. 156, 62 S. W. 824.

In a suit for contribution, a note given plaintiff as evidence of his loan held admissible in evidence, in connection with evidence of the custom of defendants in repaying advancements, to show whether the rule of limitations was varied by the understanding of the parties. *Jarvis v. Matson*, 52 C. A. 170, 113 S. W. 326.

In suits for contribution, the right of action is upon the implied promise to repay, and limitations begin to run from the date of each advancement. *Id.*

If money advanced was not to be repaid until some definite future time, no cause of action for contribution accrued until such time. *Id.*

An action does not lie for the recovery of money paid for taxes at the instance and request of another until actual payment. *Graves v. Bullen*, 53 C. A. 261, 115 S. W. 1177.

Where the surviving husband sold the community property and appropriated the entire proceeds to his own use, the right of action by the heirs of the deceased wife for their share in the property at once accrued, and the statute began to run. *Wingo v. Rudder*, 103 T. 150, 124 S. W. 899.

Where a surety executed his sole note for the surety debt, limitations against the right to reimbursement began to run from the date of the note. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

#### 14. Continuing contracts.—See, also, notes under Arts. 5687, 5688.

Limitation does not run against an action on a continuing contract until its repudiation is known to plaintiff. *Bank v. Barrett* (Civ. App.) 25 S. W. 456.

Limitations against a claim by attorneys against a client held to begin to run from the time of the death of the client. *Stark v. Hart*, 22 C. A. 543, 55 S. W. 378.

Right to recover rents for a mill site and water privilege, held limited to two years prior to the commencement of the action. *Briggs v. Avary*, 47 C. A. 488, 106 S. W. 904.

Where a contract required the maintenance and repair of a pavement, and the contractor refused to do, the contract might be treated as a continuing one, and the statute did not run from the refusal, but from the date of the defaults of the contractor. *Nelson v. San Antonio Traction Co.* (Civ. App.) 142 S. W. 146.

15. **Severable contracts and installments.**—See, also, notes under Art. 5688.

An action to recover installments on bonds maturing more than four years before suit brought held barred by limitations. *Thornburgh v. City of Tyler*, 16 C. A. 439, 43 S. W. 1054.

Where the failure to pay the purchase-money note first falling due matured the others, a complaint on all the notes, brought more than four years after such failure, is subject to the four-year statute. *Dodge v. Signor*, 18 C. A. 45, 44 S. W. 926.

Where trust deed provided that note should become due on default of interest, and the note provided that on such default it should become due on election of payee, limitations did not run until such election. *Bowman v. Rutter* (Civ. App.) 47 S. W. 52.

Where several notes, maturing monthly, are secured by a mortgage providing that, on default in the payment of three notes, all should become due, on such default limitations commence to run against the entire debt. *San Antonio Real-Estate, Building & Loan Ass'n v. Stewart*, 94 T. 441, 61 S. W. 386, 86 Am. St. Rep. 864.

Where limitations have commenced to run against an entire debt payable in installments, because of default, the contract may be reinstated and the running of the statute stopped by agreement of the parties. *Id.*

Where a lien securing notes provides that when three matured notes are unpaid all shall become due, limitations commence to run against all the notes as soon as three are past due. *San Antonio Real-Estate, Building & Loan Ass'n v. Stewart*, 27 C. A. 299, 65 S. W. 665.

Facts held to show that certain notes were not barred by the four-year limitation. *Harrington v. Clafin*, 28 C. A. 100, 66 S. W. 898.

Where two notes each contain a provision that a failure to pay the note when due shall, at the option of the holder, mature both notes, failure to pay the first note does not mature the second, so as to start limitations running, in the absence of the exercise of such option. *Cooper v. Ford*, 29 C. A. 253, 69 S. W. 487.

In an action by a policeman for salary due under his contract of employment, the salary for a current month would not become due until the first day of the month following, and limitations would run only from the time it was due. *City of Paris v. Cabiness*, 44 C. A. 587, 98 S. W. 925.

16. **Accounts.**—See, also, notes under Arts. 5687, 5688.

Limitation runs on open accounts of physicians, attorneys, factors, pilots and other persons undertaking to perform services which require skill, for reward, from the time the service is rendered or performed. *Gulick v. Forston*, 1 App. C. C. § 426; *Jones v. Lewis*, 11 T. 360; *Graham v. Gautier*, 21 T. 112.

Agreement by a creditor to "carry the debt" without any agreement as to length of credit would not take the case out of the rule respecting limitations concerning debts due on demand. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

17. **Torts.**—See, also, notes under Arts. 5685, 5687. Relief on ground of fraud, see post, §§ 39, 40.

When an act is in itself lawful as to the person who bases thereon an action for injuries subsequently accruing from, and consequent upon, the act, the cause of action does not accrue until the injury is sustained. *Waterworks v. Kennedy*, 70 T. 233, 8 S. W. 36.

When a nuisance is permanent and continuing the damages resulting therefrom should be litigated in one suit; when it is not permanent, but is dependent upon accidents, successive actions may be brought for injury as it occurs, which will not be barred unless the statute has run against the special injury before suit. *Railway Co. v. Anderson*, 79 T. 427, 15 S. W. 484, 23 Am. St. Rep. 350.

When an injury gives a cause of action by reason of its being an invasion of plaintiff's right, limitation will run from the time the wrongful act was committed without reference to the time when the damages developed. *Trube v. Montgomery*, 27 S. W. 19, 7 C. A. 557; *Waterworks v. Kennedy*, 70 T. 236, 8 S. W. 36; *Lyles v. Railway Co.*, 73 T. 95, 11 S. W. 782.

Statute does not commence to run, on the construction of a ditch by a city, against action for damages to property, so as to bar recovery for subsequent damages, where the property was not directly invaded. *City of Houston v. Parr* (Civ. App.) 47 S. W. 393.

Cause of action for abatement of upper dam held to have accrued when built, and not when water supply to lower dam became inadequate. *Cape v. Thompson*, 21 C. A. 681, 53 S. W. 368.

An action against a cemetery company to recover damages for the burial of persons not connected with him on plaintiff's lot held barred by limitation, which ran from the time the wrongful act was committed. *Kruegel v. Trinity Cemetery Co.* (Civ. App.) 63 S. W. 652.

Limitations held not to commence to run against right of action for damages from surface water caused by public improvements when the improvements were made; the injury being continuous and increasing. *City of Houston v. Houston E. & W. T. R. Co.*, 26 C. A. 228, 63 S. W. 1056.

An action for damages for permanent injuries to real property by reason of a diversion of surface water is barred after two years from the time the damage occurred. *Tietze v. International & G. N. R. Co.*, 35 C. A. 136, 80 S. W. 124.

A cause of action for damages from the operation of a railroad in the street in front of plaintiff's property held not to have arisen until a change in the use to which the road was put. *Grossman v. Houston, O. L. & M. P. Ry. Co.*, 99 T. 641, 92 S. W. 836.

Plaintiff, in an action for damages owing to leakage from a water supply pipe line, held entitled to recover for any damages sustained prior to the filing of an amended pe-

tion, and for two years prior to the filing of the original petition. *City of Paris v. Tucker* (Civ. App.) 93 S. W. 233.

Limitations against an action to restrain the maintenance of a ditch on the boundary line between adjoining owners held to have begun to run from the date plaintiff's land was injured by the ditch. *Simon v. Nance*, 45 C. A. 480, 100 S. W. 1038.

The time when limitations began to run against an action for damages for a nuisance determined. *Texas & Pac. Ry. Co. v. Edrington*, 100 T. 496, 101 S. W. 441, 9 L. R. A. (N. S.) 988.

In an action against a railroad for the overflow of plaintiff's land resulting from the erection of an embankment, the statute held to begin to run when the damage was done by the overflow, and the rule of prescription governing easements held to have no application. *Gulf, C. & S. F. Ry. Co. v. Caldwell* (Civ. App.) 102 S. W. 461.

An action against a railroad company for injuries to plaintiff's property by the increased use of a track originally constructed for a switch track held to have accrued only from the date that the increased use of the track operated as an injury to plaintiff's property. *Schueller v. San Antonio & A. P. Ry. Co.*, 46 C. A. 444, 102 S. W. 922.

An action for damages in that a railroad by failure to construct openings in its fence entirely cut off a field accrues when the fence is built. *Sutherland v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 108 S. W. 969.

Limitations of action for injuries caused by diversion of water on adjoining lands because of insufficient drain box constructed by railroad held to run from time of actual injury, and not from time of construction of the drain box. *Texas & P. Ry. Co. v. Ford*, 54 C. A. 312, 117 S. W. 201.

The right of action for damages to land by overflow of water through ditches dug on a right of way held to accrue when land was overflowed, and not when the ditches were dug. *St. Louis Southwestern Ry. Co. of Texas v. Clayton*, 54 C. A. 512, 118 S. W. 248.

Under the rule that where the structure constituting a nuisance is permanent and the injury is constant, or certain to occur, the whole damage may be recovered at once, plaintiff, failing to sue for damages on the permanent raising of a dam resulting in the inundation of his land, was barred. *Abilene Light & Water Co. v. Clack* (Civ. App.) 124 S. W. 201.

That on the permanent raising of a dam resulting in the inundation of plaintiff's lands defendant paid plaintiff a certain sum per year as damages did not stop the running of the statute; there being no evidence that plaintiff's cause of action was merged in the contract for the payment of damages. *Id.*

An action for damages to abutting property resulting from the operation of trains on the street held not barred. *Trinity & B. V. Ry. Co. v. Jobe* (Civ. App.) 126 S. W. 32.

A cause of action for rendering the waters of a bayou salty and unfit for irrigation held to accrue on the completion of a canal from salt water to an intersection with the bayou. *Bigham Bros. v. Port Arthur Canal & Dock Co.* (Civ. App.) 126 S. W. 324.

Agreements between plaintiff's predecessors in title and defendant concerning fishing privileges on an artificial lake formed by flooding part of plaintiff's land held to stop the running of limitations against plaintiff's right to object to the flooding of the land. *Fin & Feather Club v. Thomas* (Civ. App.) 138 S. W. 150.

Limitations held to begin to run from the time of the creation of a nuisance of a permanent character. *Uvalde Electric Light Co. v. Parsons* (Civ. App.) 138 S. W. 163.

**18. Reimbursement or indemnity from person ultimately liable.**—See notes under Art. 5687. Liability for contribution, ante, § 13.

The statute of limitations begins to run between cosureties at the time the debt is paid, irrespective of the time when the obligation was entered into or became due. *Beck v. Tarrant*, 61 T. 402.

Ordinarily there is no liability for contribution to a cosurety who voluntarily pays a debt after it is barred by limitation; yet if he pays it after judgment on a suit begun before limitation has run, such payment, after a period when the bar of the statute would have been complete if the suit had not been brought, will render his cosurety liable for contribution, and the plea of limitation is not available against such action. *Glasscock v. Hamilton*, 62 T. 143.

Where the payee of an obligation, after death of principal debtor, has proceeded against the sureties, and his remedy as against the deceased principal's estate is barred, the sureties may yet recover against the estate under an implied contract between principal and surety. *Willis v. Chowning*, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

Where S., standing in the position of a surety, had paid part of the creditor's claim, and then allowed the period of limitation to expire without enforcing her right against the debtor, her claim was barred. *Darrow v. Summerhill*, 24 C. A. 208, 58 S. W. 158.

Evidence of clerk of court, uncorroborated, which is in conflict with other evidence, as to money embezzled, held insufficient to show that the embezzlement occurred at a time to establish the defense of limitations, in action against his sureties. *Dodson v. Ford*, 29 C. A. 115, 68 S. W. 194.

Fact that two years had elapsed since injury caused by defective sidewalk before filing of answer by defendant city impleading property owner held not to bar city's action for indemnity, since its cause of action did not accrue until it had suffered damage. *City of San Antonio v. Talerico*, 98 T. 151, 81 S. W. 518.

A claim barred by the statute against a principal held provable against his surety's estate, not being barred against it, because of suspension of the statute by death. *Charbonneau v. Bouvet*, 98 T. 167, 82 S. W. 460.

Action by bank against banking firm to recover money which the bank was compelled to pay by reason of the firm's breach of contract held not barred by limitations, since the cause of action did not accrue until the firm made default and the bank paid the demand. *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 598.

Where plaintiff was surety on renewal notes, and the creditor refused longer to accept paper signed by the principal, but accepted plaintiff's individual note therefor, the principal agreeing to reimburse plaintiff, the execution of plaintiff's own note for the amount of the debt constituted a payment as between him and the principal, and started the running of limitations. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

19. **Liabilities created by statute.**—Right of action by old county against county created out of it, to recover the latter's proportion of the debt of the original county, does not arise until discontinuance of payment by such new county. *Hardeman County v. Foard County*, 19 C. A. 212, 47 S. W. 30.

Limitations would run against a right of action to compel a railroad company to construct its road through a county seat within three miles of its line, as required by Const. art. 10, § 9, only from the time the road was constructed within three miles of the town, and not from the time the profiles of the right of way were filed with the county clerk. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

20. **Equitable actions and remedies.**—See notes under Arts. 5687-5690, 5691-5693. Relief on ground of mistake, see post, § 27. Existence of trust, see post, §§ 29, 30.

An action to remove a cloud on title, caused by a mistake in a deed thirty years old, is not barred where the parties claiming under such deed admitted the mistake until within a year of bringing the action. *Riggs v. Pope*, 21 S. W. 1013, 3 C. A. 179.

Equity will not suspend statute of limitations in favor of one who seeks subrogation to a vendor's lien. *Darrow v. Summerhill*, 93 T. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

Limitations do not apply, in partition between heirs, to the right of one to compel contribution for expenditures beneficial to the estate. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347.

Recording of mortgage does not put mortgagor on inquiry to discover mistake in description, so as to start running of limitations against suit for reformation, since limitations did not begin to run till the fraud or mistake could reasonably have been discovered. *American Freehold Land Mortg. Co. v. Face*, 23 C. A. 222, 56 S. W. 377.

Limitations against mortgagor's right to reform mortgage because of fraudulent representation held not to begin to run before execution of renewal mortgage. *Id.*

Where a debt secured by a trust deed is barred by limitation, a reformation of the deed will not be granted. *Galloway v. Kerr* (Civ. App.) 63 S. W. 180.

When obligations which are a lien on a homestead are included in a trust deed on the homestead and other property, under which the property is sold, but the sale is invalid as to the homestead, the claim of the purchaser by subrogation to enforce the valid lien against the homestead accrues with the maturity of the trust deed, and is barred in four years thereafter. *Hillyer v. Westfall* (Civ. App.) 67 S. W. 1045.

As a general rule courts of equity will adopt the length of time to bar causes of action that prevail in analogous cases in actions at law. *Watson v. Texas & P. Ry. Co.* (Civ. App.) 73 S. W. 830.

The right to have a contract set aside for fraud may be lost because of unreasonable delay by lapse of less time than fixed by the statute of limitations. *Texas & P. Ry. Co. v. Jowers* (Civ. App.) 110 S. W. 946.

If one acquires land pursuant to an agreement to convey it to another on payment of the purchase price, the cause of action for specific performance, or enforcement of the trust, if any exists, arises when he acquires the title. *Hoffman v. Buchanan*, 67 C. A. 368, 123 S. W. 168.

Plaintiff's right to redeem land as a junior lienholder held to run from expiration of a reasonable time to foreclose after his debt matured. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

General rule stated as to application in equity of statutes of limitation to question of laches and stale demand. *Coleman v. Zapp* (Civ. App.) 135 S. W. 730.

A guardian of an insane person having misappropriated funds of the ward, action was commenced on his bond a year after his death, and final judgment against the surety was affirmed three years later and two years after the death of the ward. Held, that action by the surety, commenced soon afterwards, based on subrogation to the right of the ward's estate, against the persons, who, with notice of their trust character, received such funds from the guardian in satisfaction of his personal obligation to them, was not barred. *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

#### (B) Performance of Condition, Demand and Notice

21. **Conditions precedent in general.**—Where seed is sold to be paid for when weighed up, limitations begin to run when it is so weighed. *National Cotton Oil Co. v. Taylor* (Civ. App.) 45 S. W. 478.

Limitations on an action for the price of fences to be determined by measurement held to run only from the purchaser's repudiation of the contract and refusal to measure. *Stribling v. Moore*, 33 C. A. 297, 76 S. W. 593.

In an action for breach of contract to purchase land, held, that plaintiff could not set up limitations as a bar to the defense that plaintiff failed to furnish an abstract of title as agreed, though not stated in contract. *Jackson v. Martin*, 37 C. A. 593, 84 S. W. 603.

Limitations held not to run on a contract to repay the purchase price upon satisfactory proof of a certain defect until such proof was made. *Williamson v. Heath*, 49 C. A. 254, 108 S. W. 933.

Rule respecting suspension of limitations on suits depending upon preliminary acts to be performed by plaintiff, stated. *Gamble v. Martin* (Civ. App.) 129 S. W. 386.

An action by the surety of a guardian of an insane person who had paid a judgment on the bond, suing, by subrogation to the right of the ward, one who had participated in the guardian's misappropriation, held not barred. *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

22. **Demand.**—A county warrant is prima facie evidence of a subsisting debt, but it affords no right of action until the county has by some act repudiated the claim, and limitation does not run against an action thereon until the act of repudiation. *Leach v. Wilson County*, 62 T. 331.

When a party receives a receipt for a sum of money, to be returned with interest when called on so to do, the statute commences to run from its date. *Schraum v. Nolte*, 1 App. C. C. § 1156.

When notes and bills are payable "after sight," or "after notice," the statute does not begin to run from the date of the bill or note. The presentment or notice must be made

within a reasonable time, as in case of notes payable after demand. What this reasonable time is depends upon the circumstances of each particular case, and is a matter of fact for the jury. If no cause for delay can be shown, the demand is barred, unless made within the period of limitations. *Id.*

A note payable on demand is payable immediately, and no special demand is necessary. The statute commences to run from the date of the note. *Schraum v. Nolte*, 1 App. C. C. § 1156; *Cook v. Cook*, 19 T. 436; *Henry v. Roe*, 83 T. 446, 18 S. W. 806.

Limitation does not run against a school claim during the period of its recognition by the county as a valid claim, and not until after its disallowance. *Caldwell Co. v. Harbert*, 68 T. 322, 4 S. W. 607.

Execution of a mortgage on land by owner thereof, who had given a title bond, held not to start running of limitations, since the cause of action could not accrue till the obligor had been requested and had refused to perform the conditions of the bond. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

The limitation of action against an assignee for the misappropriation of money held to run from the date of failure to pay over upon demand. *American Bonding Co. v. Williams* (Civ. App.) 131 S. W. 652.

A statement by plaintiff, at the time an account was stated, that he was to "carry the debt" without any proof as to the length of time, would not take the case out of the general rule with reference to limitations concerning debts payable on demand. *Stacy v. Parker* (Civ. App.) 132 S. W. 532.

A demand obligation being due at its date, a creditor cannot suspend limitations by postponing his demand. *Id.*

23. *Notice.*—Notice of mistake, see post, § 38. Notice of fraud, see post, § 40. Notice of repudiation of trust, see post, § 42.

Where a bank agreed to pay its attorney their fee when a judgment obtained in its favor was satisfied, limitations did not run against the attorney's claim until they received notification of the satisfaction. *Cobb v. First Nat. Bank*, 91 T. 226, 42 S. W. 770.

Limitations held not to have run against claim for improvements on land by one holding under void parol gift until after the gift had been disavowed by the donor. *Morris v. Wells*, 27 C. A. 363, 66 S. W. 248.

If limitation begins to run so as to sustain a claim of adverse possession, it will not be interrupted on the ground that a subsequent purchaser had no notice of the facts setting it running. *Eastham v. Gibbs* (Civ. App.) 125 S. W. 372.

24. *Leave to sue.*—Limitation did not begin to run against right of Lampasas county to sue Mills county for the latter's share of former's debts, until passage of Act April 26, 1893. *Mills County v. Lampasas County* (Civ. App.) 40 S. W. 552.

(C) *Ignorance, Mistake, Trust, Fraud and Concealment of Cause of Action*

25. *Ignorance of cause of action.*—Concealment of cause of action, see post, § 31. Discovery of mistake, see post, § 26. Discovery of fraud, see post, § 28. Knowledge of repudiation or violation of trust, see post, § 30.

Statute held not to commence to run until discovery of fraud of an agent, although the principal had annually appointed a committee to examine the agent's accounts, where the committee had not discovered the fraud. *Moore v. Waco Building Ass'n*, 19 C. A. 68, 45 S. W. 974.

Limitations against action for conversion held to run from day of conversion, though plaintiff had no knowledge of the conversion. *Meyer Bros. Drug Co. v. Fry* (Civ. App.) 48 S. W. 752.

The knowledge of the ancestor that a deed executed by him, absolute in form, was in fact a mortgage, is not imputable to his heirs or devisees, so as to set limitations running against them before actual knowledge on their part. *Rice v. Ward*, 92 T. 704, 51 S. W. 844.

In an action by heirs to recover community personal property left by their father, a decree of partition of the community lands held competent evidence on the issue as to whether they had notice of the existence of such personal property, more than two years before bringing suit. *Gerfers v. Mecke*, 28 C. A. 269, 67 S. W. 144.

Where plaintiffs' father died, leaving community personalty of which their mother had possession until her death, when her second husband took possession, plaintiffs could not recover the value of such property unless they sued within two years after knowledge of their rights. *Id.*

Where a surviving wife did not know of her interest in community land until sixty years after her husband's death, her claim was not stale. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892.

Transfer of a safe bailed to a firm by the bailee to a corporation, the officers of which were the same persons as composed the firm, held not to start limitations against the right of the owner to recover the safe in the absence of notice of any adverse claim by the corporation. *Woodward v. San Antonio Traction Co.* (Civ. App.) 95 S. W. 76.

That a deed contained a misdescription held insufficient to charge the grantee with notice thereof, unless he was cognizant of facts which would have caused an ordinarily prudent person to investigate. *Isaacks v. Wright*, 50 C. A. 312, 110 S. W. 970.

Limitations held to begin to run against the right of an assignee of the proceeds of a note in the hands of another when he knew that the note had been collected or should, in the exercise of reasonable diligence, have known it. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

Evidence held insufficient to show that a chattel mortgagee was ignorant of the actual of a cause of action for conversion, as affecting bar by limitations. *Beaumont Rice Mills v. Port Arthur Rice Milling Co.* (Civ. App.) 141 S. W. 349.

26. *Mistake as ground for relief.*—See, also, notes under Art. 5690.

Exception to petition and trial amendment to correct mistake in deed on ground that they showed action was barred by four years' statute of limitations held properly overruled. *Harris v. Flowers*, 21 C. A. 669, 52 S. W. 1046.

A right of action to reform a mistake in a deed accrues at the time the mistake was discovered or might by the exercise of reasonable care and diligence have been discovered. *Wright v. Isaacks*, 43 C. A. 223, 95 S. W. 55.

In a suit where no limitation would run against plaintiff's right to have deeds alleged to have been intended as a mortgage canceled and released until the mortgage debt was discharged, or defendant refused to allow them to redeem, it was immaterial when plaintiffs learned that the instruments were absolute deeds. *Openshaw v. Rickmeyer*, 45 C. A. 508, 102 S. W. 467.

The rule that limitations will not run in case of mistake until discovery by the party sought to be charged does not apply where plaintiff purchased school land in 1884 and a mistake of the surveyor was not discovered until 1908. *Paterson v. Rector* (Civ. App.) 127 S. W. 561.

Evidence held to sustain a finding that defendant, by the exercise of ordinary care, should have discovered the mistake more than four years before the filing of the cross-bill. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

27. **Fraud as a ground for relief—In general.**—Where a debtor conveys his land to his wife in trust for himself, the statute does not run in her favor against the claims of his creditors. *O'Neal v. Clymer* (Civ. App.) 61 S. W. 545.

One collecting a note under an agreement to apply the proceeds in diverting a part of the proceeds held guilty of fraud so that limitations began unless he concealed the act so as to prevent a discovery of the facts. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

28. **Discovery of fraud.**—See notes under Arts. 5688, 5690. Fraud creating resulting trust, see post, § 29. Repudiation of trust, see post, § 30.

Undiscovered fraud will prevent the running of the statute of limitations, provided the failure to sooner discover it was not caused by want of proper diligence of the party who asserts the existence of the fraud. *Calhoun v. Burton*, 64 T. 510; *Munson v. Hallo-well*, 26 T. 475, 84 Am. Dec. 582; *Anding v. Perkins*, 29 T. 348; *Bremond v. McLean*, 45 T. 10; *Kuhlman v. Baker*, 50 T. 630; *Alston v. Richardson*, 51 T. 6; *Ripley v. Withee*, 27 T. 14; *Ransome v. Bearden*, 50 T. 119; *Connoly v. Hammond*, 51 T. 635; *Coleman v. Thurmond*, 56 T. 514; *Brown v. Brown*, 61 T. 45.

Where there is fraud growing out of a transaction wherein there was an exchange of deeds to land, the party has four years within which to sue for a rescission; or if the fraud was not immediately discovered he has four years from time of the discovery of the fraud, provided that it must be discovered within a reasonable time. What is a reasonable time is sometimes a mixed question of law and fact. *Cooper v. Lee*, 1 C. A. 9, 21 S. W. 998.

In case of constructive fraud, limitation will run from the time when, with reasonable diligence, defendant ought to have discovered it. *Lastovica v. Sulik* (Civ. App.) 33 S. W. 909.

Where plaintiff could have discovered the fraud by reasonable diligence, held, that he was not entitled to benefit of the exception suspending running of the statute till discovery. *Cleveland v. Carr* (Civ. App.) 40 S. W. 406.

Vendee purchasing land knowing of equity of the children of vendor, their mother, therein, participates with her in the fraud on them, so that limitations do not run in his favor until discovery. *Worst v. Sgitcovich* (Civ. App.) 46 S. W. 72.

On conveyance by defendant to another of lands he had previously sold plaintiff, the statute runs from the time plaintiff has actual notice of second conveyance. *Mitchell v. Simons* (Civ. App.) 53 S. W. 76.

Limitations do not begin to run, in case of relief on the ground of fraud or mistake, until the fraud or mistake is or could have been discovered. *American Freehold Land Mortg. Co. v. Pace*, 23 C. A. 222, 56 S. W. 377.

Insolvent debtor's conveyance to his niece for an insufficient consideration held sufficient information to creditor to put him on inquiry as to intent to defraud, and hence statute runs against creditor from recording of conveyance. *Vodrie v. Tynan* (Civ. App.) 57 S. W. 680.

Statute of limitations held to run from date of creditor's knowledge of debtor's fraudulent conveyance, and not from date of creditor's subsequent judgment; no reason being alleged for delay in obtaining judgment. *Id.*

Limitation held to begin to run against a wife's right of action to set aside a judgment on community property obtained by the fraudulent acts of her husband from the time of her discovery of the fraud. *Cetti v. Dunman*, 26 C. A. 433, 64 S. W. 787.

Limitation held to run in favor of the transferee and occupant of land transferred in fraud of creditors from the time such creditors might have learned of the transfer by the exercise of ordinary diligence. *Moore v. Brown*, 27 C. A. 208, 64 S. W. 946.

Where plaintiff was induced to perform a contract by promises fraudulently made by defendant, which he never intended to perform, limitations do not commence against services under such contract until the fraud is discovered. *West v. Clark*, 28 C. A. 1, 66 S. W. 215.

Limitations as to a right to cancel a deed for fraud do not commence to run until discovery of the fraud. *Hodges v. Hodges*, 27 C. A. 537, 66 S. W. 239.

Evidence in an action for injuries, wherein plaintiff sought to avoid the two-year limitations on the ground of defendant's fraud, held sufficient to show that plaintiff by ordinary diligence could have discovered the fraud more than two years prior to the action. *Missouri, K. & T. Ry. Co. v. Smith*, 28 C. A. 565, 68 S. W. 543.

Limitations commence to run against an action to set aside a judgment on account of the fraud of plaintiff's attorneys, representing him at the time it was rendered, from the time when the fraud is discovered, or should have been. *Watson v. Texas & P. Ry. Co.* (Civ. App.) 73 S. W. 830.

Limitations held not to run against an action by a child to set aside a partition of property with her mother for fraudulent statements of the latter, until knowledge of the facts. *Pitman v. Holmes*, 24 C. A. 485, 78 S. W. 961.

Where a party defrauded had the means of discovery of the fraud at hand, he would be held, as a matter of law, to have had notice of everything which the use of such means would have disclosed. *Boren v. Boren*, 38 C. A. 139, 85 S. W. 48.



Limitations do not commence to run against a cause of action for deceit until the discovery of the fraud, where the failure to discover the fraud sooner was not due to any negligence. *Western Cottage Piano & Organ Co. v. Griffin*, 41 C. A. 76, 90 S. W. 884.

Limitations will not begin to run against an action for false representations until the falsity of the representations is discovered, or should have been discovered by the use of ordinary diligence. *Harris v. Cain*, 41 C. A. 139, 91 S. W. 866.

To suspend the running of limitations against attack on judgment, fraud in obtaining judgment must have been concealed so that it could not be ascertained by reasonable diligence. *Dunn v. Taylor*, 42 C. A. 241, 94 S. W. 347.

To prevent the running of the statute for conversion on the ground of want of knowledge held, that it was necessary to prove some excuse why the fraud was not known. *Clement v. Clement*, 44 C. A. 574, 99 S. W. 138.

An action to recover money paid through fraud of defendant and mistake of plaintiff held barred by the two-year statute, where there was no concealment, but the facts were accessible to plaintiff, and he merely relied on the integrity and honesty of defendants. *Stanford v. Finks*, 45 C. A. 30, 99 S. W. 449.

Actual fraud or concealment of material facts held to suspend operation of statute until the party injured thereby discovers the fraud or might have discovered it by reasonable diligence. *Shuttleworth v. McGee*, 47 C. A. 604, 105 S. W. 823.

Cliant employing attorney to sue upon promissory note held not guilty of laches precluding him from maintaining an action for the attorney's fraud. *Id.*

In an action by a purchaser for the deceit of the broker of the vendor inducing the purchase, held, that failure to bring the action within four years was not excused. *Gordon v. Rhodes & Daniel* (Civ. App.) 117 S. W. 1023.

Where the avenues of discovery of the accrual of a cause of action are open and numerous, notwithstanding attempts at fraudulent concealment, the presumption is that plaintiff had actual seasonable knowledge of the fact so that the acts of concealment do not prevent the running of limitations. *Vernon v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

As affecting limitations on a suit to cancel a deed for fraud, evidence held insufficient to warrant a finding that by using reasonable diligence grantor could have discovered that defendant was claiming under the deed. *Rankin v. Rankin* (Civ. App.) 134 S. W. 392.

Fraud or ignorance thereof, unaccompanied by concealment, will not prevent the running of limitations. *Prosser v. First Nat. Bank* (Civ. App.) 134 S. W. 781.

An action for fraud, begun within two years after the discovery of the fraud by the injured party, is not barred. *Coleman v. Ebeling* (Civ. App.) 138 S. W. 199.

An action by a principal against his agent for an accounting for funds misappropriated, held not barred by limitations until the misappropriations are discovered. *Ash v. A. B. Frank Co.* (Civ. App.) 142 S. W. 42.

A cause of action by a chattel mortgagee for conversion held to accrue on the discovery of the fraud participated in by the person converting the mortgaged chattels. *Port Arthur Rice Milling Co. v. Beaumont Rice Mills*, 105 T. 514, 143 S. W. 926, 148 S. W. 283, 150 S. W. 884, 152 S. W. 629.

Limitations did not run against plaintiff's action to recover damages arising from a fraudulent conspiracy until plaintiff discovered the fraud. *Port Arthur Rice Milling Co. v. Beaumont Rice Mills*, 105 T. 514, 143 S. W. 926, 148 S. W. 283, 150 S. W. 884, 152 S. W. 629.

An action for fraud committed by defendant employed to sell plaintiff's land for a part of the proceeds based on defendant making sales and appropriating the proceeds was not barred, where it was brought within two years after plaintiff learned the facts by an independent investigation. *Thomason v. Rogers* (Civ. App.) 155 S. W. 1040.

29. Existence of trust.—In general.—Fraud of person acting in fiduciary capacity, see post, § 30. Ignorance of cause of action, see ante, § 25. Mistake as a ground for relief, see ante, § 26.

No lapse of time will bar the cestui que trust from enforcing a resulting trust so long as the trust relation is admitted, and there is no adverse holding by the trustee or those claiming under him. In constructive trusts the rule is different. These limitations run from the time at which the cestui que trust could have indicated his right by action or otherwise. *Cole v. Noble*, 63 T. 432; *Campbell v. McFadin*, 71 T. 28, 9 S. W. 138; *Robertson v. Du Bose*, 76 T. 1, 13 S. W. 300; *Rucker v. Daily*, 66 T. 284, 1 S. W. 318; *Reed v. West*, 47 T. 240; *Yeary v. Cummins*, 28 T. 91; *Wilson v. Simpson*, 80 T. 279, 16 S. W. 40; *Browning v. Pumphrey*, 81 T. 163, 16 S. W. 870.

A trustee of an express trust cannot, by conveying the property to himself, render the trust a constructive one and hence limitations did not commence to run from the time of such conveyance. *Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land Mortgage Co.*, 16 C. A. 520, 42 S. W. 864.

A trustee of an implied trust recognizes the trust, so that limitations do not run in his favor, by signing a trust deed, though his name is not in the body of it. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 639.

Limitation in favor of husband, converting community property on wife's death, and buying land with it in his name, held to run against heirs, from the date of deed to such land, as a constructive trust. *Clifton v. Armstrong* (Civ. App.) 54 S. W. 611.

Complaint held not an action to set aside a deed and barred by limitations, but one to create a trust. *Williams v. Emberson*, 22 C. A. 522, 55 S. W. 595.

An instrument executed by a grantee to his grantor held not to have been a completed declaration of an express trust, against which limitations would not run. *Laguerenne v. Farrar*, 25 C. A. 404, 61 S. W. 953.

Proceedings by a putative wife for her share of property jointly acquired during the cohabitation held not barred by the two or four year limitation. *Lawson v. Lawson*, 30 C. A. 43, 69 S. W. 246.

Admission by constructive trustee of receipt of money for another held not to make trust continuing one, so as to postpone limitations until knowledge of repudiation by him was brought home to cestui que trust. *Bridgens v. West*, 35 C. A. 277, 80 S. W. 417.

In an action against an administrator to recover an alleged deposit which he claimed had been contributed as plaintiff's share of the capital of a firm, limitations could not be successfully pleaded in either event. *Altgelt v. Elmendorf* (Civ. App.) 86 S. W. 41.

Where one in 1858 located a certificate for lands under an agreement for a patent in the name of another, who should hold title to one-third for locator's benefit, it created a trust, so that an action to recover such interest was not barred by limitation of ten years or laches. *Morris v. Unknown Heirs of Hamilton* (Civ. App.) 95 S. W. 66.

An agreement between defendants and another held not to create a trust relation with plaintiff so as to prevent a partition of land in which plaintiff had an interest, and which ignored the interest, from putting in motion limitations against him. *Honea v. Arledge*, 56 C. A. 296, 120 S. W. 508.

One collecting a note held not to hold the proceeds under an express trust for another. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

In case of a resulting trust, the statute does not begin to run against an action by the cestui que trust till repudiation of the trust by the trustee, and notice to them thereof. *Tennison v. Palmer* (Civ. App.) 142 S. W. 948.

Statement of an account between the trustee and the cestui que trust, without any demand for payment of the balance or termination of the trust, will not start limitations against the trustee's duty to pay over the balance. *Watson v. Dodson* (Civ. App.) 143 S. W. 329.

Executors sued by a legatee for an accounting and to recover plaintiff's distributive share cannot invoke the statute. *Farrell v. Cogley* (Civ. App.) 146 S. W. 315.

30. Repudiation or violation of trust.—See, also, notes under Arts. 5681, 5690. Limitation does not run in favor of a trustee until notice of repudiation to the beneficiary. *Gibbons v. Bell*, 45 T. 418; *Cole v. Noble*, 63 T. 432; *Goode v. Lowery*, 70 T. 150, 8 S. W. 73; *Wilson v. Simpson*, 80 T. 279, 16 S. W. 40; *Abernathy v. Stone*, 81 T. 435, 16 S. W. 1102; *Sprague v. Haines*, 68 T. 215, 4 S. W. 371; *Brotherton v. Weathersby*, 73 T. 473, 11 S. W. 505; *Robertson v. Du Bose*, 76 T. 10, 13 S. W. 300; *Galbraith v. Howard*, 11 C. A. 230, 32 S. W. 803.

Limitation did not run in favor of an attorney for money collected for another until the trust relation was repudiated. *Hammon v. Jackson* (Civ. App.) 26 S. W. 799.

Where a trustee fraudulently and without authority conveyed to himself and afterwards conveyed to a third person, held, that the statute commenced to run against suit to cancel the conveyances from date of the latter. *Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land-Mortgage Co.*, 16 C. A. 520, 41 S. W. 140.

Limitations do not run in favor of a trustee of an express trust, where he does not repudiate the trust, so as to defeat the equity of the cestui. *Barnett v. Houston*, 18 C. A. 134, 44 S. W. 689.

The wrongful sale of the trust property by the trustee does not set limitations running against the beneficiaries, where the trustee after the sale recognizes the continuance of the trust. *Mixon v. Miles* (Civ. App.) 46 S. W. 105.

A conveyance of the estate by the trustee held not to set the statute in motion until the beneficiary learned of it, though the deed of conveyance was recorded. *Davis v. Davis*, 20 C. A. 310, 49 S. W. 726.

In an action to declare a deed executed by plaintiff's intestate a mortgage, held proper to instruct that plaintiff was not affected by limitations until he discovered the true character of the instrument. *Rice v. Ward* (Civ. App.) 54 S. W. 318.

Limitations held to run against action to recover money held in trust only from the time repudiation of the trust was brought to plaintiff's notice. *Gregory v. Montgomery*, 23 C. A. 68, 56 S. W. 231.

Surviving husband held to have repudiated trust relation, on taking charge of the community property, as to the children's interest therein, so as to start the running of limitations. *Koppelman v. Koppelman* (Civ. App.) 59 S. W. 827.

The statute will run against the beneficiary's demand, founded on a completed declaration of an express executed trust, when the acts of the trustee are equivalent to the repudiation of the trust, and the beneficiary has knowledge thereof. *Laguere v. Farrar*, 25 C. A. 404, 61 S. W. 953.

One claimed to be a constructive trustee may rely on limitations without showing that he has repudiated the trust, unless plaintiffs show ignorance of their rights. *Oakes v. West* (Civ. App.) 64 S. W. 1033.

The statute does not run against a person claiming damages for injuries inflicted by an insolvent corporation until its officers indicate to the claimant an intention to repudiate the trust created by law. *Scott v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 66 S. W. 485.

Claim of plaintiff in trespass to try title held not barred, there having been no repudiation of the trust. *Yeary v. Crenshaw*, 30 C. A. 399, 70 S. W. 579.

Limitations do not begin to run in favor of a trustee, as against the beneficiary, until the trustee repudiates the trust and the beneficiary has notice thereof. *Barnett v. Barnett* (Civ. App.) 80 S. W. 537; *McCarthy v. Woods*, 87 S. W. 405; *Bateman v. Ward*, 93 S. W. 508.

Where a locative interest in land was held in trust, and possession was taken under such equitable title, limitations did not begin to run until the trust was repudiated. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Under an agreement between a purchaser at a tax sale and the owner, the purchaser held the owner's agent in leasing the land and paying taxes thereon, so that limitations did not run against the owner until the agency was repudiated. *Hall v. Semple* (Civ. App.) 91 S. W. 248.

Limitations do not commence to run against an action by the pledgor of corporate stock against the pledgee for a conversion thereof until the pledgor had notice of the pledgee's repudiation of the trust and appropriation of the stock. *Davis v. Hardwick*, 43 C. A. 71, 94 S. W. 359.

Limitations, laches, or stale demand cannot be urged against the enforcement of a resulting trust until the trust has been repudiated. *Pearce v. Dyess*, 45 C. A. 406, 101 S. W. 549.

A deceased tax collector's successor held to hold fees on delinquent taxes collected in trust for the heirs of the deceased collector, so that limitations did not run against action to recover until repudiation of the relation. *Bond v. Poindexter* (Civ. App.) 116 S. W. 395.

Limitations held not to run against an action on a bond as community administrator until there had been a repudiation of the trust or adverse holding under such circumstances as to be notice to the cestui que trust. *Wingo v. Rudder* (Civ. App.) 120 S. W. 1073.

If a person held title to land in trust for a county, his possession would not be adverse, so as to start the statute of limitations, until there was a repudiation of the trust. *Bell County v. Felts* (Civ. App.) 122 S. W. 269.

A suit to cancel a deed of land in trust for specified purposes held not barred where there was no repudiation of the trust four years before suit. *Smith v. Olivarrí* (Civ. App.) 127 S. W. 235.

Where a cestui que trust dismissed a suit to enforce the same, because he believed that his rights were not in fact repudiated, limitations did not run against him. *Snouffer v. Helsing* (Civ. App.) 130 S. W. 912.

Action by heirs against independent executrix held not barred by limitation, where there is no showing that she has repudiated the trust and that such repudiation was brought home to party. *Japhet v. Pullen* (Civ. App.) 133 S. W. 441.

In case of a resulting trust, the statute does not begin to run against an action by the cestuis que trust till repudiation of the trust by the trustee, and notice to them thereof. *Tennison v. Palmer* (Civ. App.) 142 S. W. 948.

Limitations will not begin to run against a trustee's liability to account, until his repudiation of the trust and knowledge thereof is brought home to the cestui que trust. *Watson v. Dodson* (Civ. App.) 143 S. W. 329.

That a trustee to loan money mingled it with his own, and loaned it in his own name, held insufficient to show repudiation of the trust. *Id.*

A grantee for life by conveying in fee held to have repudiated a trust, so as to make limitations begin to run upon the taking of possession by the grantee. *Horan v. O'Connell* (Civ. App.) 144 S. W. 1048.

Limitations will not run in favor of a trustee against his beneficiary until there is some manifestation of a hostile purpose by the trustee, notice of which is brought home to the beneficiary. *Home Inv. Co. v. Strange* (Civ. App.) 152 S. W. 510.

Where vendor held a note for the price in trust as to the excess above a specified sum per acre, for himself and for his broker, limitations did not begin to run in the vendor's favor against the broker, until the former repudiated such trust to the latter's knowledge. *Campbell v. Shifflett* (Civ. App.) 154 S. W. 664.

On the death of the wife, the duty of the husband is to take charge of the community property and to hold it in trust for settlement, and the two-year limitation as to conversion, etc., does not start to run against a suit by the wife's heirs to recover her share from the husband until he repudiates the trust. *Wood v. Dean* (Civ. App.) 155 S. W. 363.

**31. Concealment of cause of action.**—An action against an attorney for negligence in permitting a judgment to become outlawed held barred. *Presnall v. McLeary* (Civ. App.) 50 S. W. 1066.

The fact that the rolls were marked "paid" opposite the names of persons to whom receipts were issued (when they had not paid) did not put the commissioners' court on notice that more money had been collected than reported. The withholding by the collector from his reports of stubs of receipts issued when no payments had been made, was such concealment as suspended the running of the statute of limitations. *Ward v. Marion County*, 26 C. A. 361, 63 S. W. 155, overruling *Ward v. Marion County*, 26 C. A. 361, 62 S. W. 557.

Where defendant received money for plaintiff and concealed the fact from him, limitations would not run until after plaintiff had knowledge of such concealment, or by the exercise of reasonable care could have discovered the fact. *Holland v. Shannon* (Civ. App.) 84 S. W. 854.

Where the avenues of discovery of the accrual of a cause of action are open and numerous, notwithstanding attempts at fraudulent concealment, the acts of concealment held not to prevent the running of limitations. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

#### (D) Pendency of Legal Proceedings or Stay

**32. Suspension or stay in general.**—Whenever the law requires a delay in legal proceedings, it also suspends the running of limitations. *Hume v. Perry* (Civ. App.) 136 S. W. 594.

**33. Pendency of action or other proceeding.**—See, also, notes under Art. 5680. Commencement of action or other proceeding, see post, §§ 37-52.

Limitations in favor of purchaser from heir run during pendency of administration. *Robb v. Henry* (Civ. App.) 40 S. W. 1047.

Action by heir to remove administrator held not to prevent running of statute as against administrator in favor of grantee of heir of certain land of decedent. *Bowen v. Kirkland*, 17 C. A. 346, 44 S. W. 189.

A mortgagee who has his claim approved by the probate court administering on mortgagor's estate, reduces it to the status of a judgment, and thereby removes the operation of limitations on the original claim. *Hays v. Tilson*, 18 C. A. 610, 45 S. W. 479.

Limitations held not to run against one becoming an equitable assignee of a mortgage by purchasing under an illegal foreclosure. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

The running of the statute against the right to sue for breach of warranty of title is not interrupted by a suit by the warrantee, to set aside a judgment rendered against him for the land, which he voluntarily dismisses. *Herr v. Rodriguez* (Civ. App.) 50 S. W. 487.

The bringing of trespass to try title does not stop the running of limitations against the right of plaintiffs, the heirs of a subvendee, to pay the balance of the purchase price owing by the vendee, and thus obtain title to the land. *Robinson v. Thompson* (Civ. App.) 52 S. W. 117.

An agreement by which money due, to enjoin the collection of which a suit was pending, was paid under protest, held not to affect the running of limitations against the right to recover the money so paid. *City of Dallas v. Kruegel*, 95 T. 43, 64 S. W. 922.

A garnishment proceeding held insufficient to suspend the statute of limitations as against the debt garnished. *Holland v. Shannon* (Civ. App.) 84 S. W. 854.

A judgment establishing a debt secured by a deed of trust against a decedent, whose estate had not been administered, held to stop the running of limitations against such debt. *Cates v. Field* (Civ. App.) 85 S. W. 52.

Where both parties acquiesced in a judgment for thirty years, held, that the doctrine of *lis pendens* would not apply to prevent limitations from running in favor of one of the parties or privies, even if the judgment was not final. *Maes v. Thomas* (Civ. App.) 140 S. W. 846.

**34. Pendency of appeal.**—Though a judgment is suspended by an appeal, it is not thereby so vacated as to allow limitations to run after its rendition in a suit to recover lands held adversely. *Miller v. Gist*, 91 T. 335, 43 S. W. 263.

Appeal by a defendant who had disclaimed as to the interests claimed by the other defendants held not to stay limitations on the judgment against the other defendants. *Britton v. Matlock*, 40 C. A. 275, 89 S. W. 1092.

**35. Stay of proceedings.**—A stay of proceedings held not to forbid the filing of an amended petition, and hence not to prevent limitations from running against claims first set up therein. *Taub v. Woodruff* (Civ. App.) 134 S. W. 750.

**36. Suspension of statute of limitations.**—When after the dismissal of a suit the judgment is set aside and the cause reinstated on the docket, limitation is suspended by the commencement of the suit. *Miller v. Earle*, 4 App. C. C. § 222, 15 S. W. 916.

Where the statute of limitations was suspended by law as to taxes due a state or county, mere lapse of time could not be set up to defeat their recovery. *State v. Gibson*, 27 C. A. 355, 65 S. W. 690.

(E) *Commencement of Action or Other Proceeding*

**37. Mode of computation of time limited.**—A debt contracted on the 28th day of the month on six months' time is due on the 28th day of the sixth month thereafter. Thus, a debt for goods sold on the 6th day of August, 1880, on six months' time, was held to be due on the 28th of February, 1881, and an action brought on the 28th day of February, 1883, was barred by limitation. *State v. Asbury*, 26 T. 82; *Shaline v. Goodman*, 2 App. C. C. § 267.

In the computation of time from an act done, the day on which the act is done will be excluded whenever such exclusion will prevent an estoppel or save a forfeiture. The day on which the statute took effect is excluded. When an act is to be done within a given time, e. g., thirty days, the party has the whole of the thirtieth day in which to perform it; but if it is to be done after the expiration of thirty days, it cannot be performed until on the thirty-first day, the law taking no notice of fractions of a day. *Dowell v. Vinton*, 1 App. C. C. § 331; *O'Connor v. Towns*, 1 T. 107; *Burr v. Lewis*, 6 T. 76; *Campbell v. Lane*, 25 T. Sup. 93; *Moore v. Hallaman*, 25 T. Sup. 81; *Cox v. Reinhardt*, 41 T. 591; *Watkins v. Willis*, 58 T. 521.

In computing time during which limitation will run, the day on which the cause of action accrued is excluded. *Smith v. Dickey*, 74 T. 61, 11 S. W. 1049; *State v. Asbury*, 26 T. 82; *Lubbock v. Cook*, 49 T. 96. See *Baldwin v. W. U. Tel. Co.* (Civ. App.) 33 S. W. 890.

The injuries occurred on October 30, 1895. Suit was filed October 30, 1896. Held, that the suit was brought within a year after the accident. *T. & P. R. R. Co. v. Moore* (Civ. App.) 43 S. W. 67.

The day of doing an act may be included or excluded in computing time, so as to operate most favorably to the party entitled to the favor. *Ætna Life Ins. Co. of Hartford, Conn., v. Wimberly* (Civ. App.) 108 S. W. 778.

When the time within which an act is to be done is to be computed from and after a certain day, the rule is to exclude that day. *Id.*

The time within which to commence a suit is not extended because the last day of the period of limitation was Sunday. *Standard v. Thurmond* (Civ. App.) 151 S. W. 627.

Where a cause of action subject to the four-year limitation, accrued October 2, 1907, the time to sue expired October 1, 1911; and a suit commenced the following day was barred. *Id.*

**38. Proceedings constituting commencement of action**—In general.—See, also, note under Art. 5680.

Limitation is interrupted by a commencement of suit, no matter how defectively the cause of action may be presented in the petition. *Scoby v. Sweatt*, 23 T. 729; *Coats v. Elliott*, 23 T. 612; *Epperson v. Young*, 19 T. 475; *Coles v. Portis*, 18 T. 156; *Young v. Epperson*, 14 T. 618; *Smith v. McGaughey*, 13 T. 467; *Kinney v. Lee*, 10 T. 155; *Wells v. Fairbanks*, 5 T. 583; *Bremond v. Johnson*, 1 App. C. C. § 609. If the petition fails to aver facts removing the bar, limitation runs until the amendment. *Howard v. Windom*, 86 T. 560, 26 S. W. 483.

The filing of a petition to enjoin a sale under a trust deed was not the commencement of an action on the notes secured thereby, and did not suspend the running of the statute of limitation as against the executors of the beneficiary in the deed, who were not parties when the injunction was granted. *Davis v. Andrews*, 88 T. 524, 30 S. W. 432, 32 S. W. 513.

Limitation is not suspended by the filing of a petition, when there has been an unreasonable delay in issuing citation. *Goldstein v. Gans* (Civ. App.) 32 S. W. 185.

Filing a petition on which at petitioners' request no citation is issued is sufficient to interrupt limitations. *Wood v. Mistretta*, 20 C. A. 236, 49 S. W. 236.

An action is not barred where the petition was filed in time, though without fault of plaintiff the citation failed to issue until after limitation. *City of Belton v. Sterling* (Civ. App.) 50 S. W. 1027.

In trespass to try title, where plaintiff claims title under a deed from one tenant in common and defendant under the statute of limitations, the statute ceases to run

in defendant's favor as to plaintiff's interest acquired from the tenant in common when the pleading setting up that title is filed, but continues to run against the interests of the cotenants, and, if at the time of trial the statutory period has elapsed as to their interests, plaintiff can recover only the interest of his donor. *Hutcheson v. Chandler*, 47 C. A. 124, 104 S. W. 434.

The statute is suspended by the institution of a suit, service on defendant, and its appearance and answer. *Forbes Bros. Teas & Spice Co. v. McDougale, Cameron & Webster* (Civ. App.) 150 S. W. 745.

**39. Issuance and service of process.**—A suit against a nonresident, in which no sufficient process was issued or served, held insufficient to suspend the statute against the debt sued on. *August Kern Barber Supply Co. v. Freeze*, 96 T. 513, 74 S. W. 303.

A suit is not commenced in justice court, so as to toll limitations, until the citation is issued. *Hooks v. Gulf, B. & K. C. Ry. Co.* (Civ. App.) 97 S. W. 516.

Laches in prosecuting a cause of action commenced for a tort held to constitute a bar to the action. *Faires v. Loessin*, 46 C. A. 551, 102 S. W. 924.

**40. Want of jurisdiction.**—Suit by foreign receiver in Texas does not interrupt running of statute against the cause of action. *Kellogg v. Lewis*, 16 C. A. 668, 40 S. W. 323.

**41. Defects as to parties.**—Effect as to persons not parties, see post, § 44.

A suit by husband and wife instituted within the year is not subject to limitation by an amendment, after the year, dropping the wife's name. *Railway Co. v. Campbell* (Civ. App.) 26 S. W. 884.

Action held not barred, where original petition, erroneously describing defendant, was filed within statutory period, though a supplemental petition correcting the defect was not filed until the time had expired. *Grand Lodge A. O. U. W. v. Bollman*, 22 C. A. 106, 53 S. W. 829.

An amendment of the petition in a damage suit, after a judgment therein had been reversed on account of misjoinder of defendants, by leaving out the wrongfully joined defendant, held not to constitute a new cause of action, so as to make limitation apply. *Texas Midland R. R. v. Cardwell* (Civ. App.) 67 S. W. 157.

An action commenced against a corporation by a wrong name held saved from the bar of limitations by the mistake. *Pritchard v. McCord-Collins Co.*, 30 C. A. 582, 71 S. W. 303.

A petition on a note, misnaming defendant, held not to toll the statute. *Martinez v. Dragna* (Civ. App.) 73 S. W. 425.

Finding that an answer was filed on behalf of the real defendant, and that it had appeared in the case prior to the bar of limitations, held warranted. *McCord-Collins Co. v. Pritchard*, 37 C. A. 418, 84 S. W. 388.

Petition against one defendant alone, filed on appeal more than two years after the filing of the original suit, and stating that this defendant was an equal joint owner of the lot sold and liable for one-half of the commission sued for, did not set up a new cause of action, and hence was not defeated by a plea of limitations. *Grayson v. Hollingsworth* (Civ. App.) 148 S. W. 1135.

Where defendant corporation, sued in the wrong name, voluntarily answered to the merits, it could not plead limitations after plaintiff had corrected the misnomer. *Forbes Bros. Teas & Spice Co. v. McDougale, Cameron & Webster* (Civ. App.) 150 S. W. 745.

**42. Defects or irregularities in pleadings or other proceedings.**—Defects as to parties, see ante, § 41. Amendment of pleadings, see post, § 45.

Petition held a commencement of the suit in relation to the assumption of a note within the statute, though making no other reference to it than by referring to the recital in the deed by which it was assumed. *Smith v. Farmers' Loan & Trust Co.*, 21 C. A. 170, 51 S. W. 515.

An original petition, open to attack on a special demurrer, but good on general demurrer, stopped the running of limitations. *Schmidt v. Brittain* (Civ. App.) 84 S. W. 677.

Where a passenger on a railroad company's train was injured in 1906, the filing of a petition praying a recovery of damages for such injuries stopped the running of the statute, even though the petition was defective in failing to allege that the action was maintainable only under a foreign statute, and that fact was supplied by an answer filed long after the period of limitation would have expired had not the petition been filed. *Houston & T. C. R. Co. v. Fife* (Civ. App.) 147 S. W. 1181.

**43. Intervention or bringing in new parties.**—The intervention of parties in an action against a railway company for delaying contractors held not to constitute a new cause of action, as affected by limitations. *El Paso & S. W. R. Co. v. Harris & Liebman* (Civ. App.) 110 S. W. 145.

Where a landlord on shares brought an action for injuries to growing crops, but the tenant was not made a party plaintiff until after two years from the injury, the action of the tenant was barred by limitations. *Trinity & B. V. Ry. Co. v. Doke* (Civ. App.) 152 S. W. 1174.

**44. Effect as to persons not parties.**—See, also, post, § 45. Intervention or bringing in new parties, see ante, § 43.

A suit by one cotenant against parties in possession does not put in issue the title of his cotenant, and limitation runs against such cotenant not a party to the suit, and is not interrupted until the defendants are dispossessed through the writ of possession. *Allen v. Read*, 66 T. 13, 17 S. W. 115. Citing *Read v. Allen*, 56 T. 182; *Stovall v. Carmichael*, 52 T. 333.

Suit commenced against a railway held to arrest limitations in favor of a purchaser of the franchises carrying on its line under the former name. *Houston & T. C. Ry. Co. v. McFadden*, 91 T. 194, 40 S. W. 216.

An action by a landlord to foreclose a lien on property does not interrupt the running of limitation in favor of a purchaser of it who was not made a party. *Meyer Bros. Drug Co. v. Fry* (Civ. App.) 48 S. W. 752.

**45. Amendment of pleadings—In general.**—Defects as to parties, see ante, § 41. Intervention or bringing in new parties, see ante, § 43. Pleading limitation in general, see Art. 5706.

Failure, until an amended petition was filed, asking, also, for partition and an adjudication of the rights of all parties, to aver facts unnecessary to recovery, held not to delay interruption of limitations in defendant's favor until the amended petition was filed. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347.

The claim on which a plea in reconvention is based is not barred by limitations, though the plea filed before the claim was barred was defective; it being susceptible of amendment. *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Civ. App.) 73 S. W. 545.

An amended petition, which omits a count on a note and prays for a larger sum on the remaining causes of action, does not constitute a new cause of action, so as to affect the running of limitations. *Schmidt v. Brittain* (Civ. App.) 84 S. W. 677.

Rule stated as to amendments to a petition which will admit the bar of limitations. *Texas & N. O. R. Co. v. Clippenger*, 47 C. A. 510, 106 S. W. 155.

Certain facts held sufficient to charge defendant with notice of the filing of an amended petition, and thereby prevent the running of limitations against plaintiff's claim. *Taylor v. Silliman*, 49 C. A. 285, 108 S. W. 1011.

An amended complaint held good as against exceptions raising the defense of limitations. *Newsom & Johnston v. Sharman* (Civ. App.) 119 S. W. 912.

In an action for personal injuries, held, that limitations had not run. *Ft. Worth & R. G. Ry. Co. v. Robertson*, 55 C. A. 309, 121 S. W. 202.

In trespass to try title, a claim for damages resulting from the cutting of lumber on the land held barred by limitations. *Kirby v. Hayden* (Civ. App.) 125 S. W. 993. Plaintiff's action on a note held not barred because more than four years elapsed from the date of a new promise to pay to the time of filing plaintiff's amended original petition, where the promises was pleaded in his previous supplemental petition filed within four years after they were made. *Cotulla v. Urbahn* (Civ. App.) 126 S. W. 13.

The filing of a supplemental petition, instead of an amended petition, in an action on a note barred by limitation, held a mere irregularity, not preventing declaring on a new promise from stopping limitation from the filing of supplemental petition. *Cotulla v. Urbahn* (Sup.) 126 S. W. 1108; *Id.*, 104 T. 208, 135 S. W. 1159, 34 L. R. A. (N. S.) 345.

The statute only bars a cause of action set up by an amended petition, where the amendment sets up a new cause of action different from that alleged in the original petition. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

The running of limitations is stopped pending an action as to the cause of action alleged in the petition, but not as to an amended petition setting up a new cause of action and asking for a different or inconsistent remedy. *San Antonio & A. P. Ry. Co. v. Bracht* (Civ. App.) 157 S. W. 269.

46. Amendment restating original cause of action.—An amendment which set out more fully the nature of defendant's negligence held not to state a new cause of action, so as to be barred. *Texas & P. Ry. Co. v. Eberhart* (Civ. App.) 40 S. W. 1060.

Enlargement of the allegations as to specific injuries received by plaintiff in action for injuries held not affected by the statute. *The Oriental v. Barclay*, 16 C. A. 193, 41 S. W. 117.

Amendment to complaint held not to set up a new cause of action, so as to allow the running of the statute. *Sherman Oil & Cotton Co. v. Stewart*, 17 C. A. 59, 42 S. W. 241.

An amended petition, by which several plaintiffs were omitted, held not to constitute a new action, which would invoke the statute. *Triplett v. Morris*, 18 C. A. 50, 44 S. W. 684.

An amended petition alleging negligence in defendant's foreman and in the machinery generally does not state a new cause of action, though the original petition confined the negligence to a portion of the machinery. *Caswell v. Hopson* (Civ. App.) 47 S. W. 54.

Where an action had been begun before limitations had expired, an amended petition setting up facts for the first time after limitations had expired held not to state a new cause of action. *Orange Mill Supply Co. v. Goodman* (Civ. App.) 56 S. W. 700.

It was not error to hold that plea of limitation was not available against a cause of action in amended petition; the original petition not being in evidence, and the date of filing the amended petition not being shown. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.) 59 S. W. 626.

Where an amended petition only amplifies a cause of action set up in the original petition, and the original petition was filed within period of limitation, limitations should not be regarded as having run against the action. *Id.*

Amendment of complaint held not to change the cause of action, so that limitations would run between the filing of the petition and the amended petition. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

Where a cross-bill to recover on the bond of a claimant in an action to try the right of property is filed within four years after the claimant abandoned his claim to the property, it is in time, though the bill is amended after the period of limitations has run by alleging the manner of his failure to establish his right. *St. Louis Type Foundry v. Taylor*, 27 C. A. 349, 65 S. W. 677.

In an action for personal injuries, an amended petition held not to state a new cause of action. *Gulf, B. & K. C. Ry. Co. v. O'Neill*, 32 C. A. 411, 74 S. W. 960.

Amendment in action on account held not to state new cause of action, so as to warrant sustaining demurrer based on limitations. *Burton-Lingo Co. v. Beyer*, 34 C. A. 276, 78 S. W. 248.

An action held not to have been commenced as to certain parties plaintiff at the time of an amendment to the petition, causing it to allege that another plaintiff sued as trustee for them. *Ferguson v. Morrison* (Civ. App.) 81 S. W. 1240.

Amendment of petition to show new ground of negligence held not a statement of new cause of action, so as to bar recovery under the statute. *Johnson v. Texas Cent. R. Co.*, 42 C. A. 604, 93 S. W. 433.

The correction of a clerical error in a petition on account held not to create a new action within the statute. *Borden v. Le Tulle Mercantile Co.* (Civ. App.) 99 S. W. 128.

An original petition in a sequestration suit filed within the period limited by the statute and an amended petition filed after that period held to state the same cause of action. *Parlin & Orendorff Co. v. Glover*, 45 C. A. 93, 99 S. W. 592.

An amended petition held not to set up a new cause of action. *Hitson v. Hurt*, 45 C. A. 360, 101 S. W. 292.

An amended petition in an action for injuries to a passenger held not to state a new cause of action. *Texas & N. O. R. Co. v. Clippenger*, 47 C. A. 510, 106 S. W. 155.

A subsequent amended petition held not to state a new cause of action from that set forth in the first amended petition. *Sexton Rice & Irrigation Co. v. Sexton*, 48 C. A. 190, 106 S. W. 728.

Amendment of petition held not to change the cause of action as respects limitations. *Gulf, C. & S. F. Ry. Co. v. Overton* (Civ. App.) 107 S. W. 71.

Amended petitions in an action against railway companies for damages sustained by contractors through being delayed in commencing work held not to state new causes of action. *El Paso & S. W. R. Co. v. Harris & Liebman* (Civ. App.) 110 S. W. 145.

An amendment to a petition which sets up no new cause of action, but simply varies or expands the allegations in support of the cause of action stated, held to relate back to the commencement of the action, and the running of limitations is arrested at that point. *Texas & N. O. R. Co. v. McDonald*, 56 C. A. 34, 120 S. W. 494.

The second amended petition in an action for an architect's services held not to allege a new cause of action. *Green v. Loftus* (Civ. App.) 132 S. W. 502.

An amended petition held not to state a new cause of action. *Goodwin v. Simpson* (Civ. App.) 136 S. W. 1190.

An amendment held not to render the petition subject to the two-year limitation, by changing the cause of action from one for breach of contract to one for damages for fraud, since it was made to cure a supposed defect, and did not allege a new cause of action. *Gilliland v. Ellison*, 137 S. W. 168.

Amended petition in an action on a note held to state no new cause of action. *Schauer v. Von Schauer* (Civ. App.) 138 S. W. 145.

An amended petition held to be a continuance of an original action, begun before the running of the statute, so that the right was not barred. *Jones v. Thompson* (Civ. App.) 138 S. W. 623.

Stockholder's action against other stockholders held not barred by the two-year statute. *Kingsbury v. Phillips* (Civ. App.) 142 S. W. 73.

Amended and supplemental pleadings held not to set out a new cause of action. *Rotan Grocery Co. v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 142 S. W. 623.

An amended petition supplying a fatal defect in the original petition, was not barred, though filed more than two years after the cause of action accrued. *Western Union Telegraph Co. v. Smith* (Civ. App.) 146 S. W. 332.

Amended petitions in the county court on appeal from a justice's judgment held not to set up a new cause of action. *Galveston, H. & S. A. Ry. Co. v. Affleck* (Civ. App.) 147 S. W. 288.

In an action against a railroad company for negligent failure to furnish cars, an amendment held not to state a new cause of action. *Ft. Worth & D. C. Ry. Co. v. Matarador Land & Cattle Co.* (Civ. App.) 150 S. W. 461.

In action for railway employe's death, amendment of petition charging negligence of his foreman so as to allege negligence on the part of the engineer of the train by which he was struck held not to introduce a new cause of action. *Texas & P. Ry. Co. v. Myers* (Civ. App.) 151 S. W. 337.

An amendment of a defective cause of action, bad on general demurrer, by amplifying it so as to state a cause of action, does not permit the bar of limitations if the cause was not barred when the first petition was filed. *Eastern Ry. Co. of New Mexico v. Ellis* (Civ. App.) 153 S. W. 701.

**47. Amendment introducing new cause of action.**—A petition to recover a debt due from an illegally incorporated company from the stockholders, as partners, states a cause of action *ex contractu*; and an amended petition, alleging that defendants are liable because they have withdrawn the assets of the company, states a cause of action *ex delicto*, and, being a distinct action, is barred if the limitation was completed between the filing of the original and amended petition. *American Salt Co. v. Heidenheimer*, 80 T. 344, 15 S. W. 1038, 26 Am. St. Rep. 743.

An amendment claiming an additional number of cattle sued for sets up a new cause of action. *Worsham v. Vignal*, 14 C. A. 324, 37 S. W. 17.

Where plaintiff by a supplemental petition asserts a different title to a piano which has been in the adverse possession of defendant, limitations run until the filing of the supplemental petition. *Estey v. Fisher* (Civ. App.) 44 S. W. 555.

An amendment setting up a demand for damages for failure to deliver all the goods contracted for in an action for money overpaid held a new cause of action, and is barred if the statute has run against the claim at the time of amendment. *Nelson v. Brenham Compress Oil & Mfg. Co.* (Civ. App.) 51 S. W. 514.

Amendment held to state a new cause of action, which did not prevent bar of limitation. *Cotton v. Rand*, 93 T. 7, 51 S. W. 838.

Amendment of petition, charging the facts alleged as an action *ex contractu*, to charge the same facts as a cause of action *ex delicto*, held improper, and not to sustain the action after limitations had barred an action for breach of contract. *Phoenix Lumber Co. v. Houston Water Co.* (Civ. App.) 59 S. W. 552.

Where an amendment to a petition alleging certain facts as ground for recovery on express contract, was filed after limitations expired, and alleged the same facts as ground for recovery for negligent failure to perform a duty imposed by implication of law, held that the amendment was improper and the action was barred. *Phoenix Lumber Co. v. Houston Water Co.*, 94 T. 456, 61 S. W. 707.

Where complaint to compel a guardian to file a final account was amended to ask the setting aside of a judgment of discharge, the original complaint does not prevent the bar of limitation in favor of the judgment. *Stewart v. Robbins*, 27 C. A. 138, 65 S. W. 899.

An action on an express contract set forth in an amended petition filed more than

two years after the commencement of an action on an implied contract is barred by the two years' statute of limitations. *Booth v. Houston Packing Co.* (Civ. App.) 105 S. W. 46.

Where an action for death by the wife and children of decedent was begun within six months after the death, and an amended petition, filed more than two years after the death, alleged for the first time the existence of his mother, and demanded a recovery for her benefit, limitations barred the right of the mother, but not the right of his wife and children. *Paris & G. N. Ry. Co. v. Robinson* (Civ. App.) 127 S. W. 294.

Where an original petition charged that defendant willfully sold plaintiff a glandered horse, an amendment alleging that defendant had reason to believe that the horse was glandered, or could have known it, filed after limitations had run, stated a new cause of action. *Griffin v. Allison* (Civ. App.) 138 S. W. 1068.

Where the original petition charged a carrier with negligently failing on request of a shipper to divert a car, an amended petition, declaring on a verbal contract giving the shipper the right to sell his goods in transit and on notice to have them diverted and delivered to the buyer, stated a new cause of action within the statute. *San Antonio & A. P. R. Co. v. Bracht* (Civ. App.) 157 S. W. 269.

**48. Amendment affecting form of action or relief.**—Limitations continue to run, as against items in an amended complaint, up to the time the amendment is filed. *Santleben v. Froboese*, 17 C. A. 626, 43 S. W. 571.

Where a justice did not have jurisdiction of an action on a note, and an amended petition was filed bringing the claim within his jurisdiction, but more than four years had elapsed from the time the note became due till the filing of such amendment, the claim is barred by limitations. *Ball v. Hagy* (Civ. App.) 54 S. W. 915.

Plaintiff having filed his petition for injuries within the time limited, limitations did not prevent the subsequent filing of amendments thereto merely enlarging the relief sought. *International & G. N. R. Co. v. Dalwigh* (Civ. App.) 56 S. W. 136.

Where a case relied on is not changed, the cause of action is not changed by an amendment which claims merely a different measure of damages, so as to bar the action. *Scanlon v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 86 S. W. 930.

Fact that petition in action on liquor dealer's bond alleged making of five unlawful sales to minor held not to deprive county court of jurisdiction, so that a cotention that an amendment more than two years thereafter showed on its face that the action was barred was untenable. *McLaury v. Watelsky*, 39 C. A. 394, 87 S. W. 1045.

An amended petition, which merely sought a greater amount of damages for the same right of action, did not set up a new cause of action. *D. Sullivan & Co. v. Ramsey* (Civ. App.) 155 S. W. 580.

**49. Defenses in general.**—See, also, Art. 5706.

Matters of defense, though pleaded in the form of a set-off or counterclaim, may be set up at any time before trial, without being subject to the running of limitations during the pendency of the action. *Nelson v. San Antonio Traction Co.* (Civ. App.) 142 S. W. 146.

**50. Set-offs and counterclaims.**—Pleading set-off or counterclaim, see note under Art. 5706.

An amended cross-plea filed after the period of limitation has expired as to the matter set up in it held barred by the statute, though the original cross-complaint was filed within the statutory period as to such matter. *Ft. Smith v. Fairbanks, Morse & Co.*, 101 T. 24, 102 S. W. 908.

The rule that limitation does not affect defenses which are properly applicable to the plaintiff's cause of action does not apply to cross-actions which are not pleaded as a defense. *Id.*

In an action upon a contract, where defendants' claims against plaintiff are unliquidated, they did not extinguish pro tanto the claim sued on; and hence limitations continued to run against such claims, despite the action, until pleaded. *Nelson v. San Antonio Traction Co.* (Civ. App.) 142 S. W. 146.

**51. New action after nonsuit or dismissal.**—When the plaintiff in a suit takes a voluntary nonsuit, the running of the statute is not interrupted. *Beissner v. Texas Express Co.*, 1 App. C. C. § 806.

When, after a nonsuit, the case is reinstated, it stands as did the original suit, and limitation is not affected by the nonsuit. *Cotton v. Lyter*, 81 T. 10, 16 S. W. 553.

In an action of trespass to try title, defended on the ground that limitations had run, evidence of a former action which was dismissed, held inadmissible for plaintiffs since the former action did not prevent the running of limitations. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

**52. Presentation of claim against estate of insolvent or bankrupt.**—Where claims of creditors of assigning debtors were filed with the assignees within the statutory time, no limitation could thereafter accrue while the estate was in course of settlement. *McCord v. Sprinkel*, 105 T. 150, 141 S. W. 945, 145 S. W. 903.

A receiver of a railroad company held to have saved claims of creditors against a plea of limitations by allowing and auditing them. *St. Louis Union Trust Co. v. Missouri Pac. Ry. Co.* (Civ. App.) 146 S. W. 346.

Allowance and approval of claims in receivership proceedings prevents the running of the statute, and a subsequent motion of creditors for payment did not constitute commencement of the action. *St. Louis Union Trust Co. v. St. Louis & S. F. Ry. Co.* (Civ. App.) 146 S. W. 348.

### III. OPERATION AND EFFECT OF BAR BY LIMITATION

**53. Nature and extent of bar.**—When the interest of one or more tenants in common is barred by limitation, the plaintiff against who limitation does not run can only recover as to that not barred by limitation. *Johnson v. Schumacher*, 72 T. 334, 12 S. W. 207.



Defense of deficiency in acreage in action for price is not barred by the fact that limitations have run against prosecution of claim for deficiency. *Hynes v. Packard* (Civ. App.) 44 S. W. 548.

Where a note is merged in a judgment, the ownership of the note and the running of limitations against the same are immaterial issues in an action based on a claim of subrogation to the lien of the judgment. *Brown v. Rash*, 40 C. A. 203, 89 S. W. 438.

A purchaser of land, perfecting his title under the statute of limitations, cannot urge the invalidity of the title of his vendor as a defense to an action for the purchase price. *Overby v. Johnston*, 42 C. A. 348, 94 S. W. 131.

Plaintiff held entitled to recover for services covering an entire month, though the sum due before the sixth day of the month was barred by limitation. *O'Connell v. Storey* (Civ. App.) 105 S. W. 1174.

Limitations do not bar a defense against a legal action brought by another, nor preclude the introduction of competent evidence to establish the defense pleaded. *Snow v. Gallup*, 57 C. A. 572, 123 S. W. 222.

A suit to restrain a private nuisance cannot be brought after the time limited by statute. *Simon v. Nance* (Civ. App.) 142 S. W. 661.

The running of limitations will not give any validity to a void judgment for delinquent taxes. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**54. Bar of debt as affecting security.**—See notes under Arts. 5693, 5694.

A mortgage is so completely an incident of the debt which it is given to secure, that if the debt is barred by the statute of limitations, the creditor is left without remedy upon his mortgage, nor can he dispossess the mortgagor of land by suit after the bar is complete. *Blackwell v. Barnett*, 52 T. 326, citing *Duty v. Graham*, 12 T. 437, 62 Am. Dec. 534; *Rose v. Mitchell*, 28 T. 150; *Perkins v. Sterne*, 23 T. 561, 76 Am. Dec. 72.

When a note secured by a mortgage becoming barred is renewed, it operates as a renewal of the mortgage between the original parties thereto; but does not affect the rights of third parties to the property accruing after the execution of the mortgage, but prior to the renewal, and when the original debt was barred by the statute of limitations. *Cason v. Chambers*, 62 T. 305; *Hodges v. Taylor*, 57 T. 196; *Riggs v. Hanrick*, 59 T. 570; *Ross v. Mitchell*, 28 T. 154; *Blackwell v. Barnett*, 52 T. 326.

The lien given by either cannot be enforced through a judgment after the debt it is given to secure is barred; but the statute of limitations operates only upon the remedy by suits or actions in courts, and does not deprive the creditor of a remedy when he had provided by contract to enforce through a trust deed the payment of his claim, without the assistance of court. A debtor who admits the justice of an unpaid debt secured by his trust deed cannot by injunction restrain the sale of the trust property for its payment. *Goldfrank v. Young*, 64 T. 432, citing *Jordan v. Peak*, 38 T. 429; *Stewart v. Mackey*, 16 T. 57, 67 Am. Dec. 609; *Chipman v. McKinney*, 41 T. 78; *Wood v. Welder*, 42 T. 409; *Grigsby v. Peak*, 57 T. 147; *Sprague v. Ireland*, 36 T. 654; *Blackwell v. Barnett*, 52 T. 331; *Hemphill v. Watson*, 60 T. 679.

The fact that payee of an obligation presented it as a claim against deceased principal's estate, and was defeated by limitations, does not preclude a recovery against the sureties on the obligation. *Willis v. Chowning*, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 342.

A pledgee may enforce payment of a debt by sale of collaterals, though such debt is barred. *Tomblor v. Palestine Ice Co.*, 17 C. A. 596, 43 S. W. 896.

Limitations against an action for a personal judgment against a distributee do not apply to an action to foreclose a lien on distributed land. *Devine v. United States Mortg. Co. of Scotland* (Civ. App.) 48 S. W. 585.

Suit can be maintained by vendor of land against the grantee's vendee, who assumes, but fails, to pay the vendor's lien notes, even though the notes are barred by limitation. *Smith v. Cottingham*, 20 C. A. 303, 49 S. W. 145.

The rule that property held as security may be retained and applied, though limitation has run against the debt, held inapplicable to a partner, holding a note against his copartner, securing possession, on his partner's death, of his interest in the firm, on which he was to have a lien. *Gresham v. Harcourt*, 93 T. 149, 53 S. W. 1019.

An equitable lien existing as incident to a debt ceases to exist on the extinguishment of the debt by limitations. *Houston Ice & Brewing Co. v. Stratton*, 40 C. A. 378, 89 S. W. 1111.

Though the remedy of a principal against his debtor is barred by limitations, the remedy of the principal against guarantors of the debt is not barred, where the guaranty itself is not barred. *Western Casket Co. v. Estrada* (Civ. App.) 116 S. W. 113.

A constable's bond being merely a collateral security for performance of his duty, the two-year limitation, which bars an action for breach of duty, bars an action on the bond. *Phillips v. Hail* (Civ. App.) 118 S. W. 190.

A beneficiary under a policy assigned by the insured in payment of his debt held not entitled to plead limitations against the debt as a defense to the creditor's right to recover the debt, interest, etc., out of the proceeds of the insurance on the insured's death. *Harde v. Germania Life Ins. Co.* (Civ. App.) 153 S. W. 666.

**55. Actions and other remedies barred.**—A bill of review to set aside an allowance by a guardian, approved by the county court, held not barred by limitations. *De Cordova v. Rodgers* (Civ. App.) 67 S. W. 1042.

The fact that a private citizen's suit for damages from the flooding of his land by city waterworks has been barred will not prevent his securing an abatement of a nuisance on an amended petition. *City of Ennis v. Gilder*, 32 C. A. 351, 74 S. W. 585.

That any cause of action on vendor's express promise to make good shortage in amount of land conveyed was barred held not to bar purchaser's action as for money had and received for land falsely represented to exist. *Yates v. Buttrill* (Civ. App.) 149 S. W. 347.

**56. Persons to whom bar is available.**—Persons who may rely on limitation, see ante, § 4.

Limitation runs in favor of a second mortgagee who purchased the chattels under a foreclosure, against a prior mortgagee, although the debtor waived his right to plead limitation. *Dunn v. Smith* (Civ. App.) 23 S. W. 449.

A subsequent purchaser of mortgaged land, whether under a voluntary or forced sale, may plead limitation against the mortgage debt, though the debtor waives it and renews the debt. *Levy v. Williams*, 20 C. A. 651, 49 S. W. 930.

Holder of vendor's lien note held not entitled to plead limitations to defeat lien of similar note, in hands of another party, carrying equal lien on same property. *Columbia Ave. Saving Fund, Safe-Deposit, Title & Trust Co. v. Strawn*, 93 T. 48, 53 S. W. 342.

An agreement to extend the time of paying a note secured by a mortgage held enforceable against a subsequent purchaser of the mortgaged property, who assumed the mortgage debt; and hence he could not set up limitations against the debt until four years from the date to which payment was extended. *Shaw v. Western Land & Live-Stock Co.* (Civ. App.) 62 S. W. 941.

In an action to recover a bank deposit, limitations held unavailable either to the bank or to plaintiff as against a third party claimant. *McCormick v. National Bank of Commerce* (Civ. App.) 106 S. W. 747.

A grantee is entitled to the benefit of an extension of time of payment of a mortgage on the land conveyed, made to the grantor, though the grantee was not a party to the contract therefor. *Kelsey v. Collins*, 49 C. A. 230, 108 S. W. 793.

The fact that limitations barred an action by a debtor for the misapplication of money collected by the creditor held not to prevent him from pleading the collection in defense as a payment in an action by the creditor for the debt. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

A regular administrator must plead the statute against any barred claim, and he may not pay a claim that is barred by limitations. *Jackson v. Stone* (Civ. App.) 155 S. W. 960.

57. **Persons barred.**—Limitations as against state or municipality, see Art. 5683, and ante, §§ 2, 15. Persons under disabilities, see Arts. 5684, 5708.

In trespass to try title to lots bought at a tax sale, brought against defendants, who held them under claim of right and pleaded the ten-year statute, it was held that if there had been no tax sale, and suit had been instituted by the real owner at the time it was, the right of action of the purchaser at the tax sale, or those holding under him, was barred by the statute if the real owner's right of action would have been barred. *Jordan v. Higgins*, 63 T. 150.

Where a suit by a trustee is barred, the right of the cestui que trust to sue is also barred, though he was under a disability at the time the cause of action arose. *Wiess v. Goodhue*, 98 T. 274, 83 S. W. 178.

Heirs of a deceased wife, held barred by limitations from suing the sureties on the community bond of the husband. *Belt v. Cetti* (Civ. App.) 91 S. W. 1098.

Limitation runs against a married woman's right to recover a community homestead where the husband sells without her joining in the deed and against her consent and the vendee goes into possession. *Sanders v. Word*, 50 C. A. 294, 110 S. W. 205.

Where in 1866 the surviving husband conveyed land constituting community property, and it passed by various conveyances to defendants, an action by heirs of the deceased wife in 1908, based upon the title which descended to them under the statute, was not barred under the doctrine of stale demand. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

58. **Waiver of bar.**—Agreements shortening period of limitation, see Art. 5713. Acknowledgment or new promise, see Art. 5705.

A void deed of trust executed to secure payment of a note after the same had become barred by limitations held ineffective to constitute a waiver of the defense of limitations. *Kalteyer v. Mitchell* (Civ. App.) 110 S. W. 462.

A maker of a note secured by vendor's lien may in a suit to foreclose the lien waive the defense of limitation. *Zeno v. Adoue*, 54 C. A. 36, 117 S. W. 1039.

The right to plead the statute is a legal right and can only be waived by the person for whose protection it is given. *Jackson v. Stone* (Civ. App.) 155 S. W. 960.

## TITLE 88

### LOCAL OPTION

[See Injunctions, Penal Code, Code of Criminal Procedure. Also Taxation.]

<p>Art. 5715. Order for election. 5716. What not prohibited. 5717. Where voting to take place. 5718. Notice. 5719. Form of ballot, etc. 5720. How election to be held. 5721. Session for counting votes, when. 5722. Result to be declared. 5723. Order when against prohibition.</p>	<p>Art. 5724. Second election, when. 5725. Order on second election. 5726. Second election in subdivisions. 5727. Penalty, etc. 5728. Election, how contested. 5729. Refunding license tax. 5730. District judge to give in charge to grand jury, what.</p>
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**Article 5715. [3384] Commissioners' courts may order elections.**  
—The commissioners' court of each county in the state, whenever they deem it expedient, may order an election to be held by the qualified voters of said county, or of any commissioner's or justice's precinct, or school district, or any two or more of any such political subdivisions of a county, as may be designated by the commissioners' court of said county, to determine whether or not the sale of intoxicating liquors shall be prohibited in such county, or commissioner's or justice's precinct, or school district, or any two or more of any such political subdivisions of such county, or in any town or city; provided, it shall be the duty of said commissioners' court to order the election as aforesaid whenever petitioned so to do by as many as two hundred and fifty voters in any county, or fifty voters in any other political subdivision of the county or school district, as shall be designated by said court, or in any city or town, as the case may be; provided, that if the precinct or precincts designated embrace within the limits an incorporated town or city, then such election shall only be ordered when the petition for the same is signed by qualified voters, not less than one-tenth in number of the total vote cast for governor at the next preceding general election in such incorporated town or city; and, in case an election is asked for a subdivision of said county, composed of two or more complete commissioners' or justices' precincts, or school districts, such petition shall describe such subdivision by metes and bounds, as well as by the proper numbers of such precincts, or school districts; and said petition and the description of such subdivision shall be recorded in full in the minutes of the commissioners' court, and such description shall be embraced in the notice given for such election; provided, that where a school district, city or town, may be composed in part of two or more subdivisions of the county, named hereinbefore, the right to order and hold an election in such school district, city or town, shall not be denied; and provided, further, that no city or town shall be divided in holding a local option election for any of the other subdivisions named herein; nor shall any school district which has adopted local option be divided in a subsequent election held for any other of such subdivision covering a part of the territory of such school district. [Acts 1887, p. 96. Amend. 1893, p. 48. Amended Acts 1897, p. 235.]

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| <p>1. Validity of local option laws.<br/>2. Relation to other laws.<br/>3. Where local option elections may be held.<br/>4. Authority of court to order elections—<br/>    In general.<br/>5. — Time for exercising authority.<br/>6. — Designation of district.<br/>7. Petition for election—In general.<br/>8. — Description of territory.<br/>9. — Number of signers.<br/>10. — Recording petition.</p> | <p>11. Order for election—In general.<br/>12. — Time of making order.<br/>13. — Description of territory.<br/>14. — Recital of statutory exceptions.<br/>15. — Date of election, voting places and election officers.<br/>16. — Recording and signing minutes.<br/>17. Change of boundaries before election.<br/>18. Qualified voters.<br/>19. Mandamus to secure election.<br/>20. Local option elections for adoption of stock laws.</p> |
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See *Henry v. State*, 61 Cr. R. 187, 135 S. W. 571; *Green v. Same*, 62 Cr. R. 345, 137 S. W. 126; *State v. Savage*, 105 T. 467, 151 S. W. 530.

1. **Validity of local option laws.**—See, also, notes under Arts. 5716, 5728.

As to the validity of this act, see *Kimberly v. Morris*, 31 S. W. 808, 809, 87 T. 637.

The statute provides for submitting the question of prohibition to the voters without restriction, and conforms to the constitutional provision (article 16, § 20), although the provision in Art. 5716 as to the sale of wines for sacramental purposes be held invalid. *Bowman v. State*, 38 Cr. R. 14, 40 S. W. 796.

The legislature had the right to do exactly what was done, in passing the act known as the local option law, both under the constitution of Texas and that of the United States. *Rippy v. State*, 44 Cr. R. 72, 68 S. W. 688; *Id.* (Cr. App.) 73 S. W. 15.

Local option law held not in conflict with Const. art. 16, § 20. *Ray v. State*, 47 Cr. R. 407, 83 S. W. 1121.

The absolute prohibition of the sale of intoxicating liquors within portions of the state held a lawful exercise of the police power of the state, and not to deprive one of property without due course of law in violation of the federal and state constitutions. *Edgar v. McDonald* (Civ. App.) 106 S. W. 1135.

Where local option laws and laws in aid thereof apply equally to all in the territory where adopted, they do not deprive any citizen of his equal rights. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

2. **Relation to other laws.**—The Terrell election law (Title 49) does not purpose or attempt in any of its provisions to change the general election law with reference to ordering the election for the various things or purposes involved in the general election law prior to the time of adopting the Terrell law. *Ex parte Keith*, 47 Cr. R. 233, 83 S. W. 684.

The disorderly house statute is a general law, and applies to all parts of the state, whether local option is in force or not. *Layton v. State*, 61 Cr. R. 507, 135 S. W. 557.

The prohibition law was not repealed by the vagrancy act subsequently enacted. *Snell v. State* (Cr. App.) 150 S. W. 615.

3. **Where local option elections may be held.**—See, also, notes under Art. 5724, 5726.

This statute authorizes the holding of local option election in cities and towns, though they are not specifically named in the first part of the act. *Sweeney v. Webb*, 33 C. A. 324, 76 S. W. 769.

It was competent for the commissioners' court to order a local option election in a county, irrespective of the status of some of the precincts as to local option. *Cantwell v. State*, 47 Cr. R. 511, 85 S. W. 19.

Grant by legislature of special charter to city, authorizing it to license saloons, held not to preclude adoption of local option by the county in which the city is located. *Ex parte Elliott*, 49 Cr. R. 108, 91 S. W. 570.

4. **Authority of court to order elections.**—In general.—The first clause of this article directly and expressly confers upon the commissioners' court the authority on its own motion to order a local option election. This power is not limited by the next clause which imposes an imperative duty to order an election when proper petition is presented. The proviso is intended to apply only when citizens of the subdivision are seeking to avail themselves of the right given them by the preceding clause to compel the court to order the election. It was inserted between two other clauses relating to the ordering of such elections upon petition and not in connection with the clause empowering the court to order elections on its own motion. The purpose of the proviso is indicated not only by the structure of the article, but also by the language used. The proviso following the clause which requires the court to order an election, if proper petition is presented, must be construed as applying to that clause and not to a more remote clause containing no reference to an election upon petition. The commissioners' court has authority on its own motion to order a local option election for a subdivision embracing seven justice precincts, and it is immaterial whether the petition was signed by the requisite number of voters or whether it was recorded or whether the order conformed to the petition. The order being in due form is conclusive and the validity of the election does not depend upon the sufficiency of the petition or upon the regularity of the proceedings antedating the order. *Williams v. Davidson* (Civ. App.) 70 S. W. 988.

The commissioners' court must have known when they ordered the election of the proviso in this article under which they acted. The commissioners' precinct in which the election was ordered embraced a part of a justice precinct including about one-fourth of the town of Quitman, which was incorporated by special act of the legislature, but no officers had been elected in the town for more than thirty years, and it has failed to perform any corporate act for that length of time. It will be presumed that the commissioners' court acted properly in ordering the election. *Cofield v. Britton*, 50 C. A. 208, 109 S. W. 493, 497.

5. **Time for exercising authority.**—See "Order for election—Time for making order," post.

6. **Designation of district.**—The discretionary power which had theretofore existed in the commissioners' court to designate boundaries within which local option elections could be held, is taken away, and is now limited to designation of the particular one or more of the political subdivisions of the county theretofore in existence, so that the court cannot arbitrarily select and fix a territory, and ignore and segregate the political divisions mentioned in the statute. *Oxford v. Frank*, 30 C. A. 343, 70 S. W. 427, 428.

A commissioners' court has no authority to combine political subdivisions of the county for the purpose of a local option election. *Ex parte Mitchell* (Cr. App.) 79 S. W. 658.

An election precinct is not such a subdivision of a county as that the commissioner's court can designate it for holding a local option election. Election precincts are not of a permanent character, but are subject to annual changes, nor are they political subdivisions of a county such as justice precincts and towns and cities named in the constitution. *Efird v. State*, 46 Cr. R. 582, 80 S. W. 530.

The invalidity of the provisions for the ordering of an election in two or more subdivisions of a county held not to affect the validity of an election duly authorized by other provisions of the constitution and statute, not dependent on such invalid provisions. *Hoover v. Thomas*, 35 C. A. 535, 80 S. W. 859.

The commissioners' court cannot combine subdivisions of a county (for example, two commissioners' precincts) for the purpose of ordering a local option election therein. *Commissioners' Court of Nolan County v. Beall*, 98 T. 104, 81 S. W. 527.

The commissioners' court has no authority to combine school districts in a justice precinct for the purpose of holding a local option election therein. *Anderson v. State*, 49 Cr. R. 195, 92 S. W. 39.

**7. Petition for election—In general.**—The requisites of the petition not having been prescribed, it is sufficient when it expresses in an intelligible manner the desire of the petitioners that an election to determine the prohibition of the sale of intoxicating liquors be held within the limits therein defined. *Ex parte Lynn*, 19 App. 293; *Lipari v. State*, 19 App. 431.

The word "citizen" used in a petition is equivalent to the word "voter." *Steele v. State*, 19 App. 425.

An order of the commissioners' court declaring local option in force held not void because the petition was defective. *Cantwell v. State*, 47 Cr. R. 521, 85 S. W. 18.

In a prosecution for a violation of the local option law, held not error to admit an order of the commissioners' court for the election, where it was shown that the petition attached was made up of a number of petitions originally under separate heads. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

**8. — Description of territory.**—The petition need not set out the boundaries of the precinct. *Nichols v. State*, 37 Cr. R. 546, 40 S. W. 268.

Under this article it is only necessary to set out the territory by metes and bounds when there are two or more of these arbitrary subdivisions mentioned in the petition for local option. *Holden v. State*, 41 Cr. R. 411, 55 S. W. 337.

Mere discrepancies in the field notes in a petition for a local option election, in an order therefor, or in an order declaring its result, will not invalidate it, if the exact boundaries can be ascertained with reasonable and legal certainty. *Goble v. State* (Cr. App.) 60 S. W. 966.

**9. — Number of signers.**—Where defendant applied for a writ of habeas corpus to secure his release from imprisonment for violating the local option law on the ground that the election district included an incorporated town, the writ held properly denied where the included town was incorporated only for school purposes. The law only requires one-tenth of the voters of the entire election district embracing an incorporated city or town to sign the petition, and not one-tenth of the voters of such city or town. *Ex parte Douthitt* (Cr. App.) 63 S. W. 131.

The provision that where an incorporated town or city is embraced the petition must be signed by one-tenth of the voters therein only applies where the election is called to determine whether local option shall prevail in the precinct or precincts in which a municipal corporation is located, and not where the election is called to determine whether local option shall prevail throughout the county. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 457.

**10. — Recording petition.**—It is not necessary that the citizens' petition for a local option election be recorded, as the commissioners' court may order the election of its own motion. *McGovern v. State*, 49 Cr. R. 35, 90 S. W. 502.

**11. Order for election—In general.**—An order of the commissioners' court for a local option election is not objectionable, though it does not say in terms that the election is to be held by the "qualified voters" of the county. *Thurmond v. State*, 46 Cr. R. 162, 79 S. W. 316.

An order of the commissioners' court for local option election is not objectionable, because submitting the question "whether or not" local option shall be adopted, though the language of the law is "whether" it shall be adopted. *Id.*

An order for an election to determine whether the sale of liquor should be prohibited held a sufficient compliance with this statute, requiring an order for an election to determine whether or not such sale should be prohibited. *Wade v. State*, 52 Cr. R. 608, 108 S. W. 376, 377.

An order submitting the question of prohibition to popular vote held sufficient, though it used the word "whether," instead of "whether or not." *Wade v. State*, 53 Cr. R. 184, 109 S. W. 191; *Id.*, 53 Cr. R. 299, 109 S. W. 192.

**12. — Time of making order.**—An order for a local option election reciting that it was made February 14, 1898, shows that it was made at a regular term of court. *Loveless v. State* (Cr. App.) 49 S. W. 601.

Commissioners' court can order a local option election at either a special or regular session. *Abbott v. State*, 42 Cr. R. 8, 57 S. W. 98; *Koch v. State*, 48 Cr. R. 306, 88 S. W. 809.

The commissioners' court held authorized to make an order at special term for a local option election. *Hanna v. State*, 48 Cr. R. 269, 87 S. W. 702.

**13. — Description of territory.**—The petition, notices, and order in a local option election for a justice precinct need not set out the boundaries of the precinct. *Nichols v. State*, 37 Cr. R. 546, 40 S. W. 268.

If the boundary of a local option territory can be accurately traced according to the field notes in the petition for an election, and orders therefor and declaring its result, variances in the calls are immaterial. *Goble v. State* (Cr. App.) 60 S. W. 966.

The part of this article which requires a subdivision to be described by metes and bounds applies only where the election is ordered on petition. *Williams v. Davidson* (Civ. App.) 70 S. W. 988.

Orders of the courts fixing the limits for a local option district held not at variance, so as to invalidate a prosecution for a sale of liquor within such limits. *Efird v. State*, 44 Cr. R. 447, 71 S. W. 957.

The order for a local option election need not give the metes and bounds of the precinct. *Fitze v. State* (Cr. App.) 85 S. W. 1156.

An order for a local option election and the notices therefor held to sufficiently describe the territory. *Hill v. Howth* (Civ. App.) 112 S. W. 707.

A local option election was not rendered void for any deficiency in describing the boundaries of a commissioners' precinct, if no one could have been deceived by such discrepancy. *Stewart v. State* (Cr. App.) 153 S. W. 1150.

14. — **Recital of statutory exceptions.**—Order authorizing election on issue of prohibition need not contain the statutory exceptions as to sales for medicinal and sacramental purposes. *Shields v. State*, 38 Cr. R. 252, 42 S. W. 398.

The order for a local option election need not contain the exceptions in favor of the sale of wine and liquor for certain purposes. *Frickie v. State*, 39 Cr. R. 254, 45 S. W. 810.

An order for the holding of a local option election need not negative the exceptions. *Green v. State*, 62 Cr. R. 345, 137 S. W. 126.

15. — **Date of election, voting places and election officers.**—See notes under Art. 5717.

16. — **Recording and signing minutes.**—Where an order for a local option election was duly passed, and the pencil draft was signed by the county judge and duly entered, that the minutes were not signed until after the election did not invalidate it. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

An order for a local option election, appearing in the minutes of the commissioners' court, held valid, though the minutes were not signed. *Davidson v. State*, 44 Cr. R. 586, 73 S. W. 808.

Where the clerk has recorded the orders ordering and declaring the result of a local option election in vacation, the court may merely approve the minutes without recording the orders again. *Ex parte Walton*, 45 Cr. R. 74, 74 S. W. 314.

17. **Change of boundaries before election.**—Local option held to have been adopted in a certain commissioner's district, though new territory was added to the precinct on the day of election, it not appearing that the vote was thereby affected. *Ex parte Curlee*, 51 Cr. R. 614, 103 S. W. 896.

A change in the boundary of a precinct, made after the calling of a local option election and before such election, held not to render the election void. *Hill v. Howth* (Civ. App.) 112 S. W. 707.

18. **Qualified voters.**—See, also, Title 49, Chapter 4.

A letter written by a county judge to managers of a local option election, instructing them that certain voters were disqualified under constitutional amendment of 1902, held unobjectionable. *Ex parte Wood* (Cr. App.) 81 S. W. 529.

Gen. Laws 1903, p. 63, ch. 45, § 1, provides that time of payment of all county and state tax in certain counties for year 1902 shall be extended to October 1, 1903. On May 30, 1903, a local option election was held in one of these counties. The voters were not relieved of the necessity of paying their poll tax at such election. *Black v. Pool*, 97 T. 333, 78 S. W. 923.

In a local option election, a person is not a qualified voter who has not paid his poll tax and obtained his poll tax receipt. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

19. **Mandamus to secure election.**—Evidence held insufficient to entitle petitioners to mandamus compelling the commissioners' court to order a local option election. *Adams v. Kelley*, 17 C. A. 479, 44 S. W. 529.

Article 16, § 20, of the constitution is not self-executing, and a mandamus will not lie to compel the commissioners' court to order a local option election in the absence of a legislative provision therefor. *Adams v. Kelley* (Civ. App.) 45 S. W. 859.

20. **Local option elections for adoption of stock laws.**—See Title 124, Chapter 7.

**Art. 5716. [3385] What not prohibited.**—The preceding article shall not be so construed to prohibit the sale of wines for sacramental purposes, nor alcoholic stimulants as medicines in cases of actual sickness, but such stimulant shall only be sold upon the written prescription of a regular practicing physician, dated and signed by him, and certified, on his honor, that he, the physician, has personally examined the applicant, naming him, and that he finds him actually sick and in need of the stimulant prescribed as medicine; provided, that a physician who does not follow the profession of medicine as his principal and usual calling shall not be authorized to give the prescription provided for in this article; and provided, further, that no person shall be permitted to sell more than once on the same prescription, nor shall any person be permitted to sell at all on the prescription of a physician not herein authorized to give it, nor on a prescription which is not dated, signed, and certified as above required; provided, that every person selling such stimulants upon the prescription herein provided for shall cancel such prescription by indorsing thereon the word "canceled," and file the same away. [Id. sec. 5. Amend. 1893, p. 48.]

Validity of statute.—See, also, notes under Art. 5715.

This article, it seems, is not invalid. *Id.*

The legislature may constitutionally provide for a vote to determine whether sales shall be prohibited except for sacramental and medicinal purposes instead of absolutely. *Bowman v. State*, 38 Cr. R. 14, 40 S. W. 796.

The local option law held not unconstitutional because it exempts from its operation wine used for sacramental and medicinal purposes. *Sparks v. State* (Cr. App.) 45 S. W. 493.

The provisions of the local option law, which excepts from the prohibition sales for medicinal and sacramental purposes, do not violate the constitution prohibiting the sale of intoxicating liquors. *McLain v. State*, 43 Cr. R. 213, 64 S. W. 865.

— **Who may question validity.**—The question as to the validity of the statute on the ground that it unconstitutionally discriminates between those who practice medicine as a principal calling and those who practice occasionally cannot be raised by one not engaged in the practice of medicine but seeking to enjoin interference with his rights as a retail liquor dealer. *Sweeney v. Webb*, 33 C. A. 324, 76 S. W. 767.

**Liability to license tax.**—Persons selling under this article not subject to license tax. *Rathburn v. State*, 31 S. W. 189, 88 T. 281.

**Art. 5717. [3386] Where voting to take place.**—When the commissioners' court, of their own motion, or upon the petition provided for in article 5715, shall order the election as herein provided for, it shall be the duty of said court to order such election to be held at the regular voting place or places within the proposed limits, upon a day not less than fifteen nor more than thirty days from the date of said order; and the order thus made shall express the object of such election, and shall be held to be prima facie evidence that all the provisions necessary to give it validity, or to clothe the court with jurisdiction to make it, have been fully complied with; provided, that if there is no regular voting place within the proposed limits of a subdivision less than a justice's or voting precinct, then the commissioners' court shall designate some suitable place within said subdivision, where said election shall be held, and said place shall be named in the notices of election, and said court will appoint such officers to hold such election as are now required to hold general elections. [Id. Amend. 1893, p. 48.]

**Date of election.**—It seems that an election for prohibition in a county and for prohibition in a precinct may be held on the same day. *Lipari v. State*, 19 App. 431.

Under the statute an election held less than 15 days from the entry of the order was void. *Yates v. State* (Cr. App.) 59 S. W. 275.

A local option election, not held on the date fixed therefor by the county commissioners' court, is void. *Id.*

An order of the commissioners' court approving in all things a petition for a local option election to be held on December 17th, and then directing the election for December 6th, is not objectionable as rendering the election day uncertain. *Thurmond v. State*, 46 Cr. R. 162, 79 S. W. 316.

The commissioners' court, after making an order for a local option election on the petition of voters, held authorized to order on its own motion an election at a later day. *Hanna v. State*, 48 Cr. R. 269, 87 S. W. 702.

**Voting places.**—An election held at a place in the ward at a short distance from that designated by the order is not void. *Ex parte Segars*, 25 S. W. 26, 32 Cr. R. 553.

An order for a local option election in a subdivision of a county held to sufficiently designate the places of holding the election and the persons to hold the same. *Matkins v. State* (Cr. App.) 58 S. W. 108.

Where a local option election was held at the usual place of holding elections, and the reasons for not holding the election at the place designated are shown, the election will not be held invalid. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

An order of the commissioners' court for local option election was not invalid because it authorized the voting at boxes instead of places. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

**Election officers.**—See, also, Art. 5718 and note.

An order for a local option election in a subdivision of a county held to sufficiently designate the persons to hold the same. *Matkins v. State* (Cr. App.) 58 S. W. 108.

Where a qualified voter held a local option election, and was recognized by the voters as the presiding officer, it will be presumed that he was duly appointed. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

In a prosecution for violating local option law, held, that order for election need not show who was appointed to hold same. *Nelson v. State* (Cr. App.) 75 S. W. 502.

The order for a local option election need not show the name of the presiding officer. *Fitze v. State* (Cr. App.) 85 S. W. 1156.

**Writs of election.**—Failure of county judge in a local option election to issue writs of election held not to render the election void. *Ex parte Schilling*, 38 Cr. R. 287, 42 S. W. 553.

**Relation to other laws.**—This article is not governed by Art. 2933. *Voss v. Terrell*, 12 C. A. 439, 34 S. W. 170.

The giving of the notice of election in a local option election for the length of time required by this article is sufficient, and it is not necessary that the notice should be given as required by Art. 2993 relating to general elections. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 458.

In order to make a valid local option election it is only necessary to comply with the character of notice required under the local option election law, and the Terrell election law (title 49) does not repeal by implication any of the provisions of the local option law in regard to notices required under the local option law. *Ex parte Keith*, 47 Cr. R. 283, 83 S. W. 684.

As to notices of local option election the Terrell election law (title 49) does not apply. It is not necessary to comply with character of notice required under the local option law. *Parks v. State*, 49 Cr. R. 449, 96 S. W. 328.

**Order for posting notices.**—An order requiring the posting of notices of a local option election held sufficient. *Magill v. State*, 51 Cr. R. 357, 103 S. W. 397.

**Attaching seal to copies of order.**—Where the copies of the order for a local option election were certified to and signed by the clerk officially, that he did not attach the seal of the commissioners' court to the copies and that they contained trivial errors held not to invalidate the election. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

**Necessity of giving notice.**—The notice required by law of a local option election held essential to the adoption of prohibition. *Brooks v. Ellis* (Civ. App.) 98 S. W. 936.

**Posting notices in general.**—"Posting as required by law" notices of local option election held to mean actual posting requisite number of days before election is held. *Nelson v. State* (Cr. App.) 75 S. W. 502.

**Posting with clerk's consent.**—Notices posted with the knowledge and consent of the county clerk is a compliance with the statute, though not posted nor caused to be posted by him. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 285.

**Notices need not remain up.**—Where notices of a local option election were posted as required, it was immaterial that one was torn down before it had been up the required length of time. *Bowman v. State*, 38 Cr. R. 14, 40 S. W. 796.

The fact that notices of local option election actually posted were subsequently torn or blown down held not to affect validity of election. *Nelson v. State* (Cr. App.) 75 S. W. 502.

**Using additional methods of notice.**—Where the statute was complied with as to giving notice of a local option election, the fact that other methods of notice were also used would not vitiate the election. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

**Evidence regarding posting.**—Evidence that sheriff and deputy did not post notice of local option election themselves held insufficient to justify submission to jury of the question whether local option law had gone into effect. *Shields v. State*, 38 Cr. R. 252, 42 S. W. 398.

Sheriff held entitled to testify that he posted five local option notices, as required, notwithstanding his return showed the posting of only four. *Matkins v. State* (Cr. App.) 62 S. W. 911.

In a prosecution for violation of the local option law held, that it was not incumbent on the state to show publication or posting of the notices for the election held to determine the question of local option. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

**Effect of failure to give legal notice.**—The failure to give the statutory notice of an election, if the voters had knowledge of and participated in the election, so that the result thereof was not affected by the failure to give notice in the manner prescribed by law, will not vitiate the election. When such notice is not given, the evidence offered to show actual notice will be closely scrutinized, and unless it is sufficient to show with reasonable certainty that no injury has resulted from the failure to give the precise legal notice, the election will be declared void. *Norman v. Thompson*, 30 C. A. 537, 72 S. W. 66, 68.

Failure to post one notice of local option election for requisite number of days held to invalidate election. *Ex parte Conley* (Cr. App.) 75 S. W. 301.

**Election officers.**—See, also, Title 49, Chapter 2.

The fact that an officer acted at a local option election under the misnomer of "manager of the election," instead of "presiding officer," held not to render the election subject to collateral attack. *Ex parte Mayes*, 39 Cr. R. 36, 44 S. W. 831.

The failure to have the required number of election officers hold a local option election held not to invalidate the election. *Snead v. State*, 40 Cr. R. 262, 49 S. W. 595.

Where a county local option election was fair, and there is no intimation of fraud, the election will not be set aside because in many precincts there were only 5, instead of 7, election officers, and 1, instead of 2, ballot boxes. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 466.

A local option law held not invalid because the presiding judge of a voting precinct was at the time of the election chairman of the Democratic executive committee of the county. *Ex parte Anderson*, 51 Cr. R. 239, 102 S. W. 727.

**Validity of election.**—See notes under Art. 5720.

**Art. 5718. [3387] Notice.**—The clerk of said court shall post, or cause to be posted, at least five copies of said order at different places within the proposed limits, for at least twelve days prior to the day of election, which election shall be held and the returns thereof made in conformity with the provisions of the general laws of the state, and by the officers of election appointed and qualified under such laws. [*Id.* Amend. 1893, p. 48.]

**Art. 5719. [3388] Form of ballot, etc.**—At said election the vote shall be by official ballot, which shall have printed or written at the top thereof in plain letters the words "Official Ballot." Said ballot shall have also written or printed thereon the words "For Prohibition" and the words "Against Prohibition;" and the clerk of the county court shall furnish the presiding officer of each voting box within the proposed limits with a number of such ballots, to be not less than twice the number of qualified voters at such voting boxes; and the presiding officer of each such voting box shall write his name on the back of each ballot



before delivering the same to the voter, and the person offering to vote at such election shall, at the time he offers to vote, be furnished by such presiding officer with one such ballot; and no voter shall be permitted to depart with such ballot, and shall not be assisted in voting by any person except such presiding officer or by some officer assisting in the holding of such election, under the direction of such presiding officer when requested to do so by such voter.

Those who favor the prohibition of the sale of intoxicating liquors within the proposed limits, shall erase the words "Against Prohibition" by making a pencil mark through same, and those who oppose it shall erase the words "For Prohibition" by making a pencil mark through same. No ballot shall be received or counted by the officers of such election that is not an official ballot, and that has not the name of the presiding officer of such election written thereon in the handwriting of such presiding officer, as required by this article. [Acts 1893, p. 48. Amended Acts 1909, 1 S. S., p. 338.]

**Relation to Terrell law.**—A local option election held not vitiated by ballots not complying with the Terrell law. *Hanna v. State*, 48 Cr. R. 269, 87 S. W. 702.

This article applies in local options, and not the Terrell election law of 1905 (Title 49, Chapter 5), in the matter of ballots. *Hash v. Ely*, 45 C. A. 259, 100 S. W. 981; *Walker v. Mobley*, 101 T. 28, 103 S. W. 492.

**Statute mandatory.**—The statute prescribing the form of ballot is mandatory and must be strictly followed. *Griffin v. Tucker*, 51 C. A. 522, 119 S. W. 340.

The provision regarding the character of the ballots to be used is mandatory. *Gomez v. Timon* (Civ. App.) 128 S. W. 656.

**Form of ballots.**—See *Walker v. Mobley*, 101 T. 28, 103 S. W. 492, holding that under this article, prior to its amendment as set out in the 1911 Revision, the voter furnishes his own ballot and presents it to the judges. It may be printed or written, and need have nothing upon it save the words, "For prohibition," or "Against prohibition." The official ballot of the Terrell election law (Title 49) is not required to be used in local option elections. *Walker v. Mobley*, 101 T. 28, 103 S. W. 492.

Under this article and Art. 5721 the court was not authorized to count ballots reading "For Local Option," or those reading "Against Local Option." *Griffin v. Tucker*, 51 C. A. 522, 119 S. W. 340.

The provision as to the character of the ballots to be used is mandatory, so that a local option election is void where the ballots do not have the words "official ballot" thereon, and in which two ballots are given to each voter, marked respectively "For Prohibition" and "Against Prohibition," the voters voting one of such ballots and retaining the other in their possession. *Gomez v. Timon* (Civ. App.) 128 S. W. 656.

**Deficiency of ballots.**—Under facts stated, deficiency of ballots in a local option election held not to vitiate the election. *Short v. Gouger* (Civ. App.) 130 S. W. 267.

**Art. 5720. [3389] How election to be held.**—The officers holding said election shall, in all respects not herein specified, conform to the general election laws now in force regulating elections; and after the polls are closed shall proceed to count the votes, and, within ten days thereafter, make due report of said election to the aforesaid court. [Amended Acts 1909, 1 S. S., p. 338.]

See *Clarey v. Hurst* (Civ. App.) 136 S. W. 840; *Id.*, 138 S. W. 566.

**Relation of Terrell law to local option elections.**—There is nothing in the local option statutes that conflicts with sections 63 and 72 of the (Terrell) election law of 1903, (Arts. 3001, 3011), and therefore the provisions in those two sections are applicable in a local option election. *Arnold v. Anderson* (Civ. App.) 93 S. W. 697.

The Terrell election law (Title 49) does not apply to local option elections, as to matters in which there is a conflict, and so far as a conflict exists the local option statute will prevail. *Walker v. Mobley*, 101 T. 28, 103 S. W. 491.

**Election officers.**—See Art. 5717, 5718, and notes.

**Qualifications for voting.**—See notes under Art. 5715; and see Title 49, Chapter 4.

**Validity of election—In general.**—See, also, notes under Art. 5728 and other articles of this chapter.

An election not conducted in accordance with the requirements of the law, and all proceedings under it, is absolutely void, and the legality of the same may be questioned not only directly but collaterally. *Ex parte Kramer*, 19 App. 123; *Smith v. State*, 19 App. 444; *Lipari v. State*, 19 App. 431; *McMillan v. State*, 18 App. 375; *Boone v. State*, 10 App. 418, 38 Am. Rep. 641; *Prather v. State*, 12 App. 401, *Akin v. State*, 14 App. 142.

A local option election held valid. *Oxley v. Allen*, 49 C. A. 90, 107 S. W. 945.

A local option election held invalid because of the failure to comply with the essential prerequisites of the statutes. *Hill v. Howth* (Civ. App.) 112 S. W. 707.

— **Burden of showing illegality.**—See notes under Art. 3687, Rule 12.

— **One precinct not holding election.**—Local option election held not void because one precinct held no election. *Ex parte Schilling*, 38 Cr. R. 287, 42 S. W. 553.

— **No separate election in city in precinct.**—A local option election in a justice precinct held not void because no separate election was held for a city in the precinct on the question. *Bowman v. State*, 38 Cr. R. 14, 40 S. W. 796.

— **Time of keeping polls open.**—A failure to comply with a statute providing the hours during which polls shall be open held not to vitiate local option election, where it did not appear that any voter was thereby deprived of an opportunity to vote. *Hoover v. Thomas*, 35 C. A. 535, 80 S. W. 859.

**Art. 5721. [3390] To hold session for counting votes, when.**—Said court shall hold a special session on the eleventh day after the holding of said election, or as soon thereafter as practicable, for the purpose of opening the polls and counting the votes; and, if a majority of the votes are "For prohibition," said court shall immediately make an order declaring the result of said vote, and absolutely prohibiting the sale of intoxicating liquors within the prescribed limits, except for the purposes and under the regulations specified in this title, until such time as the qualified voters therein may at a legal election held for that purpose by a majority vote decide otherwise; and the order thus made shall be held to be prima facie evidence that all the provisions of law have been complied with in giving notice of and holding said election, and in counting and returning the votes and declaring the result thereof. [Acts 1887, p. 96; Amend. 1893, p. 48.]

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|--------------------------------------------------|--------------------------------------------------|
| 1. Validity of local option laws.                | 12. — Mistake in date of election.               |
| 2. Relation to general election law.             | 13. — Description of territory.                  |
| 3. Strict compliance with statutes.              | 14. — Ordering publication.                      |
| 4. Canvass of votes.                             | 15. — Execution and recording.                   |
| 5. — Defective ballots.                          | 16. — Burden on party attacking order.           |
| 6. — Impeaching count.                           | 17. — Operation and effect in general.           |
| 7. Order declaring result of election—Necessity. | 18. — Prima facie evidence of preliminary steps. |
| 8. — Time of making order.                       | 19. Restraining issuance of order.               |
| 9. — Sufficiency in general.                     | 20. Jurisdiction of contests.                    |
| 10. — Need not show vote by precincts.           | 21. Changes in precinct after election.          |
| 11. — Need not recite statutory exceptions.      | 22. Effect of prohibition in general.            |

See *Stockard v. Reid*, 57 C. A. 126, 121 S. W. 1144; *Coats v. Blanding* (Civ. App.) 125 S. W. 627.

1. **Validity of local option laws.**—See notes under Art. 5715.
2. **Relation to general election law.**—The local option law is complete within itself, so far as it undertakes to prescribe the duty of the commissioners' court, and Art. 3030 of the general election law does not apply to a local option election. *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.
3. **Strict compliance with statutes.**—The local option law is a penal law, and must be strictly followed in all the proceedings necessary to put it into operation, or the order declaring it to be in force in the particular territory will be void. *Griffin v. Tucker*, 51 C. A. 522, 119 S. W. 338.
4. **Canvass of votes.**—The failure of the commissioners to count the votes would not be fatal to their order declaring the result of the election. *Chapman v. State*, 37 Cr. R. 167, 39 S. W. 113.  
The commissioners' court can count the votes regardless of what results the election officers may have reached in their count of the votes, and when they have counted the votes they can declare the result of the election. *Burrell v. State* (Cr. App.) 65 S. W. 915.

Where the election officers of a local option election have made returns to the commissioners' court, it may canvass the vote and declare the result from such returns. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 466.

Under Art. 5720 and this article the commissioners' court has authority to canvass the returns made by the officers of the election, and they may not open the ballot boxes and count the votes; the word "polls" in this article meaning the returns of the election officers, though the word "poll" means the number or aggregate of heads; a list or register of heads or individuals voting at an election (citing *Words and Phrases*, vol. 6, p. 5446). *Clary v. Hurst*, 104 T. 423, 138 S. W. 566, overruling *Clarey v. Hurst* (Civ. App.) 136 S. W. 840.

This article only authorizes the canvassing of the returns made by the election officers, and does not authorize them to open the ballot boxes, and recount the ballots. *Clary v. Hurst* (Civ. App.) 140 S. W. 862.

5. — **Defective ballots.**—The commissioners' court cannot count ballots not made out in the form prescribed in the statute. *Griffin v. Tucker*, 51 C. A. 522, 119 S. W. 340.
6. — **Impeaching count.**—In an election contest, the action of the commissioners' court in counting the ballots may not be impeached by the testimony of one present at the count as to how the duty was performed. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.
7. **Order declaring result of election—Necessity.**—It is essential that the commissioners' court shall declare the result of a prohibition election before such election can become effective. *Holloway v. State*, 53 Cr. R. 246, 110 S. W. 745.
8. — **Time of making order.**—An order declaring the result of a local option election is valid, though it was made more than eleven days after the vote, and does not show on its face that it was impracticable to make it earlier. *Loveless v. State* (Cr. App.) 49 S. W. 601.
9. — **Sufficiency in general.**—An order which does not conform to the requirements of the law is void. *Steele v. State*, 19 App. 425.

An order of the commissioners' court declaring the result of a county election under the local option law need not show there was an election held in each of the election precincts of the county. *Barker v. State* (Cr. App.) 47 S. W. 980.

Order declaring result of local option election need not recite that local option was only to remain in force until another election might declare otherwise. *Armstrong v. State* (Cr. App.) 47 S. W. 1006.

Order of the commissioners' court declaring local option in effect held not invalid for not stating that court "opened" the polls. *Sinclair v. State*, 45 Cr. R. 487, 77 S. W. 621.

Order declaring result of local option election held not objectionable, as rendering uncertain the time when the law went into effect. *Thurmond v. State*, 46 Cr. R. 162, 79 S. W. 316.

Neither the order for a local option election nor the order declaring the result need show the name of the presiding officer. *Fitze v. State* (Cr. App.) 85 S. W. 1156.

An order declaring the result of a local option election need not show that it was made at a special session of the commissioners' court, held for the purpose of opening the polls, counting the votes and declaring the result of the election, or that notices of election had been posted. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

An order declaring the result of local option election, which recited that an election was held to determine whether or not the sale of spirituous, vinous or malt liquors should be prohibited, held not erroneous. *Id.*

The order of the commissioners' court held a sufficient performance of its sole duty in a local option election to declare the result of a local option election. *Griffin v. Tucker*, 102 T. 420, 118 S. W. 635.

10. — **Need not show vote by precincts.**—An order of the commissioners' court declaring the result of a county election under the local option law need not set out the vote by voting or justice precincts. *Barker v. State* (Cr. App.) 47 S. W. 980.

Order declaring result of election on question of local option need not show vote by precincts. *Armstrong v. State* (Cr. App.) 47 S. W. 1006.

11. — **Need not recite statutory exceptions.**—Order declaring result of election on question of local option need not contain exceptions authorizing sale of liquors. *Armstrong v. State* (Cr. App.) 47 S. W. 1006.

The fact that an order of the commissioners' court declaring the result of an election on the question of local option did not recite the exceptions in regard to sales for medicinal and sacramental purposes held not to invalidate the order. *Truesdell v. State*, 42 Cr. R. 544, 61 S. W. 935.

An order of the commissioners' court prohibiting the sale of intoxicants held sufficient, though it did not contain the statutory exceptions. *Racer v. State* (Cr. App.) 73 S. W. 968.

12. — **Mistake in date of election.**—An order of the commissioners' court declaring the result of a county election under the local option law is not vitiated by an erroneous reference to the year in which the local option law was passed. *Barker v. State* (Cr. App.) 47 S. W. 980.

A mistake in the date of a local option election in the order declaring the result held a clerical error and not a material variance, in a prosecution for violating the law. *Luck v. State* (Cr. App.) 97 S. W. 1049.

13. — **Description of territory.**—An order declaring the result of a local option election held valid, though it contained but a partial description of the prohibited district, where the order for the election described it fully. *Loveless v. State* (Cr. App.) 49 S. W. 602.

Mere discrepancies in the filed notes in an order declaring the result of a local option election will not invalidate it, if the exact boundaries can be ascertained with reasonable and legal certainty. *Goble v. State* (Cr. App.) 60 S. W. 966.

Unless there is a material variance between the orders in a local option election and declaring its result, indicating different territory in each, the law is not invalid. *Id.*

Where the territory covered by a supposed local option election cannot be ascertained, the election is invalid. *Ex parte Waits* (Cr. App.) 64 S. W. 254.

Neither the order for a local option election nor the order declaring the result need give the metes and bounds of the precinct. *Fitze v. State* (Cr. App.) 85 S. W. 1156.

A local option election was not rendered void for any deficiency in describing the boundaries of a commissioner's precinct, if no one could have been deceived by such discrepancy. *Stewart v. State* (Cr. App.) 153 S. W. 1151.

14. — **Ordering publication.**—See, also, Art. 5722 and notes.

The fact that the commissioners' court ordered the publication in some newspaper of an order declaring the result of a local option election for four successive weeks, though not necessary, did not vitiate the order. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

15. — **Execution and recording.**—Orders, appearing in the minutes of the commissioners' court, for a local option election, counting and declaring the vote, and publication, held valid, though such minutes were not signed. *Davidson v. State*, 44 Cr. R. 586, 73 S. W. 808.

A local option election is not void by reason of the failure of the commissioners' court to record the orders ordering and declaring the result of the election at the time designated by law. *Ex parte Walton*, 45 Cr. R. 74, 74 S. W. 314.

The order for local option, to go into effect, signed by the county judge, held not vitiated by the commissioners' court also signing it. *Hanna v. State*, 48 Cr. R. 269, 87 S. W. 702.

16. — **Burden on party attacking order.**—See notes under Art. 3687, Rule 12.

17. — **Operation and effect in general.**—See, also, notes under Art. 5727.

An order of prohibition prevents the sale of intoxicating liquors under an unexpired license. *Ex parte Lynn*, 19 App. 293; *Robertson v. State*, 12 App. 541.

A legal election, the result of which is declared, puts an end to the previous law, and no order of the commissioners to that effect is requisite. *State v. Harvey*, 11 C. A. 691, 33 S. W. 885.

A county election resulting favorably to prohibition held to prohibit the sale in precincts voting against it. *Ex parte Fields*, 39 Cr. R. 50, 46 S. W. 1127.

The designation of localities where the sale of intoxicating liquor is inhibited is not prohibition, but a mere regulation, of sale. *Garonzik v. State*, 50 Cr. R. 533, 100 S. W. 374.

18. — **Prima facie evidence of preliminary steps.**—See, also, notes under Art. 3637, Rule 12, and Art. 5727.

Order declaring result of election and putting local option in force held prima facie evidence that proper preliminary steps were taken. *Ex parte Schilling*, 38 Cr. R. 287, 42 S. W. 553.

19. **Restraining issuance of order.**—See Title 69 and notes.

20. **Jurisdiction of contests.**—See, also, Art. 5728 and notes.

The commissioners' court are only authorized by the terms of this article to count the vote and declare the result of a local option election. They are not empowered, nor could the legislature grant them the power to try contested elections. *Burks v. State*, 51 Cr. R. 637, 103 S. W. 851.

21. **Changes in precinct after election.**—Where local option was put into effect in a justice precinct, a subsequent change of boundaries in such precinct did not invalidate the local option law as previously put into operation. *Medford v. State*, 45 Cr. R. 180, 74 S. W. 768; *Nelson v. State* (Cr. App.) 75 S. W. 502.

Where local option had been established in a justice precinct by an election as authorized by the constitution, the mere addition of territory to such precinct under Const. art. 5, § 18, held not to authorize the sale of liquor in such precinct. *Ex parte Fields* (Cr. App.) 86 S. W. 1022.

The act of the commissioners' court in changing an election precinct from a justice's precinct which had adopted local option to another justice's precinct held not to repeal local option in the election precinct. *Ex parte Pollard*, 51 Cr. R. 488, 103 S. W. 878.

A change of boundary by the commissioners' court held not to affect local option as adopted, since, to nullify local option, it requires a vote of all the people living within the original bounds of the justice's precinct which put the law into effect. *Oxley v. Allen*, 49 C. A. 90, 107 S. W. 945.

22. **Effect of prohibition in general.**—See notes under Art. 5727.

**Art. 5722. [3391] Result to be declared.**—The order of court declaring the result and prohibiting the sale of such liquors shall be published for four successive weeks in some newspaper published in the county wherein such election has been held, which newspaper shall be selected by the county judge for that purpose. If there be no newspaper published in the county, then the county judge shall cause publication to be made by posting copies of said order at three public places within the prescribed limits for the aforesaid length of time. The fact of publication in either mode shall be entered by the county judge on the minutes of the commissioners' court. And entry thus made, or a copy thereof certified under the hand and seal of the clerk of the county court, shall be held sufficient prima facie evidence of such fact of publication. [*Id.* Amend. 1893, p. 48.]

**Necessity of legal publication.**—The local option law cannot be put into operation, unless the result of the election adopting it be published either in a newspaper or by posting notices thereof. *Strickland v. State* (Cr. App.) 47 S. W. 720.

The publication of the final order of the court is required as a condition precedent to putting local option into effect. *Griffin v. State* (Cr. App.) 87 S. W. 155; *Stephens v. State* (Cr. App.) 87 S. W. 157.

Unless the publication of the result has been published for four successive weeks in a newspaper designated by the county judge, the law has not been put in operation. *Chenowith v. State*, 50 Cr. R. 238, 96 S. W. 21.

**Order for publication—in general.**—An indictment which alleges that the sale was made after the commissioners' court had made an order authorizing the election, etc., and that thereupon the commissioners' court passed and published an order declaring the result, was defective; it being the duty of the county judge, and not of the commissioners' court, to publish the result of the election. *Carnes v. State*, 50 Cr. R. 282, 99 S. W. 98, but see *Watson v. State*, 52 Cr. R. 551, 107 S. W. 544.

An order of the commissioners' court held not to show that such court caused publication to be made of the order putting local option into effect. *Covington v. State*, 51 Cr. R. 48, 100 S. W. 368.

That an order of the commissioners' court declaring the result of a local option election and prohibiting the sale of liquor was not published as directed by the county judge, but as suggested by the district judge, held not to invalidate the election. *Seay v. State*, 51 Cr. R. 444, 102 S. W. 1127.

An order for the publication of the result of a local option election may be entered at any time, whether there had been a previous certificate entered by another county judge or not. *Biddy v. State* (Cr. App.) 108 S. W. 689.

— **Selection of newspaper.**—Under local option law, the fact that the order of publication of order declaring law in effect did not specify particular newspaper held not to invalidate order. *Sinclair v. State*, 45 Cr. R. 487, 77 S. W. 621.

That a county judge subsequently certified the adoption of local option in a county based in part on a voluntary publication of the local option order in a certain newspaper held not a ratification of such publication. *Chenowith v. State*, 50 Cr. R. 238, 96 S. W. 19.

The publication of the order declaring the result of a local option election held pre-

sumptively made in the newspaper selected by the county judge as required by law. *Holland v. State*, 51 Cr. R. 147, 101 S. W. 1002, 51 Cr. R. 157, 101 S. W. 1004.

It is not required that the order of the commissioners' court shall provide that the newspaper shall be selected by the county judge; this is made his duty by law independent of any order of the court. *Johnson v. State*, 52 Cr. R. 624, 108 S. W. 683.

Under this article a judgment on the contest of a local option election declaring that prohibition carried the election was not invalid because publication of result of the contest was ordered to be made by the clerk in a newspaper to be selected by him. *Bickers v. Lacy* (Civ. App.) 134 S. W. 763.

**Time of publishing order.**—Failure to immediately publish order putting local option into effect held not to vitiate the order, but to merely postpone the taking effect of the law. *Rawls v. State*, 48 Cr. R. 622, 89 S. W. 1071.

**Sufficiency of publication—in general.**—Where, notwithstanding an appeal from an order dissolving an injunction restraining the carrying into effect of a local option election, the result was finally published, it could not be held, in a collateral proceeding to punish relator for selling liquor, that such publication was void. *Ex parte Wood* (Cr. App.) 81 S. W. 529.

Published copy of order putting local option into effect need not contain the names of the county judge and the commissioners. *Hillard v. State*, 48 Cr. R. 314, 87 S. W. 821.

Where the order putting local option into effect is not published for four successive weeks, the publication is insufficient to give effect to the law. *Moss v. State* (Cr. App.) 89 S. W. 833; *Johnson v. Same* (Cr. App.) 89 S. W. 834; *Stephens v. Same, Id.*; *Ellis v. Same* (Cr. App.) 89 S. W. 974.

The publication must show whether the vote was favorable or unfavorable. *Roberts v. State* (Cr. App.) 144 S. W. 940.

**Continuity of publication.**—A break in the continuity of the publication caused by an injunction will not defeat the election. *McDaniel v. State*, 32 Cr. R. 16; 21 S. W. 684, 23 S. W. 989; *Ex parte Brown*, 35 Cr. R. 443, 34 S. W. 131.

The publication must be made for four successive weeks. The meaning of "successive" is well understood and apprehends that the publication must be continuous, that is, without a break. By judicial interpretation one exception to this continuity has been ingrafted on the statute. It is based on a breach of the continuity in the publication by act of the law. While the injunction exists no publication can be made, but when this is dissolved, the reason for delay or restraint ceases and the publication should be immediately resumed. If this is not done the publication is not sufficient. *Griffin v. State* (Cr. App.) 87 S. W. 156. *Stephens v. State* (Cr. App.) 87 S. W. 157.

The publication announcing the result of a local option election need not be in consecutive weeks, if there is a good excuse for the interruption, for example, the intervention of an injunction suit. *Gill v. State*, 48 Cr. R. 517, 89 S. W. 273.

Though two years intervened between the first and last publications of an order putting local option into effect, held it could not be said that the publication was ineffectual; it not being shown when the injunction against publication was dissolved. *Riggs v. State* (Cr. App.) 97 S. W. 482.

That there was a skip of one week in the publication of a local option election order would not render the election invalid. *Carnes v. State* (Cr. App.) 103 S. W. 934.

The law contemplates that the order shall be published for four full consecutive weeks or twenty-eight days from the day of its publication. The order in this case recites that publication was made for four successive weeks to-wit: April 8, 15, 22 and 29. When the order was published on April 29th this covered and contemplated the week in which the 29th of April was. *Williams v. State*, 53 Cr. R. 156, 109 S. W. 189, 190.

**Effect of republication.**—Where the local option law had become effective by publication of the order declaring the result of the election, the republication thereof at a subsequent time did not affect the validity of the previous proceedings. *Beaty v. State*, 53 Cr. R. 432, 110 S. W. 449.

**Proof of publication—in general.**—Showing of publication of order declaring result of local option election held sufficient. *Armstrong v. State* (Cr. App.) 47 S. W. 1006.

A certificate of the county judge reciting that a local option election was held in "precinct number two," omitting the word "justice" before "precinct," held not invalid. *Loveless v. State*, 40 Cr. R. 131, 49 S. W. 98.

The certificate of the county judge of the publication of the law is sufficient, though there is not shown any order of the commissioners' court for the publication, nor any order adopting or ratifying it. *Skipwith v. State* (Cr. App.) 68 S. W. 279.

A certificate of a county judge of notice of a local option election held insufficient to put local option into effect, it not being such as required by law. *Lively v. State* (Cr. App.) 72 S. W. 393.

It is not necessary to state in the judge's certificate the particular issues of the paper in which the publication was made. It is enough to say that it was made in four successive weeks, as required by law. *Magill v. State*, 51 Cr. R. 357, 103 S. W. 397.

Fact that the county judge certified that the result of a local option election was published four weeks on the date of the fourth issue of a weekly newspaper, while the four weeks did not expire until the end of the week in which the last issue appeared, would not vitiate his certificate. *Williams v. State*, 53 Cr. R. 156, 109 S. W. 189.

The certificate stating that publication was made as required by law is equivalent to saying that it was made for four consecutive weeks. The statement in the certificate should receive a fair and sensible construction. *Harryman v. State*, 53 Cr. R. 474, 110 S. W. 927.

**Recital of unnecessary facts.**—Where the certificate of the county judge showed that the publication of an order declaring the result of a local option election was in accordance with the statute, the fact that it referred to other things did not vitiate the order or certificate. *Neal v. State*, 51 Cr. R. 513, 102 S. W. 1139; *Id.* (Cr. App.) 102 S. W. 1141.

In a prosecution for violating the local option law, the fact that a certificate of the county court's order of publication of the result of the election, etc., contained a recital of facts having no place therein, held not prejudicial. *Walker v. State*, 52 Cr. R. 293, 106 S. W. 376.

— **Entry in minutes in general.**—An entry in the minutes of the commissioners' court of publication of the result of a local option election held valid, though the minutes were not signed. *Davidson v. State*, 44 Cr. R. 586, 73 S. W. 808.

An entry on the minutes of the commissioners' court held to show that the order of such court declaring the result of a local option election was published four successive weeks. *Ex parte Sullivan* (Cr. App.) 75 S. W. 790.

Failure of the county judge to enter on the minutes the fact of publication of the result of a local option election held not to affect the election. *Beaty v. State*, 53 Cr. R. 432, 110 S. W. 449.

Testimony is admissible to show such publication. *Id.*

An entry by the judge in the minutes that the result of a local option election was published "for the time and in the manner required by law" held sufficient under the statute. *Byrd v. State*, 53 Cr. R. 507, 111 S. W. 149.

Under this and three following articles, a county court record, purporting to show the proceedings taken for the adoption of local option, but failing to state for what purpose the local option election was held, and the minutes failing to show whether the result of the election was favorable or unfavorable, was not sufficient to show that local option had been adopted in the county. *Roberts v. State* (Cr. App.) 144 S. W. 940.

— **Who may make entry.**—Perhaps the county judge should make the entry, as the language seems to be rather strong and of mandatory nature. In this particular case the order was written by the county judge and copied by the clerk into the minutes. This, perhaps, would be sufficient. *Gorman v. State*, 52 Cr. R. 327, 106 S. W. 335.

An order of the county judge on the minutes of the commissioners' court showing that the result of a local option election had been published was not required to be written by the judge himself, but it was sufficient where he signed the minutes. *Coleman v. State*, 53 Cr. R. 578, 111 S. W. 1011.

The entry on the minutes of the commissioners' court showing that publication of the order of court declaring the result of the election need not be in the handwriting of the county judge. It can be made by the county clerk if there is evidence showing that the entry was made under the direction and with the approval of the judge, such as his signing the minutes containing the entry. *Coleman v. State*, 54 Cr. R. 396, 112 S. W. 1072, 1073.

An order of approval by a county judge in the minutes of the commissioners' court held to adopt a former entry made by the clerk, showing the publication of the order of court declaring the result of a local option election. *Id.*

That an order declaring the result of a local option election was entered by a deputy clerk, and not by the county judge, held not a valid objection to the enforcement of local option in the county. *Edgar v. State*, 59 Cr. R. 252, 127 S. W. 1053.

— **Operation and effect.**—See, also, notes under Art. 5727.

An instruction that the local option law was in force held not error, where the county judge's certificate was in evidence. *Segars v. State* (Cr. App.) 51 S. W. 238.

It is proper for the court to assume that local option is in force when the county judge has certified the fact that the order has been published as required by statute. *Johnson v. State* (Cr. App.) 55 S. W. 968.

In a prosecution for illegal sale of liquors in local option district, certificate of the county judge, certifying the publication of the local option law in the precinct where the sales were made, held admissible. *Skipwith v. State* (Cr. App.) 68 S. W. 278.

In a prosecution for violating local option law, prima facie case of fact of publication is made where county judge's certificate of the result of the election has been properly entered of record. *Nelson v. State* (Cr. App.) 75 S. W. 502.

The order is merely evidence of the facts of publication for the time required by law, and any other statements in the certificate are not admissible in evidence, and ought not to be in the certificate. *Walker v. State*, 52 Cr. R. 293, 106 S. W. 377.

The fact that the judge certifies that the publication was made is, in the absence of anything to the contrary, sufficient proof that the publication was made in a newspaper selected by him. *Johnson v. State*, 52 Cr. R. 624, 108 S. W. 683.

— **Enjoining publication.**—See also note under Art. 4643.

An injunction to commissioners' court not to further publish the order declaring result of a local option election held not to annul the election. *McHam v. Love*, 39 C. A. 512, 87 S. W. 875.

**Art. 5723. [3392] Order when against prohibition.**—If a majority voting at such election vote "Against prohibition," the court shall make an order declaring the result, and have the same entered of record in the office of the clerk of said court. [Acts 1893, p. 48.]

See *Roberts v. State* (Cr. App.) 144 S. W. 940.

**Art. 5724. [3393] Second election, when.**—No election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein, the result declared, and the notices published as provided in the preceding articles. Such time shall date from the time of publication of the last notice; provided, that, where no such notice is required to be published, then such time shall date from the time such result is declared; but at the expiration of that time the commissioners' court of each county in the state, whenever they decree it expedient, may order another election to be held by the qualified voters of said county, or of any justice's precinct, or such subdivision of a county as may be designated by the commissioners' court of such county, for the same purpose; provided, it shall

be the duty of such court to order the election aforesaid whenever petitioned to do so by as many as two hundred voters in any county, or fifty voters in any justice's precinct, or subdivision of such county, as the case may be, to order an election for the same purpose, which election shall be ordered held, notice thereof given, the votes returned and counted, and the result declared and published, in all respects as provided by this title for a first election; and the order granting such other elections, as well as that declaring the result, shall, if prohibition be carried, have the same force and effect, and the same conclusiveness, as are given to them in the case of a first election by the provisions of this title; provided, that, where no such notice is required to be published, then such time shall date from the time such result is declared. [Amended Acts 1905, p. 378.]

See *Roberts v. State* (Cr. App.) 144 S. W. 940.

**In general.**—In so far as articles 3393, 3395 (Rev. St. 1895) may be construed as enlarging the scope of article 3384 (Art. 5715) they were repealed by the amendment of 1897, which changed article 3227 to 3384. *Oxford v. Frank*, 30 C. A. 343, 70 S. W. 428.

These articles furnish a contemporary construction by the legislature of the right conferred by the constitution on the localities named to vote on the question of prohibition "from time to time." By this provision they were constrained to preserve the autonomy of the localities named in order that they might exercise their constitutional right to again vote on the question. *Ex parte Heyman*, 45 Cr. R. 532, 78 S. W. 353.

The city charter of Dallas was amended by adding territory which embraced another city (Oak Cliff) and in the amendment it was provided that the city council of Dallas should never have authority to permit intoxicating liquors to be sold within the limits of the added territory, and that local option as it then existed in the added territory should never be repealed by any action of the city council of Dallas, and that should any election be held on the question it should be held solely in the entire justice precinct in which the added territory was. This provision is not void because local option being in force the city council of Dallas would have no authority over the matter and the reference to another election referred to elections under the local option law which could not be held except under the state law. *City of Oak Cliff v. State*, 97 T. 383, 79 S. W. 1 (decision made before amendment of 1905).

This article would control as to a local option election held two years after its enactment. *Coats v. Blanding* (Civ. App.) 125 S. W. 627.

Where it appears that prohibition was adopted in a county at an election held June 5, 1910, the court will take judicial notice that another election could not have been held, and the law repealed prior to alleged violations between March and September, 1911. *Leonard v. State* (Cr. App.) 152 S. W. 632.

**When second election may be held.**—See, also, Art. 5726 and notes.

A valid election having been held in same territory less than two years prior to date of presentation of petition for another election, the commissioners' court was not authorized to grant the petition. *McHam v. Love* (Civ. App.) 87 S. W. 877.

The second election is valid when held after the expiration of two years from the first election. It makes no difference when the result of the election is published and put in operation. *Ex parte Smith*, 48 Cr. R. 356, 88 S. W. 245 (decision made before the amendment of 1905).

Under this article no local option election can be ordered within less than two years from the date of the declaration of the result of the previous election, where there has been a previous election. *Seay v. State*, 51 Cr. R. 444, 102 S. W. 1128.

A local option election was held, and the commissioners' court, on June 26th, declared the result as against prohibition, but on appeal to the court of civil appeals the result of the election was vacated and judgment rendered in favor of prohibition, and on March 9th, pursuant to the mandate of the court of civil appeals, the commissioners' court vacated its decision of June 26th and declared the result of the election as for prohibition. Held, that under this article and Art. 5721 the two years which must elapse before another election could be held began to run from the final declaration of the result of the former election, which was March 9th. *Coats v. Blanding* (Civ. App.) 125 S. W. 627.

— **Second election for same precinct and another.**—A commissioner's precinct was composed of two justices' precincts, one of which was a local option precinct. An election in the other precinct resulted unfavorably to local option. An election cannot be held in the commissioners' precinct within less than two years from the election in the last mentioned precinct. *Ex parte Randall*, 50 Cr. R. 519, 98 S. W. 870, 871.

The inhibition in this article is against a second election "within the same prescribed limits"—i. e., the limits of the subdivision in which the first was held—not within the different limits of another subdivision. For illustration: If two justice precincts compose a commissioners' precinct and prohibition is in force in one and not in the other, there is nothing to prevent an election in the commissioners' precinct in less than two years after the election in the justice precinct in which prohibition is in force. The status of the justice precinct in which prohibition is in force is not affected by the result in the commissioners' precinct election, because if prohibition is defeated in the commissioners' precinct election prohibition is still in force in the justice precinct, and if prohibition carries then the law is extended to the other justice precinct, where before the election prohibition was not in force. *Griffin v. Tucker*, 102 T. 420, 118 S. W. 639.

**Second election continuing prohibition.**—An election in a local option territory in which prohibition prevails at the time of election, resulting in favor of prohibition, does

not affect the status of the territory, but the law remains in force by virtue of the first election, and not the later one. *Leftwich v. State* (Cr. App.) 55 S. W. 571.

State held entitled to show a local option law put into operation in 1903, notwithstanding the holding of an election in 1905, prior to the commission of the alleged offense. *Givens v. State*, 49 Cr. R. 267, 91 S. W. 1090, 1091.

A local option election held subsequent to the one under which a prosecution was based, which also resulted in favor of prohibition, did not nullify, supersede, and set aside the prior election. *Wade v. State*, 53 Cr. R. 184, 109 S. W. 191.

The result of an election favorable to the local option law did not repeal a prior election, so as to invalidate a prosecution brought under the prior election. *Holmes v. State*, 55 Cr. R. 331, 116 S. W. 571.

One held properly prosecuted under the second election adopting the local option law in a county. *Mayo v. State*, 62 Cr. R. 110, 136 S. W. 790.

Orders and proceedings under a local option election offered as bearing upon the time when a local option law went into effect held inadmissible; that election having been superseded by another. *Green v. State*, 62 Cr. R. 345, 137 S. W. 126.

— **Proclamation of result.**—County held subject to the prohibition law, though there was no proclamation of the result of the second election continuing prohibition. *Decker v. State*, 39 Cr. R. 20, 44 S. W. 845.

**Second election repealing prohibition.**—See notes under Art. 5725.

**Art. 5725. [3394] Order, etc., on second election.**—When such second election results against prohibition, the court shall enter an order setting aside the previous order enforcing prohibition, and shall officially announce and publish the same as provided where the election resulted in prohibition. [Acts 1887, p. 96; Amend. 1893, p. 48. Id.]

See *Roberts v. State* (Cr. App.) 144 S. W. 940.

**Second election repealing prohibition.**—The statute expressly provides that prosecutions may be maintained for a violation of the local option law after the repeal of the law in the territory. *Woods v. State* (Cr. App.) 75 S. W. 37.

A prosecution under the local option law of a county passed in 1903 cannot be maintained after the abrogation of the law by a law passed in 1906. *Byrd v. State*, 51 Cr. R. 539, 103 S. W. 863.

— **Publication of result.**—Failure of the commissioners' court to publish the result of a county election abolishing prohibition held not to invalidate an order for a local option election in a precinct therein, which would warrant the reversal of a judgment convicting defendant of a violation of the local option law. *Lyon v. State*, 42 Cr. R. 506, 61 S. W. 125.

**Art. 5726. [3395] May hold second election in subdivision.**—The failure to carry prohibition in a county shall not prevent an election for the same from being immediately thereafter held in a justice's precinct, or subdivision of such county as designated by the commissioners' court, or of any town or city in such county; nor shall the failure to carry prohibition in a town or city prevent an election from being immediately thereafter held for the entire justice's precinct or county in which said town or city is situated; nor shall the holding of an election in a justice's precinct in any way prevent the holding of an election immediately thereafter for the entire county in which the justice's precinct is situated; but, when prohibition has been carried at an election ordered for the entire county, no election on the question of prohibition shall be thereafter ordered in any justice's precinct, town or city of said county until after prohibition has been defeated at a subsequent election for the same purpose, ordered and held for the entire county, in accordance with the provisions of this title; nor in any case where prohibition has carried in any justice's precinct shall an election on the question of prohibition be ordered thereafter in any town or city of such precinct until after prohibition has been defeated at a subsequent election ordered and held for such entire precinct. [Amend. 1893, p. 48.]

**Election in city, town or subdivision—After rejection by county.**—This article clearly provides for the holding of a second election in a city or town upon the falling of prohibition to carry in the county. Citizens of cities and towns have the right to determine whether the sale of intoxicating liquors and beer shall be prohibited within their respective limits. *Sweeney v. Webb*, 33 C. A. 324, 76 S. W. 769.

The holding of a local option election in a county in August which results against its adoption does not make illegal the holding of an election in September thereafter in a commissioner's precinct to determine whether local option should be adopted therein. *Cofield v. Britton*, 50 C. A. 208, 109 S. W. 496.

— **After adoption by county.**—Where local option prohibiting the sale of intoxicating liquors throughout a county has been adopted, the commissioners' court may refuse a petition for a local option election in a single district in such county. *Roper v. McKoy*, 29 C. A. 470, 69 S. W. 459.

**Effect of adoption by county upon precinct laws.**—A conviction for violation of the local option law in a certain precinct of the county is erroneous, where local option had



been adopted in the county before the finding of the indictment, the law in the precinct being merged into that of the county. *Raby v. State*, 42 Cr. R. 56, 57 S. W. 651.

Declaration against prohibition, in a local option election in a commissioners' precinct held not to affect the status in a justice's precinct therein in which prohibition was in effect. *Griffin v. Tucker*, 102 T. 420, 118 S. W. 635.

Under this article, the adoption by a county, at an election held throughout the county, of Pen. Code, Art. 597, fixing the penalty for violating the local option law at confinement in the penitentiary for not less than one nor more than three years, superseded the prior local option law adopted in any of the precincts in the county, so that such penalty was operative throughout the county, including such precincts. *Garrett v. State*, 61 Cr. R. 254, 134 S. W. 696.

**Election for district embracing territory already dry.**—The right of a people of a school district to have prohibition in their district is not affected or destroyed by reason of the fact that the district lies partly in a justice precinct where the local option law prevails. *Kidd v. Truett*, 28 C. A. 618, 68 S. W. 310.

That all of a county except two towns was under local option when an election was held to place the entire county under local option held not to invalidate the election. *Cantwell v. State*, 47 Cr. R. 521, 85 S. W. 18.

A commissioners' court can order an election in a commissioners' precinct, composed of two justices' precincts, though prohibition is in force in one of the justices' precincts and not in force in the other, it not being inhibited by either article 5724 or this article. *Griffin v. Tucker*, 102 T. 420, 118 S. W. 638.

**Law can only be repealed by vote of entire district.**—Local option having been adopted by a county, a city therein could not thereafter hold a local option election until the repeal of the local option law by the entire county, nor could the legislature authorize the city to hold such an election until such time, notwithstanding the result of a second county election in favor of prohibition, was not published; the first election having been declared as prohibiting the sale of liquor until the law should be repealed, and under the constitution the law could only be repealed by the voters of the entire district that adopted it. *Adams v. Kelly*, 17 C. A. 479, 44 S. W. 529.

The local option law in 1892 could only be repealed by vote of the entire people in the territory in which it was operative. *Ex parte Elliott*, 44 Cr. R. 575, 72 S. W. 837.

A local option election held only for a part of the territory originally adopting local option, being on that account void ab initio, need not be held valid until contested by competent authority, and its invalidity may be determined in a collateral proceeding. *Oxley v. Allen*, 49 C. A. 90, 107 S. W. 945.

**Art. 5727. [3396] Penalty.**—When any such election has been held and has resulted in favor of prohibition, and the aforesaid court has made the order declaring the result, and the order of prohibition, and has caused the same to be published as aforesaid, any person who shall thereafter, within the prescribed bounds of prohibition, sell, exchange, or give away, with the purpose of evading the provisions of this title, any intoxicating liquors whatsoever, or in any way violate any of the provisions of this title, shall be subject to prosecution by information or indictment, and shall be punished as prescribed in the Penal Code. [Acts 1893, p. 48. P. C. 378.]

**When prohibition takes effect.**—See, also, Art. 5722 and notes.

In a prosecution for violating the local option law, a charge that the law was in force held justified. *Sebastian v. State*, 44 Cr. R. 508, 72 S. W. 849.

One cannot be prosecuted for the sale of intoxicants until after 28 days from the first publication. *Byrd v. State*, 53 Cr. R. 507, 111 S. W. 149.

**Evidence of adoption of prohibition.**—See, also Arts. 5721, 5722, and notes.

Question whether local option law is in force in a county is for jury. *Strickland v. State* (Cr. App.) 47 S. W. 470.

An order of the commissioners' court and their publication of the result of a local option election held sufficient to establish its legality. *Cooper v. State* (Cr. App.) 65 S. W. 916.

In a prosecution for violating local option law, return and poll list of election held competent in evidence. *Nelson v. State* (Cr. App.) 75 S. W. 502.

In a prosecution for violation of the local option law, the original minutes of the commissioners' court, containing the orders going to make a valid local option law, are admissible to prove the existence of the law. *Holley v. State*, 46 Cr. R. 324, 81 S. W. 957.

The order for a local option election, the order declaring the result, and the certificate of the county judge, held sufficient evidence that local option was in force in the territory specified. *Cantwell v. State*, 47 Cr. R. 521, 85 S. W. 18.

On a prosecution for a violation of the local option law, held proper to permit the minutes of the commissioners' court to be corrected and read. *Id.*

In a prosecution for violating the local option law, a statement by a witness that there was a local option law in the county held insufficient to show that fact so as to sustain a conviction for its violation. *Bills v. State*, 55 Cr. R. 541, 117 S. W. 835.

While, under the statute, contests of local option elections must be taken in due time, the court should in every prosecution for violating the local option law require the introduction of formal orders of the commissioner's court adopting local option in the county. *Id.*

Under Arts. 5722-5725, a county court record, purporting to show the proceedings taken for the adoption of local option, but failing to state for what purpose the local option election was held, and the minutes failing to show whether the result of the election was favorable or unfavorable, was not sufficient to show that local option had been adopted in the county. *Roberts v. State* (Cr. App.) 144 S. W. 940.

The state, on a trial for following the occupation of selling liquor in local option territory, must show that local option was in effect at the time, and a mere offer in evidence of certified copies of orders showing that local option was in effect is not sufficient. *Lester v. State* (Cr. App.) 153 S. W. 861.

— **Judicial notice.**—The local option law is a local or special law, and is in force only in those counties where the people have adopted it, and the court on appeal does not judicially know in what territory it has been adopted. *Dorman v. State*, 64 Cr. R. 104, 141 S. W. 526.

**Effect of prohibition in general—Legality of contracts.**—Though a lease provided that the premises should be used for the saloon business, the contract was not rendered illegal, nor the lessee absolved, by the adoption of local option in the county. *Houston Ice & Brewing Co. v. Keenan*, 99 T. 79, 88 S. W. 197.

In an action for the price of beer sold defendant on the ground of illegality of consideration, in that the beer was intended to be sold in a local option territory evidence held insufficient to show that the place where the liquor was retailed was a local option territory, so as to defeat the action. *Dallas Brewery v. Holmes Bros.*, 51 C. A. 514, 112 S. W. 122.

— **Sales to minors.**—Where the local option law is in force in a district, the law prohibiting the sale of liquor to minors held superseded. *Tompkins v. State*, 49 Cr. R. 154, 90 S. W. 1019.

A sale of liquor to a minor in local option territory cannot be prosecuted under the statute prohibiting sales to minors, as it is a violation of the local option law. *Dean v. State*, 49 Cr. R. 249, 92 S. W. 38.

A person can be convicted of giving intoxicating liquors to a minor, regardless of whether the local option law was in force in the county. *Ex parte Cassens*, 57 Cr. R. 377, 122 S. W. 888, 891.

**What constitutes sale within prescribed bounds.**—Order to one outside local option district for whisky to be sent by express C. O. D. held not a sale consummated within the inhibited district, and hence a prosecution for the illegal sale of liquors there will not lie. *Weathered v. State* (Cr. App.) 60 S. W. 876.

If accused merely acted as another's agent in purchasing intoxicants and delivering them, he is not guilty of making a sale in violation of the local option law. *Scott v. State* (Cr. App.) 153 S. W. 871.

**Changes in boundaries of precinct—Before election.**—See notes under Art. 5715.

— **After election.**—See notes under Art. 5721.

**Change of laws during period of prohibition.**—The legislature cannot by amendment impose new burdens upon the people of a precinct pending the operation of the local option law therein. *Ex parte Bains*, 39 Cr. R. 62, 45 S. W. 24.

The legislature in amending the provisions of the local option law cannot affect territory in which the law is already in force. *Ex parte Elliott*, 44 Cr. R. 575, 72 S. W. 837.

Legislature held to have power to create additional offenses relating to sale of liquor in local option territory. *Mizell v. State*, 59 Cr. R. 226, 128 S. W. 125.

Accused could not be convicted of a felony for selling liquor in local option territory under the act of the thirty-first legislature, where the county had adopted local option before the act was passed. *Rice v. State*, 59 Cr. R. 293, 128 S. W. 613.

Statute making the violation of local option law a felony held not to apply to counties adopting local option before its passage. *Crawford v. State* (Cr. App.) 128 S. W. 1122.

**Art. 5728. [3397] Election, how contested.**—At any time within thirty days after the result of the election has been declared, any qualified voter of the county, justice's precinct or subdivision of such county, or any town or city of such county in which such election has been held, may contest the said election in the district court of the county in which such election has been held, which shall have original and exclusive jurisdiction of all suits to contest such election; and the proceedings in such contest shall be conducted in the same manner as has been, or may hereafter be, prescribed; and said court shall have jurisdiction to try and determine all matters connected with said election, including the petition of such election and all proceedings and orders relating thereto, embracing final count and declaration and publication of the result putting local option into effect; and it shall have authority to determine questions relating to the legality and validity of said election, and to determine whether by the action or want of action on the part of the officers to whom was entrusted the control of such election, such a number of legal voters were denied the privilege of voting as had they been allowed to vote might have materially changed the result; and, if it shall appear from the evidence that such irregularities existed in bringing about said election or in holding same, as to render the true result of the election impossible to be arrived at, or very doubtful of ascertaining, the court shall adjudge such election to be void, and shall order the proper officer to order another election to be held, and shall cause a certified copy of such judgment and order of the court to be delivered to such officer upon whom is devolved by law the duty of or-

dering such election. It is further provided that all such cases shall have precedence in the district court and appellate courts, and that the result of such contest shall finally settle all questions relating to the validity of said election, and it shall not be permissible to again call the legality of said election in question in any other suit or proceeding; and provided, further, that if no contest of said election is filed and prosecuted in the manner and within the time provided above, it shall be conclusively presumed that said election as held and the result thereof declared, are in all respects valid and binding upon all courts; provided, also that pending such contest the enforcement of local option law in such territory shall not be suspended, and that all laws and parts of laws in conflict herewith be and the same are hereby repealed. [Acts 1887, p. 96. Amended 1893, p. 48. Amended Acts 1907, 1 S. S., p. 447.]

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|------------------------------------------------------|--------------------------------------------------------------|
| 1. Validity of statute.                              | 15. ——— Result must be affected.                             |
| 2. Definitions of terms—Contest.                     | 16. ——— Fraud or illegality in general.                      |
| 3. ——— Election.                                     | 17. ——— Illegal ballots.                                     |
| 4. Time for contesting election—In general.          | 18. ——— Denial of privilege of voting.                       |
| 5. ——— Elections held prior to enactment of statute. | 19. ——— Failure to post notice.                              |
| 6. Jurisdiction of contests.                         | 20. Enforcement of law pending contest.                      |
| 7. Procedure in general.                             | 21. The judgment of the court—In general.                    |
| 8. ——— Notice of contest.                            | 22. ——— On appeal.                                           |
| 9. ——— Parties.                                      | 23. Presumption where election not contested.                |
| 10. ——— Petition.                                    | 24. Statutory contest only way to attack election.           |
| 11. ——— Security for costs.                          | 25. ——— Injunction.                                          |
| 12. ——— Scope of inquiry.                            | 26. Conclusiveness of decision of court of criminal appeals. |
| 13. ——— Evidence.                                    |                                                              |
| 14. Grounds of contest—In general.                   |                                                              |

**1. Validity of statute.**—See, also, notes under Art. 5715.

This article held valid. *Hardy v. State*, 52 Cr. R. 420, 107 S. W. 547.  
 This law is constitutional. It simply serves as a statute of limitation and repose against any one contesting irregularities thereof after the expiration of sixty days. *Evans v. State*, 55 Cr. R. 450, 117 S. W. 167.

The amendment of 1907 is not a denial of due process of law, in violation of Const. U. S. Amend. 14. *Stockard v. Reid*, 57 C. A. 126, 121 S. W. 1144.

This article is constitutional. *Ex parte McGuire*, 57 Cr. R. 38, 123 S. W. 425.

The title of Gen. Laws 1907, pp. 447, 448, amending Rev. St. 1895, art. 3397 (Art. 5728 now), was sufficient to embrace any provisions therein extending the time within which a local option election may be contested. *Coats v. Blanding* (Civ. App.) 125 S. W. 627.

The amendment of 1907 does not violate any vested personal or property rights. *Id.*

**2. Definitions of terms—Contest.**—A local option "contest" defined. *Clary v. Hurst*, 104 T. 423, 138 S. W. 566.

**3. ——— Election.**—As used in this article the term "election" means the act of casting and receiving the ballots from the voters, counting the ballots and making returns thereof. Wherever the word "election" occurs, the legislature seem to have had in view those things to be done on the day of the election in contradistinction to the acts which are to be done preparatory to the election. The posting of the notices of election not being embraced in the terms of the statute, the failure to post one of such notices for twelve days prior to the election constitutes no ground for the contest of the election. *Norman v. Thompson*, 96 T. 250, 72 S. W. 63, 64.

The term "election" as used in this article means "the act of casting and receiving the ballots from the voters counting the ballots and making returns thereof." *Lowery v. Briggs* (Civ. App.) 73 S. W. 1062.

As used in this article the word "election" means the act of casting and receiving the ballots from the voters, counting the ballots and making returns thereof. As used here the word "election" has in view those things done on the day of the election and not those things done preparatory to holding the election. *Kilgore v. Jackson*, 55 C. A. 99, 118 S. W. 822, 823.

**4. Time for contesting election—In general.**—Where local option election was held on June 15th and votes counted and result announced June 22d, suit filed on July 22d to contest and citation served same day was within the thirty days provided by law. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 285.

Thirty days having elapsed after local option went into effect in a county, its adoption could not be contested. *Terry v. State* (Cr. App.) 117 S. W. 801.

Under this article, a person prosecuted for violating the local option law cannot defend on the ground of the invalidity of the local option election, after the expiration of the prescribed time. *Jerue v. State*, 57 Cr. R. 213, 123 S. W. 414.

Under the amendment of 1907 a local option election cannot be contested by any voter of the election district after 30 days from the declaring of the result, or by any voter in districts within the state which have voted on local option within 60 days. *Kirksey v. State*, 61 Cr. R. 298, 135 S. W. 124.

Under this article, where no contest was filed within thirty days after prohibition was declared, one tried for violating the law was not entitled to have the ballots examined for defects avoiding the election. *Kirksey v. State*, 61 Cr. R. 641, 135 S. W. 577.

**5. ——— Elections held prior to enactment of statute.**—The provision that contests of elections theretofore held must be made within 60 days from taking effect of the law,

and not otherwise, is valid, and applies to all local option elections. *Hardy v. State*, 52 Cr. R. 420, 107 S. W. 548; *Starnes v. State*, 52 Cr. R. 403, 107 S. W. 551.

The act of the thirtieth legislature expressly limited attack on local option laws, as far as contest is concerned, to sixty days after the act took effect. *Wilson v. State* (Cr. App.) 107 S. W. 818.

Where accused was prosecuted more than sixty days after this law took effect, he could not raise the question of the validity of the election by attacking the orders of the commissioners' court. The record shows there was no civil contest of the local option law. *Alexander v. State*, 53 Cr. R. 504, 111 S. W. 145.

The amendment of article 3397, Rev. St. 1895, by the act of 1907 (now Art. 5728), enlarges the field of inquiry in contests of local option elections, and provides for filing contests within sixty days after taking effect of law under elections theretofore held. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 285.

The amendment of 1907 inhibited contests of election after sixty days from the time the law took effect. *Romero v. State*, 56 Cr. R. 435, 120 S. W. 860.

Under the amendment of 1907 an election cannot be contested by any voter, in districts which have held elections prior to the enactment of the statute, after sixty days from the declaration of the result of the election. *Kirksey v. State*, 61 Cr. R. 298, 135 S. W. 124.

**6. Jurisdiction of contests.**—The district court has jurisdiction of contest of local option election, although the ground of invalidity is not specified in this article. *Oxford v. Frank*, 30 C. A. 343, 70 S. W. 428, 429.

The commissioners' court has no authority to try a local option election contest and declare such an election illegal and void. *Burks v. State*, 51 Cr. R. 637, 103 S. W. 851.

This article gives to the district court of the county in which a local option election has been held original and exclusive jurisdiction of all suits for the contest of a local option election, and confers upon such court jurisdiction to try and determine all matters connected with said election. *Cofield v. Britton*, 50 C. A. 208, 109 S. W. 495.

Under this article, Art. 3050, and Const. art. 5, § 11, a district judge of a district not embracing the county in which the contested election was held, sitting in exchange with the judge of that district, could try the case; jurisdiction being conferred on the district court and not its judge. *Savage v. Umphres* (Civ. App.) 131 S. W. 291.

**7. Procedure in general.**—See, also, Chapter 8 of Title 49.

Contest cannot be made in the district court without legislation prescribing the rules of procedure, etc. *Odell v. Wharton*, 27 S. W. 123, 87 T. 173.

The first part of this article indicates that it was the intention of the legislature that the general rules of procedure regulating contested elections as contained in Chapter 8 of Title 49 should be applicable to contests of local option elections. *Kidd v. Truett*, 28 C. A. 618, 68 S. W. 310.

In the absence of statute, the court was not bound, in a local option election contest, to have certain challenged ballots removed from the boxes, and then direct the clerk to recount the remaining ballots and announce the result to the court. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

**8. — Notice of contest.**—A contestee in a local option election contest does not, by answering to the merits, waive the right to insist upon a dismissal for the contestant's failure to serve the statutory notice. *Norton v. Alexander*, 28 C. A. 466, 67 S. W. 787.

Actual notice to one of defendants in contested local option election of grounds of contest held not to dispense with necessity for serving written notice required by statute to confer jurisdiction. *Mercer v. Woods*, 33 C. A. 642, 78 S. W. 15.

Notice of the ground of contesting an election held sufficient within Arts. 3051, 3077, 3078, and this article. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

Service of the notice of contested election on the assistant county attorney held proper under Art. 3053. *Id.*

**9. — Parties.**—The members of the Anti-Prohibition organization of the county held not necessary parties to a contest of a local option election. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

One is not estopped from contesting a local option election where a temporary injunction obtained by him restraining the publication of the result has been dissolved. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

A voter's capacity under this article to contest an election cannot be objected to on appeal, where the court below made no finding on such capacity and no finding on that point was requested by the contestee. *Savage v. Umphres* (Civ. App.) 131 S. W. 291.

**10. — Petition.**—In a petition contesting an election to decide whether intoxicating liquors should be sold in a specified territory, it is not sufficient to allege the grounds of contest in the words of the statute, but facts must be averred which would show that the election was either illegal or that the result was impossible to be arrived at, or that it was very doubtful of ascertaining. The fact that 500 illegal votes were cast, without stating for which side they were cast does not make the election invalid. They may have been cast against prohibition, and if so the result was not thereby changed. *Stinson v. Gardner*, 97 T. 287, 78 S. W. 494.

A petition in an action to contest the validity of a local option election held insufficient. *Stinson v. Gardner* (Civ. App.) 79 S. W. 354; *Oxley v. Allen*, 49 C. A. 90, 107 S. W. 945.

**11. — Security for costs.**—In a contest of a local option election, a motion for security for costs held properly overruled. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

**12. — Scope of inquiry.**—A suit under the statute to contest a local option election is a special proceeding, and the courts are limited in their investigation to such subjects as are specified in the statute. *Cofield v. Britton*, 50 C. A. 208, 109 S. W. 493.

**13. — Evidence.**—It is not error to refuse permission to defendant to introduce in evidence injunction proceeding, pending in district court, wherein it is sought to prevent the putting into operation the local option law in the county. *Keller v. State*, 46 Cr. R. 588, 81 S. W. 1214.

In a suit to contest the validity of a local option election, the refusal to admit certain testimony regarding a previous local election held not erroneous. *Oxley v. Allen*, 49 C. A. 90, 107 S. W. 945.

Evidence in a contest of a local option election as to the casting of unnumbered ballots held not admissible under the general denial. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

**14. Grounds of contest—In general.**—See, also, notes under Arts. 5715, 5717, 5720, and other articles in this chapter.

It was the intention by enacting this article to provide that a local option election might be contested upon any ground which would render such election illegal or void. *Kidd v. Truett*, 28 C. A. 618, 68 S. W. 310, 311.

The finding of a court in an election contest that a voter who was not allowed to vote would have probably voted for prohibition held erroneous. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

Findings of the district judge in a proceeding to contest a local option election held to authorize a judgment declaring such election void under this article. *Savage v. Umphres* (Civ. App.) 131 S. W. 291.

**15. — Result must be affected.**—Where, at a county local option election, the election in one precinct was invalid, but the vote of such precinct would not change the result, the election for the county will not be held invalid. *Roper v. Scurlock*, 29 C. A. 464, 69 S. W. 456.

An allegation that 500 illegal votes were cast, without stating for which side they were cast, does not show that the election was invalid, as they may have been cast for prohibition and not have affected the result of the election going against prohibition. *Stinson v. Gardner*, 97 T. 287, 78 S. W. 494.

Petition in local option election contest, stating payment of poll tax for voters, but failing to allege how such voters voted, held to state no ground of contest. *Stinson v. Gardner* (Civ. App.) 79 S. W. 354.

Allowance of certain erroneous votes in a local option election held not to invalidate the election, in the absence of a showing that such votes were sufficient to change the result. *Hoover v. Thomas*, 35 C. A. 535, 80 S. W. 859.

In order to render the election void on account of action or want of action on part of officers, it must appear that such number of legal voters were denied privilege of voting, as, had they been allowed to vote, the result would have been materially changed. *Ex parte Wood* (Cr. App.) 81 S. W. 530.

In a local option election contest, that only one of two tickets bearing the same number was counted for prohibition did not show any injury, in the absence of an allegation that the other ticket was voted against prohibition. *Savage v. Umphries* (Civ. App.) 118 S. W. 893.

**16. — Fraud or illegality in general.**—It is not necessary in order to make a case of fraud and illegality in an election that the officers holding the election should themselves be implicated. If a sufficient number of illegal or fraudulent votes have been cast to make the verdict at the polls a false verdict, the election should be set aside. *Whaley v. Thompson*, 41 C. A. 405, 93 S. W. 213.

**17. — Illegal ballots.**—See, also, Art. 5719 and notes.

If officers of the election provide illegal ballots and these are voted, and the irregularity renders it impossible to arrive at the result of the election the election must be declared void. *Griffin v. Tucker*, 51 C. A. 522, 119 S. W. 340.

**18. — Denial of privilege of voting.**—This statute makes it the duty of the court in which the validity of a local option election is contested to declare the election void "where such a number of legal voters were denied the privilege of voting as had they been allowed to vote might have materially changed the results." *Truesbell v. Bryan*, 24 C. A. 386, 60 S. W. 60.

**19. — Failure to post notice.**—See, also, notes under Art. 5718.

The failure to post one of the notices of election for twelve days prior to the election constitutes no ground for the contest of the election. *Norman v. Thompson*, 96 T. 250, 72 S. W. 63.

**20. Enforcement of law pending contest.**—A mere contest of a local option election does not suspend a prosecution under the law, declared in force by the proper authorities. *Ex parte McGuire*, 57 Cr. R. 38, 123 S. W. 425.

A prosecution for violating the local option law (Arts. 5715-5730) may be maintained pending a contest of the election adopting such law. *Gober v. State*, 57 Cr. R. 66, 123 S. W. 427.

Where an election at which local option was voted in the county was held to be illegal on an appeal to the Court of Civil Appeals in an election contest, on the judgment becoming final, the contest was no longer "pending" within the provision of this article that the enforcement of the local option law shall not be suspended pending the contest. *Savage v. State* (Civ. App.) 138 S. W. 211.

**21. The judgment of the court—In general.**—The clause relating to the character of judgment to be entered in certain contingencies was inserted in order to secure the people of the territory to be affected in their rights to have another election in such case and to prevent unnecessary delay in bringing on such election. *Kidd v. Truett*, 28 C. A. 618, 68 S. W. 310, 311.

A contest of election concludes no question which may be involved in a prosecution for the violation of the law after it has been declared in force. *Norman v. Thompson*, 96 T. 250, 72 S. W. 62.

**22. — On appeal.**—By virtue of this article the appellate court can reverse the judgment and render judgment for the proposition which was carried by the election according to the decision of the appellate court. *McCormick v. Jester*, 53 C. A. 306, 115 S. W. 278.

**23. Presumption where election not contested.**—The court, on a trial for violating the local option law, must assume that the election putting the law in force was valid, where there was no contest as provided by this article; and it cannot consider questions

as to the sufficiency of the orders and judgments of the commissioners' court putting local option into effect. *Wesley v. State*, 57 Cr. R. 277, 122 S. W. 550.

Under this article the trial court and the court on appeal must assume the verity of the judgment of the commissioners' court, determining that the local option law was adopted at an election held therefor, until the same has been annulled in a contest in the district court. *Ex parte McGuire*, 57 Cr. R. 38, 123 S. W. 425.

In a prosecution for liquor selling, the regularity of an uncontested local option election is assumed. *Trinkle v. State*, 57 Cr. R. 567, 123 S. W. 1114.

Under this article it will, in the absence of a contest, be conclusively assumed, on appeal from a conviction for violating the local option law, that the judgment and decree putting local option in force and the proclamation of the county judge had the effect to institute the law in the county. *Doyle v. State*, 59 Cr. R. 60, 127 S. W. 815.

In a prosecution for selling intoxicating liquor in a local option territory after the time for contesting the election in such territory prescribed by this article has elapsed, the validity of the election upon the introduction of the orders of the commissioners' court is presumed, and it was not error for the court to instruct that prohibition was in force in the territory described in the orders. *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

24. **Statutory contest only way to attack election.**—The legality of an election cannot be questioned in a prosecution for giving away liquors at such elections. *Anderson v. State*, 39 Cr. R. 34, 44 S. W. 824.

A licensed liquor dealer held not entitled to contest a local option election by proceedings in equity. *Norton v. Alexander*, 28 C. A. 466, 67 S. W. 787.

The validity of a local option election law cannot be inquired into in a habeas corpus proceeding to release one charged with violating a local option law. The validity of such an election must be inquired into by contest before the district court. *Ex parte Thulemeyer*, 56 Cr. R. 337, 119 S. W. 1146.

Where prohibition had been in effect in a county for several years, and no contest had been made or was pending, objections to the orders of the court putting prohibition in effect, raised on a trial for violating the local option law, could not be considered. *Gipson v. State*, 58 Cr. R. 403, 126 S. W. 267.

25. — **Injunction.**—See, also, Title 69.

Election contest held to be a mere political proceeding, as distinguished from a suit, so that injunction will not lie to prevent publication of result of local option election, even at the suit of liquor dealers, on allegation of irreparable injury to their property in case of publication. *Robinson & Watson v. Wingate*, 36 C. A. 65, 80 S. W. 1067.

Equity held without jurisdiction to prevent by injunction a publication of the result of a local option election, but the remedy is in the manner pointed out by statute. *Merrill v. Savage*, 49 C. A. 292, 109 S. W. 408.

26. **Conclusiveness of decision of court of criminal appeals.**—Where the court of criminal appeals declared the local option election in certain districts void, and the state and county accepted the decision, and licenses were issued for the sale of liquor for many years, the decision is conclusive upon the civil courts. *State v. Schwarz*, 103 T. 119, 124 S. W. 420.

**Art. 5729. [3398] Refunding of license tax.**—In all cases where any person, firm or association of persons pursuing the occupation of liquor dealers under license issued in accordance with the laws of this state has been or shall hereafter be prevented from pursuing such occupation for the full time to which he would be otherwise entitled by reason of the adoption of local option in any county, precinct, subdivision of such county, town or city, a proportionate amount of the taxes paid by him for the unexpired term shall be refunded to him. [Acts 1883, p. 110. Amend. 1893, p. 48.]

**Art. 5730. [3399] District judges to give in charge to grand juries.**—It is hereby made the duty of the district judges to give this law in charge to the grand juries; and it is made the special duty of the county attorneys to file or have filed a complaint in the county court of said county against all houses, and the keepers thereof, used for the sale, exchange or gift of any kind of intoxicating liquors, in any county, justice's precinct or subdivision of such county, or of any town or city in such county in this state when local devices are resorted to, to prevent or avoid detection of the keeper thereof; and, upon said complaint being filed with any justice of the peace, describing the place where the device is kept, and the name of the person violating this law, if known, said justice of the peace shall issue his warrant commanding any sheriff or constable to search said place, and, if the law is being violated, to arrest the person or persons so violating the law; and it shall be the duty of the sheriff of the county wherein such house or place where such device is kept, for the sale or gift of intoxicating liquors, to demand admission into the same; and, upon admittance being refused, the sheriff is hereby authorized and required by law to force open the same and arrest and

hold for trial before the courts all such persons who shall violate any of the provisions of this title; and it is the duty of the county judges and justices of the peace, having jurisdiction in the premises, to see that this law is rigidly enforced; provided, no arrest or search shall ever be made until the sheriff shall first procure a warrant therefor, issued by the proper authority. [Acts 1879, p. 41. Amend. 1893, p. 48.]

**House or place.**—The words "house" or "place" in this article include an arbor kept by defendant for the purpose of selling liquor. *Whitcomb v. State*, 21 S. W. 976, 2 C. A. 301.

## TITLE 89

## MANDAMUS

Art.  
5731. No mandamus on ex parte hearing.

Art.  
5732. Mandamus, etc., not to issue against officer of executive department, except by supreme court.

**Article 5731. [1450] No mandamus on ex parte hearing.**—No mandamus shall be granted on ex parte hearing; and any peremptory mandamus granted without notice shall be abated on motion. [Act May 11, 1846, p. 300, sec. 4. P. D. 1407.]

**Art. 5732. [4861] Mandamus, etc., not to issue against officer of executive department, except by supreme court.**—No court of this state (except the supreme court, as provided by article 1526) shall have power, authority or jurisdiction to issue the writ of mandamus or injunction or any other mandatory or compulsory writ of process against any of the officers of the executive departments of the government of this state to order or compel the performance of any act or duty which, by the laws of this state, they, or either of them, are authorized to perform, whether such act or duty be judicial, ministerial or discretionary. [Acts 1881, p. 7, sec. 4.]

For jurisdiction of the several courts in mandamus, see Arts. 1526, 1528, 1592, 1713, 1772.

## DECISIONS RELATING TO SUBJECT IN GENERAL

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| <p><b>I. Nature and grounds in general.</b></p> <ol style="list-style-type: none"> <li>1. Mandatory injunction.</li> <li>2. Existence and adequacy of other remedy in general.</li> <li>3. Remedy by appeal, writ of error or certiorari.</li> <li>4. Nature and existence of rights to be protected or enforced.</li> <li>5. Nature of act to be commanded.</li> <li>6. Demand and default.</li> <li>7. Mandamus ineffectual or not beneficial.</li> <li>8. Persons entitled to relief.</li> </ol> <p><b>II. Subjects and purposes of relief.</b></p> <ol style="list-style-type: none"> <li>9. In what cases mandamus will issue in general.</li> <li>10. Acts and proceedings of courts, judges and judicial officers—Courts and judicial officers subject to mandamus.</li> <li>11. — Matters of discretion in general.</li> <li>12. — Specific acts.</li> <li>13. — Entertaining and proceeding with cause.</li> <li>14. — Pleading.</li> <li>15. — Conclusions of law and fact.</li> <li>16. — New trial.</li> <li>17. — Signing or entry of judgment or order.</li> <li>18. — Vacation of judgment or order.</li> <li>19. — Proceedings for review.</li> <li>20. — Taxation of costs.</li> <li>21. — Criminal prosecutions.</li> <li>22. Acts and proceedings of public officers or boards and municipalities—Official character of act.</li> </ol> | <ol style="list-style-type: none"> <li>23. — Ministerial acts in general.</li> <li>24. — Matters of discretion.</li> <li>25. — Specific acts.</li> <li>26. — Title to and possession of office.</li> <li>27. — Matters relating to public schools.</li> <li>28. — Proceedings relating to public lands.</li> <li>29. — Issuance of certificates and licenses.</li> <li>30. — Establishment of roads.</li> <li>31. — Issuance of warrants and payment of claims.</li> <li>32. — Assessment and levy of taxes.</li> <li>33. Acts and proceedings of private corporations and individuals—Membership in corporation or association.</li> <li>34. — Exercise of corporate franchises and powers.</li> <li>35. — Performance of corporate contracts.</li> </ol> <p><b>III. Jurisdiction, proceedings and relief.</b></p> <ol style="list-style-type: none"> <li>36. Jurisdiction in general.</li> <li>37. Jurisdiction of supreme court.</li> <li>38. Jurisdiction of courts of civil appeals.</li> <li>39. Time to sue and leave of court.</li> <li>40. Parties.</li> <li>41. Alternative writ.</li> <li>42. Pleading.</li> <li>43. Scope of inquiry.</li> <li>44. — Judgment or order.</li> <li>45. Peremptory writ.</li> <li>46. Appeal and error.</li> <li>47. Costs.</li> </ol> |
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## I. NATURE AND GROUNDS IN GENERAL

1. Mandatory injunction.—See notes under Art. 4643.
2. Existence and adequacy of other remedy in general.—Mandamus will not issue where there is another adequate statutory or common-law remedy. *Screwmen's Ass'n v. Benson*, 76 T. 552, 13 S. W. 379.



The writ will be refused where there is an adequate legal remedy. *Jackson v. Swayne*, 92 T. 242, 47 S. W. 711.

Law held to afford no adequate remedy precluding mandamus in the case of a refusal to enter judgment on an alleged invalid verdict affecting the title of land. *Texas Tram & Lumber Co. v. Hightower*, 100 T. 126, 96 S. W. 1071.

Facts held not to sustain an exception to a petition for mandamus that there was an adequate remedy at law. *Bailey v. Aransas County*, 46 C. A. 547, 102 S. W. 1159.

The legal remedy which will bar mandamus must not only be adequate, but it must be specific and appropriate. *International Water Co. v. City of El Paso*, 51 C. A. 321, 112 S. W. 816.

A city, contracting with one for water for itself and its inhabitants, held entitled to maintain mandamus to compel performance thereof, as against the objection that its other remedy was adequate. *Id.*

Where a city engineer refused to disclose a street line in front of relator's premises as required by ordinance, except in accordance with the contention of the city authorities, relator did not have an adequate remedy by trespass to try title, precluding resort to mandamus. *Giraud v. Winslow* (Civ. App.) 127 S. W. 1180.

If a member of one party has by misrepresentation or silence caused his name to be placed upon the primary ballot of another party and defeated a member of such party, the result of such illegal act may be remedied by an action under the primary election law to contest such nomination so that mandamus will not lie. *Deweese v. Stevens*, 105 T. 356, 150 S. W. 539.

The city council having acted on and refused a telephone company's application to erect poles in the streets, it cannot be said resort should be to mandamus rather than injunction against the city's interference with such erection. *City of Brownwood v. Brown Telegraph & Telephone Co.* (Civ. App.) 152 S. W. 709.

**3. Remedy by appeal, writ of error or certiorari.**—Mandamus will not issue to compel the county superintendent of schools to approve a salary voucher when no appeal has been taken to the state superintendent. *Plummer v. Gholson* (Civ. App.) 44 S. W. 1.

Mandamus will not lie to compel the entry of a judgment for injunction, there being remedy at law by appeal. *Aycock v. Clark*, 94 T. 375, 60 S. W. 665.

Adequate relief from an order punishing contempt by forbidding a further appearance or filing of any paper can be obtained by appeal therefrom, and therefore mandamus cannot be resorted to. *Kruegel v. Nash*, 31 C. A. 15, 70 S. W. 983.

A writ of mandamus held not to be made a substitute for appeal or writ of error. *Smith v. Conner*, 98 T. 434, 84 S. W. 815.

The remedy for the error in computing interest accrued on a demand or otherwise, so that the judgment is rendered for an excessive sum, is by appeal or certiorari, and not by injunction. *Kansas City Life Ins. Co. v. Warbington* (Civ. App.) 113 S. W. 988.

Mandamus, and not certiorari, is the proper remedy to compel the clerk to perform his ministerial duty of preparing the transcript on appeal. *Martin v. Irvin* (Civ. App.) 147 S. W. 1164.

Mandamus will not lie to correct a judgment, however erroneous, from which an appeal may be taken. *Shook v. Journeay* (Civ. App.) 149 S. W. 406.

**4. Nature and existence of rights to be protected or enforced.**—Where a board of medical examiners placed such a construction on the law as to deprive a citizen of an unquestionable legal right, the latter was entitled to have the determination reviewed by mandamus. *Board of Medical Examiners of Texas v. Taylor*, 56 C. A. 291, 120 S. W. 574.

Codification commissioners held not entitled to maintain mandamus to compel the secretary of state to deliver to them possession of two bills passed by the thirty-second legislature, entitled "Revised Civil Statutes" and "Revised Criminal Statutes," that they might complete their labors thereon. *Minor v. McDonald*, 104 T. 461, 140 S. W. 401.

Mandamus must be founded upon a clear legal right in relator. *Erp v. Robison* (Sup.) 155 S. W. 180.

Courts will not control the secretary of state in rejecting a corporate charter because its purpose clause is not justified unless the purpose named is clearly authorized by law. *Smith v. Wortham* (Sup.) 157 S. W. 740.

**5. Nature of act to be commanded.**—Before mandamus will lie, a plain and unambiguous duty which it is designed to enforce must already have been imposed by law. *Caven v. Coleman*, 100 T. 467, 101 S. W. 199.

Mandamus will lie to compel the performance of an act which the law enjoins as a duty resulting from an office, trust, or situation. *City of San Antonio v. Routledge*, 46 C. A. 196, 102 S. W. 756.

Mandamus lies only to compel the performance of an existing legal duty and cannot be the means of imposing that duty. *Missouri, K. & T. Ry. Co. of Texas v. Thompson*, 55 C. A. 12, 118 S. W. 618.

To justify mandamus, a legal duty must be shown. *Conger v. Robison*, 104 T. 141, 135 S. W. 110.

**6. Demand and default.**—Mandamus will not lie to compel a tax collector to issue a license as merchant druggist where he had not refused to do so. *Yellowstone Kit v. Wood*, 18 C. A. 683, 43 S. W. 1068.

Mandamus will not issue to compel a trial judge to make up and file a statement of facts on appeal, where relator did not apply therefor till after expiration of time for filing the record in the appellate court. *Capps v. Russell*, 25 C. A. 257, 60 S. W. 993.

Writ of mandamus, being based on default of duty, cannot direct a future levy of taxes in advance of default in making such levy. *City of Austin v. Cahill*, 99 T. 172, 83 S. W. 542, 89 S. W. 552.

Demand on a city to levy taxes to meet bonds held not necessary prerequisite of a mandamus to compel it to do so, where such demand would have met with a refusal. *Id.*

Mandamus will not lie to compel a city to levy a tax to discharge a debt, where it does not appear that the city council has refused on request to do so. *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Civ. App.) 107 S. W. 157.

A city, granting to a company a franchise to supply the city and its inhabitants with water, held entitled to maintain mandamus to compel the company to construct the necessary connections to supply water to consumers, without applying for such connections in each case. *International Water Co. v. City of El Paso*, 51 C. A. 321, 112 S. W. 816.

The supreme court will not issue mandamus to compel a district judge to set a case for rehearing during term time, when the only request by relator was to set the case for hearing in vacation. *Ashford v. Goodwin*, 103 T. 491, 131 S. W. 535, Ann. Cas. 1913A, 699.

Before mandamus will be granted to coerce action by a judge, a previous request to act and a definite, unqualified refusal must be shown. *Shook v. Journeay* (Civ. App.) 149 S. W. 406.

7. **Mandamus ineffectual or not beneficial.**—Where the granting of a writ of mandamus to compel the secretary of state to accept franchise tax would not improve the position of the relator, it should be denied. *Arkansas Building & Loan Association v. Madden*, 91 T. 461, 44 S. W. 823.

Where the record on appeal shows conclusively that the conclusions of fact and law were not filed in time, mandamus does not lie to compel the district court to correct the record by striking therefrom the conclusions of fact and law. *Houston Oil Co. of Texas v. Powell* (Civ. App.) 151 S. W. 887.

8. **Persons entitled to relief.**—Mandamus held not to lie to compel the undoing of what relator caused or helped to be done. *Nevell v. Terrell*, 99 T. 355, 87 S. W. 659, 89 S. W. 971.

A city held not deprived, by reason of contracts, of its right to maintain mandamus to compel a water company to construct, at its own cost, the necessary connections to supply water to consumers. *International Water Co. v. City of El Paso*, 51 C. A. 321, 112 S. W. 816.

Qualified taxpayers of a county held to have sufficient interest to sue out mandamus to compel a county commissioners' court to take certain sections of land from a school district, and permit them to be annexed to another district. *McLaughlin v. Smith* (Civ. App.) 140 S. W. 248.

## II. SUBJECTS AND PURPOSES OF RELIEF

9. **In what cases mandamus will issue in general.**—Mandamus will be issued to compel the performance of an act purely ministerial; otherwise if there is the exercise of judgment or discretion. *Arberry v. Beavers*, 6 T. 457, 55 Am. Dec. 791; *Auditorial Board v. Arles*, 15 T. 72; *Auditorial Board v. Hendrick*, 20 T. 60; *H. T. & B. R. Co. v. Randolph*, 24 T. 317; *Johnson v. Campbell*, 39 T. 83; *Bledsoe v. Int. R. R. Co.*, 40 T. 537; *Kuechler v. Wright*, 40 T. 600; *Rains v. Simpson*, 50 T. 495, 32 Am. Rep. 609; *T. M. Ry. Co. v. Locke*, 63 T. 623.

As to the power to issue a writ of mandamus to compel the performance of a judicial act, see *Wells v. Littlefield*, 62 T. 28; *Guilford v. Love*, 49 T. 744; *Kleiber v. McMannus*, 66 T. 49, 17 S. W. 249; *Ewing v. Cohen*, 63 T. 485; *Schultze v. McLeary*, 73 T. 92, 11 S. W. 924; *Teat v. McGaughey*, 85 T. 478, 22 S. W. 302; *Steele v. Goodrich*, 28 S. W. 939, 87 T. 401.

Mandamus is the proper remedy to enforce the performance of ministerial or judicial acts, clearly defined and enjoined (*Reagan v. Copeland*, 78 T. 551, 14 S. W. 1031; *Railway Co. v. Jarvis*, 80 T. 456, 15 S. W. 1089; *Schley v. Maddox* (Civ. App.) 22 S. W. 998; *Walker v. Barnard*, 27 S. W. 726, 3 C. A. 14), when there is no other adequate legal remedy (*State v. Morris*, 86 T. 226, 24 S. W. 393), and a judicial discretion cannot be exercised (*Screwmen's Ben. Ass'n v. Benson*, 76 T. 552, 13 S. W. 379; *Callaghan v. Salliway*, 5 C. A. 239, 23 S. W. 837; *Railway Co. v. Lane*, 79 T. 643, 15 S. W. 477, 16 S. W. 18; *Ewing v. Cohen*, 63 T. 482; *Sansom v. Mercer*, 63 T. 488, 5 S. W. 62, 2 Am. St. Rep. 505; *Campbell v. Blanchard*, 2 U. C. 321; *Wells v. Littlefield*, 62 T. 28; *Luckey v. Short*, 1 C. A. 5, 20 S. W. 723).

A mandamus will be granted to compel the clerk of a court to issue a citation (*Williams v. Taylor*, 83 T. 667, 19 S. W. 156); to compel the issuance of a warrant by the county treasurer for the payment of an audited claim (*Brown v. Ruse*, 69 T. 589, 7 S. W. 489); to compel the location of a land certificate (*Railway Co. v. Jarvis*, 80 T. 456, 15 S. W. 1089; *Grigsby v. Bowles*, 79 T. 138, 15 S. W. 30; *Railway Co. v. Lane*, 79 T. 643, 15 S. W. 477, 16 S. W. 18).

10. **Acts and proceedings of courts, judges and judicial officers.—Courts and judicial officers subject to mandamus.**—Where a court is void, mandamus will not lie to compel it to permit the county attorney to take charge of certain prosecutions therein. *Jackson v. Swayne*, 92 T. 242, 47 S. W. 711.

Where it is judicially known by the court that a party is no longer a justice of the peace, it will refuse a writ directing him to proceed to trial as such justice. *First Nat. Bank v. Rowland*, 45 C. A. 3, 99 S. W. 1043.

11. — **Matters of discretion in general.**—The discretion of members of the commissioners' court as to approval of the official bond of the county judge cannot be controlled by mandamus, though some or all of the members were influenced by corrupt motives. *Gouhenour v. Anderson*, 35 C. A. 569, 81 S. W. 104.

The discretion of the trial court in adopting a reasonable method to enforce the right of a partner to inspect books disclosing firm transactions will not be controlled by mandamus. *Rush v. Browning*, 103 T. 649, 132 S. W. 763.

Mandamus will not lie to an inferior court to compel performance of a duty requiring exercise of a judicial discretion. *Jefferson v. Scott* (Civ. App.) 135 S. W. 705.

Mandamus to an inferior court lies only respecting a purely ministerial act. *Wright v. Swayne*, 104 T. 440, 140 S. W. 221.

12. — **Specific acts.**—The clerk may be required by mandamus to issue an order of sale. *Moore v. Muse*, 47 T. 210.

Mandamus will be granted to compel a clerk of the court to issue a citation. *Williams v. Taylor*, 83 T. 667, 19 S. W. 156.

Mandamus will not lie to compel a judge to dismiss a suit against a corporation and to discharge a receiver. *Matlock v. Smith*, 96 T. 211, 71 S. W. 956.

Where the commissioners' court arbitrarily and without exercising discretion refused to approve the official bond of the county judge, mandamus lies to compel them to exercise their discretion. *Gouhenour v. Anderson*, 35 C. A. 569, 81 S. W. 104.

13. — **Entertaining and proceeding with cause.**—To entitle one to mandamus to compel a lower court, on remand, to try a particular issue only, it must appear that the order remanding the case directed the trial of that issue. *Taylor v. Jones*, 24 C. A. 201, 58 S. W. 47.

Mandamus held to lie to compel a judge to try a case though there be remedy by injunction. *St. Louis, S. F. & T. Ry. Co. v. Smith* (Civ. App.) 99 S. W. 171.

Where the court granting a preliminary injunction deliberately refuses to further proceed with the case, the party enjoined may by mandamus compel a hearing. *Ex parte Roper*, 61 Cr. R. 68, 134 S. W. 334.

14. — **Pleading.**—A trial judge's determination whether a petition states a good cause of action involves judicial discretion not controllable by mandamus. *Jefferson v. Scott* (Civ. App.) 135 S. W. 705.

15. — **Conclusions of law and fact.**—Mandamus will lie to compel a court of civil appeals to find conclusions of fact, when it wholly fails to do so, but not to correct insufficient conclusions. *Moore v. Waco Bldg. Ass'n*, 92 T. 265, 47 S. W. 716.

Mandamus will not lie to compel a judge to file conclusions of fact and law; he having understood that the request therefor was withdrawn, and his statement that he could see no reason or necessity for findings being acquiesced in by counsel. *Magee v. Penn* (Civ. App.) 67 S. W. 1077.

16. — **New trial.**—Unless a judge's action in granting a new trial is void, mandamus does not lie to control his action. *Wright v. Swayne*, 104 T. 440, 140 S. W. 221.

17. — **Signing or entry of judgment or order.**—Mandamus will not lie to compel the entry of the judgment for injunction, the act being judicial. *Aycock v. Clark*, 94 T. 375, 60 S. W. 665.

A mandamus will not issue from the court of criminal appeals to compel the clerk of the court below to enter the sentence in a criminal case on the record. *Jones v. State*, 43 Cr. R. 419, 66 S. W. 559.

Mandamus to compel the trial court to immediately enter judgment refused. *Testard v. Brooks* (Civ. App.) 70 S. W. 240.

18. — **Vacation of judgment or order.**—The refusal of a county judge to make publication of the result of a local option election held a substantial refusal to perform a statutory duty, and mandamus will not lie to vacate an order of the district judge compelling the county judge to make such publication. *Thorne v. Moore*, 101 T. 205, 105 S. W. 985.

Mandamus does not lie to compel a trial judge to vacate a judgment of dismissal and to try an election contest on the merits. *Jefferson v. Scott* (Civ. App.) 135 S. W. 705.

The trial judge's action in granting a petition for mandamus to compel the chairman of a Democratic executive committee to certify a certain name to the county clerk as the Democratic nominee for county commissioner held to involve the exercise of a judicial discretion which could not be reviewed by an original writ of mandamus to vacate the order. *Deweese v. Stevens*, 105 T. 356, 150 S. W. 589.

19. — **Proceedings for review.**—Mandamus may be resorted to to compel clerk of supreme court to transmit to court of civil appeals copy of order of supreme court refusing writ of error, and may be issued by a justice of the supreme court in vacation. *Hines v. Morse*, 92 T. 194, 47 S. W. 516.

Mandamus lies to compel the court in which a judgment was entered to determine the issue as to the ability of plaintiff in error to pay the costs of an appeal, under Art. 2098. *Cox v. Hightower*, 19 C. A. 536, 47 S. W. 1048.

A plaintiff, failing to present the statement of facts to defendant's counsel until the day before the expiration of the time for filing, when it was impossible for counsel then to prepare a statement, held not entitled to mandamus to compel the court to make cut and file the statement. *Kruegel v. Nash*, 28 C. A. 306, 68 S. W. 61.

The court of criminal appeals may issue mandamus to compel the trial court to enter a notice of appeal, where the trial court willfully or inadvertently fails to enter such notice, or, through force or fear, accused is prevented from giving it. *Ex parte Martinez* (Cr. App.) 145 S. W. 959.

Mandamus lies to compel the district court to correct the record on appeal, when necessary to have the error corrected. *Houston Oil Co. of Texas v. Powell* (Civ. App.) 151 S. W. 887.

20. — **Taxation of costs.**—Mandamus will not lie against the clerk of the county court to compel the entry on the probate fee book of sheriff's fees in a guardianship proceeding in such court. *Shrewsbury v. Ellis*, 26 C. A. 406, 64 S. W. 700.

The fact that sheriff's fees in a guardianship proceeding in the county court have never been adjudicated is a defense to a mandamus proceeding by the sheriff against the clerk of such court to compel the entry of such fees on the probate fee book. *Id.*

21. — **Criminal prosecutions.**—Mandamus will not lie to compel a city court to permit the county attorney to take charge of the prosecution, if the ordinance upon which it is based is void. Mandamus to compel the city court to permit the county attorney to appear will be refused when its jurisdiction of the offense is not exclusive, and the county attorney could have filed a complaint in justice's or county court. *Jackson, City Judge, v. Swayne, County Attorney*, 92 T. 242, 47 S. W. 711.

The writ will not be issued to require a city judge to permit the county attorney to control proceedings in the municipal court, because if the law under which that court essays to act is invalid there can be no legal prosecution, and if valid the county attorney's rights are not exclusive, and this in spite of Const. art. 5, § 21. *Id.*

Invalidity of a municipal ordinance, under which offenses also punishable by statute are being prosecuted, is no ground for a writ to compel the court to permit the county attorney to take charge of the prosecutions. *Id.*

Mandamus held not to lie to compel a county attorney to institute a criminal prosecution. *Murphy v. Sumners*, 54 Cr. R. 369, 112 S. W. 1070.

If the stenographer did not comply with the judge's order requiring him to furnish a statement of facts to an indigent accused upon affidavit, accused would be required to sue out mandamus to compel the issuance of the statement by the stenographer, in order to enable accused to procure a reversal for failure to have a statement of facts. *Wood v. State* (Cr. App.) 150 S. W. 194.

**22. Acts and proceedings of public officers or boards and municipalities—Official character of act.**—An officer cannot be compelled by mandamus to perform an act unless it is one that is imperatively required of him by law to perform. *Hart v. Wilson* (Civ. App.) 156 S. W. 520.

**23. — Ministerial acts in general.**—Mandamus held the proper remedy to compel performance of a ministerial duty by a county clerk. *Newton v. Leal* (Civ. App.) 56 S. W. 209.

The drawing of a warrant by a municipal officer for the payment of a definitely ascertained demand is a ministerial act, which may be compelled by mandamus. *Altgelt v. Campbell* (Civ. App.) 78 S. W. 967.

Mandamus will not lie to compel the performance of an act by an official, unless his duty to perform the same is so clear and free from doubt as not to require the exercise of discretion on his part, and so that its performance amounts to a mere ministerial act. *Wortham v. Sullivan* (Civ. App.) 147 S. W. 702.

**24. — Matters of discretion.**—Discretion of city council in letting contracts cannot be controlled by mandamus. *Brown v. City of Houston* (Civ. App.) 48 S. W. 760.

A decision of the commissioners' court in a local option election held a decision on a matter committed to the court by the constitution, so that mandamus does not lie to control it. *Durrett v. Robinson*, 103 T. 502, 131 S. W. 400.

**25. — Specific acts.**—Mandamus will be granted upon the application of a municipal corporation to compel an officer to perform his duty. *Elser v. City of Ft. Worth* (Civ. App.) 27 S. W. 739.

Mandamus is the proper remedy to compel the commissioner of the land office to receive and file field notes. *Hogue v. Baker*, 92 T. 58, 45 S. W. 1004.

Where the articles of a corporation include a purpose for which a corporation is not authorized to be formed and also a legal purpose, the secretary of state cannot be required by mandamus to file such articles. *Miller v. Tod*, 95 T. 404, 67 S. W. 483.

Where a city has no board of health or city engineer, so that they may be appointed members of the "examining and supervising board of plumbers," a mandamus will not lie to compel the city council to establish such board of health and appoint an engineer, so that this law may be complied with. *Caven v. Coleman*, 100 T. 467, 101 S. W. 199, reversing (Civ. App.) 96 S. W. 777.

A county surveyor cannot be required to make a survey in territory lying beyond a de facto line of the county and in which political powers of the state are not exercised. *Wortham v. Sullivan* (Civ. App.) 147 S. W. 702.

**26. — Title to and possession of office.**—Mandamus a proper remedy to restore one to an office. *Nelson v. Edwards*, 55 T. 389.

Mandamus is properly granted to restore a person to an office from which he has been illegally ousted. *Johnson v. City of Galveston*, 11 C. A. 469, 33 S. W. 150.

Action of city council in removing the mayor held not reviewable by mandamus. *Riggins v. Richards* (Civ. App.) 79 S. W. 84.

Where the authorities of a city were threatening to unlawfully appoint a successor of a municipal officer, and to dispossess him of his office and of the property thereof, his remedy was not mandamus, but injunction. *Callaghan v. McGown* (Civ. App.) 90 S. W. 319.

Mandamus held not to be the proper remedy of a school superintendent to compel the school trustees to recognize his right to the office, and to prevent them from interfering therewith. *Young v. Dudley* (Civ. App.) 140 S. W. 802.

**27. — Matters relating to public schools.**—Mandamus to compel reinstatement of pupil refused, where facts showing cause of suspension of pupil were not set forth. *Cochran v. Patillo*, 16 C. A. 458, 41 S. W. 537.

Where a decision of the state superintendent that a teacher's contract is valid is not appealed from, the teacher is entitled to mandamus to compel recognition of the contract. *Town of Pearsall v. Woolls* (Civ. App.) 50 S. W. 959.

Mandamus to compel taking of school census held improper, under the pleading. *Burrell v. Blanchard* (Civ. App.) 51 S. W. 46.

The contention that a county superintendent should not be compelled to approve a teacher's contract, because it would render the funds of the district deficient, held not sustainable under the evidence. *Watkins v. Huff* (Civ. App.) 63 S. W. 922.

Mandamus held not to lie to require state board of education to set aside an order and make a different decision. *McFall v. State Board of Education*, 101 T. 572, 110 S. W. 739.

**28. — Proceedings relating to public lands.**—Mandamus is not available to compel the land commissioner to cancel a patent issued nearly fifty years ago, and issue another to petitioner, if it appears that a determination of rights would involve doubtful questions of fact. *Teat v. McGaughey*, 85 T. 478, 22 S. W. 302.

Mandamus was the proper remedy to compel the commissioner of the general land office to reinstate relator as a purchaser of certain sections of school lands, where their award to him had been canceled. *Hazlewood v. Rogan*, 95 T. 295, 67 S. W. 80.

Mandamus will not lie to compel the land commissioner to reinstate a sale, when disputed questions of fact must be determined. *Wooten v. Rogan*, 96 T. 434, 73 S. W. 799.

A land commissioner cannot be compelled by mandamus to sell land previously sold to an alleged minor, where he would be required to determine the question of minority. *Boozar v. Terrell*, 96 T. 635, 75 S. W. 482.

Mandamus will not lie to compel the commissioner to approve an application of assignee of a lessee to purchase leased school land in one of the counties during the continuance of the lease when no annual rental is delinquent. *Martin v. Terrell, Com'r*, 97 T. 118, 76 S. W. 743.

The supreme court has no power to interfere by mandamus to compel the commissioner of the general land office to accept an application for the purchase of school land, where the right to purchase depends on a question of fact. *Clark v. Terrell*, 98 T. 15, 81 S. W. 4.

Mandamus held proper remedy, where the commissioner of the general land office erroneously treated relator's lease of state lands as void. *McDowell v. Terrell*, 99 T. 107, 87 S. W. 668.

Applicants to purchase school land, whose applications were accepted subject to a reservation of minerals, held not entitled to mandamus to determine the land commissioner's right to reserve the minerals prior to the accrual of their right to demand patents. *Thaxton v. Terrell*, 99 T. 562, 91 S. W. 559.

Where a certificate is issued by the commissioners, showing that the purchaser has occupied the land as required by statute, and the commissioner attempts to revoke for failure to so occupy, mandamus to compel him to reinstate the sale will be granted. *Mitchell v. Robison*, 103 T. 642, 132 S. W. 465.

**29. — Issuance of certificates and licenses.**—Mandamus will not lie to board of pharmaceutical examiners to issue certificate to one passing requisite examination. *Dean v. Campbell* (Civ. App.) 59 S. W. 294.

Mandamus will not lie to compel the insurance commissioner to issue the certificate provided for by Art. 4497 before he has completed his investigation as his action is discretionary and there is no absolute ministerial duty resting on him. The commissioner must be satisfied that the company seeking the certificate has met all the requirements of law. The court cannot by mandamus deny him the authority which the statute gives him of investigating the subject before acting. *Metropolitan Life Ins. Co. v. Love* (Civ. App.) 108 S. W. 822.

Before mandamus can issue to compel the commissioner of banking and insurance to issue a license, etc., it must appear that the acts are imperatively required of him by law. *Trinity Life & Annuity Society v. Love*, 102 T. 277, 115 S. W. 26, 116 S. W. 1139.

**30. — Establishment of roads.**—Commissioners' court held not subject to mandamus under the statutes concerning the establishment of roads. *Howe v. Rose*, 35 C. A. 328, 80 S. W. 1019.

**31. — Issuance of warrants and payment of claims.**—Mandamus is the proper remedy to compel the issuance of a warrant on the county treasurer for the payment of the audited claim. Though the practice in such cases is to swear to the petition, the statute does not expressly require it. *Brown v. Ruse*, 69 T. 589, 7 S. W. 489.

Mandamus will not lie to compel the county treasurer to pay warrants the legality of which he doubts, the payment having been prohibited by the commissioners' court. *Walker v. Barnard & Co.*, 8 C. A. 14, 27 S. W. 726.

A claimant against a city held not entitled to mandamus to compel the issuance of a warrant for his claim out of its regular order. *Altgelt v. Campbell* (Civ. App.) 78 S. W. 967.

Mandamus will not go to compel a city to appropriate to the payment of interest on bonds taxes collected indiscriminately for interest and sinking fund both. *City of Austin v. Cahill* (Civ. App.) 88 S. W. 536.

Mandamus held to lie to compel the city of San Antonio to pay off a judgment rendered against it, and to exercise the power conferred by law to raise money to discharge it. *City of San Antonio v. Routledge*, 46 C. A. 196, 102 S. W. 756.

Where funds for payment of teachers' salaries have been wrongfully disbursed by school trustees, mandamus to the treasurer held the proper remedy to recover the amount on hand. *Stephenson v. Camp* (Civ. App.) 133 S. W. 816.

Mandamus held to lie to compel a treasurer, who has collected a special assessment, to pay a part thereof as called for by a warrant. *Fairbanks, Morse & Co. v. Tilson* (Civ. App.) 146 S. W. 363.

**32. — Assessment and levy of taxes.**—The requirements of the constitution and a city charter, that provision for interest and a sinking fund shall be made on the creation of a municipal debt, may be enforced by mandamus. *Wright v. City of San Antonio* (Civ. App.) 50 S. W. 406; *Berlin Iron Bridge Co. v. Same*, Id. 408.

Judgment on a claim against a city, and mandamus to enforce the levy of a tax, held, under the circumstances, obtainable in the same suit. *City of Austin v. Cahill*, 99 T. 172, 88 S. W. 542, 89 S. W. 552.

Failure of a city to levy taxes to meet bonds at the time required by law may be remedied by mandamus, relating back to the time when the levy should have been made. Id.

For unpaid obligations incurred by a city during years that are past, a tax may be levied and placed on the rolls of the year when levied to pay the indebtedness, and, if the city refuse to make the levy and a surplus taxing power remains, it can be compelled by mandamus to do so. *City of San Antonio v. Routledge*, 46 C. A. 196, 102 S. W. 756.

Mandamus held to lie to compel the city of San Antonio to levy a special tax to pay a judgment against it. Id.

Mandamus will not lie to compel a city to levy a tax to discharge a debt where it does not appear that there is a necessity therefor. *Gutta Percha & Rubber Mfg. Co. v. City of Cleburne* (Civ. App.) 107 S. W. 157.

Mandamus will lie to require the commissioner of banking and insurance to impose tax assessments upon insurance companies required by statute. *Firemen's Fund Ins. Co. v. Von Rosenberg*, 103 T. 571, 132 S. W. 467.

**33. Acts and proceedings of private corporations and individuals**—Membership in corporation or association.—Mandamus will not lie to restore a member expelled from an association, where he has failed to appeal under the provisions of the constitution of the association, although the order of expulsion was void. *Screwmen's Ass'n v. Benson*, 76 T. 552, 13 S. W. 379; *Benson v. Screwmen's Ass'n*, 21 S. W. 562, 2 C. A. 66.

Where the executive officers of a mutual benefit society attempt to enforce an unauthorized resolution, the member's remedy is by injunction, or by mandamus to compel restoration, if suspended for refusing to comply therewith. **Supreme Ruling of Fraternal Mystic Circle v. Ericson** (Civ. App.) 131 S. W. 92.

34. — **Exercise of corporate franchises and powers.**—A street railway company accepting the franchise can be compelled by mandamus to operate its road. *Railway Co. v. State* (Civ. App.) 38 S. W. 54.

A city held entitled to mandamus; a railroad having refused to comply with an ordinance as to grade of its tracks at street crossings. *Houston & T. C. R. Co. v. City of Dallas* (Civ. App.) 78 S. W. 525.

Facts held to justify mandamus compelling a street railway to forthwith proceed to perform its franchise obligation to pave its portion of a street which was then being improved by the city. *Denison & S. Ry. Co. v. City of Denison* (Civ. App.) 112 S. W. 780.

There being no statutory requirement imposing on a carrier the duty of delivering to a connecting carrier the routing instructions of the shipper, and the common-law duty, when delivering a through shipment to a connecting carrier, to also deliver a waybill or the routing instructions under which the shipment is to be made, not requiring such act, mandamus will not lie to enforce performance of such an act. *Missouri, K. & T. Ry. Co. v. Thompson*, 55 C. A. 12, 118 S. W. 618.

35. — **Performance of corporate contracts.**—A city held entitled to maintain mandamus to compel performance of a contract to furnish water to it and its inhabitants. *International Water Co. v. City of El Paso*, 51 C. A. 321, 112 S. W. 816.

Proceedings for an order compelling defendant to furnish water to irrigate plaintiff's crop held one for mandamus and not injunction. *Old River Rice Irr. Co. v. Stubbs* (Civ. App.) 133 S. W. 494.

### III. JURISDICTION, PROCEEDINGS AND RELIEF

36. **Jurisdiction in general.**—A peremptory writ can be issued only by a court. *Murphy v. Wentworth*, 36 T. 147.

Mandamus cannot be issued by the district court to revise the judgment of an inferior court over which it has no appellate control. *Ewing v. Cohen*, 63 T. 482.

Judges of the district court may grant a writ of mandamus in vacation. *Dunnagan v. Wingfield* (Civ. App.) 141 S. W. 288.

37. **Jurisdiction of supreme court.**—See Arts. 1526, 1528.

38. **Jurisdiction of courts of civil appeals.**—See Arts. 1592, 1595.

39. **Time to sue and leave of court.**—An action within Acts 1905, c. 29, held begun by the filing of a motion for leave to file a petition for mandamus against the commissioner of the land office to compel him to award land, accompanied by the petition therefor. *King v. Robison*, 103 T. 390, 128 S. W. 368.

Relators held not entitled to mandamus to compel the printing of a statute with the laws of the thirty-second legislature, where the proceeding was not instituted until after the laws had been published in pamphlet form. *Minor v. McDonald*, 104 T. 461, 140 S. W. 401.

40. **Parties.**—See, also, Chapter 5 of Title 37.

Mandamus will not lie to compel the commissioner of the general land office to issue a patent, where it appears there is an adverse claimant to the land who is not made a party to the proceeding. *Chappell v. Rogan*, 94 T. 492, 62 S. W. 539.

Mandamus against the judge is not the proper remedy to compel the clerk to file a motion. *Kruegel v. Nash*, 31 C. A. 15, 70 S. W. 983.

A third person, purchasing free school lands pending mandamus to compel the commissioner of the general land office to award the lands to the relator, cannot intervene. *Sherrod v. Terrell*, 97 T. 97, 76 S. W. 442.

In mandamus to compel the commissioner of the land office to reinstate relator as lessee of certain lands, another person, to whom the commissioner had subsequently leased the lands, held a necessary party. *Nevell v. Terrell*, 99 T. 355, 87 S. W. 659.

A mandamus to compel the commissioner of the general land office to award to relator public land previously awarded to others cannot be directed to land awarded to an applicant not made a party. *Halbert v. Terrell*, 102 T. 29, 112 S. W. 1036.

On the retirement from office of the defendant in a mandamus proceeding, the writ must abate in the absence of statute permitting a substitution of his successor. *Carpenter v. Kone*, 54 C. A. 264, 118 S. W. 203.

41. **Alternative writ.**—An alternative writ issued in vacation should be made returnable to the next term of the court. A peremptory writ can be issued only by a court. *Murphy v. Wentworth*, 36 T. 147.

The statute fixing the length of time for the service of a citation before the term of court to which it is returnable does not apply to the service of an alternative writ of mandamus. *Jones v. Doherty* (Civ. App.) 56 S. W. 596.

42. **Pleading.**—See, also, Chapters 2, 3 and 8 of Title 37.

Mandamus will issue on the sworn allegations of the complaint, when they are sufficient, and are met only by a general denial. *Burrell v. Blanchard* (Civ. App.) 51 S. W. 46.

43. **Scope of Inquiry.**—Validity of original cause of action on which judgment was rendered cannot be questioned in proceeding to enforce it by mandamus. *City of Sherman v. Langham*, 92 T. 13, 42 S. W. 961, 39 L. R. A. 258.

The court of civil appeals will not determine, on application for mandamus to compel the clerk of the lower court to deliver to appellant a transcript omitting certain papers, whether such papers are necessary. *Baum v. McAfee* (Civ. App.) 117 S. W. 883.

44. — **Judgment or order.**—Where a teacher sues to compel recognition of her rights, relief should be limited to mandamus directing the board to permit plaintiff to exercise her rights, and an injunction restraining other teachers interfering therewith. *Town of Pearsall v. Woolls* (Civ. App.) 50 S. W. 959.

Mandamus issued by a district to a county court in probate proceedings should never proceed farther than to command the county court to proceed to judgment. *Shook v. Journey* (Civ. App.) 149 S. W. 406.

45. **Peremptory writ.**—Where, in mandamus to compel a city engineer to ascertain and disclose the street line in front of relator's premises in accordance with a city ordinance, he admitted a refusal to disclose the line, except in accordance with the

claim of the city authorities, in accordance with his data, the court was authorized to suspend the hearing and order a peremptory writ. *Giraud v. Winslow* (Civ. App.) 127 S. W. 1180.

46. **Appeal and error.**—A judgment awarding a peremptory mandamus can be superseded by appeal. *Griffin v. Wakelee*, 42 T. 513.

Held, that a rehearing will not be granted in mandamus proceeding where nothing will be gained by granting it. *Metropolitan Life Ins. Co. v. Love*, 101 T. 444, 108 S. W. 821, 1157.

No appeal being given by statute from an order of a district judge granting a writ of mandamus in vacation, an appeal will not lie from such order. *Dunnagan v. Wingfield* (Civ. App.) 141 S. W. 288.

Error in granting writ of mandamus to compel justice of the peace to send up transcript, although there was no pleading or evidence assailing the action of the justice in setting aside a pauper's affidavit in lieu of a cost bond, held fundamental error, apparent on the face of the record. *Hart v. Wilson* (Civ. App.) 156 S. W. 520.

On reversal of judgment of county court granting writ of mandamus to compel justice of the peace to send up transcript in order that appeal might be perfected, held, that the mandamus proceeding, an independent suit, would be remanded to the county court and not to the justice court. *Id.*

47. **Costs.**—See Chapter 18 of Title 37.

## TITLE 90

## MEDICINE—PRACTICE OF

Chap.  
1. Physicians and Surgeons.  
2. Nurses.

Chap.  
3. Anatomical Board.

## CHAPTER ONE

## PHYSICIANS AND SURGEONS

Art.	Art.
5733. Medical board established.	5741. Examination, how conducted, and to include what.
5734. Qualifications of members.	5742. Does not apply to whom.
5735. Board shall keep register.	5743. Board may refuse to admit certain persons.
5736. Physicians required to keep register.	5744. Revocation of license.
5737. District clerks to keep register.	5745. Who regarded as practicing medicine.
5738. Reciprocity allowed.	5746. Definitions.
5739. Applicants for license to pass examination, etc.	5747. Malpractice, cause for revoking license.
5740. Disposition of fees.	

**Article 5733. Medical board established.**—A board, to be known as the board of medical examiners for the state of Texas, shall consist of eleven men learned in medicine, legal and active practitioners in the state of Texas, who shall have resided and practiced medicine in this state under a diploma from a legal and reputable college of medicine of the school to which said practitioner shall belong for more than three years prior to their appointment, and no one school shall have a majority representation on said board. Said board shall be appointed by the governor of this state within ninety days after his inauguration, and the term of office of its members shall be two years or until their successors shall be appointed and qualified. No member of said board shall be a stockholder or a member of the faculty or a board of trustees of any medical school. Vacancies occurring in the board shall be filled by the governor. The word "medicine," as used in this article, shall have the same meaning and scope as given to it in article 5745. [Acts 1907, p. 224, sec. 1.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Constitutionality of prior act.**—As to constitutionality of the present act, see notes under Art. 5736.

A prior act limiting the board of medical examiners to graduates of a medical college recognized by the American Medical Association, which is composed exclusively of allopathic physicians, is not repugnant to state constitution, art. 16, § 31. *Dowdell v. McBride*, 92 T. 239, 47 S. W. 524.

**Art. 5734. Organization, meetings, etc., of the board.**—The members of said board shall qualify by taking the oath of office before a notary public, or other officer empowered to administer oaths, in the county in which each shall respectively reside. At the first meeting of said board after each biennial appointment, the board shall elect a president, vice-president and secretary-treasurer. Six members shall constitute a quorum. Regular meetings shall be held at least twice a year, at such times and places as shall be deemed most convenient for applicants. Due notice of such meetings shall be given by publication in such papers as may be selected by the board. Special meetings may be held upon a call of three members of the board. The board may prescribe rules, regulations and by-laws, in harmony with the provisions of this chapter, for its own proceedings and government for the examination of applicants for the practice of medicine and obstetrics. Said board, or any member, shall have power to administer oaths for all purposes required



in the discharge of its duties, and to adopt a seal to be affixed to all of its official documents. [Id. sec. 2.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5735. Board shall keep register.**—The board of examiners shall preserve a record of its proceedings in a book kept for that purpose, showing name, age, place and duration of residence of each applicant, the time spent in medical study in respective medical schools, and the year and school from which degrees were granted; said register shall also show whether applicants were rejected or licensed, and shall be prima facie evidence of all matters contained therein. The secretary of the board shall, on March 1 of each year, transmit an official copy of said register to the secretary of state for permanent record, certified copy of which, with hand and seal of the secretary of said board, or secretary of state, shall be admitted in evidence in all courts. [Id. sec. 3.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5736. Physicians required to register.**—It shall be unlawful for any one to practice medicine in any of its branches upon human beings within the limits of this state, who has not registered, in the district clerk's office of the county in which he resides, his authority for so practicing, as herein prescribed, together with his age, postoffice address, place of birth, school of practice to which he professes to belong, subscribed and verified by oath, which, if willfully false, shall subject the applicant to conviction and punishment for false swearing as provided by law. The fact of such oath and record shall be indorsed by the district clerk upon the certificate. The holder of the certificate must have the same recorded upon each change of residence to another county, and the absence of such record shall be prima facie evidence of the want of possession of such certificate. [Id. sec. 4.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Constitutionality of act.**—Const. art. 16, § 31, provides that the legislature may pass laws prescribing the qualifications of practitioners of medicine and punish persons for malpractice, but that no preference shall ever be given by law to any school of medicine. Held, that the word "medicine," as used in the constitution, embraced the art of healing, by whatever scientific or supposedly scientific method; the art of preventing, curing, or alleviating diseases, and remedying as far as possible results of violence and accident, some thing or method supposed to possess curative power, and hence authorized the passage of this act, requiring physicians and surgeons, including osteopaths, to obtain a license before engaging in the public practice of their profession. *Ex parte Collins*, 57 Cr. R. 2, 121 S. W. 501.

This act regulating the right to practice medicine, and defining who shall be regarded as medical practitioners, was a reasonable exercise of the state's police power, *Singh v. State* (Cr. App.) 146 S. W. 891.

This act, requiring one desiring to practice medicine to obtain authority so to do from the state board of medical examiners, is valid, since no one has an inalienable right to practice medicine or treat diseases for pay. *Lewis v. State* (Cr. App.) 155 S. W. 523.

**Necessity of having certificate.**—Although one may have a diploma "issued by a bona fide medical college of respectable standing" still he must receive a certificate to practice medicine from one of the duly constituted boards of medical examiners of the state of Texas, which shall be recorded before he would be authorized to practice. It is not necessary for him to be examined if he has complied with other provisions of the statute, but he must have the certificate. That a board refuses to examine him, or issue a certificate to him, is no defense. *Stone v. State*, 48 Cr. R. 114, 86 S. W. 1031.

**Prosecutions for unlawfully practicing.**—In general.—Where, in a prosecution for practicing medicine without a license, accused testified that he never procured a license to practice medicine, and had not filed for registration a license to practice medicine in any county, it was no defense that the alleged offense was committed before he was required to register and file a certificate to practice medicine, if he desired so to do, under this act as a legal practitioner of medicine within the state under prior laws then in force, which required a physician to file a diploma or license, and have the same recorded in the office of the clerk of the district court in which he practiced. *Dankworth v. State*, 61 Cr. R. 157, 136 S. W. 788.

**Indictment or information.**—Under this act an indictment which charges that accused did unlawfully engage in the practice of medicine in C. county without having first filed for record with the clerk of the district court of said county his authority for practicing medicine, is insufficient for failure to allege either that accused resided in C. county or that he did not register his authority to practice in the office of the district clerk of the county in which he resided. *Lockhart v. State*, 58 Cr. R. 80, 124 S. W. 923.

In a prosecution for violation of this act the complaint and information need not negative the exceptions in the act, which are not contained in the enacting clause, defining the offense, since the prosecution is not required to anticipate defenses arising under the act. *Newman v. State*, 58 Cr. R. 223, 124 S. W. 956.

Under this article and Art. 5745 an indictment charging the defendant with unlawfully practicing medicine, without having properly registered his authority for so doing, and treating and offering to treat physical disease and disorder, and making a charge therefor, is sufficient. *Young v. State*, 61 Cr. R. 440, 134 S. W. 736.

An indictment for practicing medicine without registering and filing for record the required certificate, in violation of this act, need not negative exceptions prescribed by the act which are not contained in the clause defining the offense. *Dankworth v. State*, 61 Cr. R. 157, 136 S. W. 788.

— **Evidence.**—In a prosecution for practicing medicine without authority in violation of this act, evidence that defendant treated persons other than the person named in the information was admissible. *Germany v. State*, 62 Cr. R. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

Evidence as to whether the treatment given by defendant to certain patients was harmful or beneficial was immaterial. *Id.*

Evidence that defendant made representations to the father of the prosecuting witness and to others that he could cure certain diseases, and had cured them, was admissible. *Id.*

Evidence of advertisements issued by defendant for the purpose of obtaining practice was admissible. *Id.*

The admission of the testimony of the father of the prosecuting witness that he had such witness treated by other physicians before she was treated by defendant was harmless error. *Id.*

In a prosecution against defendant for practicing medicine without a license, evidence that, on request being made for receipts for money paid by a patient's husband, defendant stated that he did not give receipts because they were unnecessary as he could not collect by law, was admissible to show that defendant was aware of the provisions of this act and that the business he was pursuing was prohibited. *Singh v. State* (Cr. App.) 146 S. W. 891.

The state was not limited to proof of defendant's treatment of the person alleged, but was entitled to show that defendant had treated and offered to treat other persons as proof that he had been treating or offering to treat various diseases for compensation, especially in view of the defense that he only accepted free will offerings in return. *Id.*

In a prosecution for practicing medicine without a license, newspaper advertisements, in which defendant called himself a "professor" able to cure any and all diseases, and invited the afflicted public to come to him for treatment, were not inadmissible, because they did not show that he was practicing, or offering to practice, medicine, and did not claim to be a physician or practitioner of medicines belonging to any particular school, or because such advertisements stated that he made no charge. *Mueller v. State* (Cr. App.) 153 S. W. 1142.

Defendant's newspaper advertisements were not objectionable because the state, at the time the advertisements were offered, had not shown that defendant had treated the particular persons named in the first count of the indictment. *Id.*

Where defendant was charged in one count with practicing medicine in that he treated certain named persons, and in another count with offering to treat diseases without a license, evidence that, at various times about the time charged in the indictment, defendant treated numerous witnesses, whose names were not mentioned in the indictment, for various ailments and diseases were admissible in support of either or both counts. *Id.*

Evidence held to sustain a conviction of accused for unlawfully practicing medicine without a license. *Id.*

**Unlicensed practitioner's right to recover fees.**—By the act of March 23, 1887, article 3635, Rev. St. 1895, the law of 1879 was amended by providing that before the person to whom a certificate was granted (under the law of 1879) is entitled to practice by virtue thereof, such certificate was to be recorded in the office of the district clerk of the county in which the practitioner resides or sojourns. By not complying with this law, not only was a practitioner unable to force collection of his pay for professional services, but he was liable to prosecution under article 756 of the Penal Code.

A physician or surgeon practicing without a license cannot recover for his services. *Kenedy v. Schultz*, 25 S. W. 667, 6 C. A. 461; *Railway Co. v. Muth*, 27 S. W. 752, 7 C. A. 443.

To recover for medical services, it must appear that the physician had a certificate to practice, and that it was recorded. *Wilson v. Vick* (Civ. App.) 51 S. W. 45.

Physician who has duly recorded diploma from duly authorized college may recover for medical services rendered, though he has no certificate from state medical examiners. *Wilson v. Vick*, 93 T. 88, 53 S. W. 576.

Regular practicing physician may recover for medical services, although he has not obtained a certificate to practice from a medical board appointed by district judge. *Carleton v. Sloan* (Civ. App.) 55 S. W. 753 (decision under prior act).

A contract for medical services by a physician practicing under an unauthorized temporary certificate is unenforceable. *Peterson v. Seagraves*, 94 T. 390, 60 S. W. 751.

A physician may not recover for professional services without compliance with the statute regulating the practice of medicine. *Wooley v. Bell*, 33 C. A. 399, 76 S. W. 797.

**Art. 5737. District clerks to keep register.**—It is hereby made the duty of the district clerk of each county in this state to purchase a book of suitable size, to be known as the "Medical Register" of such county, and set apart one full page for the registration of each physician, and to record in the same the name and record of each practitioner who presents a certificate from the state board of examiners, issued under this law. The clerk shall receive the sum of one dollar from each physician

so registered, which shall be his full compensation for all duties required under this law. When any physician shall die, or remove from the county, or have his license revoked, it shall be the duty of said clerk to make a note of facts at the bottom of the page as closing the record. On the first day of January in each year, said clerk shall, on request of the board, certify to the office of the state board of medical examiners a correct list of the physicians then registered in the county, together with such other information as said board may require. A copy from the medical register pertaining to any person, certified to by said clerk under the seal of said court, also a certificate issued by said officer certifying that any person named has or has not registered in said office as required by this chapter, shall be admitted as evidence in all trial courts. [Id. sec. 5.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5738. Reciprocity allowed.**—The board of medical examiners may, at its discretion, arrange for reciprocity in license with the authorities of other states and territories having requirements equal to those established by this law. License may be granted applicants for license under such reciprocity on payment of twenty dollars. [Id. sec. 6.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446; *Lockhart v. State*, 58 Cr. R. 80, 124 S. W. 923.

**Verification certificate.**—Section 6 of this act provided for the issuance of verification certificates to practitioners under former laws or under medical diplomas, upon application within one year after passage of the act. The above provision was omitted when the section was re-enacted in Rev. Civ. St. 1911, as Art. 5738.

Where one has been granted a certificate under articles 3784, 3785, Sayles' Ann. Civ. St. 1897, to practice medicine in any county, and the certificate has been duly recorded, the board of examiners has no right to refuse a verification license to an applicant therefor, nor to limit the certificate of a female applicant to the practice of obstetrics. *Board of Medical Examiners v. Taylor*, 56 C. A. 291, 120 S. W. 575.

Under Rev. St. 1895, arts. 3784, 3785, requiring the board of medical examiners to examine applicants for certificates to practice medicine in any of its branches in enumerated subjects, and providing that the board, being satisfied as to the qualifications of an applicant, shall grant to him a certificate, which shall entitle the person to practice medicine, etc., a certificate reciting that the board has examined a person, and has found her qualified to practice the branches of obstetrics and diseases peculiar to women and children, is, in the absence of any evidence to the contrary, a valid license to such person to practice medicine as limited in the certificate, and such person is entitled to a verification certificate, under Acts 1907, c. 123. *State Board of Medical Examiners v. Taylor*, 103 T. 444, 129 S. W. 600.

**Art. 5739. Applicants for license to pass examination, etc.**—All applicants for license to practice medicine in this state, not otherwise licensed under the provisions of law, must successfully pass an examination before the board of medical examiners established by this law. Applicants to be eligible for examination must present satisfactory evidence to the board that they are more than twenty-one years of age, of good moral character, and graduates of bona fide, reputable medical schools. Such schools shall be considered reputable within the meaning of this law, whose entrance requirements and courses of instruction are as high as those adopted by the better class of medical schools of the United States, whose course of instruction shall embrace not less than four terms of five months each. Application for examination must be made in writing under affidavit to the secretary of the board, on forms prepared by the board, accompanied by a fee of fifteen dollars; except, when an applicant desires to practice obstetrics alone, the fee shall be five dollars. Such applicants shall be given due notice of the date and place of examination. Applicants to practice obstetrics in the state of Texas, upon proper application, shall be examined by the board in obstetrics only, and upon satisfactory examination shall be licensed to practice that branch only; provided, this shall not apply to those who do not follow obstetrics as a profession, and who do not advertise themselves as obstetricians or midwives, or hold themselves out to the public as so practicing. In case any applicant, because of failure to pass examination, be refused a license, he or she shall, after one year, be

permitted to take a second examination without an additional fee. [Id. sec. 7.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Verification certificate.**—See notes under Art. 5738.

**Temporary certificate.**—One member of the board of examiners cannot issue a third temporary certificate to an applicant so as to entitle him to practice medicine and charge fees. *Peterson v. Seagraves*, 94 T. 390, 60 S. W. 752 (decision under prior act).

**Unlicensed practitioner's right to recover fees.**—See notes under Art. 5736.

**Art. 5740. Disposition of fees.**—The fund realized from the aforesaid fees shall be applied first to the payment of necessary expenses of the board of examiners; any remaining funds shall be applied by the order of the board to compensating members of the board in proportion to their labors. [Id. sec. 8.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5741. Examination, how conducted, and to include what.**—All examinations shall be conducted in writing, and in such manner as shall be entirely fair and impartial to all individuals and every school of medicine, the applicants being known by numbers, without names or other method of identification on examination papers by which members of the board may be able to identify such papers, until after the applicants have been granted licenses or rejected. Examinations shall be conducted on the scientific branches of medicine only, and shall include anatomy, physiology, chemistry, histology, pathology, bacteriology, physical diagnosis, surgery, obstetrics, gynecology, hygiene, and medical jurisprudence. Upon satisfactory examination under the rules of the board, applicants shall be granted licenses to practice medicine. All questions and answers, with grades attached, shall be preserved for one year. All applicants examined at the same time shall be given identical questions in each of the above branches. All certificates shall be attested by the seal and signed by all members of the board, or a quorum thereof. [Id. sec. 9.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Constitutionality.**—See, also, notes under Art. 5736.

This act is not unconstitutional in discriminating against the practice of the masseur treatment, in failing to provide any board or authority to whom one can apply for license to practice such treatment, for a license to practice that treatment can be obtained from the state medical board, and the condition that an applicant have certain medical knowledge is not a discrimination against the practice of the masseur treatment, but a valid exercise of police power. *Germany v. State*, 62 Cr. R. 276, 137 S. W. 130, Ann. Cas. 1913C, 477.

**Nature of license.**—A license to practice medicine is a privilege or franchise, the refusal to grant which does not constitute a penalty. *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Necessity of having certificate.**—See note under Art. 5736.

**Verification certificate.**—See notes under Art. 5738.

**Temporary certificate.**—See note under Art. 5739.

**Art. 5742. Does not apply to whom.**—Nothing in this law shall be so construed as to discriminate against any particular school or system of medical practice. This law shall not apply to dentists legally qualified and registered under the laws of this state who confine their practice strictly to dentistry; nor to nurses who practice only nursing; nor to masseurs, in their particular sphere of labor, who publicly represent themselves as such; nor to commissioned or contract surgeons of the United States army, navy or public health and marine hospital service, in the performance of their duties, but such shall not engage in private practice without license from the board of medical examiners; nor to legally qualified physicians of other states called in consultation, but who do not open offices or appoint places in this state where patients may be met or called to see. This law shall be so construed as to apply to persons other than licensed druggists of this state not pretending to be physicians, who offer for sale on the streets or other public places remedies which they recommend for the cure of disease. [Id. sec. 10.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**When prior act took effect.**—The act of February 22, 1901, which excludes from its operation all those who were practicing medicine in Texas prior to January 1, 1885, did not

go into effect until ninety days after the adjournment of the twenty-seventh legislature, and adjournment occurred April 9, 1901. *Wickes-Nease v. Watts*, 30 C. A. 515, 70 S. W. 1002, 1003.

**Masseur treatment.**—See notes under Arts. 5736, 5741, 5745.

**Practice of dentistry.**—See Title 43.

**Art. 5743. Board may refuse to admit certain persons.**—The state board of medical examiners may refuse to admit persons to its examinations, or to issue the certificate provided for in this law, for any of the following causes:

1. The presentation to the board of any license, certificate or diploma which was illegally or fraudulently obtained, or when fraud or deception has been practiced in passing the examination.

2. Conviction of a crime of the grade of a felony, or one which involves moral turpitude, or procuring, or aiding or abetting the procuring of a criminal abortion.

3. Other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public; or for habits of intemperance or drug addiction calculated to endanger the lives of patients; provided, that any applicant who may be refused admittance to examination before said board shall have his right of action to have such issue tried in the district court of the county in which some member of the board shall reside. [Id. sec. 11.]

**Validity of statute.**—See, also, note under Art. 5744. As to constitutionality of the act in general, see notes under Art. 5736.

This article, authorizing the denial of a physician's license for other grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public, was not void for uncertainty. *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Denial of license not a penalty.**—A license to practice medicine is a privilege or franchise by the government, and a refusal to grant it, for whatever reason, did not constitute a penalty. *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Unprofessional or dishonorable conduct.**—See, also, notes under Art. 5744.

By the use of the word "other," in subdivision 3, it was intended that the conduct referred to therein should be similar in its nature to that designated in the preceding subdivision and defined as a crime of the grade of a felony, etc. *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5744. Revocation of license.**—The right to practice medicine in this state may be revoked by any court of competent jurisdiction, upon proof of the violation of the law in any respect in regard thereto, or for any cause for which the state board of medical examiners is authorized to refuse to admit persons to its examinations as provided in the preceding article; and it shall be the duty of the several district and county attorneys of this state to file and prosecute appropriate judicial proceedings in the name of the state, on request of any member of said board. [Id. sec. 12.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Validity of statute.**—See, also, Art. 5743 and note.

The failure of this act to define "grossly unprofessional or dishonorable conduct of a character likely to deceive or defraud the public," enumerated as one of the grounds for revoking a license to practice medicine, does not invalidate that portion of the act. *Berry v. State* (Civ. App.) 135 S. W. 631.

**Action of civil nature.**—An action to revoke a license to practice medicine is of a civil nature. *Berry v. State* (Civ. App.) 135 S. W. 631.

**Jurisdiction.**—Any district court of a county in which two acts relied on occurred held to have jurisdiction of action to revoke license to practice medicine. *Berry v. State*, (Civ. App.) 135 S. W. 631.

**Revocation of licenses in general.**—The petition, in an action to revoke a license to practice medicine for grossly unprofessional and dishonorable conduct of a character likely to deceive and defraud the public, held sufficient as against exceptions thereto. *Berry v. State* (Civ. App.) 135 S. W. 631.

Where a petition to revoke a license under this act is based on grossly unprofessional and dishonorable conduct likely to deceive the public, the charge that the jury must find defendant guilty of a felony, or other crime involving moral turpitude, in order to return a verdict for the state was properly refused; each subdivision of the grounds stated being sufficient in itself to justify a judgment of revocation. Id.

In an action to revoke license to practice medicine, issue as to proper method in different schools of physicians held not raised, in absence of evidence that defendant's treatment was the proper one in the eclectic school, as assumed by him. Id.

**Art. 5745. Who regarded as practicing medicine.**—Any person shall be regarded as practicing medicine within the meaning of this law:

1. Who shall publicly profess to be a physician or surgeon and shall

treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method, or to effect cures thereof;

2. Or who shall treat or offer to treat any disease or disorder, mental or physical, or any physical deformity or injury by any system or method, or to effect cures thereof and charge therefor, directly or indirectly, money or other compensation. [Id. sec. 13.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446; *Young v. State*, 61 Cr. R. 440, 134 S. W. 736.

**Constitutionality of act.**—See notes under Art. 5736.

**Practicing medicine—In general.**—Under this article an information charging that accused did practice medicine, etc., was not objectionable for failure to allege that he professed to be a physician or surgeon; the act not being limited to persons so professing, but including any person treating or offering to treat any disease, etc. *Singh v. State* (Cr. App.) 146 S. W. 891.

— **Masseur treatment.**—See, also, Art. 5742, and notes under Arts. 5736, 5741.

Under this article an osteopath is not entitled to practice without a license. *Ex parte Collins*, 57 Cr. R. 2, 121 S. W. 501.

A party who advertised in a local newspaper that he was a masseur doctor located at a certain place, and that he could heal all diseases, and who treated many persons who came to him afflicted with various ailments, for which he received compensation, was "practicing medicine," within the meaning of this article, and hence was required to have a license, although he prescribed and used no drugs, but only massage treatment. *Newman v. State*, 58 Cr. R. 223, 124 S. W. 956.

While this act does not apply to masseurs in their particular sphere of labor who publicly represent themselves as such, yet a masseur who treats or offers to treat diseases or disorders, mental or physical, and attempts to effect a cure thereof, and charges compensation therefor, without having registered and filed a certificate authorizing him to practice medicine, is guilty of a violation of the act. *Dankworth v. State*, 61 Cr. R. 157, 136 S. W. 788.

A masseur who publicly represents himself as a masseur, and who limits his practice to that of a masseur, is exempt from the law requiring a certificate for the practice of medicine; but where he represents himself as a masseur, but undertakes to cure diseases for pay and represents himself as able to cure diseases, he must obtain the proper certificate. *Milling v. State* (Cr. App.) 150 S. W. 434.

Instructions clearly drawing the distinction between the practice of medicine and practicing solely as a masseur, and stating that, before accused could be convicted, the jury must be satisfied that he practiced medicine and charged for his services in the practice, etc., held to correctly submit the issues. *Id.*

— **Prayer and laying on of hands.**—Under this and the preceding articles no person may treat or offer to treat any disease or bodily infirmity by any manner or method whatsoever, without having first been licensed to practice as provided, and hence it prohibited the attempted treatment of disease by an unlicensed person by means of prayer and the laying on of hands. *Singh v. State* (Cr. App.) 146 S. W. 891.

— **Treating without medicine.**—This act does not seek to regulate how any one shall treat diseases, but merely provides that, before any one shall treat, or offer to treat, diseases, he shall show his competency and obtain from the state board of medical examiners authority to practice, and one treating, or offering to treat, without medicine, various diseases for a specific compensation is within the act. *Lewis v. State* (Cr. App.) 155 S. W. 523.

— **Practicing for free will offerings.**—Proof that defendant did not charge for his services directly, but told all who applied for treatment that he would receive from them "free will offerings," and that he actually did receive pay from patients, was sufficient to show that he practiced medicine for compensation. *Singh v. State* (Cr. App.) 146 S. W. 891.

**Art. 5746. Definitions.**—The terms, "physician," and, "surgeon," as used in this law, shall be construed as synonymous, and the terms, "practitioners" and "practitioners of medicine," and, "practice of medicine," as used in this law, shall be construed to refer to and include physicians and surgeons. [Id. sec. 16.]

See *Morse v. State Board of Medical Examiners*, 57 C. A. 93, 122 S. W. 446.

**Art. 5747. Malpractice cause for revoking license.**—Any physician or person who is engaged in the practice of medicine, surgery, osteopathy, or who belongs to any other school of medicine, whether they use the medicines in their practice or not, who shall be guilty of any fraudulent or dishonorable conduct, or of any malpractice, or shall, by any untrue or fraudulent statement or representations made as such physician or person to a patient or other person being treated by such physician or person, procure and withhold, or cause to be withheld, from another any money, negotiable note, or thing of value, may be suspended in his right to practice medicine or his license may be revoked by the district court of the county in which such physician or person resides, or of the county where such conduct or malpractice or false

representations occurred, in the manner and form as is provided for re-voicing or suspending license of attorneys at law in this state. [Acts 1905, p. 370, sec. 1.]

## CHAPTER TWO

### NURSES

<b>Art.</b>	<b>Art.</b>
5748. Board of nurse examiners.	5752. Persons entitled to registration without examination.
5749. [Superseded.]	5753. Board to have power to revoke certificates, etc.
5750. Regulations governing board.	5754. Disposition of fees, etc.
5751. Board to meet, examine applicants, etc.	5755. Law does not apply, when.

**Article 5748. Board of nurse examiners; qualifications; appointment, etc.**—That a board to be known as the board of nurse examiners for the state of Texas is hereby established. Said board shall be composed of five registered nurses, who shall be trained nurses of at least twenty-three (23) years of age, of good moral character and graduates of a training school connected with a general hospital or sanitarium of good standing presided over by a graduate nurse where a two years' training with a systematic course of instruction is given in the wards. Two members of said board must be nurses who have had at least two years experience in educational work among nurses. Said board shall be appointed by the governor of this state within sixty days after this Act shall go into effect, and biennially thereafter within sixty days after his inauguration, and the term of office shall be two years, or until their successors shall be appointed and qualified. Vacancies occurring in the board shall be filled by the governor. [Acts 1909, p. 228, sec. 1. Amended Acts 1911, p. 165, sec. 1, superseding Arts. 5748, 5749, Rev. St. 1911.]

**Art. 5749.** Superseded. See Art. 5748.

**Art. 5750. Regulations governing board.**—The members of said board shall as soon as organized, annually in the month of April, elect from their members a president and secretary who shall also be the treasurer. Three members shall constitute a quorum, and special meetings shall be called by the secretary upon the written request of any two members. The board is authorized to make such by-laws and rules as shall be necessary to govern its proceedings, and to carry into effect the purpose of this law. The board shall adopt Robert's Rules of Order to guide it in the transaction of its business. The secretary shall keep a record of all the meetings of said board, including a register of the names of all nurses duly registered under this law, which shall at all reasonable times be open to public scrutiny; and said board shall cause the prosecution of all persons violating any of the provisions of this law, and may incur necessary expenses on that behalf. The president and secretary shall make biennial report to the governor on or before the first day of January immediately preceding the convening of the legislature, together with a statement of the receipts and disbursements of said board. [Acts 1909, p. 228, sec. 2.]

**Art. 5751. Board to meet, examine applicants, etc.**—That after organization it shall be the duty of said board to meet regularly once in every six (6) months, notice of which meeting shall be given to the public press and in one nursing journal one month previous to the meeting. At every regular meeting, namely, every six months, it shall be the duty of the board to examine all applicants for registration under this act. Applicants must be graduated from a chartered training school, presided over by a graduate nurse. Upon filing application for examination, each applicant shall pay an examination fee of five dollars, which

shall be in no case returned to the applicant, whether the examination be passed or not, but in case the applicant passes the examination, then no further fee shall be required for registration. The examination shall be of such a character as to determine the fitness of the applicant to practice professional nursing as contemplated by this Act; provided, said board shall prepare questions for examinations and shall examine applicants on the following subjects: Practical nursing, surgical nursing, obstetrical nursing, materia medica, anatomy, physiology, hygiene, dietetics and gynecology. If the results of the examination shall be satisfactory to the majority of the board, the board shall sign and issue a certificate to the applicant to that effect, which certificate shall be attested by the secretary, whereupon the person named in the certificate shall be duly qualified to practice professional nursing in this state. Any registered nurse from any other state where the laws with reference to professional nursing are up to the standard of the laws of the state of Texas, who shall show to the satisfaction of the board that he or she is a trained, graduate nurse of a hospital or sanitarium, the standard of instruction and training of which shall meet the requirements of the rules prescribed by said board, and who shall be otherwise properly qualified, may receive a certificate and be registered as a nurse of this state without examination. [Acts 1909, p. 228, sec. 3. Amended Acts 1911, p. 165, sec. 1, superseding Art. 5751, Rev. St. 1911.]

**Art. 5752. Persons entitled to registration without examination, etc.; certificate of registration, etc.**—That all nurses who are engaged in nursing at the time of the passage of this Act, and who shall show to the satisfaction of the said board that they are of good moral character and were graduated prior to April, 1909, from a training school connected with a hospital or sanitarium giving two years general training, or prior to the year 1901, having given 18 months general training, and who maintains in other respects proper standards, shall be entitled to registration without examination, provided they register prior to January 1st, 1912. All persons who have heretofore received registration certificates in compliance with an Act of the regular session of the thirty-first legislature, being "An Act to define and regulate the practice of professional nursing, to create a board of nurse examiners for the examination and licening [licensing] of nurses, and to prescribe their qualifications, to provide for their proper registration and for the revocation of certificates, and to fix suitable penalties for the violation of this Act," shall not be required to obtain new registration certificates, but such certificates heretofore secured under said Act of the thirty-first legislature shall be in all things valid and binding and of full force and effect. All persons who are in training in the wards of a general hospital or sanitarium in this state where a two-years' training with a systematic course of instruction is given at the time of the passage of this Act, and shall graduate hereafter, and possess the above qualifications, shall be entitled to registration without examination. Provided application for registration certificate shall be made to the board herein provided for, who shall issue proper certificate of registration without examination, if the applicant be found entitled thereto under the provisions of this Act. All nurses who have served in the army or navy of the United States, and have been honorably discharged, shall be entitled to registration without examination. It shall be unlawful hereafter for any person to practice nursing as a registered nurse, without a certificate from the state board of nurse examiners. A nurse who has received his or her certificate according to the provisions of this Act shall be styled and known as a "Registered Nurse." No other person shall assume such title or use the abbreviation "R. N." or any other letters to indicate that he or she is a registered nurse. The board in each instance shall require a registra-



tion fee of five (\$5.00) dollars. [Acts 1909, p. 228, sec. 4. Amended Acts 1911, p. 165, sec. 1, superseding Art. 5752, Rev. St. 1911.]

**Art. 5753. Board to have power to revoke certificates, etc.**—The state board of nurse examiners shall have the power to revoke any certificate issued in accordance with this law, by a unanimous vote of said board, for gross incompetency, dishonesty, habitual intemperance, or any act derogatory to the morals or standing of the profession of nursing as may be determined by the board; but, before any certificate shall be revoked, the holder thereof shall be entitled to at least thirty days notice in writing of the charge against him or her and of the time and place of hearing and determining of such charges, at which time and place he or she shall be entitled to be heard; and, in the event said certificate shall be revoked by said board, the holder of such certificate shall have right of action within thirty days thereafter in the district court of the county of the residence of any member of the board, and said certificate shall remain in force until the question is finally decided by the courts. Upon revocation of any certificate, it shall be the duty of the secretary of the board to strike the name of the holder thereof from the roll of registered nurses. [Acts 1909, p. 228, sec. 5.]

**Art. 5754. Disposition of fees.**—All fees received by the state board of nurse examiners under this law shall be paid to the treasurer of said board, who shall pay the same out on vouchers issued and signed by the president and secretary of said board upon warrants drawn by the president of the state board of examiners. All money so received and placed in said fund may be used by the state board of nurse examiners in defraying its expenses in carrying out the provisions of this law. [Id. sec. 6.]

**Art. 5755. Law does not apply, when.**—This law shall not be construed to affect or apply to the gratuitous nursing of the sick by friends or members of the family, or to any person nursing the sick for hire who does not in any way assume the practice as a trained, graduate, or registered nurse. [Id. sec. 7.]

## CHAPTER THREE

### ANATOMICAL BOARD

<b>Art.</b>	<b>Art.</b>
5756. Board, how constituted; duties of.	5760. Schools, colleges, etc., may dissect bodies.
5757. Regulations for delivering dead bodies.	5761. Parties receiving bodies to give bond.
5758. Distribution of bodies to various institutions.	5762. Expenses, by whom paid.
5759. Regulations for moving bodies; records to be kept.	5763. Compensation of board.

[See notes on the subject of Dead Bodies, at end of chapter.]

**Article 5756. Board, how constituted; duties of.**—The professor of anatomy and the professor of surgery of each of the medical schools or colleges now incorporated, and the several medical and dental schools and colleges which may hereafter be incorporated in this state are constituted a board, to be known as the anatomical board of the state of Texas, for the distribution and delivery of dead human bodies, hereinafter described, to and among such institutions as, under the provisions of this chapter, are entitled thereto. The said board shall have the power to establish rules and regulations for its government, and to appoint and remove proper officers, and shall keep full and complete minutes of its transactions, and records sufficient for identification shall also be kept, under its direction, of all bodies received and distributed by said board and of persons to whom the same may be distributed, which

minutes and records shall be open at all times to the inspection of each member of said board and of any district attorney or county attorney of this state. [Acts 1907, p. 117, sec. 1.]

**Art. 5757. Regulations for delivering dead bodies.**—All public officers, agents, and servants, and all officers, agents, and servants of any county, city, town, district, or other municipality, and of any and every almshouse, prison, morgue, hospital, or any other public institution, other than the state orphans' home, the confederate home, the state blind institute, and the state deaf and dumb institute, insane asylum, and epileptic colony, or any other home for the indigent, or other eleemosynary institution maintained by the state, having charge of, or control of, dead human bodies required to be buried at public expense, are hereby required, after notification in writing by said board of distribution or its duly authorized officers, or persons designated by the authorities of said board, then and thereafter to announce to said board, its authorized officer or agent, whenever such body or bodies come into his or their possession, charge, or control, and shall without fee or reward greater than the value of such fee as may be paid in any county, city, town, or municipality on the third day of April, 1907, for the burial of pauper bodies, deliver such body or bodies, and permit and suffer the said board and its agents and the physicians and surgeons, from time to time designated by them, who may comply with the provisions of this chapter, to take and remove all such bodies as are not desired for post mortem examinations by the medical staff of public hospitals or institutions for the insane, to be used within this state for the advancement of medical science; but no such notice need be given, nor any such body be delivered, if any person claiming to be and satisfying the authorities in charge of such body that he or she is of a kindred or is related by marriage to the deceased, or is a bona fide friend or representative of an organization of which the deceased was a member, shall claim the said body for burial, but it shall be surrendered, without cost to such claimant for interment, or shall, upon such claimant's request, be interred in the manner provided for the interment of bodies not coming within the operation of this chapter, nor shall notice be given for the body to be delivered, if the deceased died of contagious disease, save tuberculosis, or syphilis; nor shall notice be given, if such deceased person were a traveler who died suddenly, in which case, the body shall be buried. It is further required that due effort be made by those in charge of such almshouse, prison, morgue, hospital, or other public institution having charge or control of such dead human bodies, to find kindred or relatives of such deceased and notify him or her of the death; and failure to claim such body by kindred or relation within twenty-four hours after receipt of such notification shall be recognized as bringing such body under the provisions of this chapter, and delivery shall be made as soon thereafter to said board, its officers, or agents as may be possible. Such person in charge of such public institution shall file with the county judge an affidavit that he has made diligent inquiry and stating such inquiry as he has made. In case a body is claimed by relatives within ten days after it has been delivered to an institution or person entitled to receive the same under the provisions of this chapter, it shall be delivered to them for burial and without cost. [Id. sec. 2.]

**Art. 5758. Distribution of bodies to various institutions.**—The board, or their duly authorized agents, may take and receive such bodies so delivered as aforesaid, and shall, upon receiving them, distribute and deliver to and among the schools, colleges, physicians and surgeons aforesaid in the manner following: Those bodies needed for lecture and demonstration, in the said incorporated schools and colleges, shall first

be supplied; the remaining bodies shall then be distributed proportionately and equitably, the number assigned to each to be based upon the number of students receiving instruction or demonstration in normal or morbid anatomy and operative surgery, which number shall be certified by the dean of each school or college to the board at such times as it may direct. Instead of receiving and delivering said bodies themselves through their agent or servant, the said board may, from time to time, either directly or by their designated officer or agent, authorize physicians and surgeons who shall receive them, and the number which each shall receive. [Id. sec. 3.]

**Art. 5759. Regulations for moving bodies; records to be kept.**—The board may employ public carriers for the conveyance of said bodies, which shall be carefully deposited, with the least possible public display. Sender shall keep on permanent file a description by name, color, sex, age, place and cause of death of each body transmitted by him; or where the body shall be one of a person unknown, the color, age, sex, place and supposed cause of death; and any other data available for identification, such as scars, deformities, etc., shall be put on record. A duplicate of this description shall be mailed, or otherwise safely conveyed, to the person or institution to whom the body is being sent; and the person or institution receiving such body shall, without delay, mail or otherwise safely convey to sender a receipt for the same in the full terms of the description furnished by sender. All these records shall be filed in a manner to be determined by the board so that they may be at any time available for inspection by the board, or any district or county attorney of this state. [Id. sec. 4.]

**Art. 5760. Schools, colleges, etc., may dissect bodies.**—Any and all schools, colleges, and persons who may be designated by said anatomical board of the state of Texas, shall be, and are, by this chapter authorized to dissect, operate upon, examine, and experiment upon such bodies hereinbefore described and distributed for the furtherance of medical science; and such dissections, operations, examinations, and experiments shall not be considered as amenable under any already existing laws for the prevention of mutilation of dead human bodies. Such persons, schools, or colleges shall keep a permanent record, sufficient for identification of each body received from such anatomical board or agent, which record shall be subject to inspection by the board, or its authorized officer or agent. The board shall also have power to authorize incorporated schools or colleges and individual physicians and surgeons to experiment on the lower animals under bond as hereinafter designated. [Id. sec. 5.]

**Art. 5761. Parties receiving bodies to give bond.**—No school, college, physician, or surgeon shall be allowed or permitted to receive any such body or bodies until bond shall have been given to the state by such physician or surgeon, or by or in behalf of such school or college, to be approved by the clerk of the county court in and for the county in which such physician or surgeon may reside, or in which such school or college may be situated, and to be filed in the office of said clerk; which bond shall be in the penal sum of one thousand dollars, conditioned that all such bodies which the said physician or surgeon, or said college, shall receive thereafter shall be used, and all such experiments on the lower animals shall be conducted only for the promotion of medical science; and whosoever shall sell or buy such body or bodies, or in any way traffic in the same, or shall transmit or convey, or cause or procure to be transmitted or conveyed, said bodies to any place outside the state, shall be guilty of a misdemeanor, and shall, on conviction, be punished as provided in the Penal Code. [Id. sec. 6.]

**Art. 5762. Expenses, by whom paid.**—Neither the state, nor any county, nor municipality, nor any officer, agent or servant thereof, shall be at any expense by reason of the delivery or distribution of any such body; but all expense thereof, and of said board of distribution, shall be paid by those receiving the bodies in such manner as may be specified by said anatomical board of the state of Texas, or otherwise agreed upon. [Id. sec. 7.]

**Art. 5763. Compensation of board.**—No compensation other than actual traveling expenses shall be received for their services in this capacity by members of this board. [Id. sec. 9.]

#### DEAD BODIES

**Rights in dead bodies.**—While a dead human body is not property, it is a sort of quasi property, to which certain persons may have rights, and the right to dispose of a corpse by decent sepulture includes the right to the possession of the body in the condition in which death leaves it. *Gray v. State*, 55 Cr. R. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513.

Neither the right of sepulture nor the right to have a dead body unmolested is an absolute one, but they must yield where they conflict with the public good or where the demands of justice require such subordination. *Id.*

**Damage to corpse in transit.**—A mother may recover from a carrier for its negligent handling of the corpse of her child resulting in injury to the corpse. *Missouri, K. & T. Ry. of Texas v. Hawkins*, 50 C. A. 128, 109 S. W. 221.

## TITLE 91

## MILITIA

[See Rangers, State, Title 116.]

Chap.  
1. General Provisions.  
2. Reserve Militia.

Chap.  
3. National Guard.

## CHAPTER ONE

## GENERAL PROVISIONS

Art.  
5764. Active and reserve militia.  
5765. Who are subject to military duty.

Art.  
5766. Exemptions.  
5767. Governor to be commander-in-chief.

**Article 5764. Active and reserve militia.**—The militia of this state shall be divided into two classes, the active and the reserve militia. The active militia shall consist of the organized and uniformed military forces of this state, which shall be known as the Texas national guard; the reserve militia shall consist of all those liable to service in the militia, but not serving in the Texas national guard. [Acts 1905, p. 167, sec. 2.]

**Art. 5765. Who are subject to military duty.**—All able-bodied male citizens, and able-bodied males of foreign birth who have declared their intention to become citizens, who are more than eighteen and less than forty-five years of age, who are residents of this state and who are not exempted by the laws of the United States, or of this state, shall constitute the militia and be subject to military duty. [Id. sec. 1.]

**Art. 5766. Exemptions.**—In addition to the persons exempted by the laws of the United States, the following persons shall be exempt from military duty in this state, namely:

1. The lieutenant governor and the heads of the several departments.
2. The judges and clerks of all courts of record.
3. The members and officers of both houses of the legislature.
4. The sheriffs, district attorneys, county attorneys, county assessors, county collectors, county treasurers, and county commissioners.
5. The mayor, alderman, assessor and collector of incorporated cities and towns.
6. The officers and guards of state prisons, houses of correction, and the officers and instructors and attendants of other state institutions; keepers, attendants and assistants of poor houses; superintendents, nurses and assistants of all hospitals.
7. The members of any regularly organized and paid fire or police department in any city or town, but no member of the active militia shall be relieved from duty because of his joining any such fire company or department.
8. All ministers of the gospel exclusively engaged in their calling; all teachers engaged in public institutions and public schools.
9. All persons who shall have served in the active militia of this state for the term of seven years, and have been honorably discharged therefrom.
10. Idiots, lunatics, vagabonds, confirmed drunkards, persons addicted to the use of narcotic drugs, and persons convicted of infamous crimes.
11. Any person who conscientiously scruples to bear arms; provided he shall pay an equivalent for personal service.

12. All such exempted persons, except those enumerated in subdivision 10, shall be liable to military duty in case of war, insurrection, invasion or imminent danger thereof. [Id. sec. 3.]

**Art. 5767. Governor to be commander-in-chief.**—The governor of this state, by virtue of his office, shall be the commander-in-chief of the military forces of this state, except of such portions as may at times be in the service of the United States. Whenever the governor is unable to perform the duties of commander-in-chief, the adjutant general of this state shall command the military forces of this state, except in cases where the lieutenant governor, or the president of the senate, under the laws of this state, is required to perform the duties of governor. [Id. sec. 4.]

## CHAPTER TWO

### RESERVE MILITIA

Art. 5768. Reserve militia not subject to military duty, except, etc.	Art. 5774. Persons drafted may furnish substitute.
5769. Governor may order enrollment.	5775. Officer neglecting or refusing to perform duty in drafting liable to penalty.
5770. Officer making enrollment to serve notice, etc.	5776. Power of governor to call out militia.
5771. Persons making enrollment to have access to assessment rolls.	5777. Reserve militia to be mustered in, when.
5772. Governor may draft for military duty, when.	
5773. Persons drafted shall report, etc.	

**Article 5768. Reserve militia not subject to military duty, except, etc.**—The reserve militia shall not be subject to active military duty, except when called into the service of this state, or of the United States, in case of war, insurrection, invasion, or for the prevention of invasion, the suppression of riot, tumults and breaches of the peace, or to aid the civil officers in the execution of the law and the service of process, in which case, they or so many of them as the necessity requires, may be ordered out for actual service by draft or otherwise, as the governor may direct. The portion of the reserve militia ordered out or accepted shall be mustered into the service for such period as may be required, and the governor may assign them to existing organizations of the active militia, or organize them as the exigency of the occasion may require. [Id. sec. 5.]

**Art. 5769. Governor may order enrollment.**—Whenever the governor deems it necessary, he may order an enrollment of all persons, other than members of the active militia, liable to military duty, to be made by the county assessor of each county, or by other persons designated by the governor. Such enrollment shall state the name, residence, age, color, and occupation of the persons enrolled. Enrolling officers shall have power to question under oath, which they are hereby authorized to administer, any person deemed liable to perform military duty, but who denies the same; and, if any person refuses to be sworn, the enrolling officer shall enroll his name in the same manner as though he had admitted his liability. The assessor, or such other person as may be designated by the governor to act as enrolling officer, shall, within such time as may be required by the governor, prepare and file three copies of such enrollment, properly certifying that he has enrolled all persons residing in his county, who are liable to perform military duty, one copy to be filed in the office of the adjutant general, one copy in the office of the county clerk of the county in which the enrollment was made, and one copy retained by the enrolling officer. Upon filing the lists of enrollment, as herein provided, the enrolling officer shall be paid

eight cents for each person so enrolled and notified, as hereinafter set out, out of the treasury of the county. [Id. sec. 6.]

**Art. 5770. Officer making enrollment to serve notice, etc.**—The officer making the enrollment shall, at the time of making the same, serve a notice of such enrollment upon each person enrolled, by delivering such notice to him, or leaving it with some person of suitable age and discretion, at his place of residence, or by mailing such notice at the expense of the county to his last known place of residence or abode. All persons claiming exemption must, within ten days after receiving such notice, file a written statement of such exemption, verified by affidavit, in the office of the county clerk. Such clerk shall thereupon, if such person be exempted according to law, mark the word, "exempt," opposite his name; and the remainder of all thus enrolled, and not thus found to be exempt, shall constitute the militia of this state and be subject to military duty; and such clerk shall transmit a copy of such corrected list of enrollment to the adjutant general within twenty days after the filing of the original list of enrollment by the enrolling officer, for which he shall be allowed two cents for each name on such list, to be paid by the county. The officer highest in rank in the active militia, and the heads of the fire and police departments in each city or town, shall, whenever an enrollment is ordered, file, within ten days, in the office of such county clerk a certified list of the names of all persons in the active militia of such county or in such department. [Id. sec. 7.]

**Art. 5771. Persons making enrollment to have access to assessment rolls.**—The assessor in each county of this state shall allow persons appointed to make such enrollment, if persons other than the assessor be appointed, at all proper times to examine their assessment rolls and make copies thereof. All persons shall, upon the application of any person making such enrollment, give the name of and all other information concerning any person within their knowledge liable to be enrolled, under penalty of ten dollars for every concealment, or false information, or refusal to give the information requested, to be recovered in the name of the state of Texas by a judge advocate, district or county attorney in the justice court, Austin, Texas, or precinct of his residence, with costs. The officer making the enrollment shall, within ten days, report all persons who shall fail or neglect to give information to the adjutant general. [Id. sec. 8.]

**Art. 5772. Governor may draft for military duty, when.**—Whenever it shall be necessary to call out any portion of the reserve militia for active duty, the governor may apportion the number by draft according to the population of the several counties of the state, or otherwise, as he shall direct. The governor shall direct his order to the sheriff of each county from which any draft is required, setting forth the number of persons such county is to furnish. Upon the requisition of the governor being received by the sheriff, he shall immediately personally notify the county clerk, who shall repair to his office and in public shall copy by name or number, from the corrected list of enrollment of such county on file in his office, all persons who are so returned as liable to perform military duty; such names, or their corresponding numbers, shall be placed on slips of paper of the same size and appearance, as near as practicable, which slips, so named or numbered, shall be placed in a box suitable for that purpose, and the number required to fill such draft or requisition shall be drawn therefrom, in the same manner as jurors are by law now drawn. All persons so drawn and liable to perform military duty shall be determined to be legally held to serve, in the manner and for the purpose and time specified in the requisition; and the sheriff shall notify the persons so drafted by registered letter, or personally in writing, at what time and place they shall appear; for which service he

shall receive expense of postage and five cents each, to be paid by the county. [Id. sec. 9.]

**Art. 5773. Persons drafted shall report, etc.**—Every member of the reserve militia ordered out, or who volunteers, or is drafted, under the provisions of this law, who does not appear at the time and place designated by the sheriff, or his commanding officer, within twenty-four hours from such time, or who does not produce a sworn statement of physical disability from a physician in good standing, to so appear, shall be taken to be a deserter and dealt with as prescribed for deserters by law. [Id. sec. 10.]

**Art. 5774. Persons drafted may furnish substitute.**—Any person in the reserve militia of this state, who has been drawn to perform military duty, may, at any time, be exempt until again required in his turn to serve, by furnishing an acceptable substitute on or before the day fixed for his appearance; but, if, during any period of service, any man who is serving in the active militia as a substitute for another, becomes liable to service in his own person, he shall be taken for such service, and his place as substitute shall be supplied by the man in whose stead he was serving, or another substitute. [Id. sec. 11.]

**Art. 5775. Officer neglecting or refusing to perform duty in drafting, liable for penalty.**—If any sheriff, or constable, county assessor, or county clerk, shall neglect or refuse to perform any duty enjoined upon him by this law, in addition to criminal liability, the person or persons guilty of such refusal or neglect shall be liable to a penalty of not less than one hundred dollars nor more than one thousand dollars, to be recovered against him or his bondsmen in the name of the state of Texas, by suit instituted by a judge advocate, district or county attorney, in the proper court of Travis county, or the county of which such person is the sheriff, constable, assessor or clerk. [Id. sec. 12.]

**Art. 5776. Power of governor to call out militia.**—The governor shall have power, in case of insurrection, invasion, tumult, riot, or breach of peace, or imminent danger thereof, to order into the active service of this state any part of the militia that he may deem proper. When the militia of this state, or a part thereof, is called forth under the constitution and laws of the United States, the governor shall order out for service the active militia, or such part thereof as may be necessary; and, if the number available be insufficient, he shall order out such part of the reserve militia as he may deem necessary. During the absence of organizations of the militia in the service of the United States, their state designations shall not be given to new organizations. [Id. sec. 13.]

**Art. 5777. Reserve militia to be mustered in, when.**—The portion of the reserve militia ordered out or accepted into the service, as indicated in articles 5768 and 5772 of this chapter, shall be immediately mustered into the service for such period as the governor may direct, and shall be organized into troops, batteries, companies and such other organizations as may be necessary, which may be arranged in squadrons, battalions, regiments, or corps, or assigned to organizations of the active militia already existing. The governor is authorized to appoint the officers necessary to commence or complete, or to command any organization thus created. Such new organization shall be equipped, disciplined and governed according to the military laws and military regulations of this state. [Id. sec. 14.]



## CHAPTER THREE

### NATIONAL GUARD

**Art.****ORGANIZATION**

5778. National guard to consist of existing military organizations.
5779. Governor to prescribe regulations for government of national guard.
5780. Governor to make and publish regulations.
5781. Governor's staff.
5782. Military organizations deemed to be bodies corporate, etc.
5783. Discipline to conform to that of the United States army.
5784. Prohibiting organization of militia companies, except, etc.

**ADJUTANT GENERAL**

5785. Adjutant general's department.
5786. Rank of adjutant general.
5787. Term of office and salary of adjutant general.
5788. Oath and bond of adjutant general.
5789. Adjutant general to have seal.
5790. Adjutant general to control the military department of the state.
5791. Duties of adjutant general.
5792. Same.
5793. Same.
5794. Annual report to be printed.
5795. Adjutant general to hire clerks and laborers.
5796. Assistant adjutant general.
5797. Assistant adjutant general to be appointed by the governor.
5798. Assistant adjutant general authorized to administer oaths to officers of militia, etc.
5799. Adjutant general to issue certificate of organization, etc.
5800. Adjutant general to purchase certain military stores, etc.

**ASSISTANT QUARTERMASTER GENERAL**

5801. Assistant quartermaster general.

**COMMISSIONED OFFICERS**

5802. Officers to be commissioned by the governor.
5803. Commissions.
5804. Qualifications of commissioned officers.
5805. Officers to pass examinations.
5806. Board of examiners to be appointed by the governor.
5807. Officers to take oath within ten days after appointment.
5808. Governor may confer brevet commissions.
5809. Supernumerary list.
5810. Retirement.
5811. Governor may order board to examine character, capacity, etc., of officers.
5812. Governor may require bond from officers.
5813. Bond admissible as evidence.
5814. Commanding officers may make certain deductions.
5815. Company commanders custodians of company funds.
5816. In case of absence or disability, duty assigned to officer shall descend to next ranking officer.
5817. Officer can excuse from duty, when.
5818. Commissioned officers to furnish arms, equipment, etc.
5819. Certain applicants for commissions exempt from examination.

**Art.****NON-COMMISSIONED OFFICERS AND ENLISTED MEN**

5820. Who may voluntarily enlist in militia.
5821. Enlistment for term of three years.
5822. Person enlisting shall take oath.
5823. Disqualifications for enlistment, how removed.
5824. Non-commissioned officers, how appointed.
5825. Discharged and re-enlisted men entitled to credit.
5826. Governor may appoint second lieutenants by brevet.
5827. Physical examination.
5828. Assignment of pay invalid.
5829. Veterans of Spanish-American war entitled to credit for time served in the service of the United States.
5830. No fees allowed for administering oaths to soldiers.

**SERVICE AND DUTIES**

5831. Governor may call out militia, when.
5832. Same.
5833. Duty of officer on receipt of order.
5834. Commanding officer's duty in case of riot.
5835. Governor may order active militia to assist civil authorities, etc.
5836. Commanding officer may order closing of saloons, etc., when.
5837. Organizations shall drill, etc.
5838. Shall participate in practice, marches, etc.

**COMPENSATION AND PRIVILEGES**

5839. Pay, etc., of militia when in active service.
5840. Same.
5841. Members of militia exempt from certain taxes.
5842. Same.
5843. Same.
5844. Same.
5845. Same.
5846. State to provide for wounded or disabled, etc., when.
5847. State to pay for transportation, etc.
5848. Members of militia exempt from arrest, when.

**ARMS, EQUIPMENT, ETC.**

5849. Enlisted men to return property.
5850. Officers and soldiers liable for damage to equipment, etc.
5851. Government property not to be put to private use.
5852. Arms, equipment, etc., to be provided by state.
5853. Sheriff may seize arms, etc., when.
5854. Sheriff in executing such warrant may call on militia.
5855. Sheriff shall collect arms, etc., when.
5856. Arms, equipment, etc., exempt from forced sale.
5857. Governor to draw arms, equipment, etc., from United States government.
5858. Arms, etc., to be stored, where.
5859. Uniform same as that prescribed for United States army.

**ARTICLES OF WAR**

5860. Rules and articles for the government of the military forces.

Art.	COURTS MARTIAL	Art.
5861.	Evidence in courts martial.	5880. Procedure in cases of misdemeanor with jail sentence.
5862.	Privileges of accused.	5881. Conviction in cases of fine and cost.
5863.	Counsel for defendant to be detailed, when.	5882. Fines to be paid to whom in cases of general court martial.
5864.	Judge advocate to appoint reporter.	5883. Fines to be paid in cases of summary courts.
5865.	Judge advocate may issue process, etc.	5884. Sheriff to execute lawful process from courts martial.
5866.	Process generally.	5885. Jurisdiction presumed.
5867.	Penalty for disobeying, etc.	5886. Acts by or under military authority exempt from punishment.
5868.	Witnesses entitled to transportation.	5887. Change in venue in certain cases.
5869.	Compensation of.	
5870.	Same.	GENERALLY
5871.	Attachment may issue for witnesses.	5888. Commissioners' court and city council may make appropriations for militia.
5872.	No fees allowed, except, etc.	5889. Militia entitled to right of way on streets.
5873.	Governor may order arrest, etc.	5890. Unlawful disposition of property, illegal wearing of uniform, etc.
5874.	Suit on bonds, etc.	5891. Arrest of trespassers; may prohibit sale of liquors, etc.
5875.	Code of Criminal Procedure to govern in giving bail, etc.	5892. Insurrection may be declared, when.
5876.	Warrant of arrest to extend to every part of the state, etc.	5893. Troops to enter state only by permission.
5877.	Defendant liable for costs.	
5878.	Same.	
5879.	Procedure in cases of conviction of felony.	

## ORGANIZATION

**Article 5778.** National guard to consist of existing military organizations.—The Texas national guard shall consist of the existing military organizations, and such others as may be organized hereafter, and such persons as are held to military duty under the laws of this state, or such persons as are exempt under said laws who may accept appointment or voluntarily enlist therein, or of such persons of the reserve militia as may be mustered therein, as provided in articles 5768 and 5777 of this title; but at no time, except in case of war, insurrection, invasion, the prevention of invasion, the suppression of riot, or the aiding of the civil authorities in the execution of the laws of this state, shall the maximum strength thereof exceed seven thousand officers and enlisted men. [Id. sec. 15.]

**Art. 5779.** Governor to prescribe regulations for government of national guard.—The governor is hereby authorized, and it shall be his duty, to prescribe such regulations as he may see fit for the organization of the Texas national guard; and he shall, from time to time, as he may deem for the best interests of the service, change such regulations, which shall be in accordance with this chapter, and conform as near as practicable to the organization of the regular army of the United States. He may, at any time for cause deemed good and sufficient by him, muster out of the service or reorganize any portion of the Texas national guard or the reserve militia, or discharge any officer or enlisted man thereof, and he shall have full control and authority over all matters touching the military forces of this state, its organization, equipment and discipline. [Id. sec. 16.]

**United States army regulations.**—The duties of the national guard being defined by this act, by which the governor is alone authorized to prescribe regulations, in the absence of proof that the governor had adopted and promulgated the United States army regulations as governing the state militia, such regulations are not applicable to the militia. *Manley v. State*, 62 Cr. R. 392, 137 S. W. 1137.

**Art. 5780.** Governor to make and publish regulations.—The governor is hereby authorized, and it shall be his duty, to make and publish regulations in accordance with existing military laws, for the government of the military forces of this state, which shall embrace all necessary orders and forms of general character for the performance of all duties incumbent on officers and men in the military service, including rules for the government of courts martial; the existing regulations to remain in force until the governor shall have published such regulations.

The governor shall, as he may see fit from time to time, create new regulations, or amend, modify, or repeal existing regulations. [Id. sec. 17.]

**Art. 5781. Governor's staff.**—The governor shall have a staff consisting of the adjutant general and twelve aides-de-camp. The adjutant general shall have rank and be appointed as provided by this Act; the twelve aides-de-camp shall have the rank of lieutenant colonel while so serving, and shall be appointed by, and serve during the pleasure of the governor. Three of the aides-de-camp shall be selected from the officers of the Texas national guard below the grade of colonel, and nine shall be selected without restriction as to the source of selection; provided, further, that said aides-de-camp shall not be ineligible from holding any office of emolument, trust or honor within this state, nor shall said aides-de-camp be ineligible from serving as chairman or member of any committee of any political party or organization. [Acts 1907, p. 224, sec. 18. Amended Acts 1911, p. 25, sec. 1, superseding Art. 5781, Rev. St. 1911.]

**Art. 5782. Military organizations deemed bodies corporate, etc.**—Whenever any troop, battery, company, signal corps or band is mustered into the active militia of this state by the authority of the governor, such troop, battery, company, signal corps or band shall, from the date of such muster-in, be deemed and held in law a body corporate and politic, with power under its corporate name to take, purchase, own in fee simple, hold, transfer, mortgage, pledge and convey real or personal property to an amount in value, at the time of its acquisition, of two hundred thousand dollars (provided that the natural enhancement in value of any property properly acquired by any such company shall not affect the right of such company to hold or otherwise handle such property), and with like power under its corporate name to sue and be sued, plead and be impleaded, and to prosecute and defend in the courts of this state or elsewhere; to have and use a common seal of such device as it may adopt; to ordain and establish by-laws for the government and regulation of the company affairs not inconsistent with the constitution and laws of this state and of the United States, and the orders and regulations of the governor; and such by-laws to alter and amend at will; and generally to do and perform any and all things necessary and proper to be done in carrying out and perfecting the purpose of its organization, of which the officers, and in case of a band, the non-commissioned officers, shall be directors, the senior the president. [Acts 1907, p. 224, sec. 54. Amended Acts 1911, p. 149, sec. 1, superseding Art. 5782, Rev. St. 1911.]

**Art. 5783. Discipline to conform to that of the United States army.**—The system of discipline and exercise of the active militia of this state shall conform generally to that of the army of the United States, as it is now or may hereafter be prescribed by the president, and to the provisions of the laws of the United States, except as otherwise provided by law, or by the regulations issued by the governor. [Acts 1905, p. 167, sec. 67.]

**Art. 5784. Prohibiting organization of military companies, except, etc.**—No body of men, other than the regularly organized militia of this state and the troops of the United States, shall associate themselves together as a military company or organization or parade in public with firearms in any city or town of this state; but students in the educational institutions where military science is a prescribed part of the course of instruction, and soldiers honorably discharged from the service of the United States, and confederate veterans, may, with the consent of the governor, drill and parade with firearms in public. This article shall not be construed to prevent parades by the active militia of any other state as hereinafter provided. [Id. sec. 74.]

## ADJUTANT GENERAL

**Art. 5785. Adjutant general's department.**—There shall be at the seat of government of this state an executive department known as the adjutant general's department, and the adjutant general shall be the head thereof. [Id. sec. 19.]

**Art. 5786. Rank of adjutant general.**—The adjutant general shall have the rank of brigadier general, and shall be appointed by the governor, by and with the advice and consent of the senate, if in session. [Id. sec. 20.]

**Art. 5787. Term of office and salary of adjutant general.**—The adjutant general shall hold his office for the term of two years, and until the appointment and qualification of his successor in office. In case of a vacancy in such office, the appointment shall be made for the unexpired term only. He shall receive an annual salary of two thousand dollars. [Id. sec. 21.]

Salary of adjutant general.—See Art. 7054.

Fees for copies and certificates.—See Arts. 3833-3836.

**Art. 5788. Oath and bond of adjutant general.**—Before entering upon the duties of his office, the person appointed adjutant general shall enter into a bond with two or more good and sufficient sureties, to be approved by the governor, which bond shall be in the sum of ten thousand dollars, payable to the governor of this state and his successors in office, and conditioned for the faithful performance of the duties of said office. He shall also take and subscribe the oath of office prescribed by the constitution for all officers, which oath and bond shall be deposited in the office of the secretary of state. [Id. sec. 22.]

**Art. 5789. Shall have a seal.**—The adjutant general shall procure and keep in his office a seal for the authentication of all certificates and other instruments emanating from his office, when such authentication is required by law or necessary, the device upon which seal shall consist of a star of five points with the words, "Office of Adjutant General, State of Texas," around the margin. [Id. sec. 23.]

**Art. 5790. Shall have control of military department of the state.**—The adjutant general shall be in control of the military department of this state and subordinate only to the governor in matters pertaining to said department, or the military forces of this state; and he shall perform such duties as may, from time to time, be entrusted to him by the governor relative to the military commissions, the military forces, the military stores and supplies, or to other matters respecting military affairs of this state; and he shall conduct the business of the department in such manner as the governor shall direct. And he shall have the custody and charge of all books, records, papers, furniture, fixtures, and other property relating to his department; and shall perform, as near as practicable, such duties as pertain to the chief of staff, the military secretary and other chiefs of staff departments, under the regulations and customs of the United States army. [Id. sec. 24.]

**Art. 5791. Duties of adjutant general.**—The adjutant general shall, from time to time, define and prescribe the kind as well as the amount of supplies to be purchased for the military forces of this state, and the duties and powers respecting such purchases; and shall prescribe general regulations for the transportation of the articles of supply from the places of purchase to the several camps, stations of companies, or other necessary places for the safe-keeping of such articles, and for the distribution of an adequate and timely supply of the same to the regimental quartermasters, and to such other officers as may, by virtue of such regulations, be entrusted with the same; and shall fix and make reasonable

allowance for the store rent and storage necessary for the safe-keeping of all military stores and supplies; and shall control and supervise the transportation of troops, munitions of war, equipments, military property and stores throughout the state. [Id. sec. 25.]

**Art. 5792. Same.**—The adjutant general is authorized to prescribe rules and regulations to be observed in the preparation and submission and opening of bids for contracts under the adjutant general's department; and he may, at his discretion, require any bid to be accompanied by a bond in such penal sum as he may deem advisable, with good and sufficient security, conditioned that the bidder will enter into a contract agreeable to the terms of his bid, if the same be awarded to him, within sixty days from the date of the opening of the bids, or otherwise pay the penalty. No bid shall be withdrawn by the bidder within the said period of sixty days. [Id. sec. 26.]

**Art. 5793. Same.**—The adjutant general is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, the custody, use and preservation of the records, papers and property appertaining to it. He shall superintend the preparation of such returns and reports as may be required by the laws of the United States from this state, and perform such other duties prescribed for him by this act or by other laws of this state, or by the governor. He shall keep a register of all officers of the militia of this state, and keep in his office all records and papers required to be kept and filed therein. He shall, at the expense of this state, when necessary, cause the military law and regulations of this state to be printed, indexed and bound in proper and compact form and distributed to the commissioned officers, sheriffs, clerks and assessors of the counties of this state at the rate of one copy to each; and to each commissioned officer and headquarters he shall issue one copy of the necessary text books, and of such annual reports concerning the militia as the governor may direct. He shall cause to be prepared and issued all necessary blank books, blanks, forms and notices required to carry into full effect the provisions of this act. All such books and blanks shall be and remain the property of this state. He shall make such regulations pertaining to the preparation of the reports and returns, and to the care and preservation of property for military purposes, whether belonging to this state or to the United States, as, in his opinion, the conditions demand; such regulations to be operative and in force when promulgated in the form of general orders, circulars, or letters of instruction. He shall report annually to the governor:

1. A statement of all moneys received or disbursed by him since his last annual report.

2. An account of all arms, ammunition, and other military property belonging to this state, or in possession of this state, from what source received, to whom issued, and its present condition, so far as he may be informed.

3. The number, condition and organization of the Texas national guard and reserve militia.

4. Any suggestions which he may deem of importance to the military interests and conditions of this state and the perfection of its military organization. [Id. sec. 27.]

**Art. 5794. Annual report to be printed.**—The annual report provided for in the preceding article shall be printed annually and laid before the legislature for its information. [Id. sec. 28.]

**Art. 5795. To hire clerks and laborers.**—All necessary clerks and employés will be appointed and laborers will be hired by the adjutant general. [Id. sec. 29.]

**Art. 5796. Assistant adjutant general.**—The adjutant general shall have one assistant adjutant general, who shall fill the position of chief clerk, with the rank of colonel, one assistant quartermaster general, with the rank of colonel, and such necessary clerks, employés, and laborers as may be required, from time to time, to carry on the operations of his department, all of whom shall be under the direction and control of the adjutant general. [Id. sec. 30.]

**Art. 5797. Assistant adjutant general to be appointed by the governor.**—The assistant adjutant general shall be appointed by the governor on the recommendation of the adjutant general, and shall remain in office during the pleasure of the governor, and until his successor is appointed and qualifies. He shall receive an annual salary of twelve hundred dollars, and shall, during his term of office, be entitled to all rights, privileges and immunities granted officers of like rank in the Texas national guard. He shall, before entering upon the duties of his office, take and subscribe to the oath of office prescribed for officers of the Texas national guard, which oath shall be deposited in the office of the adjutant general. He shall aid the adjutant general by the performance of such duties as may be assigned him, and shall, in case of absence or inability of the adjutant general to act, perform all such portions of the duties of the adjutant general as the latter may expressly delegate to him. [Id. sec. 31.]

**Art. 5798. Authorized to administer oaths to officers of militia, etc.**—The assistant adjutant general is hereby authorized and directed, on application and without compensation therefor, to administer oaths of office to officers of the active militia, and to employés of the adjutant general's office required to be taken on their appointment or promotion. [Id. sec. 32.]

**Art. 5799. To issue certificates to organizations, etc.**—On the muster-in to the active militia of this state of any troop, battery, company, signal corps, or band, the adjutant general shall issue to such organization a certificate to the effect that such organization has been duly organized in accordance with the laws and regulations of the militia service of this state, and that such organization is entitled to all the rights, powers, privileges and immunities conferred by such laws and regulations. Such certificate shall be in such form as the adjutant general may prescribe. Such certificate shall be evidence in all courts of this state that the organization therein named is duly incorporated; but, in suits by or against any troop, battery, company, signal corps, or band of the active militia of this state, it shall not be necessary for either party, where the incorporation is alleged, to prove such incorporation, unless that fact is denied under oath by the opposite party. [Id. sec. 55.]

**Art. 5800. To purchase certain military stores, etc.**—The adjutant general may, after the appropriations are made for that purpose, purchase and keep ready for use, or issue to the military forces of this state, as the best interests of the service may require, such amount and kind of quartermaster's, ordnance, subsistence, medical, signal, engineer's, and all other military stores and supplies as shall be necessary; he shall see that all military stores and supplies, both the property of this state and of the United States, are properly cared for and kept in good order, ready for use; and all accounts which may accrue against this state under the provisions of this chapter shall, if correct, be certified and approved by the adjutant general and paid out of the state treasury as other claims are paid. Any military stores belonging to this state which may become unserviceable, obsolete, or unfit for further use, may be disposed of in such manner as the governor or adjutant general may prescribe by regulations or order; and the adjutant general is hereby authorized to sell or destroy, as he may see fit for the best interests of the

service, any unserviceable, or obsolete, or unsuitable military stores belonging to this state, the sums realized from the sale thereof to be turned into the state treasury, to be credited to any fund appropriated for the use of the active militia of this state, as shall be determined at the time by the governor or adjutant general; or he may, in his discretion, exchange such stores for such other military stores as the interest of the service may require, for the use of the active militia of this state. [Id. sec. 101.]

#### ASSISTANT QUARTERMASTER GENERAL

**Art. 5801. Assistant quartermaster general.**—The assistant quartermaster general shall be appointed by the governor on recommendation of the adjutant general, and shall remain in office during the pleasure of the governor, and until his successor is appointed and qualified. He shall receive an annual salary of fifteen hundred dollars, and shall, during his term of office, be entitled to all rights, privileges and immunities granted officers of like rank in the Texas national guard. He shall, before entering upon the duties of his office, enter into a bond, with two or more good and sufficient sureties, to be approved by the governor, which bond shall be in the sum of ten thousand dollars, payable to the governor of this state and his successors in office, and conditioned faithfully to discharge the duties of his office and disburse and account for all moneys, and to faithfully keep, issue and account for all military stores, supplies and other property of this state, or of the United States, coming into his possession or entrusted to his care for the use of the military forces of this state. He shall take and subscribe the oath of office prescribed for officers of the Texas national guard, which oath and bond shall be deposited in the office of the adjutant general. He shall, under the immediate direction of the adjutant general, perform, as near as may be, the duties pertaining to the chiefs of the quartermaster, subsistence, and ordnance departments under the regulation and customs of the United States army. He shall, upon assuming the duties of his office, receipt to the adjutant general for all military property of whatever kind belonging to this state, or to the United States, which may be on hand and intended for the use of or issue to the military forces of this state, and he shall also receipt to the adjutant general for such other military property as may, from time to time, be received from the United States, or from other sources. He shall be responsible for all quartermaster's, subsistence, ordnance, medical, signal, and all other military stores and supplies belonging to this state, or which may be issued to this state by the United States, except such of the above mentioned stores and supplies as may be issued to officers and organizations of the military forces of this state in accordance with the regulations in force. He shall issue and receive such quartermaster's, subsistence, ordnance, medical, signal, and all other military stores and supplies as the governor, or the adjutant general, may direct. He shall attend to the care, preservation, safe keeping, and repairing of the arms, ordnance, accoutrements, equipments and all other military property belonging to this state, or issued to this state by the United States, for the purpose of arming and equipping the military forces of this state. He shall prepare such returns of all quartermasters, subsistence, ordnance, medical, signal, and all other military stores and supplies that have been issued this state by the United States at the times and in the manner required by the secretary of war, and shall render semi-annually to the adjutant general returns of all military stores and supplies on hand or issued, in such manner as required by the adjutant general. He shall render to the adjutant general annually, or oftener if required, a statement of all moneys received or disbursed by him since last report. He shall perform the duties of quartermaster,

commissary, and paymaster of the ranger force, and such other duties as may be required of him by the governor or the adjutant general. [Id. sec. 33.]

### COMMISSIONED OFFICERS

**Art. 5802. Officers to be commissioned by governor.**—All officers in the military service of this state shall be appointed and commissioned by the governor, at his discretion; and no one shall be recognized as an officer, unless he shall have been duly commissioned, and shall have taken the oath of office. [Id. sec. 34.]

**Art. 5803. Commissions.**—All commissions in the military service of this state shall be in the name and by the authority of the state of Texas, sealed with the state seal, signed by the governor, and attested by the secretary of state, and recorded by the adjutant general in a record book kept in his office for that purpose; provided, no fee for issuing such commissions shall be charged, or collected. [Id. sec. 35.]

**Art. 5804. Qualifications of commissioned officers.**—Commissioned officers must be citizens of the United States and residents of this state of the age of eighteen years or upward. No person who has been dishonorably discharged from the military service of this state, or expelled from any military organization, shall be commissioned, unless he produces the written consent to such appointment of the commanding officer of the organization from which he was expelled or dishonorably discharged, and of the commanding officer who approved such expulsion, or issued such dishonorable discharge. No person shall be commissioned, unless he shall possess the additional requirements herein prescribed for the particular office to which he is to be commissioned. A general officer, at the time of appointment, must be an officer above the grade of captain in the military service of this state, and must have been, for six successive years immediately preceding his appointment, a commissioned officer in such service, or he must have had previous service as a commissioned officer in the military service of this state, or of the United States, or both, for nine years. A colonel of a regiment, at the time of his appointment, must be an officer in the active service of the military forces of this state, and for five successive years immediately preceding his appointment must have been an officer in such active service, or must have had previous service of at least eight years in the active military forces of this state, or of the United States, or both. A lieutenant colonel, or a major of the line, at the time of his appointment, must be an officer in active service of the military forces of this state, and for four successive years immediately preceding his appointment must have been an officer in such active service, or must have had previous service of at least seven years in the active military forces of this state, or of the United States, or both. Staff officers, on promotion to colonel, must have had two years previous service as an officer in the active military forces of this state, or of the United States, or both; on promotion to lieutenant colonel or major, one year previous service as above. A judge advocate must be a counsellor at law of the supreme court of this state of at least ten years standing, if of the grade of colonel, or lieutenant colonel; of at least seven years, if of the grade of major, and of at least four years standing, if of the grade of captain. Surgeons and assistant surgeons must be graduates of a reputable school of medicine, and of at least ten years practice, if of the grade of lieutenant colonel; of at least seven years practice, if of the grade of major; of at least five years, if of the grade of captain; and of at least two years, if of the grade of lieutenant. An engineer officer of the military forces of this state must have been educated as a military or civil engineer. A signal officer must have a knowledge of signaling, telegraphing, topography, and map mak-



ing. A veterinary surgeon must be a graduate of a reputable incorporated school of veterinary science. A chaplain must be a regularly ordained minister of some religious denomination. [Id. sec. 36.]

**Art. 5805. Officers to pass examination.**—Before receiving a commission consequent upon an original appointment, or before being commissioned to a higher grade as a result of promotion, every officer must have passed a satisfactory examination before a board as to his knowledge of military affairs and general knowledge and fitness for the service. Anyone failing to pass such examination shall not be eligible for an office in the militia of this state, or for promotion, for the period of one year from the date of such failure. Judge advocates, medical officers, and veterinary surgeons shall be examined as to their general and professional knowledge and fitness for the service only. The following are exempt from examination: General officers, chaplains and enlisted men placed on the retired list as brevet second lieutenants. [Id. sec. 37.]

**Art. 5806. Boards of examiners to be appointed by governor.**—Boards of examination under the preceding article shall be appointed by the governor. Such boards shall consist of not less than three officers, and shall have the same power to take evidence, administer oaths, and compel witnesses to attend and testify and produce books and papers, and punish their failure to do so, as is possessed by a general court martial. When returns of appointments are received by a board, the persons appointed shall by it be ordered before it for examination, and the result of the examination, with all papers in the case, shall be forwarded to the adjutant general. [Id. sec. 38.]

**Art. 5807. Officers to take oath within ten days after appointment.**—Every officer duly commissioned shall, within ten days after his commission is tendered to him, or within ten days after he shall have been notified personally or by mail that the same is held in readiness for him by a superior officer, take and subscribe the constitutional oath of office. Such oath shall be taken and subscribed before an officer authorized to administer an oath, or some general or field officer, or an officer who shall hold the assimilated grade of a field officer, who has taken the oath himself, and who is hereby authorized to administer the same. In case of neglect or refusal to take and subscribe such oath within the time mentioned, such commission shall be canceled by the governor, and a new appointment shall be made; such oath of office shall be filed in the office of the adjutant general. [Id. sec. 39.]

**Art. 5808. Governor may confer brevet commissions.**—The governor may, upon the recommendation of their commanding officers, confer brevet commissions of a grade higher than the ordinary or brevet commissions ever held by them, upon officers of the military service of this state for gallant conduct, or meritorious service of not less than twenty-five years. He may also confer upon officers in active service in the military service of this state, who have previously served in the forces of the United States in time of war, brevet commissions of a grade equal to the highest grade in which they previously served. Such commissions shall carry with them only such privileges or rights as are allowed in like cases in military service of the United States. [Id. sec. 40.]

**Art. 5809. Supernumerary list.**—Officers who shall be rendered surplus by reduction or disbandment of organizations, or in any manner provided by this law, now or hereafter, shall, at the discretion of the governor, be withdrawn from active service and placed upon the supernumerary list. The governor may detail supernumerary officers for active duty, in which case they shall rank in their grade from the date of such detail, and he may relieve them from such duty and return them to the supernumerary list at his discretion. [Id. sec. 41.]

**Art. 5810. Retirement.**—Any officer of the active militia who has reached the age of sixty-four years may be placed upon the retired list by the governor. Any officer who shall have served as an officer in the same grade in the military service of this state for the continuous period of eight years, or as an officer in the military service of this state continuously for ten years, or as an officer in the military service of this state for twelve years, or as an officer and enlisted man in the military service of this state for eighteen years, may, upon his own request, be placed upon the retired list and withdrawn from active service and command by the governor. Any officer who has become, or who shall hereafter become, disabled, and thereby incapable of performing the duties of his office, shall be withdrawn from active service and placed on the retired list by the governor. Any officer who has become, or shall hereafter become, unfit or incompetent, and thereby incapable of performing the duties of his office, shall be discharged upon the recommendation of his commanding officer, or the recommendation of an inspecting officer. Such retirement or discharge shall be by order of the governor, and, in either case, shall be subject to the provisions of this article. Before making such order, the governor shall, at his discretion, appoint a board of not less than five commissioned officers, one of whom shall be a surgeon, whose duty it shall be to determine the fact as to the nature and cause of incapacity of such officer as appears disabled or unfit, or incompetent, from any cause to perform military service, and whose case shall be referred to it. No officer whose grade or promotion would be affected by the decision of such board, in any case that may come before it, shall participate in the examination or decisions of the board in such case. Such board is hereby invested with the powers of courts of inquiry and courts martial, and, whenever it finds an officer incapacitated for active service, shall report such fact to the governor, stating cause of incapacity, whether from disability, unfitness, or incompetency, and if he approves such finding such officer shall be placed on the retired list, or discharged, as herein provided. The members of the board shall, before entering upon the discharge of their duties, be sworn to an honest and impartial performance of their duties as members of such board. No officer shall be placed upon the retired list, or discharged by the action of such board, if appointed by the governor, without having had a fair and full hearing before the board, if upon the notice he shall demand it, and the governor in his discretion shall think proper to appoint such board. It shall not be necessary to refer to any case for the action of such board arising under this article, unless the officer designated be placed on the retired list or discharged shall, within twenty days after being notified that he will be so retired or discharged, serve on the adjutant general a notice in writing that he demands a hearing and examination before such board, and the governor approve such demand. The governor may withdraw from active service and command and place upon the retired list any officer who has been twenty-five years in the military service of this state, on the recommendation of the commanding officer of his organization and the commanding officer of the brigade or division. Vacancies created by the operations of this article shall be filled in the same manner as other vacancies. [Id. sec. 42.]

**Art. 5811. Governor may order board to examine character, etc., of officers.**—The governor may, whenever he may deem that the good of the service requires it, order any officer before a board of examination, to consist of not less than three nor more than five officers above the grade of captain, which is hereby invested with the powers of courts of inquiry and courts martial, and such board shall examine into the moral character, capacity, and general fitness for the service of such officer, and record and return the testimony taken and a record of its proceedings. If the findings of such board be unfavorable to such officer and be

approved by the governor, he shall be discharged from the service. No officer whose grade or promotion would in any way be affected by the decision of such board, in any case that may come before it, shall participate in the examination or decision of the board in such case. Failure to appear when ordered before a board constituted under this article shall be a sufficient ground for a finding by such board that the officer ordered to appear be discharged. [Id. sec. 43.]

**Art. 5812. Governor may require bond from officers.**—When required to do so by the governor, any officer of the active militia of this state shall give good and sufficient bond in such sum as the adjutant general may direct, payable to the governor of this state and his successors in office, at Austin, Texas, conditioned faithfully to discharge the duties of his office, and faithfully to expend all public money of this state and account for the same, and to account for and safely keep all public property of this state, or of the United States issued and intended for use of the military forces of this state, which he may receive from time to time, and to promptly turn over the same to whomsoever the governor may direct. Such bond shall be signed by at least two good and sufficient sureties, or executed and guaranteed by any corporation having power to guarantee the fidelity of persons holding positions of public or private trust, which such corporations are hereby authorized to execute, which may be authorized to carry on business in this state; such bond shall be in such sum as may be prescribed by the adjutant general, and shall be approved by him and filed in his office; and such bond shall not extend to the reasonable wear and tear of arms, equipments, and other military supplies, incident to the military service; provided, that the commanding officer of every troop, battery, company, or signal corps and the chief musician of every band mustered into the military service of this state shall file the bond provided by this article in the office of the adjutant general, before the commission of such officer shall be issued, or any arms, uniforms, equipments, or other military property shall be issued for the use of his organization; and, provided, further, that when required to do so by the governor any non-commissioned officer or enlisted man of the military forces of this state shall make and file the bond as provided by this article. Whenever such bond is sued upon, the principal and sureties therein shall pay a reasonable attorneys' fee, not to exceed ten per cent, and said fee shall not be less than ten dollars, and they shall also pay all court costs in connection with such suit. [Id. sec. 52.]

**Art. 5813. Records admissible as evidence.**—Copies of all bonds and other papers filed in the office of the adjutant general, in accordance with the provisions of this chapter or any other law of this state, certified under the hand and seal of office of the adjutant general, shall be admitted in evidence in all courts of this state, in the same manner and with like effect as the original would be if duly proven. [Id. sec. 53.]

**Art. 5814. Commanding officers may make certain deductions.**—The commanding officer of any troop, battery, company, signal corps, or band is hereby authorized to deduct from any pay for military service due any officer or enlisted man of his organization such amount as such officer or enlisted man may owe his organization for dues and fines, as provided by the by-laws of such organization. [Id. sec. 56.]

**Art. 5815. Company commanders custodians of company funds.**—The commanding officer of each company shall be the custodian of the company fund, and it shall be his duty to receive, safely keep, and properly disburse, as may be required by the governor, all money that may be entrusted to his care, and to render, on June 30 and December 31 of each year, to adjutant general, an itemized statement of all money by him received and disbursed for the preceding six months. [Id. sec. 60.]

**Art. 5816. In case of absence or disability duty shall descend to next ranking officer.**—The duties assigned to an officer by title in this chapter shall devolve, in case of absence or disability to command of the officer named, upon the line officer next in rank, except as otherwise provided in this chapter. [Id. sec. 63.]

**Art. 5817. Officer can excuse from duty, when.**—The officer ordering any military duty shall have the power to excuse any officer or enlisted man for absence therefrom upon good and sufficient grounds. [Id. sec. 65.]

**Art. 5818. Commissioned officers to furnish arms, etc.**—Every commissioned officer shall provide himself with the arms, uniforms, and equipments prescribed and approved by the governor. [Id. sec. 66.]

**Art. 5819. Certain applicants for commissions exempt from examination.**—Any person who graduates from any college or school of this state, wherein there is a prescribed course of military instruction under the supervision of an officer of the United States army, or an officer of the active militia of this state, shall, if he applies for appointment as a commissioned officer in the active militia of this state, in the grade of second lieutenant, within two years after graduation, be exempt from examination in all military subjects, except the militia law of this state, and examination as to personal qualifications and physical condition; and in no case shall such graduate be drafted to serve in any capacity other than that of a commissioned officer; provided, that, when an officer of the active militia of this state is military instructor, the adjutant general shall prescribe the course of military instruction to be given, and when such colleges or schools do not follow the course of instructions so prescribed, the graduates thereof shall not be entitled to the exemptions and privileges specified in this article. [Id. sec. 102.]

#### NON-COMMISSIONED OFFICERS AND ENLISTED MEN

**Art. 5820. Who may voluntarily enlist in militia.**—Any male citizen of the United States, or any male who has declared his intention to become such citizen, who is a resident of this state, if more than eighteen or less than forty-five years of age, able-bodied, free of disease, and of good character and temperate habits, may voluntarily enlist in the active militia of this state; provided, persons may enlist who are under eighteen and over forty-five years of age on the written authority of the adjutant general. [Id. sec. 44.]

**Art. 5821. Enlistment for a term of three years.**—All enlistments in the active militia of this state shall be for the term of three years; and no soldier shall be again enlisted in the active militia of this state whose service during his last preceding term of enlistment has not been honest and faithful. [Id. sec. 45.]

**Art. 5822. Persons enlisting shall take oath.**—Every person who enlists or re-enlists in the active militia of this state shall sign and make oath to an enlistment paper, which shall be filed in the office of the adjutant general. Such oath shall be taken and subscribed to before a field officer, or the commanding officer of a signal corps, troop, battery, or company who are hereby authorized to administer such oaths; and such oaths may be taken before any officer authorized by the laws of this state to administer oaths. A person making a false oath to any statement contained in such enlistment paper shall, upon conviction, be deemed guilty of false swearing and punished accordingly. [Id. sec. 46.]

**Art. 5823. Disqualifications for enlistment, how removed.**—No minor shall be enlisted without the written consent of his parents or guardian. A man who has been expelled, or dishonorably discharged, from the

military service of this state, or of the United States, shall not be eligible for enlistment or re-enlistment, unless he produce the written consent to such enlistment of the commanding officer of the organization from which he was expelled, or dishonorably discharged, and of the commanding officer who approved such expulsion, or issued such dishonorable discharge. [Id. sec. 47.]

**Art. 5824. Non-commissioned officers, how appointed.**—Commanding officers of regiments and of battalions and squadrons not part of regiments shall appoint and warrant the non-commissioned staff officers of their respective regiments, battalions, or squadrons, and they shall, in their discretion, warrant the non-commissioned officers of the troops, batteries and companies of their respective regiments, battalions and squadrons from the members thereof, upon the written nomination of the commanding officer of the troops, batteries and companies, respectively. In troops, batteries and companies not a part of a regiment, battalion or squadron, and in signal and hospital corps, the non-commissioned officers shall be warranted by the commanding officer of the brigade or division, in his discretion, to which such organization may be attached, from the members of such organization upon the written nomination of the commanding officer of the troop, battery, company, signal, or hospital corps. To be eligible for appointment as sergeant, first class, of the hospital corps, a candidate must be a registered pharmacist. A sergeant of the hospital corps must be appointed from the hospital corps. The officer warranting a non-commissioned officer shall have power to reduce to the ranks for good and sufficient reasons the non-commissioned officers named in this article. [Id. sec. 48.]

**Art. 5825. Discharged and re-enlisted men entitled to credit.**—Men who have been discharged by reason of disbandment may be re-enlisted, and shall then receive credit for the period served at the time of such disbandment. A man discharged for physical disabilities shall, if such disability cease, and he again enlists, or a man discharged upon his own request shall, if he again enlists, receive credit for the period served prior to such discharge. [Id. sec. 49.]

**Art. 5826. Governor may appoint second lieutenants by brevet.**—The governor may appoint and commission enlisted men, who have served well and faithfully in the active militia of this state for a period of not less than twenty-five years, without examination, second lieutenants by brevet; provided, such enlisted men, so appointed and commissioned, shall be immediately placed on the retired list. [Id. sec. 50.]

**Art. 5827. Physical examination.**—No applicant for appointment or enlistment in the active militia of this state will be commissioned or enlisted without first passing a satisfactory physical examination. [Id. sec. 57.]

**Art. 5828. Assignment of pay invalid.**—No assignment of pay by any officer or an enlisted man shall be valid, except as otherwise provided by the governor. [Id. sec. 58.]

**Art. 5829. Veterans of Spanish-American war entitled to credit for time served in service of United States.**—For all purposes under this title, officers and enlisted men of the active militia of this state who entered the United States service in the Spanish-American war shall, on re-entering the active militia of this state, be entitled to credit for the time served in the forces of the United States in that war, as if this service had been rendered in the active militia of this state. [Id. sec. 61.]

**Art. 5830. No fee allowed for administering oaths, etc., to soldiers.**—No officer, civil or military, shall be entitled to charge or receive any fee or compensation for administering or certifying any oath administered or certified under the provisions of this title. [Id. sec. 62.]

## SERVICE AND DUTIES

**Art. 5831. Governor may call out militia, when.**—When an invasion of, or an insurrection in, this state is made or threatened, or when the governor may deem it necessary for the enforcement of the laws of this state, he shall call forth the active militia, or any part thereof, to repel, suppress, or enforce the same, and if the number available is insufficient he shall order out such part of the reserve militia as he may deem necessary. [Id. sec. 75.]

**Art. 5832. Same.**—When there is in any county, city, or town in this state tumult, riot, or body of men acting together by force with intent to commit a felony, or breach of the peace, or to do violence to person or property, or by force to break or resist the laws of this state, or when such tumult, riot, mob, or other unlawful act or violence is threatened and that fact is made to appear to the governor, he may issue his order to any commander of a division, brigade, regiment, squadron, battalion, troop, battery or company of the active militia of this state to appear at the time and place directed, to aid the civil authorities to suppress or prevent such violence and in executing the laws; provided, whenever the necessity for military aid in preventing or suppressing such violence and in executing the laws is immediate and urgent, and it is impracticable to furnish such information to the governor in time and secure military aid by his order, the district judge of the judicial district in which the disturbance occurs, or the sheriff of such county, or the mayor of such city, or town may call for aid upon the commanding officer of the active militia stationed therein, or adjacent thereto; such call shall be in writing, and the civil officer making the call shall as soon as possible notify the governor of his action. [Id. sec. 76.]

**Art. 5833. Duty of officer on receipt of order.**—The officer to whom the order of the governor, or the call of the civil authority, is directed shall, upon its receipt, forthwith order his command, or such portion thereof as may be ordered or called for, to parade at the time and place appointed, and shall immediately notify the governor of his action. [Id. sec. 77.]

**Art. 5834. Commanding officer's duty in case of riot.**—When such troops have appeared at the appointed place, the commanding officer thereof shall obey and execute such general instructions, which shall be in writing if practicable, otherwise verbal instructions given in the presence of two or more credible witnesses, as he may there and then receive from the civil authorities charged by law with the suppression of riot, or tumult, or the preservation of the public peace, but such commanding officer shall exercise his discretion as to the proper method of practically accomplishing the instructions received; the kind and extent of force to be used, and the particular means to be employed to accomplish the object specified by the civil authority shall be left solely to such commanding officer. [Id. sec. 78.]

**Art. 5835. Governor may order active militia to assist civil authorities, etc.**—The governor may order the active militia, or any part thereof, to assist the civil authorities in guarding prisoners, or in conveying prisoners from and to any point in this state, or discharging other duties in connection with the execution of the law as the public interest or safety at any time may require. [Id. sec. 79.]

**Art. 5836. Commanding officer may order closing of saloons, when.**—Whenever any part of the active militia of this state is on active duty pursuant to the order of the governor, or call of civil authority, to aid in the enforcement of the law, the commanding officer of such troops may order the closing of any place where intoxicating liquors, arms, ammuni-

tion, dynamite or other explosives are sold, and forbid the selling, bartering, lending, or giving away any of said articles so long as any of the troops remain on duty in such place or in the vicinity where such place may be located, whether any civil officer has forbidden the same or not. [Id. sec. 80.]

**Art. 5837. Organizations shall drill, etc.**—Officers and enlisted men of each troop, battery, and company of the active militia of this state shall assemble for and undergo drill and instruction at company, battalion, or regimental armories (troop, squadron, or battery armories for cavalry or field artillery) or rendezvous or for target practice, not less than twenty-four times during each calendar year preceding the annual allotment of funds under section 1661, Revised Statutes of the United States, as amended. During the same period, there shall be at least one inspection of each troop, battery, and company by an officer of the active militia of this state, or by an officer of the regular army of the United States, at such times as the governor may direct. In addition to such drills and parades, the commanding officer of any organization may require the officers and enlisted men of his command to meet for parade, drill, or instruction at such times and places as he may appoint. [Id. sec. 93.]

**Art. 5838. Shall participate in practice marches, etc.**—Each troop, battery, or company of the active militia of this state, not especially excused by the governor, will be required to participate for at least five consecutive days annually in practice marches or camps of instruction, under such regulations as the governor may prescribe, and under such instructors as he may appoint. [Id. sec. 94.]

#### COMPENSATION AND PRIVILEGES

**Art. 5839. Pay of militia in active service.**—The military forces of this state, when called into actual service of this state in time of war, insurrection, invasion or imminent danger thereof, or the prevention of invasion, shall, during their time of service, be entitled to the same pay, rations, and allowances for clothing as is now or may hereafter be established by the laws for the army of the United States. [Id. sec. 81.]

**Art. 5840. Same.**—When the military forces of this state, or any part thereof, are called into active service under articles 5832, 5833, 5834 and 5835, officers shall, during their term of service, receive the same pay as is now or may hereafter be established by law for the army of the United States, and enlisted men shall be paid for such time per day as follows: Chief musician of cavalry, artillery, infantry and engineers, three dollars; first-class sergeants of signal corps and hospital corps, two dollars and seventy-five cents; battalion sergeants major of engineers, battalion quartermaster sergeants of engineers, sergeants major of artillery senior grade, first sergeants of engineers, company quartermaster sergeants of engineers, sergeants of engineers, sergeants of signal corps, regimental quartermaster sergeants, regimental commissary sergeants, and regimental sergeants major, two dollars and fifty cents; sergeants major of artillery, junior grade, first sergeants of infantry, cavalry and artillery, sergeants of hospital corps, drum majors, sergeants major of squadron and battalion, color sergeants, chief trumpeters of cavalry and artillery, principal musicians of cavalry, artillery, infantry and engineers, two dollars and twenty-five cents; corporals of engineers and signal corps, cooks of engineers and signal corps, sergeants and cooks of infantry, cavalry, artillery and bands, mechanics of coast artillery, stable sergeants of field artillery, privates of hospital corps, company quartermaster sergeants of cavalry, artillery and infantry, two dollars; first-class privates of engineers and signal corps, corporals of cavalry, artillery, infantry and bands, artificers of field artillery and infantry,

farriers, blacksmiths, saddlers and wagoners of cavalry, one dollar and seventy-five cents; privates of cavalry, artillery, infantry, signal corps and bands, second class privates of engineers, musicians of artillery, infantry and engineers, trumpeters cavalry, one dollar and fifty cents. [Id. sec. 82.]

**Art. 5841. Members of militia exempt from certain taxes.**—All officers and enlisted men of the active militia of this state, who comply with their military duties as prescribed by this chapter, shall be entitled to exemption from the payment of all poll taxes, except the poll tax prescribed by the constitution for the support of the public schools; exemption from the payment of any road or street tax, and from any road duty whatsoever under the laws of this state, and exemption from jury service or duty of every character and description. [Id. sec. 83.]

**Art. 5842. Same.**—In order to entitle any troop, battery, company, signal corps, or band of the active militia of this state to the exemption from the payment of poll taxes as specified in the preceding article, the commanding officer of such organization shall, between the first days of January and April of each year, file with the assessor of taxes for his county a list of all members of his command who have discharged the military duties required of them for the preceding year, and who have been present for at least twenty-four drills or parades, or have been excused for non-attendance thereof by reason of illness or other necessary cause; such list shall be certified to by such commanding officer, and the persons whose names appear on such list shall not be assessed for any poll taxes whatever, other than the poll tax of one dollar prescribed by the constitution for the support of public schools for the current year; and it shall be the duty of assessors with whom such lists are filed to note the exemptions on his assessment roll as set forth in such lists, and furnish such information to all concerned as may be necessary in carrying out the provisions of this article. [Id. sec. 84.]

**Art. 5843. Same.**—In order to entitle any troop, battery, company, signal corps, or band of the active militia of this state to exemption from the payment of road or street taxes, jury service or duty, and road duty as specified in article 5841 of this chapter, the commanding officer of such organization shall, between the first and thirty-first days of January of each year, file lists similar to that set forth in the preceding article, certified to by him, one copy with the clerk of the district court of his county, and one copy with the clerk of the county court of his county; and the names appearing on such lists shall thereafter be exempt from jury service or duty of every character and description, from the performance of any road duty, and from the payment of any road or street tax in such county for the current year. Clerks of the county courts shall furnish information of the person so exempt to the proper road overseers and to all others concerned. [Id. sec. 85.]

**Art. 5844. Same.**—In order to entitle any general, field or staff officer of the active militia of this state to the exemptions as set forth in article 5841 of this chapter, such officer shall, between the first days of January and April of each year, file with the assessor of taxes for his county his certificate to the effect that he is an officer of the active militia of this state in good standing, and that he has faithfully discharged all the military duties required of him during the preceding year, and, on filing the certificate as herein required, such officer shall not be assessed for any poll tax whatever other than the poll tax of one dollar prescribed by the constitution for the support of public schools for the current year; and such officer shall file similar certificates between the first and thirty-first days of January of each year, with the district and county clerks of his county, and, on filing such certificates, shall thereafter be exempt from jury service or duty of every character and description, from the



performance of any road duty and from the payment of any road or street tax in such county for the current year. [Id. sec. 86.]

**Art. 5845. Same.**—In order to entitle any non-commissioned staff officer, member of the engineer or hospital corps, or other enlisted man of the active militia of this state, not belonging to the regular organization, to the exemptions as set forth in article 5841 of this chapter, such non-commissioned officer or soldier shall prepare and file affidavits similar to the certificate provided in the preceding article for officers, with the assessor, district and county clerks of his county; such affidavits shall be filed during the same period and in the same manner as set forth above for officers, and, on filing such affidavits, such non-commissioned officer or soldier shall be entitled to the same exemptions in the same manner as provided for such officers. [Id. sec. 87.]

**Art. 5846. State to provide for wounded or disabled, when.**—Every member of the military forces of this state who shall be wounded or disabled while in the service of this state, in case of riot, tumult, breach of the peace, resistance to process, invasion, insurrection or imminent danger thereof, or whenever called upon in aid of the civil authorities shall be taken care of and provided for at the expense of this state. [Id. sec. 88.]

**Art. 5847. State to pay for transportation, etc.**—The state shall make suitable provision for the pay, transportation, subsistence and quarters of all troops of this state who may attend at any annual encampment, or when called into active service of this state. [Id. sec. 95.]

**Art. 5848. Members of militia exempt from arrest, when.**—No persons belonging to the active militia of this state shall be arrested on any civil process while going on duty to or returning from any place at which he may be required to attend for military duty, except in cases of treason, felony, or breach of the peace. [Id. sec. 70.]

#### ARMS, EQUIPMENT, ETC.

**Art. 5849. Enlisted men to return property.**—An enlisted man who has not returned all the public property for which he is responsible shall, under no circumstances, receive a full and honorable discharge. [Id. sec. 51.]

**Art. 5850. Officers and soldiers liable for damage to equipment, etc.**—The cost of arms, equipment and all other military supplies and stores, and the cost of repairs or damage done to arms, equipment and all other military supplies and stores, shall be deducted from the pay of any officer or soldier in whose care or use the same were when such loss, destruction or damage occurred, if said loss, destruction or damage was occasioned by the carelessness, neglect or abuse of said officer or soldier. [Id. sec. 59.]

**Art. 5851. Government property not for private use.**—No officer or enlisted man of the active militia of this state having property in charge shall loan for private use, or permit to be used for any other purpose than the legitimate purpose intended, any public property that he may be responsible for to the governor. All property issued to a brigade, regimental, battalion, or company commander, or to any band, corps, or auxiliary squad or to any military organization whatever, when not in legitimate use, shall be carefully stored and protected from waste, theft, loss or injury. [Id. sec. 64.]

**Art. 5852. Arms, equipment, etc., to be provided by state.**—All organizations shall be provided by this state with such arms, equipments, books of instruction and of record and other supplies as may be necessary for the proper performance of the duty required of them by this

chapter; and each organization shall keep such property in proper repair and in good condition. [Id. sec. 68.]

**Art. 5853. Sheriff may seize arms, etc., when.**—Whenever it shall come to the knowledge of the governor, on the affidavit of a credible person, that persons having arms, equipments, or other military property issued by this state for the use of the military forces of this state, without authority of law, and that such persons fail or refuse to deliver up such property, it shall be his duty forthwith to issue his warrant to the sheriff of the county where such persons may be or reside, commanding such sheriff to seize and take into his possession such arms, equipments or other military property, and the same keep subject to the further order of the governor. [Id. sec. 89.]

**Art. 5854. Sheriff in executing such warrant may call on militia.**—Any sheriff receiving a warrant such as is specified in the preceding article shall proceed without delay to execute the same in the manner therein directed, and in executing such warrant he may summon to his aid the power of the county and any command of the active militia of this state that may be convenient. [Id. sec. 90.]

**Art. 5855. Sheriff to collect arms, etc., when.**—The sheriffs of the several counties of this state shall, from time to time, collect such arms or property as may be liable to loss or in the hands of unauthorized persons, and such property, when collected and turned over to them, safely keep subject to the order of the governor, to whom a report of such collection shall be made; and the official bond of sheriffs shall extend to and include the faithful performance of their duties under this and the preceding articles. [Id. sec. 91.]

**Art. 5856. Arms, etc., exempt from forced sale.**—Arms, equipments, clothing, or other military supplies issued by this state to organizations or members of the active militia for military purposes, shall be exempt from levy and sale by virtue of an execution for debt, or in any other legal proceedings. [Id. sec. 92.]

**Art. 5857. Governor to draw arms, etc., from U. S. government.**—The governor in his official capacity is authorized to draw from the United States government all arms, equipments, munitions, or other military stores to which this state may, from time to time, be entitled, for the use of the militia, and may execute such bonds in the name of the state of Texas as may be necessary or requisite to secure their issuance. [Id. sec. 96.]

**Art. 5858. Arms, etc., to be stored, where.**—The governor shall cause all arms, equipment, munitions, or other military property belonging to or under the control of this state, to be stored at such points as he may deem most conducive to the interests of this state and the convenience of the people. [Id. sec. 97.]

**Art. 5859. Uniform, same as that prescribed for United States army.**—The uniform for officers and enlisted men of the active militia of this state shall be the same as that prescribed for the United States army, with such modifications as the governor may deem necessary from time to time. All uniforms and other military property issued by this state shall be used for military purposes only, and when issued shall be receipted for, and kept and accounted for in such manner as the adjutant general may prescribe. [Id. sec. 100.]

## ARTICLES OF WAR

**Art. 5860. Rules and articles for the government of the military forces.**—The military forces of this state shall be governed by the following rules and articles:

The word, "officer," as used therein, shall be understood to designate commissioned officers; the word, "soldier," shall be understood to include non-commissioned officers, musicians, artificers, privates and other enlisted men; the word, "company," shall be understood to include troops, batteries, companies, signal corps, hospital corps, bands and detachments, and the convictions mentioned therein shall be understood to be convictions by court martial.

Article 1. Enlistment in the active militia of this state shall be voluntary, and every person who enlists therein shall take and subscribe an oath (or affirmation) in the following form:

"I, ....., do solemnly swear (or affirm) that I will bear true faith and allegiance to the state of Texas and to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever, and that I will obey the orders of the governor of Texas, and the orders of the officers appointed over me, according to the laws, rules and articles for the government of the military forces of the state of Texas."

Art. 2. Every officer who knowingly enlists or musters into the military service of this state any minor over the age of sixteen years without the written consent of his parents or guardian, or any minor under the age of sixteen years, or any insane or intoxicated persons, or any deserter from the military service of this state or of the United States, or any person who has been convicted of any infamous crime, shall, upon conviction, be dismissed from the service or suffer such other punishment as a court martial may direct.

Art. 3. No enlisted man, duly sworn, shall be discharged from service without a discharge in writing, signed by a field officer of the regiment to which he belongs, or by the commanding officer when no field officer is present; and no discharge shall be given to any enlisted man before his term of service has expired, except by order of the governor, the adjutant general, or by order of a court martial.

Art. 4. Any officer who knowingly musters as a soldier a person who is not a soldier, shall be deemed guilty of knowingly making a false muster, and punished as a court martial may direct.

Art. 5. Any officer who takes money, or other thing, by way of gratification, on mustering any regiment, or company, or on signing muster rolls, shall be dismissed from the service, and shall thereby be disabled to hold any office or employment, civil or military, in the service of the state of Texas, or suffer such other punishment as a court martial may direct.

Art. 6. Every commanding officer shall, in the beginning of January and July of each year, and oftener if required by the governor, transmit to the adjutant general's department an exact return of the troops under his command, specifying the names of the officers absent from their posts, with the reasons for and the time of their absence. Such returns shall be made in the form and forwarded in the manner prescribed by the adjutant general; and any such officer, who through neglect or design omits to send such return, shall, on conviction thereof, be punished as a court martial may direct.

Art. 7. Every officer who knowingly makes a false return to the adjutant general's department, or to any of his superior officers authorized to call for such returns, of the state of the regiment or company under his command, or of any arms, ammunition, clothing or other stores thereunto belonging, shall be punished as a court martial may direct.

Art. 8. Every officer who signs a false certificate relating to the absence or pay of any officer or soldier shall be dismissed from the service, or suffer such other punishment as a court martial may direct.

Art. 9. Any officer who knowingly makes a false muster of man

or horse, or who signs, or directs, or allows, the signing of any muster roll, knowing the same to contain a false muster, shall, upon proof thereof by two witnesses before a court martial, be dismissed from the service, and shall thereby be disabled to hold any office or employment, civil or military, in the service of the state of Texas.

Art. 10. Any officer who wilfully or through neglect suffers to be lost, damaged, or spoiled any military stores or supplies belonging to this state, or to the United States, which have been received for use of the military forces of this state, shall make good the loss or damage and suffer such punishment as a court martial may direct.

Art. 11. Any soldier who sells or through neglect loses or spoils the arms, uniforms, equipments, accoutrements, or any other military stores or supplies issued to him for his use or in his charge, shall make good the loss or damage, and suffer such punishment as a court martial may direct.

Art. 12. Any officer or soldier who shall strike his superior officer, or offers any violence to him, the said superior officer being engaged in the reasonable execution of his official duties, or if any officer or soldier disobeys any lawful command of his superior officer, he shall suffer punishment as a court martial may direct.

Art. 13. Any officer or soldier who begins, excites, causes, or joins in any mutiny or sedition in any regiment, company quarters or guard, shall suffer such punishment as a court martial may direct.

Art. 14. Any officer or soldier who, being present at any mutiny or sedition, does not use his utmost endeavor to suppress the same, or having knowledge of any intended mutiny or sedition, does not, without delay, give information thereof to his commanding officer, shall suffer such punishment as a court martial may direct.

Art. 15. All officers, of what conditions soever, have power to part and quell all quarrels, frays and disorders, whether among persons belonging to their own or to any regiment or company, and to order officers into arrest, and non-commissioned officers and soldiers into confinement who take part in same, until their proper superior officer is acquainted therewith. And whosoever being so ordered refuses to obey such officer or non-commissioned officer, or draws a weapon upon him, shall be punished as a court martial may direct.

Art. 16. No officer or soldier shall send a challenge to another officer or soldier to fight a duel, or accept a challenge so sent. Any officer who so offends shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court martial may direct.

Art. 17. Any soldier who absents himself from his company or guard, without leave from his commanding officer, shall be punished as a court martial may direct.

Art. 18. Any officer or soldier who fails, except when prevented by sickness or other necessity, to repair, at the fixed time, to the place of parade, exercise, or other rendezvous appointed by his commanding officer, or goes from the same, without leave from his commanding officer, before he is dismissed or relieved, shall be punished as a court martial may direct.

Art. 19. Any soldier who is found one mile from camp, without leave in writing from his commanding officer, shall be punished as a court martial may direct.

Art. 20. Any officer who is found drunk on his guard, party or other duty, shall be dismissed from the service. Any soldier who so offends shall suffer such punishment as a court martial may direct.

Art. 21. Any sentinel who is found sleeping upon his post, or who leaves it before he is regularly relieved, shall suffer such punishment as a court martial may direct.

Art. 22. Any officer or soldier who quits his guard, without leave from his superior officer, except in case of urgent necessity, shall be punished as a court martial may direct.

Art. 23. Any officer who, by any means whatsoever, occasions false alarms in camp, command, or quarters, shall suffer such punishment as a court martial may direct.

Art. 24. Any officer or soldier who misbehaves himself before the enemy, runs away, or shamefully abandons any place, post or guard, which he is commanded to defend, or speaks words inducing others to do the like, or casts away his arms or ammunition, or quits his post or colors to plunder or pillage, shall suffer such punishment as a court martial may direct.

Art. 25. Any officer or soldier who, having been duly enlisted or drafted in the military service of this state, deserts the same, shall suffer such punishment as a court martial may direct.

Art. 26. Every soldier who deserts the military service of this state shall be liable to serve for such period as shall, with the time he may have served previous to his desertion, amount to the full term of his enlistment; and such soldier shall be tried by a court martial and punished, although the term of his enlistment may have elapsed previous to his being apprehended and tried.

Art. 27. Any officer who, having tendered his resignation, quits his post or proper duties, without leave and with intent to remain permanently absent therefrom, prior to due notice of the acceptance of the same, shall be deemed and punished as a deserter.

Art. 28. No soldier shall enlist himself in any other regiment or company, without a regular discharge from the regiment or company in which he last served, on a penalty of being reputed a deserter and suffering accordingly. And in case any officer shall knowingly receive and entertain such soldier, or shall not, after his being discovered to be a deserter, immediately give notice thereof to the command in which he last served, the said officer shall, by court martial, be dismissed.

Art. 29. In time of war, insurrection or rebellion, larceny, robbery, burglary, arson, mayhem, manslaughter, murder, assault and battery with intent to kill, wounding by shooting or stabbing with intent to commit murder, rape, or assault and battery with an intent to commit rape, shall be punishable by the sentence of a general court martial when committed by persons in the military service of the state; and punishment in every such case shall not be less than the punishment provided for like offenses by the Penal Code of this state.

Art. 30. When any officer or soldier is accused of a capital crime, or of any offense against the person or property of any citizen of this state, which is punishable by the laws of this state, the commanding officer and the officers of the regiment or company to which the person so accused belongs are required, except in time of war, upon application duly made by or in behalf of the party injured, to use their utmost endeavors to deliver him over to the civil authority and to aid the officers of justice in apprehending and securing him in order to bring him to trial. If, upon application, any officer refuses or wilfully neglects, except in time of war, to deliver over such accused person to the civil authorities, or to aid the officers of justice in apprehending him, he shall be punished as a court martial may direct.

Art. 31. Any person in the military service of this state who makes, or causes to be made, any claim against this state or the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who presents, or causes to be presented, to any person in the civil or military service thereof, for approval or payment, any claim against this state, or the United States, or any officer thereof, knowing such claim to be false or fraudulent; or

Who enters into any agreement or conspiracy to defraud this state, or the United States, by obtaining, or aiding others to obtain, the allowance or payment of any false or fraudulent claim; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against this state, or the United States, or against any officer thereof makes or uses, or procures or advises the making or use of, any writing, or other papers, knowing the same to contain any false or fraudulent statement; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance or payment of any claim against this state, or the United States, or any officer thereof, makes, or procures or advises the making of, any oath to any fact or to any writing or other paper, knowing such oath to be false; or

Who, for the purpose of obtaining, or aiding others to obtain, the approval, allowance, or payment of any claim against this state, or the United States, or any officer thereof, forges or counterfeits or procures or advises the forging or counterfeiting of any signature upon any writing or other paper, or uses, or procures or advises the use of, any such signature, knowing the same to be forged or counterfeited; or

Who, having charge, possession, custody or control of any money or other property of this state, or the United States, furnished or intended for the military service of this state, knowingly delivers, or causes to be delivered, to any person having authority to receive the same, any amount less than that for which he receives a certificate or receipt; or

Who, being authorized to make or deliver any papers certifying the receipt of any property of this state, or the United States, furnished or intended for the military service of this state, makes or delivers to any person, such writing, without having full knowledge of the truth of the statements therein contained, or with intent to defraud this state, or the United States; or

Who steals, embezzles, knowingly and wilfully misappropriates, applies to his own use or benefit, or wrongfully or knowingly sells or disposes of any ordnance, arms, equipments, ammunition, clothing, subsistence stores, money or other property of this state, or the United States, furnished or intended for the military service of this state; or

Who knowingly purchases, or receives in pledge for any obligation or indebtedness, from any soldier, officer or other person who is a part of, or employed in, said forces or service, any ordnance, arms, equipments, ammunition, clothing, subsistence stores or other property of this state, or the United States, such soldier or officer, or other person not having lawful right to sell or pledge the same, shall, on conviction thereof, be punished by fine or imprisonment, or by such other punishment as a court martial may adjudge, or by any or all of said penalties. And if any person, being guilty of any of the offenses aforesaid, while in the military service of this state, receives his discharge, or is dismissed from the service, he shall continue to be liable to be arrested and held for trial and sentence by a court martial, in the same manner and to the same extent as if he had not received such discharge or been dismissed.

Art. 32. Any officer, who is convicted of conduct unbecoming an officer and a gentleman, shall be dismissed from the service.

Art. 33. All crimes not capital, and all disorders and neglects, which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles, are to be taken cognizance of by a general or a regimental, or a summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court.

Art. 34. Whenever, by any of these articles of war for the government of the military forces of this state, the punishment or conviction of any military offense, is left to the discretion of the court martial, the

punishment therefor shall not be in excess of a limit which the governor may prescribe.

Art. 35. The officers and soldiers of any troops, whether active or reserve militia of this state or otherwise, appointed, enlisted, mustered or drafted into the military forces of this state, shall at all times, and in all places be governed by these articles, and shall be tried by courts martial.

Art. 36. All retainers of the camp and all persons serving with the military forces of this state in the field, though not enlisted soldiers, shall be subject to these rules and articles in the same manner as enlisted men.

Art. 37. Officers charged with crime shall be arrested and confined in their quarters or tents, or other place, and deprived of their swords by the commanding officer. And any officer who leaves his confinement before he is set at liberty by his commanding officer shall be dismissed from the service, and suffer such other punishment as a court martial may direct.

Art. 38. Soldiers charged with crime shall be confined until tried by court martial, or released by proper authority.

Art. 39. Any provost marshal, or any officer commanding a guard, who shall refuse to receive or keep any prisoner committed to his charge by an officer belonging to the military forces of this state, shall suffer such punishment as a court martial may direct; provided, the officer committing shall, at the same time, deliver a statement in writing, signed by himself, of the crime charged against the prisoner.

Art. 40. Every officer to whose charge a prisoner is committed shall, within twenty-four hours after such commitment, or as soon as he is relieved from his guard, report in writing to the commanding officer the name of such prisoner, the crime charged against him, and the name of the officer committing him; and, if he fails to make such report, he shall be punished as a court martial may direct.

Art. 41. Any officer who presumes, without proper authority, to release a prisoner committed to his charge, or suffers any prisoner so committed to escape, shall be punished as a court martial may direct.

Art. 42. No officer or soldier put in arrest shall be continued in confinement more than five days, or until such time as a court martial can be assembled.

Art. 43. When an officer is put in arrest for the purpose of trial, except at remote stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within five days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.

Art. 44. The governor, or any general, or other officer, commanding a division or brigade, may appoint general courts martial whenever necessary. But when any such general or other officer is the accuser or prosecutor of any officer under his command, the court shall be appointed by the governor; and its proceedings and sentence shall be sent directly to the adjutant general, by whom they shall be laid before the governor for his approval or orders in the case.

Art. 45. Officers who may appoint a court martial shall be competent to appoint a judge advocate for the same.

Art. 46. General courts martial may consist of any number of officers, from five to thirteen, inclusive, but they shall not consist of less than thirteen when that number can be convened without injury to the

service. A decision of the appointing authority as to the number that can be assembled without injury to the service is conclusive.

Art. 47. When the requisite number of officers to form a general court martial is not present in any command or detachment, the commanding officer shall, in cases which require the cognizance of such a court, report to the governor, who shall thereupon order a court to be assembled at the nearest and most convenient place at or near which there may be such a requisite number of officers, and shall order the party accused, with the necessary witnesses, to be transported to the place where the said court shall be assembled.

Art. 48. Every officer commanding a camp or other place where the troops consist of different corps, and every officer commanding a regiment, separate squadron or battalion, shall be competent to appoint for such camp or other place, or such regiment, separate squadron or battalion, regimental courts martial, consisting of three officers, to try enlisted men for offenses not capital; but such courts martial shall be appointed and the officers designated by superior authority when by him deemed desirable. Such courts martial shall have power to award punishment not to exceed confinement at hard labor for thirty days, or forfeiture of thirty dollars pay, or a fine of thirty dollars, or any or all of such confinement, forfeiture of pay and fine, and, in case of a non-commissioned officer, reduction to the ranks in addition thereto.

Art. 49. Every commanding officer of each camp or other place, regiment or corps, detached battalion or company, and the commanding officer of each company at its home station, shall have power to appoint for such place, command or station summary courts martial to consist of one officer to be designated by him, to try enlisted men for offenses not capital; but such summary courts martial may be appointed and the officer designated by superior authority when by him deemed desirable; and, when but one commissioned officer is present with a command, he shall hear and finally determine such cases. Such summary courts shall have power to adjudge punishment not to exceed confinement at hard labor for thirty days, forfeiture of thirty dollars pay, or a fine of thirty dollars or any or all of such confinement, forfeiture of pay and fine, and, in case of non-commissioned officers, reduction to the ranks in addition thereto; provided such summary courts shall not adjudge confinement for more than ten days, forfeiture of more than ten dollars pay, or a fine of more than ten dollars, or any or all of such confinement, forfeiture of pay and fine, unless the accused shall, before trial, consent in writing to trial by said court; but, in case of refusal to so consent, the trial may be had either by general, regimental or by said summary court, but in case of trial by said summary court, without consent of as aforesaid, the court shall not adjudge confinement for more than ten days, or forfeiture of more than ten dollars pay, or a fine of more than ten dollars, or any or all of such confinement, forfeiture of pay and fine. The officer holding the summary court shall have power to administer oaths and to hear and determine cases cognizable by said court, and when satisfied of the guilt of the accused, adjudge the punishment to be inflicted, which said punishment shall not exceed the limit prescribed in this article.

Art. 50. There shall be a summary court record kept at the headquarters of the proper command in the field, each regiment or corps, detached battalion or company, and each company at its home station, for which summary courts martial have been appointed, in which shall be entered a record of all cases heard and determined and the action had thereon. And the commanding officer of each camp or other place, regiment or corps, detached battalion or company, and each company at its home station, for which summary courts martial have been appointed shall, on the last day of every month and oftener if required, make a report to the adjutant general of the number of cases determined by summary courts,



during the period, setting forth the offenses committed and the penalties awarded.

Art. 51. The judge advocate of any general or regimental court martial shall administer to each member of such court, before they proceed upon any trial, the following oath (or affirmation): "You, A. B., do swear (or affirm) that you will well and truly try and determine, according to evidence, the matter now before you, between the state of Texas and the prisoner to be tried, and that you will duly administer justice, without partiality, favor or affection, according to the provisions of the rules and articles for the government of the military forces of this state, and if any doubt should arise, not explained by said articles, then according to your conscience, the best of your understanding, and the customs in like cases; and you do further swear (or affirm) that you will not divulge the sentence of the court until it shall be published by the proper authority, except to the judge advocate; neither will you disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice in due course of law. So help you God."

Art. 52. When the oath (or affirmation) has been administered to the members of a court martial, the president of the court shall administer to the judge advocate, or person officiating as such, an oath (or affirmation) in the following form: "You, A. B., do swear (or affirm) that you will not disclose or discover the vote or opinion of any particular member of the court martial, unless required to give evidence thereof as a witness by a court of justice in due course of law; nor divulge the sentence of the court to any but the proper authority until it shall be duly disclosed by the same. So help me God."

Art. 53. A court martial may punish, at discretion, any person who uses any menacing words, signs or gestures in its presence, or who disturbs its proceedings by any riot or disorder.

Art. 54. All members of a court martial are to behave with decency and calmness.

Art. 55. Members of a court martial may be challenged by a prisoner, but only for causes stated to the court. The court shall determine the relevancy and validity thereof, and shall not receive a challenge to more than one member at a time.

Art. 56. When a prisoner, arraigned before a court martial, from obstinacy and deliberate design, stands mute or answers foreign to the purpose, the court may proceed to trial and judgment as if the prisoner had pleaded not guilty.

Art. 57. The judge advocate general, or some person deputed by him, or by the governor, or general, or officer commanding the division, brigade, camp or other place, regiment, separate squadron or battalion shall prosecute in the name of the state of Texas; but when the prisoner has made his plea he shall so far consider himself counsel for the prisoner as to object to any leading question to any of the witnesses and to any question to the prisoner, the answer to which might tend to criminate himself. And whenever a court martial shall sit in closed session the judge advocate shall withdraw, and, whenever his legal advice or his assistance in referring to recorded evidence is required, it shall be obtained in open court.

Art. 58. The judge advocate general and the officers of his department, the judge advocate of court martial and the trial officers of summary courts are hereby authorized to administer oaths for the purpose of the administration of military justice and for other military purposes.

Art. 59. The depositions of witnesses for the accused residing beyond the limits of the state, or the county in which any military court may be ordered to sit, may be taken and read in evidence as provided by the laws of this state.

Art. 60. All persons who give evidence before a court martial shall be examined on oath (or affirmation) which shall be administered by the judge advocate in the following form: "You swear (or affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth and nothing but the truth. So help you God."

Art. 61. A court martial shall, for reasonable cause, grant a continuance to either party for such time and as often as may appear to be just; provided, that if the prisoner be in close confinement the trial shall not be delayed for a longer period than sixty days.

Art. 62. Members of a court martial, in giving their votes, shall begin with the youngest in commission.

Art. 63. Officers shall be tried only by general courts martial; and no officer shall, when it can be avoided, be tried by officers inferior to him in rank.

Art. 64. No officer shall be discharged or dismissed from the service, except by order of the governor, or by sentence of a general court martial.

Art. 65. When an officer is dismissed from the service for cowardice or fraud, the sentence shall direct that the crime, punishment, name and place of abode of the delinquent shall be published in the newspapers in and about the state and in the county in which the offender lives, or where he usually resides; and, after such publication, it shall be scandalous for an officer to associate with him.

Art. 66. When a court martial suspends an officer from command, it may also suspend his pay and emoluments for the same time, according to the nature of his offense.

Art. 67. No person shall be tried the second time for the same offense.

Art. 68. No person shall be liable to be tried or punished by a general court martial for any offense, except for desertion in the face of an enemy, committed more than two years before the arraignment of such person for such offense, unless he shall meanwhile have absented himself from this state, in which case the time of his absence shall be excluded in computing the period of the limitation; provided, that said limitation shall not begin until the end of the term for which said person was mustered into service.

Art. 69. No sentence of a court martial respecting a general officer, and no sentence of a court martial directing the dismissal of any officer, shall be carried into execution until it shall have been confirmed by the governor.

Art. 70. No sentence of a court martial shall be carried into execution until the same shall have been approved by the officer ordering the court, or by the officer commanding for the time being.

Art. 71. All sentences of a court martial may be confirmed and carried into execution by the officer ordering the court, or by the officer commanding for the time being, where confirmation by the governor is not required by these articles.

Art. 72. Any officer who is authorized to confirm and carry into execution the sentence of a court martial shall have power to pardon or mitigate any punishment adjudged by it, except the punishment of dismissal of an officer; and the governor shall have power to pardon or mitigate any punishment adjudged by any court martial.

Art. 73. Every judge advocate, or person acting as such, at any general or regimental court martial, shall, with such expedition as the opportunity of time and distance of place may admit, forward the original proceedings and sentences of such court to the adjutant general, in whose office they shall be carefully preserved.

Art. 74. Every party tried by a general or regimental court martial shall, upon demand thereof, made by himself or by any person in his

behalf, be entitled to a copy of the proceedings and sentence of such court.

Art. 75. A court of inquiry to examine into the nature of any transaction of, or accusation or imputation against, any officer or soldier may be ordered by the governor, or by any commanding officer; but such courts of inquiry shall never be ordered by any commanding officer, except upon a demand by the officer or soldier whose conduct is to be inquired of.

Art. 76. A court of inquiry shall consist of one or more officers, not exceeding three, and a recorder to reduce the proceedings and evidence to writing.

Art. 77. The recorder of a court of inquiry shall administer to the members the following oath: "You shall well and truly examine and inquire, according to the evidence, into the matter now before you, without partiality, favor, affection, prejudice or hope of reward. So help you God." After which the president of the court shall administer to the recorder the following oath: "You, A. B., do swear that you will, according to your best abilities, accurately and impartially record the proceedings of the court and the evidence to be given in the case in hearing. So help you God."

Art. 78. A court of inquiry and the recorder thereof shall have the same power to summon and examine witnesses as is given to courts martial and the judge advocates thereof. Such witnesses shall take the same oath which is taken by witnesses before courts martial, and the party accused shall be permitted to examine and cross-examine them so as fully to investigate the circumstances in question.

Art. 79. A court of inquiry shall not give an opinion on the merits of the case inquired of, unless specially ordered to do so.

Art. 80. The proceedings of a court of inquiry must be authenticated by the signatures of the recorder and the president thereof, and delivered to the commanding officer.

Art. 81. The proceedings of a court of inquiry may be admitted as evidence by a court martial in cases not extending to the dismissal of an officer; provided, that the circumstances are such that oral testimony can be obtained.

Art. 82. The foregoing articles shall be read once in every twelve months to every company in the military service of this state, and shall be duly observed and obeyed by all officers and soldiers in said service. [Id. sec. 103.]

**Militiaman killing citizen—Jurisdiction.**—Under article 30 of this statute, the district court of D. county had jurisdiction to try a member of the state militia for murder alleged to have been committed while such soldier was doing patrol duty within the county in time of peace. *Manley v. State*, 62 Cr. R. 392, 137 S. W. 1137.

Where a member of the national guard, while on duty in time of peace, committed a capital offense by killing a citizen who insisted on passing a military line, the courts of the state had jurisdiction to try the soldier therefor, both under authority conferred by article 30 of this statute and independent thereof; the state courts having first obtained jurisdiction before a military investigation was begun. *Manley v. State* (Cr. App.) 154 S. W. 1008.

**Duty to obey orders.**—Since under this article one who enlists in the national guard is required to obey the orders of his superior officers, and may not question the authority of the order directing executive service, where accused as a member of the national guard was called into active service by the mayor of a city to do patrol duty during a visit of the president in the city, and while performing such service killed deceased by stabbing him with a bayonet, whether the mayor had authority to call out the national guard under such circumstances was irrelevant. *Manley v. State*, 62 Cr. R. 392, 137 S. W. 1137.

## COURTS MARTIAL

Art. 5861. **Evidence in courts martial.**—The rules of evidence in all courts martial shall follow in general, so far as apposite, the common law rules of evidence as observed by the courts of this state in criminal cases; but a certain latitude in the introduction of evidence and the examination of witnesses by an avoidance of restrictive rules is permis-

sible, when it is in the interest of the administration of military justice. [Id. sec. 104.]

**Art. 5862. Privileges of accused.**—In all trials before courts martial, the accused shall have the right to demand the nature and cause of the accusation against him, and to be presented with a copy of the charges. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him, and shall have compulsory process for obtaining witnesses in his favor. [Id. sec. 105.]

**Art. 5863. Counsel for defendant to be detailed, when.**—The officer ordering a general or regimental court martial will at the request of any prisoner who is to be arraigned, detail as counsel for his defense a suitable officer, one not acting as a summary court; provided, such request is made within a reasonable time before trial. If there be no such officer available, the fact will be reported to the adjutant general for his action. An officer so detailed should perform such duties as usually devolve upon counsel for defendant before civil courts in criminal cases. [Id. sec. 106.]

**Art. 5864. Judge advocate to appoint reporter.**—The judge advocate of a military court shall have power to appoint a reporter, who shall record the proceedings of, and testimony taken before, such court, and may set down the same, in the first instance in shorthand. The reporter shall, before entering upon his duty, be sworn or affirmed faithfully to perform the same. [Id. sec. 107.]

**Art. 5865. Judge advocate may issue process, etc.**—The president or judge advocate of every general or regimental court martial shall have power to issue like process to compel witnesses to appear and testify, which courts of criminal jurisdiction within this state may lawfully issue; and such process shall be issued in the same style and manner and executed by the same officers as when issued by such court. [Id. sec. 108.]

**Art. 5866. Process generally.**—The president of any court martial, and any summary court officer, shall have authority to issue, under his hand, in the name of the state of Texas, directed to any sheriff or constable, whose duty it shall be to serve or execute the same in the same manner in which like process is served or executed when issued by a magistrate, all necessary process, subpoenas, attachments, warrants of arrest and warrant of commitment. [Id. sec. 109.]

**Art. 5867. Penalty for disobeying, etc.**—Every person, who being duly subpoenaed to appear as a witness before a regimental or general court martial, who wilfully neglects or refuses to appear, or refuses to qualify as a witness or produce documentary evidence which such person may have been legally subpoenaed to produce, shall be guilty of a misdemeanor, and prosecuted in the proper justice court, and punished by a fine not exceeding one hundred dollars; provided, such witness may plead as a defense that he was not tendered or paid one day's fee and mileage for the journey to and from the place of trial, as provided by this chapter, such amounts to be paid by the adjutant general's department out of any appropriation or funds available for that purpose; provided, that no witness shall be compelled to incriminate himself, or to answer any questions which may tend to incriminate or degrade him. [Id. sec. 110.]

**Art. 5868. Witnesses entitled to transportation.**—Persons in the employ of this state, but not belonging to the military forces thereof, when traveling upon summons as witnesses before military courts, are entitled to transportation in kind from their place of residence to the place where the court is in session and return. If no transportation be furnished, they are entitled to reimbursement of the cost of travel actu-

ally performed by the shortest usually traveled route. They are also entitled to reimbursement of the actual cost of meals and rooms at a rate not to exceed two dollars per day for each day actually and unavoidably consumed in travel, or in attendance upon the court under the order or summons. No allowance will be made to them when attendance upon court does not require them to leave their place of residence. [Id. sec. 111.]

**Art. 5869. Compensation of.**—A person not in the employ of this state and not belonging to the active military forces thereof, who has been duly summoned to appear as a witness before a military court, will receive one dollar and fifty cents per day for each day actually in attendance upon the court, and six cents a mile for going from his place of residence to the place of trial or hearing, and six cents a mile for returning. Civilian witnesses will be paid by the adjutant general's department. [Id. sec. 112.]

**Art. 5870. Same.**—The charges for return journeys of witnesses will be made upon the basis of the actual charges allowed for travel to the court, and the entire account thus completed will be paid upon discharge from attendance without waiting for completion of return travel. [Id. sec. 113.]

**Art. 5871. Attachment may issue for witnesses.**—In all cases where a witness has been subpoenaed and fails to attend, attachment shall issue, and he shall be liable for the costs of such attachment, unless good cause be shown to the court why he failed to obey the subpoena, which cost may be recovered by civil suit in any court having jurisdiction of the amount involved. [Id. sec. 114.]

**Art. 5872. No fees allowed, except, etc.**—No fees shall be allowed to a person as witness fees, unless such person has been subpoenaed, attached, or recognized as a witness in the case. [Id. sec. 115.]

**Art. 5873. Governor may order arrest, etc.**—When charges against any person in the military service of this state come before the governor, or any officer authorized to order a court martial for the trial of such person, and the governor, or such officer, believes that such charges can be sustained, and has reason to believe that the person so charged will not appear for trial, or intends to flee from justice, the governor, or such officer, may issue a warrant of arrest to the sheriff or any constable of the county in which the person so charged, resides, or wherein he is supposed to be, commanding such sheriff or constable to take the body of the person so charged and confine him in jail until such time as his case may finally be disposed of; and it shall be the duty of the sheriff or constable, on the order of the governor, or officer ordering the court, to bring the person so charged before the court martial for trial, or to turn over to whoever the order may direct; it shall be the duty of the governor, or the officer issuing the warrant of arrest, to indorse thereon the amount of bail to be required; and it shall be a violation of duty on the part of any sheriff or constable to permit a person so committed to remain out of jail, except that he may, when such person desires it, permit him to give bail in the sum indorsed on the warrant of arrest, conditioned for his appearance, from time to time, before such court martial as he may be ordered for trial, and until his case is finally disposed of, or until such time as he may surrender to the sheriff or constable as directed by the reviewing authority of the court martial before which he may be ordered for trial. [Id. sec. 116.]

**Art. 5874. Suit on bonds, etc.**—Upon the failure of any person, who has been admitted to bail conditioned for his appearance for trial before a court martial, or upon the failure of any person admitted to bail to appear as a witness in any case before a court martial, as conditioned in the bail bond of any such person, the court martial shall certify the fact

of such failure to so appear to the officer ordering the court martial, or the officer commanding for the time being, as the case may be; and it shall be the duty of such officer to cause a judge advocate, district or county attorney, to file suit in any court having jurisdiction of the amount involved in Austin, Texas. [Id. sec. 117.]

**Art. 5875. Code of Criminal Procedure to govern in giving bail, etc.**—The rules laid down in the Code of Criminal Procedure of this state relating to the giving of bail, the amount of bail, the number of sureties, the persons who may be sureties, the property exempt from liability, the responsibility of parties to the same and all other rules of a general nature not inconsistent with this law are applicable to bail taken as provided by this chapter. [Id. sec. 118.]

**Art. 5876. Warrant of arrest to extend to every part of the state, etc.**—A warrant of arrest issued by the governor, or other officer authorized to order a general court martial, and all subpœnas and other process issued by general courts martial shall extend to every part of the state; but warrants of arrest issued by an officer, other than those named above, and all subpœnas and other process issued by other military courts can not be executed in any other county than the one in which they were issued, except they be indorsed by the governor, or an officer authorized to order a general court martial, in which case they can be executed anywhere in the state. The indorsement may be, "Let this process be executed in any county of the state of Texas." The indorsement shall be dated and signed officially by the governor, or officer making it. [Id. sec. 119.]

**Art. 5877. Defendant liable for costs.**—The judgment of every court martial shall direct that all costs incurred in any trial shall be paid by the defendant; and it shall be the duty of the officer ordering the court, or the officer commanding for the time being, as the case may be, to enforce the collection thereof in the manner prescribed by this law; and when the defendant is imprisoned for costs, as hereinafter provided by this law, the adjutant general shall pay said cost out of any funds which may be available. [Id. sec. 120.]

**Art. 5878. Same.**—Upon conviction of any person by a court martial, the cost accruing for witness fees and the fees for sheriffs or constables for executing the process, subpœnas, writs of attachment, warrant of arrest, warrant of commitment, or any other authorized writs, shall be taxed against defendant; and any sheriff or constable executing any process, subpœna, writ of attachment, warrant of arrest, warrant of commitment, or any other authorized writs, shall be allowed the same fees as provided by the Code of Criminal Procedure in this state. [Id. sec. 121.]

**Art. 5879. Procedure in cases of conviction of felony.**—When the sentence of a court martial adjudges confinement, and the reviewing authority has approved the same in whole or in part, and such sentence as approved exceeds two years confinement, the reviewing authority, or the commanding officer for the time being, as the case may be, shall issue a warrant of commitment to the sheriff of the county in which such court martial was held, directing such sheriff to take the body of the person so sentenced and confine him in the county jail of such county until a duly accredited agent of the state penitentiary shall take charge of such person for confinement in the state penitentiary; and it shall be the duty of such reviewing authority, or the commanding officer for the time being, as the case may be, to certify a copy of the proceedings, as approved, of the court martial in the case of such person to be confined, to the superintendent of the state penitentiary, which shall be sufficient authority for, and it shall be the duty of, such superintendent to send for and confine such person in the state penitentiary for the

period named in the proceedings of the court martial as approved, or until he may be directed to release him by proper authority; and it shall be the duty of the state penitentiary board to make such provisions as may be necessary for receiving from the sheriff as aforesaid and confining such person in such manner as persons are received and confined in the state penitentiary on sentence of district courts in this state. [Id. sec. 122.]

**Art. 5880. Procedure in cases of misdemeanor with jail sentence.**—When the sentence of a court martial adjudges confinement, and the reviewing authority has approved the same, in whole or in part, and such sentence, as approved, does not exceed two years confinement, the reviewing authority, or the commanding officer for the time being, as the case may be, shall issue a warrant of commitment to the sheriff of the county in which such court martial was held, directing such sheriff to take the body of the person so sentenced and confine him in the county jail of such county for the period named in such sentence, as approved, or until he may be directed to release him by proper authority; and such confinement shall be carried out as prescribed for confinement in the county jail by the Code of Criminal Procedure of this state. [Id. sec. 123.]

**Art. 5881. Conviction in cases of fine and costs.**—When the sentence of a court martial adjudges a fine and cost against any person, and such fine and cost has not been fully paid within ten days after the confirmation thereof, the governor, or officer ordering the court, or the officer commanding for the time being, as the case may be, shall issue a warrant of commitment directed to the sheriff of the county in which the court martial was held, directing him to take the body of the person so convicted and confine him in the county jail; and it shall be the duty of the sheriff to take the body of the person convicted and confine him in the county jail for one day for any fine not exceeding one dollar, and one additional day for every dollar above that sum, and one additional day for each dollar of cost. [Id. sec. 124.]

**Art. 5882. Fines to be paid to whom in cases of general court martial.**—All fines and forfeitures, imposed by general or regimental courts martial, shall be paid to the officer ordering such courts, or to the officer commanding for the time being, and by said officer, within five days from the receipt thereof, paid to the adjutant general, who shall disburse the same as he may see fit for military purposes. [Id. sec. 125.]

**Art. 5883. Fines to be paid in cases of summary courts.**—All fines and forfeitures imposed by summary courts martial shall be paid to the officer ordering the court, or the officer commanding for the time being, and by such officer, within five days from the receipt thereof, placed to the credit of the company fund of the company of which the person fined was a member when the fine was imposed. [Id. sec. 126.]

**Art. 5884. Sheriff to execute lawful process from courts martial.**—When any lawful process, issued by the proper officer of any court martial, comes to the hand of any sheriff or constable, he shall perform the usual duties of such officer and perform all acts and duties by this chapter imposed or authorized to be performed by any sheriff or constable. [Id. sec. 127.]

**Art. 5885. Jurisdiction presumed.**—The jurisdiction of the courts and boards established by this chapter shall be presumed, and the burden of proof shall rest on any person seeking to oust such courts or boards of jurisdiction in any action or proceeding. [Id. sec. 131.]

**Art. 5886. Acts by or under military authority exempt from punishment.**—No action or proceeding shall be prosecuted or maintained against a member of the military forces of this state, or officer or person

acting under its authority or reviewing its proceedings, on account of the approval or imposition or execution of any sentence, or the imposition or collection of any fine or penalty, or the execution of any warrant, writ, execution, process, or mandate of a military court. [Id. sec. 132.]

**Killing citizen in time of peace.**—See, also, notes under Art. 5860.

Since in time of peace a militiaman has only the rights of a peace officer, if in the performance of his duty his life becomes in danger, or it appears to him under all the facts and circumstances in evidence that some person is about to assault him with the intention of killing him, or doing him some bodily injury, he may kill such other in self-defense, but he has no other authority to take human life. *Manley v. State*, 62 Cr. R. 392, 137 S. W. 1137.

In a prosecution of a militiaman for killing a citizen while doing guard duty in time of peace, evidence that the state militia was a part of the United States soldiery, and concerning the instructions given to the soldiers as a body, and to defendant individually by his superior officers, was immaterial. *Id.*

That a militiaman doing guard duty in time of peace was directed by his superior officer to keep the people out of a certain inclosure at all hazards did not authorize him to kill a citizen attempting to break into the inclosure after being warned, but only authorized him to use such means as were necessary to perform his order without taking life or committing an assault. *Id.*

In a prosecution of a militiaman for killing a citizen while doing guard duty in a city during a presidential visit at a point where a part of the city street had been closed to travel, accused having had no control over the closing of the street, and having no authority to question his orders with reference thereto, the court should have charged that the inclosure wired off and guarded was not to be taken as a circumstance against accused, nor the fact that he was there as a soldier and had a gun with a bayonet thereon, but that the jury should assume that he was properly at the place in question with the right to carry the gun and bayonet. *Id.*

**Art. 5887. Change of venue in certain cases.**—Any officer or member of the military forces of this state, who is indicted or sued for any injury to persons or property done while performing, or endeavoring to perform, any duty required of him by this law, shall have the right, and it is hereby made the duty of the court in which such indictment or suit is pending, upon the application of the person so indicted or sued, to remove the venue of such cause to some court of competent jurisdiction in another county not subject to the same or some other disqualification; provided, such application is supported by the affidavit of two credible persons to the effect that they have good reason to believe that the defendant can not have a fair and impartial trial before such court. [Id. sec. 133.]

**Knowledge of affiants.**—Under this article, where a member of the national guard indicted for murder committed while doing guard duty applied for a change of venue, and filed an affidavit supported by necessary compurgators, and the county attorney elected not to attack the credibility of the latter but only their means of knowledge, it was the duty of the court to grant the change; the statute not contemplating a trial of the question whether accused could or could not get a fair trial in the county. *Manley v. State*, 62 Cr. R. 392, 137 S. W. 1137.

## GENERALLY

**Art. 5888. Commissioners' court and city council may make appropriations for militia.**—The commissioners' court of each [county,] and the council of any city or town in this state, are hereby authorized and empowered, in their discretion, to appropriate a sufficient sum, not otherwise appropriated, to pay the necessary expenses of the troops, batteries, companies, signal corps, hospital corps and bands of the active militia of this state located in their respective counties, cities or towns, not to exceed the sum of one hundred dollars per month for such expenses of any one organization. [Id. sec. 69.]

**Art. 5889. Militia entitled to right of way on streets.**—The commanding officer of any portion of the active militia of this state, parading or performing any military duty in any street or highway, may require any or all persons in such street or highway to yield to the right of way to such militia; provided, that carriage of the United States mails, the legitimate functions of the police and the progress and operations of hospital ambulances, fire engines and fire departments shall not be interfered with thereby. [Id. sec. 71.]



**Art. 5890. Unlawful disposition of property; illegal wearing of uniform, etc.**—Any person who shall secrete, sell, dispose of, offer for sale, purchase, retain after demand made by a commissioned officer of the active militia of this state, or in any manner pawn or pledge, any arms, uniforms, equipments, or other military property, issued under the provisions of this chapter, or of the military regulations of this state, and any person who shall wear any uniform, or part thereof, or device, strap, knot or insignia of any design or character used as a designation of grade, rank, or office, such as are by law or by general regulations duly promulgated, prescribed for the use of the active militia of this state, or similar thereto, except members of the army of the United States, or the active militia of this state, or any other state, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished as provided in the Penal Code, and in addition thereto shall forfeit to this state one hundred dollars for each offense, to be sued for in the name of the state of Texas by a judge advocate, district or county attorney. All money recovered by any action or proceeding under this article shall be paid to the adjutant general, who shall apply the same to the use of the active militia of this state. [Id. sec. 72.]

**Art. 5891. Arrest of trespassers; may prohibit sale of liquor, etc.**—The commanding officer upon any occasion of duty may place in arrest, during the continuance thereof, any person who shall trespass upon the camp ground, parade ground, armory or other place devoted to such duty, or shall in any way or manner interrupt or molest the orderly discharge of duty by those under arms, or shall disturb or present the passage of troops going to and returning from any duty. He may prohibit and prevent the sale or use of all spirituous liquors, wine, ale or beer, the holding of huckster or auction sales, and all gambling within the limit of the post, camp ground, place of encampment, parade or drill under his command, or within limits not exceeding one mile therefrom, as he may prescribe. And he may in his discretion abate as common nuisances all such sales. [Id. sec. 73.]

**Art. 5892. Insurrection may be declared, when.**—Whenever any portion of the military forces of this state is employed in aid of the civil authority, the governor, if in his judgment the maintenance of law and order will thereby be promoted, may, by proclamation, declare the county or city in which the troops are serving, or any specified portion thereof, to be in a state of insurrection. [Id. sec. 98.]

**Art. 5893. Troops to enter state only by permission.**—No armed military force from another state, territory or district shall be permitted to enter this state without the permission of the governor, unless such force is part of the United States army. [Id. sec. 99.]

## TITLE 92

## MILL PRODUCTS

Art. 5894.	Packages, how marked; standard weights.	Art. 5900.	How samples secured; analysis and publication.
5895.	Unground or unbroken seed or grain not included in definition.	5901.	Term "importer" defined.
5896.	Concentrated feed stuffs, definition.	5902.	What feedstuffs deemed adulterated.
5897.	Sample to be deposited with director of agricultural station.	5903.	Duties and powers of director of experiment station.
5898.	Tax tags; disposition of funds collected.	5903a.	Disposition of funds for concentrated commercial feed stuffs.
5899.	Manufacturers and importers to furnish list of, and marks.	5903b.	Same.

**Article 5894. Packages, how marked; standard weights.**—Every lot or parcel of concentrated feeding stuffs, as defined in article 5896, used for feeding farm live stock, sold, offered, or exposed for sale in the state of Texas for use within this state, shall have printed on a tag described in article 5898, a plainly printed statement clearly and truly certifying the number of net pounds of feeding stuff in the package, stating the name or names of material of which such weight is composed, where the contents are of a mixed nature, the name, brand, or trade mark under which the article is sold, the name and address of the manufacturer or importer, the place of manufacture, such information as is required by article 5902, if any, and a chemical analysis stating the minimum percentages it contains of crude protein, allowing one per cent of nitrogen to equal six and one-fourth per cent of protein, of crude fat, of nitrogen-free extract, and the maximum percentage it contains of crude fiber; these constituents to be determined by the methods adopted at the time by the association of official agricultural chemists of the United States. Mill products hereinafter mentioned shall have the following standard weights, viz.: Flour, one hundred and ninety-six pounds per barrel, or forty-eight pounds per sack; corn meal, bolted or unbolted, thirty-five pounds per sack; rice bran, one hundred and forty-three pounds per sack; rice polish, two hundred pounds per sack; and other feeds made from cereals of any kind, whether pure, mixed, or adulterated, one hundred pounds per sack. Fractional barrels and sacks shall weigh in the same proportion, and those weights shall be net and exclusive of the barrel or sack in which said product is packed. [Acts 1905, p. 207. Amended Acts 1907, p. 243, sec. 1.]

**Art. 5895. Unground or unbroken grain or seed not included in definition.**—The term, "concentrated commercial feeding stuffs," as herein used, shall not include hay or straw, the whole seed or grains of wheat, rye, barley, oats, Indian corn, rice, buckwheat, or broom corn, or any other whole or unground grains or seeds. [Acts 1905, p. 207, sec. 2.]

**Art. 5896. Concentrated feed stuffs, definition.**—The term, "concentrated feed stuffs," as herein used, shall include wheat bran, wheat shorts, linseed meals, cotton seed meals, pea meals, cocoanut meals, gluten meals, gluten feeds, maize feeds, starch feeds, sugar feeds, dried brewer's grains, malt sprouts, hominy feeds, cerealine feeds, rice meal, rice bean, rice polish, rice hulls, oat feeds, corn and oat chops, corn chops, ground beef, or mixed fish feeds, and all other materials of similar nature not included herein. [Id. sec. 3.]

**Art. 5897. Sample to be deposited.**—Before any concentrated feeding stuff, as defined in article 5896 of this chapter, is so offered or exposed for sale, the importer, manufacturer and party who causes it to

be sold, or offered for sale, within the state of Texas for use within this state, shall, for each and every feed stuff bearing a distinguishing name and trade mark, file with the director of the Texas agricultural and experiment station a certified copy of the statement named in article 5894, and shall also deposit with said director a sealed glass jar or bottle containing not less than one pound of the feeding stuff to be sold, or offered for sale, accompanied by an affidavit that it is a fair average sample thereof, and corresponds within reasonable limits to the feeding stuff which it represents in the percentage of protein, fat and crude fiber, and nitrogen-free extract which it contains. This shall not be construed to apply to farmers who grind their own feed stuff, and who do not adulterate same. [Acts 1905, p. 207. Amended 1907, p. 243, sec. 4.]

**Art. 5898. Tax tags; disposition of funds collected.**—The manufacturer, importer, agent or seller of each concentrated commercial feeding stuff as defined in article 5896 of this chapter, shall, before the article is offered for sale, pay to the director of the Texas agricultural experiment station an inspection tax of ten cents per ton for each ton of such concentrated feeding stuff sold, or offered for sale, in the state of Texas for use within this state, and shall affix to each lot shipped in bulk, and to each bag, barrel or other package of such concentrated feeding stuffs, a tag to be furnished by said director, stating that all charges specified in said article have been paid. The director of said Texas agricultural experiment station is hereby empowered to prescribe the form of such tags, and adopt such regulations as may be necessary for the enforcement of this law. Whenever the manufacturer or importer or shipper of a concentrated feeding stuff shall have filed a statement named in article 5894 of this chapter, and have paid the inspection tax, no agent or seller of said manufacturer, inspector or shipper shall be required to file such statement or pay such tax. The amount of the inspection tax and penalties received by said director shall be paid into the state treasury. So much of the inspection tax and penalties collected under this chapter shall be paid by the state treasurer to the treasurer of the Texas agricultural and mechanical college as the director of the Texas agricultural experiment station may show by his bills has been expended in performing the duties required by this chapter, but in no case to exceed the amount of the inspection tax and penalties received by the state treasurer under this chapter. [Id. sec. 5.]

**Art. 5899. Manufacturers and importers to furnish list of, and marks.**—All manufacturers and importers of concentrated commercial feeding stuffs, or dealers in same, shall, when requested, furnish the director of the Texas experiment station with a complete list of names or trade marks of such feeding stuffs. [Acts 1905, p. 207, sec. 8.]

**Art. 5900. How samples secured; analysis; publication.**—The director of the Texas agricultural experiment station shall cause one analysis or more to be made annually of each concentrated commercial feeding stuff sold or offered for sale under the provisions of this chapter. Said director is hereby authorized in person or by deputy to take a sample not exceeding two pounds in weight for analysis from any lot or package of concentrated commercial feeding stuff which may be in the possession of any manufacturer, importer, agent, dealer or buyer in this state; but said sample shall be drawn or taken in the presence of said party or parties in interest, or their representatives, and shall be taken from a parcel, lot or number of parcels which shall not be less than five per cent of the whole lot inspected, and shall be thoroughly mixed and divided into two samples, and placed in glass or metal vessels carefully sealed, and a label placed on each, stating the name or brand of the feeding stuff, or material sampled, the name of the party from whose stock the sample is drawn, and the date and place of taking such sample, and said label shall be signed by the director or his deputy and

the party or parties at interest, or their representative present at the taking and sealing of said sample; provided, that where the party or parties at interest refuse to be present and take part in the sampling of the said feed stuffs, the director or his deputy may take said samples in the presence of two disinterested witnesses, one of said duplicate samples shall be retained by the director and the other shall be left with the party whose stock was sampled, and the sample or samples retained by the director shall be for comparison with the certified statements made in articles 5894 and 5897 of this chapter. The result of the analysis of the sample or samples so prescribed, together with such additional information as circumstances advise, shall be published in reports or bulletins by the Texas agricultural and mechanical college from time to time. [Acts 1905, p. 207, sec. 9.]

**Art. 5901. Term "importer" defined.**—The term, "importer," for all the purposes of this chapter shall be taken to mean all such persons as shall bring into or offer for sale within this state concentrated commercial feeding stuffs manufactured without this state. [Acts 1905, p. 207, sec. 10.]

**Art. 5902. What feed stuffs deemed adulterated.**—For the purpose of this chapter, a feeding stuff shall be deemed to be adulterated if it contains any sawdust, dirt, damaged feed, or any foreign matter whatever, or if it is in any respect not what it is represented to be, or if any rice hulls or chaff, peanut shells, corncobs, oat hulls, or other similar substances of little or no feeding value are admixed therewith; provided, that no wholesome mixture of feeding stuffs shall be deemed to be adulterated if the true percentage of constituents thereof is plainly and clearly stated on the package and made known to the purchaser at the time of the sale. It shall be the duty of the director of the experiment station to examine, or have examined for adulteration, all suspicious samples of feeding stuffs, and such other samples as may be desirable. [Acts 1905, p. 207. Amended Acts 1907, p. 243, sec. 11.]

**Art. 5903. Duties and powers of director of experiment station.**—The director of the experiment station is empowered to adopt standards or definitions for concentrated feeding stuffs, and such regulations as may be necessary for the enforcement of the law. The said director shall have the power to refuse the registration of any feeding stuff, under a name which would be misleading as to the material of which it is made up, or which does not conform to the standards or definitions aforesaid. Should any of said materials be registered and it is afterwards discovered that they are in violation of the above provisions, the said director shall have the power to cancel the registration ten days after notice. The director of the Texas experiment station is hereby empowered to adopt such regulations as may be necessary for the enforcement of all the provisions of this chapter. [Acts 1907, p. 243, sec. 11a.]

**Art. 5903a. Disposition of funds for concentrated commercial feed stuffs.**—That all money or moneys heretofore or hereafter collected by the officers and employes of the agricultural and mechanical college, under the provisions of the pure feed acts, passed by the twenty-ninth legislature, being chapters 108 and 118 of said acts, and amended by chapter 131, Acts of the thirtieth legislature, regulating the sale of concentrated commercial feed stuffs and so forth, and paid into the state treasury, and not heretofore expended for and on behalf of the agricultural and mechanical college, be and the same are hereby transferred and appropriated to the use and benefit of the agricultural and mechanical college of Texas; and the treasurer of this state shall keep an account on his books, to be designated and known as "Pure Feed Fund of the Agricultural and Mechanical College," and to which said fund he shall at once transfer from the general fund all funds heretofore collect-

ed and paid into the general fund by said pure feed department of the agricultural and mechanical college under said acts (and not expended for the use of the agricultural and mechanical college), and shall place all funds hereafter collected under said acts to said fund.

**Art. 5903b. Same.**—Said fund so appropriated and collected shall be used by the board of directors of the agricultural and mechanical college for making all necessary repairs at the agricultural and mechanical college, erection of buildings and other improvements, and for such other purposes as may be deemed advisable by the board of directors; and said funds shall be paid out by the state treasurer on warrants issued by the president and secretary of the board of directors. The said board of directors shall, on the thirty-first day of August of each year, file a sworn report with the governor, giving an itemized statement of all receipts and disbursements of said fund for the year ending on said date.

## TITLE 93

## MINES AND MINING

Chap.  
1. Mining Claims, Permits and Leases.

Chap.  
2. State Mining Board and Coal Mining Regulations.

## CHAPTER ONE

## MINING CLAIMS, PERMITS AND LEASES

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| <p>Art.<br/>5904. Lands open to prospecting, development and lease, etc.</p> <p>5904a. Right to prospect for and develop petroleum oil and natural gas.</p> <p>5904b. Right to prospect for and develop petroleum oil and gas in surveyed lands; application; how many acres may be awarded; duty of county clerk; fees.</p> <p>5904c. Right to prospect in unsurveyed lands, etc.; application; duty of county surveyor; extent of surveys and locations, etc.</p> <p>5904d. Commissioner to issue permit, when.</p> <p>5904e. Payments to be made by applicant, etc.; extension of permit granted, when.</p> <p>5904f. Owner to commence work; statements of expenditures; revocation of permit; transfers and liens, etc.</p> <p>5904g. Owner of permit shall have right to lease, when; conditions.</p> <p>5904h. Lands sold with reservation of minerals, etc., subject to prospect and lease; payments to land owner; condemnation, when.</p> <p>5904i. Limit of holdings.</p> <p>5904j. Association applying to file statement of membership; permit; lease.</p> <p>5904k. Cancellation of permits and leases, etc.</p> <p>5904l. Coal and lignite subject to prospect and development, under what terms and conditions.</p> <p>5904m. Other minerals.</p> <p>5905. [Repealed.]</p> <p>5906. Mining claim shall be of what extent.</p> | <p>Art.<br/>5907. Locator to post notice; markers.</p> <p>5908. To file copy of notice, etc., with county clerk; application for survey; duty of surveyor; fees.</p> <p>5909. Joint claim; right of co-owner who has paid against defaulting co-owner, etc.</p> <p>5910-5916. [Repealed.]</p> <p>5917. Placers and certain other mining claims, subject to location, entry and lease, on what terms, etc.</p> <p>5917a. Royalties; forfeiture, etc.</p> <p>5918. [Repealed.]</p> <p>5919. Timber and trees.</p> <p>5920. Claims and rights not impaired, etc.</p> <p>5920a. Surface rights of locator or owner of mining claim; compensation in case of disagreements, etc.</p> <p>5920b. Rights of prior purchasers or lessees from state to apply for reserved mineral rights.</p> <p>5920c. Relinquishment of permit, lease or claim.</p> <p>5920d. Moneys to be credited to what funds, etc.</p> <p>5920e. Protection of waters from pollution, etc.</p> <p>5920f. Taxation.</p> <p>5920g. Land may be sold without minerals, etc.</p> <p>5920h. Commissioner of general land office to have supervision, etc.</p> <p>5920i. Number of mining claims to one person, etc.</p> <p>5920j. Unconstitutionality of part not to invalidate whole.</p> <p>5921, 5922. [Repealed.]</p> |
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[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 5904. [3498a] Lands open to prospecting, development and lease, etc.**—All public school, university, asylum and the other public lands, fresh water lakes, islands, bays, marshes, reefs, and salt water lakes; belonging to the state of Texas, and all lands which may hereafter be so owned and all lands which have been heretofore sold or disposed of by the state of Texas, with a reservation of minerals or mineral rights therein, as well as all lands which may hereafter be sold with reservation of minerals or mineral rights therein, and lands purchased with relinquishment of the minerals therein, shall be included within the provisions of this Act and shall be open to mineral prospecting, mineral development and the lease of mineral rights therein in the manner herein provided. Only citizens of the United States and such other persons as have heretofore declared or shall hereafter declare their intention of becoming such shall be entitled to acquire any rights under this Act. It is declared to be the policy of the state to open all such lands to mineral prospecting and development on a system providing for the

payment into the state treasury to the credit of the permanent free school, university, asylum or other funds, of certain rents and royalties upon the gross output of any minerals or mineral product thereon. [Acts 1913, p. 409, sec. 1.]

Note.—Acts 1913, p. 409, sec. 33, repeals chapter 1, title 93, Rev. St. 1911, and “all other laws and parts of laws relating to the sale of mineral lands.”

Cited, *Cox v. Robinson*, 105 T. 426, 150 S. W. 1149.

To what land applicable.—The language “that public school, university and asylum lands \* \* \* containing valuable mineral deposits are hereby reserved,” etc., was not intended to operate upon lands which had not been found to contain valuable mineral deposits and were not apparently mineral lands. The state provided for the classification so as to designate the lands reserved, and offered all for sale through the same officers and it can not be said that there was an intention to have a secret reservation of that which was not known. *Schendell v. Regan*, 94 T. 585, 63 S. W. 1005.

No class as mineral lands is recognized by law, except such as had been classified as agricultural, pasture, or timbered lands that should be found to be apparently mineral-bearing, which were required to be designated as “mineral lands.” *Id.*

An applicant for mineral land when he has furnished the evidence provided for in other articles of this law that the land is mineral bearing is entitled to a patent upon his complying with the statute in regard to price and fees, although the land has not been designated by survey as mineral land. *Colquitt-Tigner Min. Co. v. Rogan*, 95 T. 452, 68 S. W. 154-159.

There is nothing in this article and Art. 5912 which indicates that the legislature used the words “public lands,” in a sense other than that which the law attaches to them. One has no right to purchase nor has the land commissioner the right to sell the soil lying below the line of ordinary high tide. *De Merit v. Robison*, 102 T. 358, 116 S. W. 796, 797.

What are minerals.—“Minerals,” if meaning both surface and subsurface minerals, includes every constituent of the earth’s crust. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

**Art. 5904a. Right to prospect for and develop petroleum oil and natural gas.**—Any person or association of persons, corporate or otherwise, desiring to obtain the right to prospect for and develop petroleum oil or natural gas that may be in any of the surveyed public free school land, university or asylum or other public lands of the state, which may be unsold at the time such desire is made known as herein provided, or in any of said land which has heretofore been sold with the reservation of minerals therein to the public free school fund or other fund and such of said land as has heretofore been purchased with the relinquishment of the minerals therein by the purchaser, or in any of said land that may hereafter be sold with the reservation of minerals therein, also in any of the fresh water lakes owned by the state or public free school fund or other fund, and also in any of the islands, bays, marshes, reefs and salt water lakes, may do so under the regulations, terms and conditions of this Act, together with such rules and regulations as may be adopted relative thereto and necessary for the execution of the purpose of this Act by the commissioner of the general land office. [Id. sec. 2.]

**Art. 5904b. Right to prospect for and develop petroleum oil and gas in surveyed lands; application; how many acres may be awarded; duty of county clerk; fees.**—One desiring to obtain the right to prospect for and develop petroleum oil or natural gas that may be in any of the surveyed lands mentioned herein shall first file with the clerk of the court of the county in which the area desired, or a portion thereof, is situated, or with the clerk of the county to which said county may be attached for judicial purposes, a separate application in writing for each tract applied for, designating the land in which he desires to acquire the aforesaid rights. No individual or corporation shall be awarded exceeding 1280 acres of the public lands of the state for oil or gas development purposes, and no individual or corporation shall be awarded exceeding 1000 acres for oil and gas development purposes within ten miles of any producing oil or gas well. The said 1280 acres in undeveloped territory, or the 1000 acres within ten miles of any producing oil or gas well, may be in as many different tracts of land or fresh water lakes as the applicant may desire, provided the applicant correctly describes the land or fresh water lakes desired for development purposes. The lines of all tracts less than a whole survey shall conform to the exterior of the lines of the survey of which it may be a part, as nearly as practicable. The

said clerk shall file and record the application or applications aforesaid and note the same on his register opposite the entry of the proper survey if surveyed, or in his record book if unsurveyed, giving the time of filing, and the applicant shall file such application in the general land office together with one dollar as filing fees within thirty days after the date it was filed by the county clerk. [Acts 1913, S. S., p. 26, sec. 1. Amending Acts 1913, p. 409, sec. 3.]

**Art. 5904c. Right to prospect in unsurveyed lands, etc.; application; duty of county surveyor; extent of surveys and locations, etc.—**One desiring to obtain the right to prospect for and develop petroleum oil or natural gas in any of the state's islands, salt water lakes, bays, marshes, reefs and fresh water lakes owned by the state, or in any of the unsurveyed public land, shall first file a separate written application for each tract applied for with the county surveyor of the county in which the area or a part of same may be situated or the county to which said county may be attached for surveying purposes giving a designation of the same sufficient to identify it. The surveyor shall immediately file and record same, giving time of such filing, and within ninety days thereafter he shall survey and deliver to the applicant the field notes and original application. Said papers, together with one dollar as filing fee, shall be filed in the general land office, within one hundred days after the application was filed with the county surveyor, and not thereafter. Locations and surveys under this section shall not exceed 1280 acres in undeveloped territory and not exceeding 1000 acres within ten miles of a producing gas or oil well. All locations and surveys under this section shall, if practicable, be of regular form, but in every case the line or lines adjacent to other surveys shall conform to the lines of such adjacent surveys. If there are no adjacent surveys the surveyor shall connect such survey with some established survey on the mainland. [Id. sec. 2. Amending Acts 1913, p. 409, sec. 4.]

**Art. 5904d. Commissioner to issue permit, when.—**When the commissioner receives an application, or application and field notes, as provided for in the two preceding sections, within the time required, together with the filing fee of one dollar, he shall file same, and if, upon examination, said papers are found to be correct, and in compliance with this Act, and if the status of the area applied for is within the provisions herein, the applicant shall be entitled to the right to prospect for and develop the petroleum oil or natural gas that may be under the surface embraced in the application and field notes, and as evidence of such right the commissioner shall issue to each applicant a permit after the applicant shall have complied with the conditions hereinafter imposed. [Acts 1913, p. 409, sec. 5.]

**Art. 5904e. Payments to be made by applicant, etc.; extension of permit granted, when.—**Before the issuance of the permit provided for in the preceding section the applicant shall pay to the commissioner of the general land office ten cents per acre for each acre embraced in the application and field notes. Thereupon a permit shall be issued to the applicant conferring upon him an exclusive right to prospect for and develop petroleum oil or natural gas within the designated area for a term not to exceed two years. Within thirty days after the expiration of the first year the owner of the permit shall pay another ten cents per acre as in the first instance. Upon the termination of the period for which the original permit was granted and the receipt of satisfactory evidence of the compliance with the conditions prescribed in section 7 of this Act [Art. 5904f], and such compliance shall not have led to the discovery of petroleum oil or natural gas in commercial quantities, then the commissioner may grant an extension of the permit for a term not to exceed one year upon the payment by the applicant or his successors in interest of an additional fee of twenty-five cents per acre. No ex-



tension, however, shall be granted unless satisfactory proof of an effort towards the development of the area included in the permit has been made in good faith and the expenditure of the sum required and duly submitted as set forth in section 7 [Art. 5904f] of this Act. [Id. sec. 6.]

**Art. 5904f. Owner to commence work; statements of expenditures; revocation of permit; transfers and liens, etc.**—Before the expiration of six months after the date of the permit the owner of said permit shall in good faith commence actual work necessary to the physical development of said area, and if petroleum oil or natural gas is not developed the owner or manager shall, on or before the thirty days after the expiration of twelve months from the date of the permit, file in the general land office a sworn statement supported by two disinterested, credible witnesses that such actual work was begun within the six months aforesaid, and that petroleum oil or natural gas has not been discovered in commercial quantities and that a bona fide effort to develop said was made during the six months preceding the filing of said statement during the two years covered by said permit the owner thereof shall expend not less than four thousand dollars in a bona fide effort for the development of such area, unless such area has sooner been developed or abandoned. The owner or manager shall, within thirty days after the expiration of the two years from the date of the permit, filed with the commissioner of the general land office a sworn statement supported by two disinterested, credible witnesses that such bona fide effort for the development of the area has been made, stating in what condition, and showing the expenditure thereof. A failure to file either of the sworn statements herein provided for and within the time specified, or the filing of a statement untrue or false in material matters, or the failure to expend the sum named in a bona fide effort toward the development of the area or areas, shall work a revocation of said permit and the termination of the rights of the owner. Such termination shall be endorsed by the commissioner of the general land office, upon a duplicate copy of the permit retained in the general land office. Upon the termination of such permit the area shall again be subject to location by another than the forfeiting owner. The expenditure herein required for development purposes may be made upon one or more contiguous tracts embraced in a permit and shall be sufficient for the entire area embraced in one such permit. The amount herein required to be expended in development purposes shall be required on each and every non-contiguous area. A separate permit shall be issued for each non-contiguous area, but may contain an entire contiguous area of two or more adjacent tracts of land. An application may embrace contiguous portions of different tracts or surveys. An assignment by deed or other form of transfer and also a lien of any form may be executed upon any claim to any person, association of persons, corporate or otherwise, that may be qualified to obtain a permit or lease in the first instance; provided, that deed or other evidence of sale, assignment or lien shall be recorded in the county where the property or a part thereof is situated and shall be filed in the land office within sixty days after the date thereof, accompanied by a filing fee of one dollar. If such instrument shall not be filed in the land office within the time required such deed or evidence of transfer or evidence of lien shall not have the effect to convey the property nor shall the obligations incurred therein be enforceable. [Id. sec. 7.]

**Art. 5904g. Owner of permit shall have right to lease, when; conditions.**—If at any time within the life of the permit one should develop petroleum oil or natural gas in commercial quantities the owner or manager shall file in the land office a statement of such development within thirty days thereafter, and thereupon the owner of the permit shall have the right to lease all or part of the area included in the permit upon the following conditions:

(1) An application and a first payment of \$2.00 per acre for a lease of the area included in a permit shall be made to the commissioner of the general land office within thirty days after the discovery of petroleum oil or natural gas in commercial quantities.

(2) A lease may be granted for a period of ten years or such portion thereof as the applicant may desire and with the option of renewal or renewals for an equal or a shorter period upon the payment of a cash sum of \$2.00 per acre in advance on the entire area included in any lease and an equal sum annually in advance thereafter during the life of such lease, and in addition thereto the owner of such lease shall pay a sum of money equal to a royalty of one-eighth of the value of the gross production of petroleum oil.

(3) The owner of a permit shall not take, carry away or sell any petroleum oil or natural gas found in any area before such owner shall have obtained a lease therefor; provided, such owner may use for fuel such portion of said substances as may be necessary for the continued development of the area without accounting therefor. In addition to the \$2.00 per acre annually in advance, the owner of a gas well shall pay a sum of money equal to 10 per cent. of the meter output of all gas sold. The said royalty on petroleum oil, or natural gas, shall be paid to the commissioner of the general land office monthly during the life of the lease. In all such payments the owner or manager shall accompany the remittance with a sworn statement of the amount produced, and the market price of the output, and a copy of any pipe or pipe lines or tank receipt, check or memoranda of amount put out or into such lines or tanks. The books and accounts and the receipts and discharges of all lines, pipe lines or tanks and gas lines and gas pipes, and all other matters pertaining to the production, transportation and marketing of the output shall be open to the examination and inspection at all times by the commissioner of the general land office or his representative or any other representative of the state. The value of any unpaid royalty or royalties and any sum or sums due to the state upon any lease contract shall become a prior lien upon all production of petroleum oil or natural gas produced upon the leased areas to secure the payment of any royalties and sums due the state. [Id. sec. 8.]

**Art. 5904h. Lands sold with reservation of minerals, etc., subject to prospect and lease; payments to land owner; condemnation, when.—**In the event any land or water included within the operation of this Act has heretofore been or may hereafter be sold by the state with the reservation of minerals therein, or has been purchased by one with the waiver of mineral rights, such land shall be subject to prospect and lease as set forth in this Act, but the owner of the permit or lease shall pay to the owner of the surface of the land twenty cents per acre per annum in advance during the life of the permit or lease and the first payment shall be paid to the commissioner of the general land office, for the use of the owner of the surface, prior to the issuance of such permit, and said sum so paid to the owner of the surface rights shall be in full compensation for all damages to such surface by reason of the ingress and egress and operation necessary to development and the operation under the permit or lease; provided, that if the owner or lessee of the surface will not accept the payment of twenty cents per acre per annum as above provided, and the lessee of the mineral rights cannot agree with such owner or lessee of the surface rights on the compensation to be paid for the use of the damages to such surface rights, then the right thereto and the ingress and egress from such mine or mining claim may be acquired by condemnation as hereinafter provided. [Id. sec. 9.]

**Art. 5904i. Limit of holdings.—**No person, association of persons, corporate or otherwise, shall hold or own at one time by permit or lease, direct or through assignment, nor hold or own a controlling interest in

more than two sections of 640 acres each, more or less, of surveyed school land, university, asylum or other public land, nor more than 1280 acres of islands, lakes, bays, marshes, reefs, or unsurveyed school, university, or asylum or other public land in any undeveloped field nor more than one thousand acres within ten miles of any producing oil or gas well. [Acts 1913, S. S., p. 26, sec. 3. Amending Acts 1913, p. 409, sec. 10.]

**Art. 5904j. Association applying to file statement of membership; permit; lease.**—A person or association of persons, corporate or otherwise, applying for a permit or lease shall file with the application a sworn statement showing what interest, if any, the applicant or each of the members of the association or each stockholder in the corporation may hold in any other permit or lease issued by the state. When the commissioner is satisfied that the applicant is entitled to such permit or lease he shall issue the permit for a term not to exceed two years, and the lease may be issued for such time as the applicant may elect, not to exceed ten years, with the right of a renewal or renewals upon such terms and conditions as hereinbefore provided. The permit or lease shall contain the terms upon which it is issued and such other matters as the commissioner may deem important to the rights of the state or applicant. Should a permit or lease be issued upon a statement by the applicant or applicants, or either of them which is false or untrue in any material fact, the commissioner may cancel such permit or lease when sufficiently informed as to such false or untrue statements. [Acts 1913, p. 409, sec. 11.]

**Art. 5904k. Cancellation of permits and leases, etc.**—Should the owner of a permit fail or refuse to proceed with reasonable diligence in a bona fide effort to develop an area included in such permit, the commissioner of the general land office may cancel same. Should the holder of a lease fail or refuse to proceed with reasonable diligence and in a bona fide effort to develop, operate and put out the product of a producing well of petroleum oil or natural gas at any time during the life of a lease, the commissioner of the general land office may cancel such lease contract. In the event of a cancellation of a permit or lease contract for the causes mentioned in this section the area included therein shall be subject to the application of another than the forfeiting owner, in the same manner as in the first instance; provided, should a lease covering a producing well be cancelled an application for a lease of such area or part thereof may be made direct to said commissioner, and a copy of such lease shall be filed in the office of the county clerk. [Id. sec. 12.]

**Art. 5904l. Coal and lignite subject to prospect and development, under what terms and conditions.**—All coal and lignite underlying the surface of the lands and waters, as defined by this Act, shall be subject to prospect and development under the following terms and conditions:

Any person, firm, or corporation desiring to prospect for coal and lignite shall file with the clerk of the county in which the land is situated his application covering not more than 2560 acres. Said application shall be made in the same manner and form as is required by other sections of this Act, and permits shall be granted by the commissioner of the general land office authorizing such prospect and development upon the following terms and conditions, subject to forfeiture for breach of any of said terms and conditions; said permit shall run for a period of twenty years with preference right of renewal to lessee for three months after the expiration thereof. Lessee shall, within sixty days after the granting of said permit, begin to prospect for coal and lignite, and shall, within ten months thereafter, sink a shaft 6 x 8 feet to coal or lignite, drive a tunnel in said coal or lignite, to a distance of twenty yards, and shall crib said shaft and prop said tunnel in strict conformity with specifications to be furnished by mine inspector of this

state, and shall, within sixty days thereafter, begin to mine said coal or lignite, and shall continuously mine the same, provided same be situated within two miles of any railroad; but, if said coal or lignite be situated more than two miles from any railroad, then said lessee shall be allowed five years within which to begin to mine said coal and lignite; provided, that in the last named contingency the said five years shall not be reckoned as any part of the time covered by said lease. The royalty to be paid to the state, shall not be less than six cents per ton for coal and not less than four cents per ton for lignite, for each and every ton of two thousand pounds of said product sold. Said royalties shall be due and payable to the state monthly, and the same shall be accompanied by a sworn statement of the lessee showing the number of tons so mined as well as the number of tons sold; provided, further, that the royalties herein provided shall, after the third year of operation of said mine, equal a minimum of \$4.00 per acre for each and every acre covered by said lease. Said mine shall be kept in continuous operation, barring strikes, lockouts, fires, floods and other accidents over which the lessee has no control; provided, further, that said lessee shall not be required to operate said mine at a time when the market price for said product is such as to cause same to be run at a loss to the lessee. [Id. sec. 13.]

**Art. 5904m. Other minerals.**—All other minerals and mineral rights that may be in the lands or waters included in section 1 [Art. 5904], of this Act, shall be subject to prospect and development under the terms and conditions hereinafter stated. [Id. sec. 14.]

**Art. 5905.** Repealed. See note under Art. 5904.

**Art. 5906. [3498d] Mining claim shall be of what extent.**—A mining claim upon deposits, veins or lodes of quartz or any other rocks, bearing silver, gold, cinnabar, lead, tin, iron, copper or any other metallic substance, may equal but shall not exceed 1500 feet in length and 600 feet in width; such claim may be of unlimited depth, but shall be bounded by four vertical planes. All claims shall be in the form of a parallelogram, unless such form is prevented by adjoining rights, and the locator shall be entitled to the use of all superficial area bounded by the enclosed lines of the claim and to all minerals therein upon the terms hereinafter provided. In all conflicts priority of location shall decide. [Acts 1913, p. 409, sec. 15.]

**Art. 5907. [3498e] Locator to post notice; markers.**—The locator of any mining claim shall post up at the center of one of the end lines of the claim a written notice stating the name of the location and of the claim and date of posting and shall describe the claim by giving the number of feet in length and width and direction the claim lies in length from the notice, together with the section number, if known, and the county, and shall place stone or concrete markers at the four corners not less than three feet high and otherwise describe the corners so that they can be readily found. The notice shall be posted in a conspicuous place so that it can be easily seen. [Id. sec. 16.]

**Art. 5908. [3498f] To file copy of notice, etc., with county clerk; application for survey; duty of surveyor; fees.**—The locator shall, within three months after the date of posting the required notices, file with the county clerk of the county in which the land, or a part of the same, is situated, a copy of the notice provided for in section 16 hereof [Art. 5907], together with a recording fee of one dollar (\$1), and an affidavit that the locator has performed ten feet of work in the shape of tunnels, shaft or open cut on the claim, and within one year from the date of the posting of the original notice the locator shall file with the county surveyor of the county in which the land or a part thereof is situated, an application in writing for the survey of the claim, giving the name of the claim and such description of its boundary and location as will en-

able the surveyor to identify the land. The affidavit shall be accompanied by a fee of twenty dollars (\$20), unless its tender is waived, and also with an affidavit stating the kind of the claim; also, the date of the first posting of the notice on the claim by the applicant, and that the notice has not been post dated or its date changed. Upon receiving the application and affidavit and fee the surveyor, shall file the application and affidavit and shall forthwith proceed to survey the claim. After the field notes are recorded and a plot of the survey is made by the surveyor, which shall be within ninety days, he shall deliver the application and the affidavit, together with the field notes and plat, to the applicant or his agent, who shall forward the same within sixty days, to the commissioner of the general land office, together with one dollar (\$1.00) as a filing fee. The fee of twenty dollars (\$20) shall cover all charges by the surveyor in connection with any one claim. [Id. sec. 17.]

**Art. 5909. [3498g] Joint claim; right of co-owner who has paid against defaulting co-owner, etc.**—If any mining claim of any character shall be filed upon jointly by two or more claimants and any one or more of them shall fail to contribute his proportion of any expenses required in this Act within the necessary time the co-owner or co-owners who have paid the fees or other expenditures required by this Act may, at the expiration of the time in which the payment is required to be made and after the same has been made, give notice in writing to such defaulting co-owner, or if such defaulting co-owner cannot be found, then by publication in a newspaper published in the county where the claim is situated, or if no such newspaper be published in such county, then in the newspaper published nearest thereto at least once a week for four successive weeks. If, after such publication notice, such delinquent shall fail or refuse to contribute his proportion of the expenditures required, his interests in the claim shall cease and shall be forfeited to the co-owner or co-owners who have made the required expenditures. An affidavit of such co-owner or co-owners of the claim, accompanied with notices given, shall, when recorded in the office of the county clerk, be sufficient evidence of such delinquency and forfeiture. [Id. sec. 18.]

**Arts. 5910–5916. Repealed. See note under Art. 5904.**

**How much land may be acquired.**—Under Art. 5912, one may acquire not exceeding two sections of land; but the law does not permit a husband and wife to each acquire two sections, and with the consent of the husband the wife may purchase any part of the land within the limit prescribed by the statute under the conditions applicable to him, and the wife may purchase with the consent of the husband the remainder of a section after deducting the amount purchased by him. *Brown v. Robison*, 103 T. 551, 131 S. W. 401.

**Sufficiency of description in affidavit.**—An affidavit by an intending purchaser of mineral lands, which, after naming different portions of different sections by number, designates the lands as "all or any of these lands," does not reasonably describe the land, within Art. 5912, where the intending purchaser is not entitled to purchase the whole of the 640 acres described by section numbers, but only the land remaining after deducting the acres previously purchased by another. *Brown v. Robison*, 103 T. 551, 131 S. W. 401.

**Land sold prior to Act March 29, 1889.**—Where land was sold by the state prior to Act March 29, 1889, and a mineral location was not made thereon until August, 1900, the locator acquired no title as against the purchaser of the land. *Heil v. Martin*, 96 T. 209, 71 S. W. 814.

**Constitutionality.**—Const. art. 14, § 7, providing that the state thereby releases to the owner or owners of the soil all mines and minerals thereon, was curative in its nature and retrospective in its effect, and intended as an extinguishment of the rights of the state in only those mines and minerals in soil owned at the time of its adoption, and was not intended to prevent the state from reserving mines and minerals in lands of the public domain subsequently granted by it, in view of the facts that this provision was originally adopted by the convention which framed the constitution of 1866 at a time when the state could not afford to be generous in its disposal of the ungranted public domain; that it was adopted, not as a general provision of the constitution, but as an ordinance substituted for one having special reference to the title to a salt lake, then in dispute; and that its language has remained unchanged in subsequent constitutions, especially as the term "release" commonly means to surrender a right or discharge a liability which presupposes the existence of some person against whom the right may be exercised or the liability enforced, and the word "owner" ordinarily means one who already has a legal or rightful title, and not one who must acquire such title in the future, in order to come within the term; and hence Art. 5916, reserving minerals on lands thereafter granted by the state, is valid. *Cox v. Robinson*, 105 T. 426, 150 S. W. 1149.

**To what land applicable.**—The language of Art. 5916, "whenever any application shall be made to buy or obtain title to any of the lands embraced in" Art. 5904, refers only to such lands as are reserved by that article which is expressed to be "all public school, university and asylum lands containing valuable mineral deposits." Lands which do not contain minerals are not embraced in that article. *Schendell v. Rogan*, 94 T. 585, 63 S. W. 1005.

**Art. 5917. [3498o] Placers and certain other mining claims, subject to location, entry and lease, on what terms, etc.**—Claims usually called placers, including all forms of metallic deposits, excepting those described in section 15 [Art. 5906], as well as any mining claim covering deposits of kaolin, baryta, salt, marble, fire clay, gypsum, nitrates, mineral paints, asbestor, marl, natural cement, clay, onyx, mica, precious stones or any other non-metallic mineral and stones valuable for ornamental or building material shall be subject to location and entry and lease on the same terms and conditions and upon similar proceedings as are provided herein for vein or lode claims; provided, all placer claims located shall conform as nearly as practicable to existing surveys and their sub-divisions, and no placer claim shall include more than forty acres, and no aggregation of individual claims shall exceed three hundred and twenty acres. After the location of any mining claim and survey thereof and the registration thereof in the office of the general land commissioner, as hereinbefore provided, the locator shall be entitled to the exclusive uses and possession thereof so long as the locator shall continue to do the amount of work upon such claims equivalent to one hundred dollars (\$100) worth of labor per annum; provided, that an affidavit shall be filed before the expiration of each and every year, setting forth, in detail, the development work that has been done that year, with an itemized statement of the value thereof. Such statement shall be filed in the office of the commissioner of the general land office, also in the office of the county clerk of the county where such mining claim is located, or the county to which such county is attached for judicial purposes. The commissioner of the general land office may, at his discretion, require additional proof that such development work has been done. [Acts 1913, p. 409, sec. 19.]

**Art. 5917a. Royalties; forfeiture, etc.**—In full payment to the state for the right to take from any mining claim of any character described in sections 15 [Art. 5906] and 19 [Art. 5917], any mineral wealth or deposit whatever, whether metallic or non-metallic, the owner or holder of such claim shall pay unto the state a royalty or rental equivalent to five per centum of the total gross output sold or disposed or from such mine or mining claim of any character therein defined. If any locator shall fail to post the location notice or to file with the county clerk the location notice and affidavit, or shall fail to file with the county surveyor the application for survey and affidavit hereinbefore required, or shall fail to file with the commissioner of the general land office the application, affidavit, file notice and plat hereinbefore required; or shall fail to comply with any of the terms or conditions herein required, such claim shall be subject to forfeiture by the commissioner of the general land office by an endorsement upon such application theretofore filed of the word "Forfeited," signed officially by him, and thereupon all rights in such mining claim and rights of the locator or claimant in such mining claim shall utterly cease and determine and the same shall be subject to relocation; provided that the commissioner of the general land office may, upon satisfactory showing to him why such conditions or requirements were not complied with, reinstate such claim upon the written request of one or more of the locators, claimants, or owners, filed in his office; provided, further, that no rights of any others have intervened at the date of filing of such request in the general land office. One interested in the claim at the date it was forfeited shall not be eligible to relocate or file upon the same land or in behalf of any other person within a period of six months next ensuing after such

forfeiture, and any attempt to make such location by such person shall be wholly void. [Id. sec. 20.]

**Art. 5918.** Repealed. See note under Art. 5904.

**Art. 5919.** [3498q] **Timber and trees.**—Any locator, claimant, or owner of any mining claim under this Act is authorized to fell and remove for building and mining purposes any timber or any trees growing or being upon any unoccupied public lands under such rules and regulations as the commissioner of the general land office may, from time to time, provide for the protection of timber and other growth upon such lands and such other purposes. [Acts 1913, p. 409, sec. 21.]

**Art. 5920.** [3498r] **Claims and rights not impaired, etc.**—Nothing in this Act contained shall ever be construed to destroy, invalidate or impair any valid claim, right or interest existing in, to or concerning any lands whatsoever at the date of the passage of this Act, or of any pre-emptor, purchaser, claimant, settler, locator or any other person whatsoever. [Id. sec. 22.]

**Art. 5920a.** **Surface rights of locator or owner of mining claim; compensation in case of disagreement, etc.**—The locator or owner of a mining claim shall have the right to occupy within the limits of his claim so much of the surface ground as is strictly necessary for the use and exploitation of the mineral deposits and for the buildings and works necessary for mining operations and for the treating and smelting of the ore produced on such claims and to occupy within and without the limits of his claim the necessary land for right of way, for ingress and egress to and from his claim, for roadways, or railways; provided, that if the locator or owner of the mineral right cannot agree with the owner or lessee of the surface right in regard to the acquiring of same and in regard to the compensation for the injury incident to the opening and the working of such mine and the access thereto, he may apply to the judge of the county court of the county in which such mining claim is located by filing a written petition setting forth with a sufficient description the property and surface right sought to be taken and the purpose for which the same is to be taken, and it shall be the duty of such county judge of such county to appoint three disinterested freeholders to examine, pass upon and determine the damages and compensation to be paid to the owner of such surface right or other property necessary to be taken, and the proceedings for acquiring or condemning such surface right or other property shall, at all times, so far as possible, be covered by the laws relating to the condemnation of rights of way for railway companies the locator or owner of such mining claim, occupying the position of the railway company, and an appeal may be taken from the decision of the commissioners upon the same terms and conditions and subject to the same regulations and qualifications prescribed by law for the condemnation of right of way for railways. [Id. sec. 23.]

**Art. 5920b.** **Rights of prior purchasers or lessees from state to apply for reserved mineral rights.**—Upon all lands of any character heretofore sold or leased by the state in which the minerals or mineral rights were reserved to the state, the public free school fund, university fund, asylum or other fund, the grantee or lessee, as the case may be, shall have the prior right for six months after date upon which this Act shall take effect to prospect, locate and apply for the mineral rights upon such land heretofore sold or leased to him, and after the expiration of such six months such preference or priority right shall cease and such grantee or lessee shall have no prior or preference rights over any other prospector or locator. [Id. sec. 24.]

**Art. 5920c.** **Relinquishment of permit, lease or claim.**—The holder of a permit, a lease, a prospecting right, or any other right acquired under this Act may relinquish one or more of such permits, leases,

claims or prospector's claims at any time by filing a relinquishment in the general land office after it is duly recorded by the clerk of the proper county, but such holder shall not be entitled to a refund of any sum paid thereon. [Id. sec. 25.]

**Art. 5920d. Moneys to be credited to what funds, etc.**—The commissioner of the general land office shall collect and transmit to the state treasurer all money derived from the development of any minerals or substance named herein and found on the public free school land or other public land, and it shall be credited to the permanent free school fund or other fund to which the land from which such money is derived is set apart. All money derived from the development of any mineral or substances named herein and found on other than public free school land, university or asylum land, shall be credited to the game, fish and oyster fund for the use of that department. All fees shall be credited to the general revenue in the manner provided by law for other fees laid into the general land office. [Id. sec. 26.]

**Art. 5920e. Protection of waters from pollution, etc.**—All development in water or on islands, marshes and reefs shall be done under such regulations as will prevent the pollution of the water and for the prevention of such pollution the game, fish and oyster commissioner may be called upon for assistance in the adoption and enforcement of rules and regulations for the protection of said waters. For a violation of such rules and regulations the commissioner of the general land office may revoke a permit or cancel a lease. [Id. sec. 27.]

**Art. 5920f. Taxation.**—The rights acquired under this Act shall be subject to taxation as is other property after the owner shall have paid to the state the sums necessary to perfect his rights. [Id. sec. 28.]

**Art. 5920g. Land may be sold without minerals, etc.**—The issuance of a permit or lease or the filing of a prospector's affidavit on unsold land included within this Act, shall not prevent the sale of the land without minerals on which such mineral or mining claim may be located under the laws applicable to such land, but in case of such sale after an application has been filed with the county clerk so herein provided the purchaser of such land shall not be entitled to any part of the proceeds of such minerals or mining location nor other compensation, nor shall such purchaser have any action for damages done to such land by or resulting from the proper working of or operation under such permit, lease or prospector's claim. [Id. sec. 29.]

**Art. 5920h. Commissioner of general land office to have supervision, etc.**—The commissioner of the general land office shall have general supervision of all matters necessary for the proper administration of the purpose of this Act, and he is authorized to adopt rules regulations and to alter or amend them from time to time as may appear necessary for the protection of the interest involved and the execution of the purposes of this Act not inconsistent with its provisions and the constitution of the state. [Id. sec. 30.]

**Art. 5920i. Number of mining claims to one person, etc.**—No individual, firm, association of persons or corporations shall be entitled to locate or lease more than five mining claims of any character defined in section 15 and 19 [Arts. 5906 and 5917] and any location or lease made contrary to this section shall be void; provided, however, that upon coal or lignite mines or deposits any one individual, firms, association of persons or corporations shall be entitled to locate or lease a total area not to exceed twenty-five hundred and sixty (\$2560) acres. [Id. sec. 31.]

**Art. 5920j. Unconstitutionality of part not to invalidate whole.**—If any provision of this bill shall be held to be unconstitutional either as applied to any character of land or water described in section 1 [Art.



5904] or in any other respect, such decision shall not be construed to invalidate the provision of this Act with regard to any other character of land of [or] waters described in section 1 or any other provision of this Act. [Id. sec. 32.]

Arts. 5921, 5922. Repealed. See note under Art. 5904.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Title to oil.**—While the landowner has no specific title to the underlying oil until it has been brought to the surface, as soon as it has been extracted it becomes the owner's property. *Bender v. Brooks*, 103 T. 329, 127 S. W. 168, Ann. Cas. 1913A, 559.

**Damages for taking oil from another's land.**—Measure of damages for taking oil from another's land through mistake as to ownership of the land, stated. *Bender v. Brooks*, 103 T. 329, 127 S. W. 168, Ann. Cas. 1913A, 559.

The measure of damages for taking oil from land through mistake as to the ownership of the land held the value of the oil at the surface, less the reasonable cost of extracting it. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

**Purchase of oil from cotenant.**—Purchasers of oil from one who, without the concurrence of his cotenants, has extracted it from land in which he has only an undivided interest, are liable to the cotenants if the transactions are a wasteful disposition of the oil. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

**Right of cotenant to extract oil.**—One having an undivided interest in land may extract oil therefrom without his cotenants concurring or participating. *Burnham v. Hardy Oil Co.* (Civ. App.) 147 S. W. 330.

**Liability of cotenant for expense of producing oil.**—One holding his cotenant to an accounting for oil extracted from the land is chargeable with the reasonable expense of producing and marketing the oil. *Burnham v. Hardy Oil* (Civ. App.) 147 S. W. 330.

Nonparticipating cotenant held not chargeable with the expense of nonproducing oil wells. *Id.*

**Contracts for development of oil and gas lands.**—Compliance within reasonable time with stipulation to secure partition of grantor's interest held necessary to preserve interest of grantee under contract for development of oil lands. *Emery v. League*, 31 C. A. 474, 72 S. W. 603.

Contract for development of oil lands held to have been forfeited by failure to comply within reasonable time with stipulation requiring grantee to obtain partition of lands. *Id.*

A contract for the drilling of an oil well construed, and held not to have given one of the parties any right to take possession of the other's drilling outfit. *Hammond v. Decker*, 46 C. A. 232, 102 S. W. 453.

A contract purporting to transfer to S. the oil, gas, and minerals under certain land held a unilateral contract. *Witherspoon v. Staley* (Civ. App.) 156 S. W. 557.

— **Options.**—Grantors of oil and gas option held to have right to rescind. *National Oil & Pipe Line Co. v. Teel* (Civ. App.) 67 S. W. 545.

Contract for development of oil lands construed, and held to confer only an option. *Emery v. League*, 31 C. A. 474, 72 S. W. 603.

An instrument held at most an option for an oil lease, and terminated by foreclosure of judgment lien against the lands. *Hodges v. Brice*, 32 C. A. 358, 74 S. W. 590.

A contract purporting to transfer to S. the oil, gas, and minerals under certain land held a mere option, which terminated on the failure of S. to perform its conditions. *Witherspoon v. Staley* (Civ. App.) 156 S. W. 557.

Where a mining lease option could have been continued by the payment of \$25 on January 28, 1911, a deposit of that sum to the landowner's credit in a bank on January 30th was insufficient, though the receipt for a prior payment erroneously recited that it extended the option to the latter date. *Id.*

— **Leases.**—An oil lease held unilateral and void. *Roberts & Corley v. McFadden, Weiss & Kyle*, 32 C. A. 47, 74 S. W. 105.

Oil lease held to have been terminated. *Id.*

An oil lease held void. *Hodges v. Brice*, 32 C. A. 358, 74 S. W. 590.

A lease of land for oil and gas development, terminable at the will of the lessee on the payment of two dollars, is terminable also at the will of the lessor on tender or payment of the value of all labor done and services rendered by defendant. *J. M. Guffey Petroleum Co. v. Oliver* (Civ. App.) 79 S. W. 884.

Diligence, good faith, and reasonable development held to be implied condition of lease of lands for oil and gas development. *Id.*

Plaintiff, in action to cancel lease of land for oil and gas development for delaying the work, held not estopped to claim a forfeiture of the lease by executory agreement for delay. *Id.*

An oil and gas lease obligating the lessee to begin work on the first oil well within six months, etc., held based on a sufficient consideration. *Great Western Oil Co. v. Carpenter*, 43 C. A. 229, 95 S. W. 57.

Duty of lessee of oil lands held to be to use reasonable diligence to develop and protect property. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 C. A. 555, 107 S. W. 609.

An oil lease construed. *Id.*

In an action by the lessee of oil land to recover by mandatory injunction a well drilled thereon by the lessor and its product, evidence held not to show that the lessee consented to the drilling of the well by the lessor, but merely declined to drill other wells itself. *O'Neil v. Sun Co.* (Civ. App.) 123 S. W. 172.

An oil lease held not to convey to the lessee the oil under the ground, but merely

to authorize him to prospect the land and acquire title to the oil upon extracting it from the ground. *Id.*

The lessee of a tract for drilling and operating oil wells thereon held not to have abandoned the right to drill upon any unreleased part thereof, in view of the provisions of the lease. *Id.*

The oil from a well drilled by a lessor during the term on an unreleased part of the land without the lessee's consent held to belong to the latter and to be apportionable under the terms of the lease. *Id.*

A lease of land for drilling wells thereon in exploration for oil and gas held to stipulate for liquidated damages for the lessee's failure to sink wells within the specified time. *Witherspoon v. Duncan* (Civ. App.) 131 S. W. 660.

An oil and gas lease held not void as being unilateral. *Witherspoon v. Staley* (Civ. App.) 138 S. W. 1191.

A junior oil and gas lessee, contracting with knowledge of facts concerning the prior lease, is in no better position than the lessor. *Id.*

An oil and gas lessor held to have waived a lessee's failure to make a payment on time. *Id.*

A lease of oil land held to include a single tract of 30 acres, and not to include a strip of land erroneously excluded from the description of a prior deed. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

Where money necessary to prevent a forfeiture of an oil and gas lease was not deposited to the lessor's credit in time, that the latter made some delay in refusing to accept the deposit did not estop him from thereafter claiming a forfeiture; the lessee not being prejudiced by such delay. *Witherspoon v. Staley* (Civ. App.) 156 S. W. 557.

## CHAPTER TWO

### STATE MINING BOARD AND COAL MINING REGULATIONS

Art.		Art.	
5923.	State mining board, duties of.	5938.	Dangerous gases and fires; inspector must be notified.
5924.	Appointment, qualifications, and terms of office of members of board.	5939.	Cages, how operated.
5925.	Duty of board to select mining inspector; place of meeting.	5940.	Powder.
5926.	Qualifications of mining inspector; term of office.	5941.	Inspector may require use of safety lamp.
5927.	State mining inspector under supervision of mining board; how removed from office.	5942.	Rules to be observed by minors.
5928.	Semi-annual meeting of board to receive reports of inspector.	5943.	Rules to be posted.
5929.	Compensation of members of board.	5944.	Coal scales.
5930.	Inspector to enforce law; salary and expenses.	5945.	Employés may employ check weighman.
5931.	Discrimination prohibited.	5946.	Kind of oil to be used.
5932.	Bond of inspector; liability for discrimination.	5946a.	Electric wires to be insulated; trolley wires, how placed.
	<b>MINING REGULATIONS</b>	5946b.	Penalty for violation.
5933.	Mine shafts, how constructed and equipped.	5946c.	Duties of state mining inspector.
5934.	Mine must be supplied with suitable props.	5946d.	Map of underground workings to be filed.
5935.	Abandoned workings to be cut off.	5946e.	Feeding animal in mine, etc., unlawful.
5936.	Ventilation.	5946f.	Permitting animal to remain over ten hours unlawful.
5937.	Same.	5946g.	Not applicable to certain mines; open light in stable prohibited; inflammable stock food.
		5946h.	Penalty for violation.
		5946i.	Duties of state mining inspector.

[In addition to the notes under the particular articles, see also notes on the subject in general at end of chapter.]

**Article 5923. State mining board; duties of.**—For the purpose of securing efficiency in the mine inspection service, a board of examiners, to be known as the state mining board, whose duty it shall be to make formal inquiry into and pass upon the practical and technical qualifications and personal fitness of persons seeking appointments as state inspector of mines, shall be appointed by the governor. [Acts 1907, p. 331, sec. 14.]

**Art. 5924. Appointment, qualifications and terms of office of members of board.**—Said board shall be composed of seven members, three of whom shall be practical miners, three shall be mine operators; and it shall be the first duty of the six members thus appointed to nominate to the governor the seventh member of said board; provided, that if the six members aforesaid shall fail for a period of ten days after their

appointment to so nominate the seventh member, the same shall be appointed by the governor. Said board shall hold office for a period of two years and until their successors have been appointed and qualified. [Id. sec. 15.]

**Art. 5925. Board to select mining inspector; place of meeting.**—The board shall meet in the capitol building at Austin biennially, for the purpose of hearing applications for the office of state mining inspector. It shall be the duty of the board to thoroughly examine all applicants who may come before it, and to select from among such applicants the person who in its opinion is best qualified to perform the duties of state mining inspector; and, upon the nomination of said board, the governor shall appoint the person so recommended. [Id. sec. 16.]

**Art. 5926. Qualifications of mining inspector; term of office.**—The state mine inspector shall be a citizen of the United States, and shall have resided in the state of Texas for one year, of temperate habits, of good repute, a man of personal integrity, shall have attained the age of thirty years, and shall have had at least five years experience working in and around coal mines, and shall not have any pecuniary interest whatever in any mine in this state. He shall hold office for a period of two years, unless sooner removed as provided herein. [Id. sec. 17.]

**Art. 5927. State mine inspector under supervision of board; how removed from office.**—It shall be the duty of the state mining board to exercise supervision over the acts of the state mine inspector, and, in the event of his incompetency or the neglect of his duty being proved to the board, said board shall recommend to the governor that he be removed from office, and his successor shall be chosen as herein provided. [Id. sec. 18.]

**Art. 5928. Semi-annual meetings of board; reports of inspector.**—The state mining board shall meet twice each year, and at such time and place as the majority may select, for the purpose of receiving reports from the inspector and instructing him in the performance of his duty. [Id. sec. 19.]

**Art. 5929. Compensation of members of board.**—The members of the state mining board shall receive as compensation for their services the sum of five dollars per day for a period not exceeding thirty days in any one year, and traveling expenses in going to and returning from board meetings. [Id. sec. 20.]

**Art. 5930. Inspector to enforce law; salary and expenses.**—It shall be the duty of the state mining inspector to enforce the provisions of this chapter under the instructions of the state mining board, and to make a report to said board at its semi-annual meetings, and oftener if required. He shall receive for his services the sum of two thousand dollars per year, and actual traveling expenses incurred in the discharge of his duty; provided, that his traveling expenses shall not in any one year exceed the sum of one thousand dollars. Said mining inspector shall file an itemized statement, showing the actual amounts expended, and the number of times he inspected each mine or mines. [Id. sec. 21. Amended Acts 1909, p. 163.]

**Art. 5931. Discrimination prohibited.**—It shall be the duty of the state mining inspector to enforce the provisions of this chapter under the instruction of the state mining board, and to make report to said board at its semi-annual meetings and oftener if required; provided, that neither the instructions of said board nor the acts of said inspector shall ever discriminate in favor of or against any mine or mines, nor against any owner, operator or employé, of any mine or mines; but said acts, either of the board, or of the inspector, shall be impartial, fair and just to all persons or corporations subject to the provisions of this chapter. [Id.]

**Art. 5932. Bond of inspector; liability for discrimination.**—Before receiving his appointment by the governor, the inspector of mines shall be required to enter into and deliver to the governor a good and sufficient bond in the sum of ten thousand dollars, with at least three good, lawful and sufficient sureties for the faithful and impartial performance of his duty; and the sureties herein required shall make affidavit before some officer authorized to administer oaths that they, in their own right, over and above all exemption, are worth the full amount of the bond they sign as sureties, said bond to be approved by the governor, provided he is satisfied as to its sufficiency, and said bond shall be conditioned that there shall be no discrimination in favor of or against any mine or mines, nor against any owner, operator or employé of any mine or mines; provided, further, if the fact may be shown that said inspector has discriminated against and to the injury of any mine or mines, or against and to the injury of any owner, operator or employé, then the said owner, operator or employé may sue upon the bond herein provided for, and shall be entitled to recover such liquidated damages as may be proven and shown in such suit.

### MINING REGULATIONS

**Art. 5933. Mine shafts, how constructed and equipped.**—Any shaft in process of sinking, and any opening projected for the purpose of mining coal of all kinds, shall be subjected to the provisions of this chapter. At the bottom of every shaft and every caging place therein, a safe commodious passageway must be cut around said landing place, to serve as a traveling way by which employés shall pass from one side of the shaft to the other without passing under or on the cage. The upper and lower landings at the top of each shaft, and the openings of each intermediate seam from or to the shaft, shall be clear and free from loose materials and shall be securely fenced with automatic or other gates or bars so as to prevent either men or materials from falling into the shaft. Every hoisting shaft must be equipped with substantial cages fitted to guide rails running from the top to the bottom. Said cages must be safely constructed, they must be furnished with suitable boiler iron covers to protect persons riding thereon from falling objects, and they must be equipped with safety catches. Every cage on which people are carried must be fitted with iron bars, rings or chains in proper place and in sufficient number to furnish a secure handhold for every person permitted to ride thereon. At the top landing, cage supports, where necessary, must be carefully set and adjusted so as to work properly and securely hold the cages when at rest. In all cases where the human voice cannot be distinctly heard, there shall be provided a metal tube or telephone from the top to the bottom of the shaft or slope through which conversation may be held between persons at the bottom and top of such shaft or slope, and that there shall also be maintained an efficient system of signaling to and from the top of the shaft or slope and each seam or opening. Every underground place on which persons travel, worked by self-acting engines, windlasses or machinery of any description, shall be provided with practical means of signaling between the stopping places and the ends of the plane, and shall further be provided, at intervals of not more than sixty feet, with sufficient manholes for places of refuge. [Acts 1907, p. 331, sec. 1.]

**Art. 5934. Mine must be suitably propped.**—Every mine shall be supplied with props and timbers of suitable length and size; and, if from any cause the timbers are not supplied when required, the miners shall vacate any and all such working places until supplied with timber needed. [Id.]

**Safe place to work.**—In an action for the death of a miner owing to the caving in of the roof of a room in a mine, evidence held to warrant a finding that deceased was killed

because of the unsafe condition of the place where he was at work, which condition was due to defendant's negligent failure to prop the roof. *Lone Star Lignite Mining Co. v. Caddell* (Civ. App.) 134 S. W. 841.

The rule that the master is not liable for injuries to a servant while engaged in making a dangerous place safe held not to apply where a coal digger is preparing an entry in a mine for props, at the time and in the manner directed by the vice principal. *Reid Coal Co. v. Nichols* (Civ. App.) 136 S. W. 847.

In an action for injuries to a coal miner, instruction held to correctly state the duty of a master to furnish a safe place. *Adams v. Consumers' Lignite Co.* (Civ. App.) 138 S. W. 1178.

The rule that a master must furnish a safe place to the servant in which to work is applicable to a mineowner. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

A rule of an owner of a coal mine held not to require a miner to discover the condition of the roof to the extent of relieving the owner from the duty of maintaining a safe place to work. *Id.*

**Inspection.**—A mineowner has the duty of inspecting the mine. *Stag Canon Fuel Co. v. Rose* (Civ. App.) 145 S. W. 677.

A fire boss of a mine represents the mineowner in the performance of the duties of inspection. *Id.*

**Art. 5935. Abandoned workings to be cut off.**—All openings connecting with worked-out or abandoned portions of every operated mine likely to accumulate explosive gases or dangerous conditions shall be securely gobbled and blocked off from the operated portions thereof, so as to protect every person working in such mines from all danger that may be caused or produced by such worked-out portions of such mines. [*Id.*]

**Art. 5936. Ventilation.**—Throughout every mine there shall be maintained currents of fresh air sufficient for the health and safety of all men and animals employed therein, and such ventilation shall be produced by a fan or some other artificial means; provided, a furnace shall not be used for ventilating any mine in which explosive gases are generated. The quantity of air required to be kept in circulation and passing a given point shall be not less than one hundred cubic feet per minute for each person, and not less than three hundred cubic feet per minute for each animal, in the mine, measured at the foot of the downcast; and this quantity may be increased at the discretion of the inspector, whenever in his judgment unusual conditions make a stronger current necessary. Said current shall be forced into every working place throughout the mine, so that all parts of the same shall be reasonably free from standing powder smoke and deleterious air of any kind. The measurement of the current of air shall be taken with an anemometer at the foot of the downcast, at the foot of the upcast and at the working face of each division or split of the air current. The main current of air shall be split or subdivided as to provide a separate current of reasonably pure air to every one hundred men at work; and the inspector shall have authority to order separate currents for smaller groups of men, if in his judgment special conditions make it necessary. The air current for ventilating the stable shall not pass into the intake air current for ventilating the working parts of the mine. Whenever the inspector shall find men working without sufficient air, he shall at once give the mine manager or operator notice and a reasonable time in which to restore the current; and, upon his or their refusal or neglect to act promptly, the inspector may order the endangered men out of the mine. [*Id.* sec. 2.]

**Art. 5937. Same.**—It shall be the duty of the mine foreman to see that proper cut-throughs are made in all the pillars at such distances as in the judgment of the mine inspector may be deemed requisite, not more than twenty yards nor less than ten yards apart, for the purpose of ventilation; and the ventilation shall be conducted through said cut-throughs into the rooms and entries by means of check doors made of canvas or other material, placed on the entries or in other suitable places; and he shall not permit any room to be opened in advance of the ventilating current. Should the mine inspector discover any room, entry, airway, or other working place, being driven in advance of the air current contrary

to the requirements of this article, he shall order the workmen in such places to cease work at once until the law is complied with. [Id. sec. 6.]

**Art. 5938. Dangerous gases and fires; inspector notified.**—Immediate notice must be conveyed by the miner or mine owner to the inspector upon the appearance of any large body of fire damp in any mine, whether accompanied by any explosion or not, and upon the concurrence of any serious fire within the mine or on the surface. [Id. sec. 3.]

**Art. 5939. Cages, how operated.**—Cages on which men are riding shall not be lifted or lowered at a rate greater than six hundred feet per minute, except with the written consent of the inspector. No persons shall carry any tools or material with him on a cage in motion, except for use in making repairs; and no one shall ride on a cage while the other cage contains a loaded car. No cage having an unstable or self-dumping platform shall be used for the carriage of men or materials, unless the same is provided with some convenient device by which said platform can be securely locked, and unless it is so locked whenever men or material are being conveyed thereon. [Id. sec. 4.]

**Art. 5940. Powder.**—No miner or other person shall carry powder into the mine, except in the original keg, or in a regulation powder can securely fastened, and the can in otherwise air tight condition. [Id. sec. 5.]

**Art. 5941. Inspector may require use of safety lamp.**—At any mine where the inspector shall find fire damp is being generated so as to require the use of a safety lamp in any part thereof, the operator of such mine, upon receiving notice from the inspector that one or more such lamps are necessary for the safety of the men in the mines, shall at once procure and keep for use such number of safety lamps as may be necessary. [Id. sec. 7.]

**Art. 5942. Rules to be observed by miners.**—It shall be unlawful for any miner, workman or other person knowingly or carelessly to injure any shaft, safety lamp, instrument, air-course or brattice, or to obstruct or throw open an air-way, or to carry any open lamp or lighted pipe, or fire in any form, into a place worked by the light of safety lamps, or within three feet of any open powder, or to handle or disturb any part of the hoisting machinery, or to enter any part of the mine against caution, or to do any wilful act whereby the lives or health of persons working in mines, or the security of the mine machinery thereof, is endangered. [Id. sec. 8.]

**Art. 5943. Rules to be posted.**—It shall be the duty of every operator to post on the engine house and at the pit top of his mine, in such manner that the employés of the mine can read them, rules not inconsistent with this law, plainly printed in the English language, which shall govern all persons working in the mine. And the posting of such notice, as provided, shall charge all employés of such mine with legal notice of the contents thereof. [Id. sec. 9.]

**Art. 5944. Coal scales.**—The owner or operator of every mine shall provide adequate and accurate scales for weighing coal; and it shall be the duty of the mine inspector to examine such scales; and, if same are not found to be accurate, he shall notify the owner to repair same; and, if such owner fails or refuses to repair same within a reasonable time, said inspector shall institute proceedings under the law against the proper parties. [Id. sec. 10.]

**Art. 5945. Employés may employ check weighman.**—The employés in any mine in this state shall have the right to employ a check weighman at their own option and their own expense. [Id. sec. 11.]

**Art. 5946. Kind of oil to be used.**—No miner, or other person employed in a mine, shall use any kind of oil other than a good quality

of lard oil for lighting purposes, except when repairing downcast or upcast shafts. [Id. sec. 12.]

**Art. 5946a. Electric wires to be insulated; trolley wires, how placed.**—From and after September 1, 1911, in all mines in this state where electricity is or hereafter shall be used as a part of the system, power or means of mining and procuring the coal or other mineral from any of said mines, that the owners or operators of every such mine shall cause all wires conducting electricity in and about said mine to be carefully and thoroughly insulated or protected in a safe manner, so that the person or animals coming in contact therewith shall not be injured thereby; all wires as aforesaid shall either be thoroughly insulated or placed where persons employed in and about the mines can not come in contact therewith, or shall be covered, protected or shielded in a safe manner, so as to prevent any injuries or accidents therefrom to those in or about the mines; provided, however, it shall not be necessary to insulate or cover trolley wires, but they shall all be hung and kept not less than five feet and six inches above the rail, and shall be securely fastened, and not permitted to sag less than said height. Where there is sufficient height in existing entries to permit this, but where sufficient height is not available in existing entries, then the trolley wires shall be placed to one side of the entry, six inches outside the rail; and in all such cases the trolley wire shall be placed on the side of the entry opposite from the working rooms, except where there are rooms on both sides of the entry, in which event, the trolley wires may be placed over the opening of said rooms, said trolley wires to be safely shielded; provided, where it is impracticable in existing entries to place trolley wires six inches outside of the rail, or five feet, six inches high, and where separate travel way is not provided, then the trolley wire shall be safely shielded; and it is further provided that this Act shall not apply to entries that are not used as travel ways for workmen or work animals; provided, however, that this section shall not apply to mines in operation in this state on January 1, 1902, and prior thereto, and which have developed until there is at least two thousand (2000) feet distance from the shaft to the face of the coal being operated, except as to extensions of trolley wires made and to be made after January 1, 1910, in such mines. [Acts 1911, p. 196, sec. 1.]

**Note.**—Section 2 makes a violation of the act a misdemeanor.

**Art. 5946b. Penalty for violation.**—Each and every person, company, corporation or receiver, who shall in any manner violate any of the provisions of this Act, shall for each and every offense committed forfeit and pay to the state a penalty of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars, and it shall be the duty of the district or county attorney to institute suit in the name of the state for the recovery of same. [Id. sec. 2a.]

**Art. 5946c. Duties of state mining inspector.**—It shall be the duty of the state mining inspector to see that the provisions of this Act are complied with, and shall report all violations hereof to the state mining board and to the district or county attorney of the county where the offense is committed. [Id. sec. 3.]

**Art. 5946d. Map of underground workings to be filed.**—It shall be the duty of every operator of a coal mine in the state of Texas to make a map of the underground workings of every mine in his charge, under operation on the first day of January, 1912, or that may be opened thereafter; said map shall be drawn on a scale of one inch to one hundred feet, and shall indicate the surface land lines as well as the rooms, entries or openings underground. It shall be brought up to date at least once each month, covering operations for the preceding month. The original of said map shall be on file at the office of the operator at or near said mine. Said map shall be extended or brought up to date at

any time requested by the state mine inspector, at least every three months, if, for any reason, a mine should be closed, then a final map shall be made and filed; provided, however, that maps existing on the date of the passage of this Act may be continued on the same scale as begun, if not smaller than one-half inch to one hundred feet. [Id. sec. 4.]

*Note.*—Section 5 provides for imposition of a fine for violation of Art. 5946d.

**Art. 5946e. Feeding animal in mine, etc., unlawful.**—It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this state, to feed or permit to be fed any work animal in said mines, or to store or keep any feed for such animals in said mines. [Acts 1911, p. 205, sec. 1.]

**Art. 5946f. Permitting animal to remain over ten hours unlawful.**—It shall be unlawful for any person, association of persons, corporation or receiver, owning, operating or managing any mine in this state, to permit any work animal to remain in any mine longer than ten consecutive hours. [Id. sec. 2.]

**Art. 5946g. Not applicable to certain mines; open light in stable prohibited; inflammable stock food.**—It is further provided that sections 1 and 2 [Arts. 5946e, 5946f] shall not apply to mines complying with the following provisions:

All stables in mines in which work animals are kept shall be equipped with fire proof doors at each opening, with a door frame of concrete, stone or brick, laid in mortar, and such stable door shall be kept closed during working hours of mines.

All feed, hay, grass, cane, etc., except corn, corn chops, bran and shelled oats, shall not be taken down the hoisting shaft until after the regular day shift is out of the mine.

It is further provided that no open light shall be taken into any underground stable by any person.

It is further provided that not over twenty-four (24) hours' supply of hay, grass or cane, or any other kind of inflammable stock food, except corn, corn chops, bran and shelled oats, shall be taken down in any one day. [Id. sec. 2a.]

**Art. 5946h. Penalty for violation.**—Each and every person, company, corporation or receiver who shall in any manner violate any of the provisions of this Act shall for each and every offense committed forfeit and pay to the state a penalty of not less than one hundred dollars nor more than five hundred dollars, and it shall be the duty of the district or county attorney to institute suit in the name of the state for the recovery of same. [Id. sec. 3.]

*Note.*—Section 4 makes a violation of the act a misdemeanor, and is omitted.

**Art. 5946i. Duties of state mining inspector.**—It shall be the duty of the state mining inspector to see that the provisions of this Act are complied with, and he shall report all violations thereof to the state mining board and to the district or county attorney of the county where the offense is committed. [Id. sec. 5.]



## TITLE 94

## MINORS

## REMOVAL OF DISABILITIES OF

[For Suit by Next Friend, etc., see Articles 2167-2171.]

<p>Art. 5947. When may have disabilities removed. 5948. Proceeding for removal.</p>	<p>Art. 5949. Shall be deemed of full age, when. 5950. Notice of proceeding, on whom served.</p>
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**Article 5947. [3499] When may have disabilities removed.**—Any minor in this state over the age of nineteen years, who may desire to have his disabilities as a minor removed, shall, by a bill or petition, present to the district court of the county where he may reside the cause or causes existing which make it advisable or advantageous to said minor to have his disabilities removed, which bill or petition shall be sworn to by some person cognizant of the facts set out in said bill or petition. [Acts 1881, p. 16, sec. 1.]

**Jurisdiction.**—Under this article a record is insufficient to show a valid removal where it does not appear that petitioner was that old, or that he resided in the county. *Cunningham v. Robison*, 104 T. 227, 136 S. W. 441.

Under this article an order purporting to remove the disabilities of relator, showing on its face that she was only temporarily a resident of that county, she having gone there to get her disabilities removed, with the intention to return to her home county, was void. *Durrill v. Robison* (Civ. App.) 138 S. W. 107.

Under this article an order of removal by a district court of the county other than that of the minor's residence was a nullity, though the minor consented thereto. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

Under this article an order removing disability of minority is void where it appears on the face of the proceeding that the minor did not reside in the county. *Rainer v. Durrill* (Civ. App.) 156 S. W. 589.

**Female minor.**—A female minor can have her disabilities of minority removed for the purpose of enabling her to manage her property. *Texas Cent. Ry. Co. v. Wheeler*, 52 C. A. 603, 116 S. W. 86.

**Signing and verifying petition.**—A judgment removing disability of minority based upon a petition not signed nor sworn to by the minor is not an absolute nullity, inasmuch as the statute does not specifically require that it shall be so signed nor prescribe the manner of its presentation, nor that it shall be verified by an affidavit with the formalities specified in Art. 12. *Stewart v. Robbins*, 65 S. W. 902.

**Conclusiveness and effect of judgment.**—The function devolving on district courts in proceedings to remove the disabilities of a minor is a special authority to the judge as a commissioner, and not to the court, and no such presumptions are indulged in favor of the order in such proceedings in case of collateral attack as in favor of an ordinary judgment. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

A former order removing a minor's disabilities held not presumptively regular in a collateral suit. *Lemons v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 134 S. W. 742.

The authority of the district court under this article to remove disabilities of minors being special, a judgment in such a proceeding is not as conclusive, especially as to jurisdiction, as an ordinary judgment. *Cunningham v. Robison*, 104 T. 227, 136 S. W. 441.

The removal by the district court of the disability of infancy of one to whom public land had been previously awarded does not avoid an award to an adult made subsequent to the award to the minor and prior to the removal of disability. *Rainer v. Durrill* (Civ. App.) 156 S. W. 589.

**Art. 5948. [3500] Proceedings for removal.**—Said petition or bill shall be docketed on the trial docket of the court, and may be heard by the court, either in regular order or at any time during term time; and, if it shall appear to the court that the ground or causes set out are sufficient, and that it is advisable, or will be advantageous to such minor, in person or property, to have his disabilities as a minor removed, the court shall enter up a decree removing the disabilities of said minor, and cause it to be entered of record among the decrees and judgments of court. [Id. sec. 2.]

**Nature of proceedings.**—This is not a strictly judicial proceeding, and no presumption is indulged in favor of the proceedings. *Brown v. Wheelock*, 75 T. 385, 12 S. W. 111, 841.

**Conclusiveness and effect of judgment.**—See notes under Art. 5947.

**Art. 5949. [3501] Shall be deemed of full age.**—After the removal of such disabilities of minority, the said minor shall be deemed and held, for all legal purposes, of full age, and shall be held responsible, and shall have all the privileges and advantages as if he were of full age, saving only that he shall not vote until he arrives at the full age of twenty-one years. [Id. sec. 3.]

**Art. 5950. [3502] Notice, on whom served.**—In all proceedings under this title, a copy of the petition shall be served upon the father of the minor, if living within the state, and, if he be dead, that fact shall be mentioned in the petition. If the father of the minor be not living, then a copy of the petition shall be served upon the county judge of the county in which the proceeding is instituted; and in all such cases the court hearing the application shall appoint a special guardian, whose duty it shall be, in connection with the county judge, to represent the true interests of the minor, as they shall understand it, in aiding or resisting the application of the minor. An allowance shall be made by the district judge presiding to the special guardian, which shall be paid out of the estate of the minor. [Id. sec. 4.]

**Residence of minor.**—See, also, notes under Art. 5947.

In view of this article, the minor's residence when the application is made may be distinct from that of the father. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

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|---------------------------------------------------------|------------------------------------------------------|
| 1. Constitutionality of certain statutes.               | 16. — Who may take advantage of minority.            |
| 2. Who are minors.                                      | 17. — Time of disaffirming.                          |
| 3. Removal of disabilities.                             | 18. — What constitutes a disaffirmance.              |
| 4. Emancipation by parent.                              | 19. — Restoration of consideration.                  |
| 5. Effect of marriage.                                  | 20. — Estoppel.                                      |
| 6. Custody—Proceedings in which custody may be awarded. | 21. Injuries to minors.                              |
| 7. — Right to custody in general.                       | 22. Appointment of guardian ad litem.                |
| 8. — Gift of child.                                     | 23. Suits by next friend.                            |
| 9. — Evidence.                                          | 24. Limitation of actions against minors.            |
| 9½. — Trial and determination.                          | 25. Pleading.                                        |
| 10. Conveyances and contracts in general.               | 26. Evidence.                                        |
| 11. Necessaries.                                        | 27. Operation and effect of judgment against infant. |
| 12. — Liability of parent.                              | 28. Setting aside judgment against minor.            |
| 13. Fraud of minor.                                     | 29. Guardian and ward.                               |
| 14. Ratification.                                       |                                                      |
| 15. Avoidance of conveyances or contracts—In general.   |                                                      |

1. **Constitutionality of certain statutes.**—Arts. 3502a, 3502b, Sayles' Ann. St. 1897, authorizing proceedings to remove a minor from improper custody, held unconstitutional and void. *Ex parte Reeves*, 100 T. 617, 103 S. W. 480.

2. **Who are minors.**—See Art. 4045.

3. **Removal of disabilities.**—See Arts. 5947-5950, and notes.

4. **Emancipation by parent.**—An agreement between a parent and a minor child, relinquishing to the child the right of the former to his earnings is valid. *Furrh v. McKnight*, 26 S. W. 95, 6 C. A. 583.

An agreement by a parent to emancipate his minor children, so as to relieve himself of their support for necessaries, is contrary to public policy. *Snell v. Ham* (Civ. App.) 151 S. W. 1077.

5. **Effect of marriage.**—See, also, Art. 4628.

Marriage of an infant operates as an emancipation from the disability of infancy. *Lawder v. Larkin* (Civ. App.) 94 S. W. 171.

6. **Custody—Proceedings in which custody may be awarded.**—Right to custody of a minor held not determinable in a guardianship proceeding begun in a county court. *Estes v. Presswood* (Civ. App.) 137 S. W. 145.

A pleading showing that the welfare of a minor requires an order from the district court or judge thereof authorizes the exercise of the judge's discretion, and it is not necessary that the proceeding be either habeas corpus or for divorce. *Green v. Green* (Civ. App.) 146 S. W. 567.

7. — **Right to custody in general.**—A father is the natural guardian of his minor child, and has the right to invoke by habeas corpus the enforcement of his authority as such guardian by the county court or a judge thereof, when the minor is held in custody by a person not entitled to the guardianship of his person. *Stirman v. Turner*, 4 App. C. C. § 140, 16 S. W. 787.

Where a child's mother and her husband are suitable persons and are able to care for the child, they are entitled to its custody, though it had been adopted by other suitable persons. *State v. Deaton*, 93 T. 243, 54 S. W. 901.

That a child will be less comfortably reared in his father's custody than in that of its grandparents does not justify giving them custody of the child. *Watts v. Lively* (Civ. App.) 60 S. W. 676.

A mother can sue in her own name for the custody of her child without being joined by her husband, and unless she is totally unfitted for its care and custody she is entitled to its possession. *Sancho v. Martin* (Civ. App.) 64 S. W. 1015, 1016.

The paramount consideration with courts in determining the right to the custody of children is the welfare of the child; but the custody of a child will be awarded to the father, unless he is shown to be unworthy and incompetent, and reciprocal affection existing between a child and its foster parents has little weight in determining the rights of the natural parents to the child's custody. *Parker v. Wiggins* (Civ. App.) 86 S. W. 788.

Where a child was lawfully in the custody of his father, domiciled in Louisiana, the relative rights of the father and mother to the child's custody should be determined by the courts of that state. *Lanning v. Gregory*, 100 T. 310, 99 S. W. 542, 10 L. R. A. (N. S.) 690, 123 Am. St. Rep. 809.

In an action by a father for the custody of his child, placed in the care of an aunt soon after its birth, where it remained for eight years, the reputation of his present wife held properly considered. *Peese v. Gellerman*, 51 C. A. 39, 110 S. W. 196.

The peace, comfort, happiness, moral training, and best interests of the child held the controlling issue, notwithstanding the relation of father and child. *Id.*

Which home is best for a child is a question of fact, to be determined primarily by the trial court. *Id.*

Rights and duties of one standing in loco parentis are the same as those of the parent. *Saunders v. Alvido & Laserre*, 52 C. A. 356, 113 S. W. 992.

The paramount consideration in determining custody is the interest and welfare of the child, but, the father being the natural guardian, it will be awarded him unless he is shown incompetent, or it be demonstrated that the welfare of the child demands a different disposition; but where the father had not supported or had any relations with the child until after the death of the child's mother, when it was some eleven years old, the affections of the child may be considered in determining the question of its disposal. *Walker v. Finney* (Civ. App.) 157 S. W. 948.

8. — Gift of child.—When the parents by a written agreement have fully relinquished their right to an infant child in favor of another, and the child has been formally adopted by that person, a court has authority to determine a controversy as to the custody of the child, and will award it as the best interests of the child may require. *Legate v. Legate* (Sup.) 28 S. W. 281, 87 T. 248.

Parent who has given child to another to care for during its minority cannot regain custody without showing that it is for the best interest of the child. *State v. Deaton* (Civ. App.) 52 S. W. 591.

A mother may abrogate a contract to give her child to another, and is entitled to its custody as against the one to whom she had given it. *Casanover v. Massengale* (Civ. App.) 54 S. W. 317.

Parol gift of child by dying mother held not to affect the rights of the child's father to the custody of the child. *Parker v. Wiggins* (Civ. App.) 86 S. W. 788.

As a general rule, it is contrary to the policy of the law to permit a person to release his authority to control the person of his child during its minority, and an attempted gift of a child, standing alone, is invalid; and the fact that a parent has attempted to give away a child is properly considered in determining the child's best interests, and whether it should be again delivered into the parent's control. *Peese v. Gellerman*, 51 C. A. 39, 110 S. W. 196.

9. — Evidence.—In habeas corpus to obtain the custody of a child, evidence considered, and held that the child's best interests would be conserved by denying the custody to petitioners. *White v. Richeson* (Civ. App.) 94 S. W. 202.

Evidence held to sustain a judgment awarding the custody of a child to those with whom the father had placed it soon after its birth. *Peese v. Gellerman*, 51 C. A. 39, 110 S. W. 196.

In an action to determine the right to the custody of an infant, evidence held to warrant a finding that the best interests of the infant would be served by delivering her into the custody of complainants. *Morrow v. Harvey* (Civ. App.) 157 S. W. 206.

9/2. — Trial and determination.—That a judgment dismissing a writ of habeas corpus to obtain the custody and control of an infant entered in vacation was not appealable did not make it the less final. *Ex parte Fuller* (Civ. App.) 123 S. W. 204.

Where an application for a writ of habeas corpus to determine the right to the custody of a minor was presented to a judge in chambers while sitting in another county from that in which petitioners resided, and pending determination of a writ issued by the judge on such application relators filed their amended application with the clerk of the court of the proper county, a final judgment dismissing the writ rendered by the judge was res judicata of the court proceeding. *Id.*

In an action by a parent to recover custody of her minor child, whether under the facts and circumstances in evidence the child's welfare demanded that the custody be awarded to the plaintiff or defendant was for the jury. *Cobb v. Works* (Civ. App.) 125 S. W. 349.

In an action by a parent to recover the custody of her minor child, where a material issue was whether under all the facts and circumstances in evidence it would be to the best interest of the child that her custody be awarded to plaintiff or defendant, a requested instruction, which ignored this issue, was properly refused. *Id.*

10. Conveyances and contracts in general.—Attorneys who contract with minors, and perform services thereunder, held entitled to reasonable compensation. *Hanlon v. Wheeler* (Civ. App.) 45 S. W. 821.

A female minor eighteen years of age is not liable for damages for breach of a marriage contract. *Wells v. Hardy*, 21 C. A. 454, 51 S. W. 503.

A sale of orphan asylum land to an infant is not voidable only, but absolutely void as against a subsequent actual settler in good faith. *Dupree v. Duke*, 30 C. A. 360, 70 S. W. 561.

An assignment for the benefit of an infant creditor will be protected without his assent thereto being shown. *South Texas Nat. Bank v. Texas & L. Lumber Co.*, 30 C. A. 412, 70 S. W. 768.

Where a father did business in the name of his minor son, and gave a note signed by both for goods purchased, but the son had neither possession nor benefit from the goods, he was not liable. *Memphis Coffin Co. v. Patton* (Civ. App.) 106 S. W. 697.

A deed of a minor is not absolutely void, but only voidable, and, unless he disaffirms the deed within a reasonable time after attaining majority, it is binding upon him. *Stone v. Wolfe*, 50 C. A. 231, 109 S. W. 981; *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

A contract by an infant for the sale of her land held voidable, not void. *Merida v. Cummings* (Civ. App.) 115 S. W. 613.

An infant's contract for the purchase of land, which has been executed by a conveyance, is binding until disaffirmed by a distinct act. *Clemmer v. Price* (Civ. App.) 125 S. W. 604.

An infant's contracts are voidable, except contracts for necessaries and contracts authorized by statute, which are binding. *Id.*

11. **Necessaries.**—Under a law authorizing minor to contract for necessaries, he can engage an attorney to prosecute for personal injuries. *Hanlon v. Wheeler* (Civ. App.) 45 S. W. 821.

The question as to what are necessaries for an infant is one of fact. *Melton v. Katzenstein* (Civ. App.) 49 S. W. 173.

Whether articles purchased by an infant were necessary to make a crop to support himself and family held a mixed question of law and fact. *Id.*

A buggy held not a necessary for an infant. *Heffington v. Jackson & Norton*, 43 C. A. 560, 96 S. W. 108.

12. — **Liability of parent.**—While a parent cannot be charged for necessaries furnished by a stranger for his minor child, except by his express or implied promise to pay, such promise may be inferred from his legal duty to furnish necessaries. *Snell v. Ham* (Civ. App.) 151 S. W. 1077.

If articles furnished to minor children were reasonably necessary for their support and comfort the father's promise to pay therefor would be inferred, in absence of a showing that he was ready to himself supply the children therewith. *Id.*

13. **Fraud of minor.**—Minors are liable for goods obtained by fraud. *Harseim v. Cohen* (Civ. App.) 25 S. W. 977.

14. **Ratification.**—A deed executed by an infant after attaining majority held not a ratification of a deed executed during minority. *Allen v. Anderson & Anderson* (Civ. App.) 96 S. W. 54.

An instrument executed by one who was an infant when his guardian signed an unauthorized power of attorney for him held not a ratification of such unauthorized act. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

An infant, who did not attempt to disaffirm a sale until three years after his majority, will be held to have affirmed it. *Daimwood v. Driscoll* (Civ. App.) 151 S. W. 621.

Where a minor did not ascertain the fact of his father's appropriation of money obtained in the father's settlement as guardian of a claim for injuries to the minor, until he attained his majority and sued to set aside the settlement, his mere unwillingness to theretofore demand such sum from his father or demand rescission of his father's purchase of a farm with the proceeds of the settlement, would not ratify it. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

15. **Avoidance of conveyances or contracts.**—In general.—Infant tenant, abandoning lease, held not liable for rent of premises for time longer than he actually occupied the same. *Peck v. Cain*, 27 C. A. 38, 63 S. W. 177.

A minor may avoid a note executed by him. *Heffington v. Jackson & Norton*, 43 C. A. 560, 96 S. W. 108.

Where an infant, on the removal of her disability by marriage, repudiated a contract for sale of her land, the vendee was entitled to remove improvements or to recover their value, though liable for the rental value and for timber taken. *Merida v. Cummings* (Civ. App.) 115 S. W. 613.

Infant purchasing corporate stock held entitled, before reaching majority, to repudiate transaction and recover sum paid from vendor and any other party who received the fund. *Gage v. Menczer* (Civ. App.) 144 S. W. 717.

Infant, on disaffirming contract of purchase of stock, held entitled to recover sum paid therefor of bank to which the vendor had transferred the money in payment of a debt. *Id.*

If a minor's disabilities had not, at the time, been removed, his appropriation of the proceeds of land purchased by his father out of a settlement of his claim for injuries would not operate to ratify the settlement, if invalid, so as to preclude the minor from having the settlement set aside. *Gulf, C. & S. F. Ry. Co. v. Lemons* (Civ. App.) 152 S. W. 1189.

A sheriff's deed, under foreclosure of a fictitious lien fraudulently claimed by surviving brothers against the interest of their deceased brother's minor heir, held void and subject to attack in a suit brought by the minor, on removal of disability, to recover the land, against the surviving brothers and their grantees. *Newton v. Easterwood* (Civ. App.) 154 S. W. 646.

An infant who purchased land giving negotiable notes in payment held not entitled to take in preference to a superior outstanding title, for he could protect himself by disaffirming his contract and the notes. *Nellius v. Thompson Bros. Lumber Co.* (Civ. App.) 156 S. W. 259.

16. — **Who may take advantage of minority.**—Adult who has received benefits under a contract cannot annul it because the other party was an infant, the contract being beneficial to such infant. *Stringfellow v. Early*, 15 C. A. 597, 40 S. W. 871.

Defendants, in an action against them and an infant tenant for removing goods of such tenant owned by them, held entitled to take advantage of such infant's disaffirmance of the contract on a plea of infancy. *Peck v. Cain*, 27 C. A. 38, 63 S. W. 177.

A minor's deed is voidable only and his minority can only be taken advantage of by him. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

17. — **Time of disaffirming.**—An infant may disaffirm a deed executed by him within a reasonable time after attaining majority, against his grantees or subsequent bona fide purchaser. Such disaffirmance may be by a conveyance by the grantor or his heirs. *Searcy v. Hunter*, 81 T. 644, 17 S. W. 372, 26 Am. St. Rep. 337; *Simpkins v. Searcy*, 10 C. A. 406, 32 S. W. 849, citing *Kilgore v. Jordan*, 17 T. 341; *Stuart v. Baker*, Id. 421; *Bingham v. Barley*, 55 T. 281, 40 Am. Rep. 801.

Where the plea of infancy is filed as soon as infant is made a party, and within less than a month after becoming of age, no question as to promptness in disaffirming the contract can arise. *Peck v. Cain*, 27 C. A. 38, 63 S. W. 177.

Defendant held, under the circumstances, to have disaffirmed a deed executed by her while a minor within a reasonable time after the removal of her disabilities of minority. *Stone v. Wolfe*, 50 C. A. 231, 109 S. W. 981.

An infant's contract for the purchase of land, which has been executed by a conveyance, must be disaffirmed within a reasonable time after he attains his majority. *Clemmer v. Price* (Civ. App.) 125 S. W. 604.

What is a reasonable time for disaffirming an infant's voidable contract is a question of fact for the jury. *Id.*

Transactions by an infant in relation to personal property may be disaffirmed as well before as after majority. *Gage v. Menczer* (Civ. App.) 144 S. W. 717.

The question of what is a reasonable time within which to bring a suit to disaffirm a conveyance made in infancy is one of fact. *Salser v. Barron* (Civ. App.) 146 S. W. 1039.

Where, in an action to disaffirm a conveyance by an infant, plaintiff alleged a purchase of the land with her own personal property, possession thereafter, and her conveyance induced by coercion by her father, and for a consideration paid to her father, and that an action to disaffirm would have been brought before, but for her father's statement that to do so would result in his arrest, and his threats to disown her and not to let her see her mother or brothers, it could not be said, as a matter of law, that plaintiff's failure to institute suit earlier barred her right to disaffirm the conveyance. *Id.*

18. — **What constitutes a disaffirmance.**—A power of sale contained in a deed of trust executed by an infant held not revoked by the marriage of the infant during minority. *Lawder v. Larkin* (Civ. App.) 94 S. W. 171.

An act of disaffirmance of a deed executed during minority must be distinct and unequivocal. *Hatton v. Bodan Lumber Co.* (Civ. App.) 123 S. W. 163.

The prosecution, after reaching majority, of a suit to cancel a contract entered into during minority, is an act of avoidance. *Gage v. Menczer* (Civ. App.) 144 S. W. 717.

19. — **Restoration of consideration.**—Plaintiff, in action to set aside deed executed by him when a minor, held not required to return consideration. *Bullock v. Sprowls* (Civ. App.) 54 S. W. 657.

Minor, who disaffirmed his deed on arriving at his maturity, held not obliged to restore consideration, which had been dissipated by him during his minority. *Bullock v. Sprowls*, 93 T. 188, 54 S. W. 661, 47 L. R. A. 326, 77 Am. St. Rep. 849.

Where one seeks to disaffirm a deed executed during minority, he must restore the consideration. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

Where no part of the purchase money is received by an infant as consideration for a conveyance, he may maintain an action to disaffirm the conveyance without tendering a return of the purchase money. *Salser v. Barron* (Civ. App.) 146 S. W. 1039.

20. — **Estoppel.**—An infant held not bound by an equitable estoppel unless his conduct has been intentional and fraudulent. *Harper v. Utsey* (Civ. App.) 97 S. W. 508.

Where an infant solemnly ratified the sale of land of an executor after reaching maturity, he cannot set it aside for irregularities after the land has greatly increased in value. *Daimwood v. Driscoll* (Civ. App.) 151 S. W. 621.

21. **Injuries to minors.**—Negligence of parents after an injury cannot be imputed to a child of tender years. *Telegraph Co. v. Hoffman*, 80 T. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; *Railway Co. v. Moore*, 59 T. 64, 46 Am. Rep. 265; *Railway Co. v. O'Donnell*, 58 T. 27; *Railway Co. v. Beckworth* (Civ. App.) 32 S. W. 809.

A minor suing by his next friend may recover damages for physical pain and suffering. *Railway Co. v. Malone*, 15 C. A. 56, 38 S. W. 538.

A minor is not entitled to a verdict for damages accruing during his minority if he has a mother living under whose charge he is. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 91 T. 569, 44 S. W. 1067.

An instruction in an action by a minor for personal injury held erroneous, as allowing a recovery for diminished earning capacity during minority. *Galveston, H. & S. A. Ry. Co. v. Jackson*, 31 C. A. 342, 71 S. W. 991.

On appeal in an action for injuries to minor, held, that case must be considered as though the minor were an adult, in so far as concerned his responsibility. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

In an action for injuries to a minor, an instruction with reference to the damages recoverable held not objectionable on the ground that it authorized a recovery of damages recoverable only by the parent. *Cameron Mill & Elevator Co. v. Anderson*, 34 C. A. 105, 78 S. W. 8.

Instruction that, if either father or son failed to use ordinary care, city is not liable for injuries of the son from defective sidewalk, held properly refused. *City of San Antonio v. Talerico* (Civ. App.) 78 S. W. 28.

An infant, in an action against his employer, cannot recover the cost of medical attention furnished him by reason of the injury complained of, unless he alleges and proves facts rendering himself liable therefor. *Bering Mfg. Co. v. Femelat*, 35 C. A. 36, 79 S. W. 869.

Parents being entitled to their minor child's services during his minority, he is not entitled to recover in a personal injury action against his employer for reduced capacity to labor during minority. *National Biscuit Co. v. Scott* (Civ. App.) 142 S. W. 65.

22. **Appointment of guardian ad litem.**—See Arts. 1942, 3534, 3562.

23. **Suits by next friend.**—See Arts. 2167 et seq., and notes.

24. **Limitation of actions against minors.**—See Arts. 5634, 5708.
25. **Pleading.**—See, also, Chapters 2, 3 and 8 of Title 37.  
 Minority cannot be set up in defense of a claim where not pleaded. *Foster v. Eoff*, 19 C. A. 405, 47 S. W. 399.
26. **Evidence.**—In an action to foreclose a chattel mortgage, evidence held sufficient to support a finding that the mortgagor was of age at the time the mortgage was executed. *Johnson v. Brown* (Civ. App.) 65 S. W. 485.  
 In a suit to set aside a judgment rendered against plaintiff during minority, canceling a deed to him, held error to exclude evidence tending to show that after plaintiff reached his majority he lived in the community of the land and knew that his former grantor was improving the same. *Johnson v. Johnson*, 38 C. A. 385, 85 S. W. 1023.  
 In an action against a minor on a note given for goods purchased by his father in a business transacted in the minor's name, evidence held to sustain a finding that the minor had no knowledge of the transaction and was not guilty of fraud. *Memphis Coffin Co. v. Patton* (Civ. App.) 106 S. W. 697.  
 In a suit on a note against a minor, evidence considered, and held sufficient to sustain a verdict for plaintiff on the issue of fraud and minority set up by defendant. *Clayton v. Ingram* (Civ. App.) 107 S. W. 880.  
 A defendant relying on plaintiff's minority to avoid a contract on which suit is based must allege and prove it. *Baldwin v. Salgado* (Civ. App.) 135 S. W. 608.  
 Where property was partitioned to a minor, it would be presumed that he was of age when he subsequently conveyed it to another. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.
27. **Operation and effect of judgment against infant.**—A judgment against an infant is voidable only, and is binding until set aside by a direct attack, even where he was sued and a guardian ad litem appointed for him under a wrong given name. *McGhee v. Romatka*, 19 C. A. 397, 47 S. W. 291.  
 Where a judgment was recovered against an infant for the balance due on the price of an automobile sold to him, which he paid, he could not recover the same on disaffirming the contract immediately after becoming of age. *Grogan v. Spaulding* (Civ. App.) 155 S. W. 1014.  
 Infants may sue and be sued, and are as much bound by a judgment or decree as if they were adults. *Id.*
28. **Setting aside judgment against minor.**—A judgment denying an application to vacate a judgment against an infant, made by the infant after his coming of age, is conclusive of his right to attack such judgment. *McGhee v. Romatka*, 19 C. A. 397, 47 S. W. 291.  
 A petition by a minor to set aside a judgment against him held sufficient, on proof of the allegations, to authorize its vacations. *Wallis v. Stuart*, 92 T. 568, 50 S. W. 567.  
 The mere knowledge of a minor of the pendency of a suit against her does not preclude her from thereafter attacking the judgment rendered in the suit. *Stephens v. Hewitt* (Civ. App.) 77 S. W. 229.  
 In a suit to set aside a judgment recovered against plaintiff during his minority, held that the question whether he had used reasonable diligence in bringing the suit after he had attained majority was one for the jury. *Johnson v. Johnson*, 38 C. A. 385, 85 S. W. 1023.
29. **Guardian and ward.**—See Title 64.

## TITLE 95

## NAME—CHANGE OF

<p><b>Art.</b> 5951. Application for change of name to district court. 5952. Minors apply by guardian.</p>	<p><b>Art.</b> 5953. Not to injure third parties. 5954. In divorce suits, name may be changed.</p>
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**Article 5951. [377] [336] Application for change of name to district court.**—When any person shall desire to change either his Christian or surname, or both, and to adopt another name instead thereof, he shall file his application in the district court of the county of his residence, setting forth the causes which induce him to desire a change of name and to adopt another; whereupon the judge of the said court, if in his opinion it should be for the interest or benefit of the applicant to change his name and to adopt another, shall by a judgment of said court order that the adopted name of the party shall be substituted for the original name. [Act Feb. 5, 1856. P. D. 32.]

See *Wiener v. Zweib*, 105 T. 262, 141 S. W. 771, 147 S. W. 867.

**Manner of designating parties to suits.**—See notes under Art. 1824 and at end of Chapter 5 of Title 87.

**Art. 5952. [378] [337] Minors by guardian.**—Whenever it shall be to the interest of any minor under the age of twenty-one years to change his name and to adopt another name instead of the original name, the guardian or next friend of said minor shall file his application in the district court of the county of the said minor's residence, setting forth the causes which induced the minor to desire to change the original name, accompanied with the full name which the minor wishes to adopt; whereupon the judge of said court, if the facts contained in the application shall satisfy him that it will be for the benefit and interest of the minor to change his name and to adopt another, shall grant authority to change his original name and to adopt another instead thereof. [Id. P. D. 33.]

**Art. 5953. [379] [338] Not to injure third persons.**—Whenever any person shall change his original name and adopt another instead thereof, it shall not operate so as to release the person from any responsibility which he may have incurred by the original name, nor shall it operate by said change of name to defeat or destroy any rights or property or action which the person had or held in his original name. [Id. P. D. 34.]

**Art. 5954. [380] [339] In divorce suits name may be changed.**—In suits for divorce, the court may, in its discretion, on the final disposition of the case, enter a decree changing the name of either party to said suit, if such change of name is specially prayed for in the pleadings of such party.

## TITLE 96

## NAVIGATION DISTRICT

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|-------|-----------------------------------------------------------------------------------------------------------|-------|---------------------------------------------------------------------------------|
| Art.  | Districts may include what.                                                                               | Art.  | Record books for bonds to be kept; duties and fees of clerk.                    |
| 5955. | Application to commissioners' court to contain what; notice given.                                        | 5978. | Bonds to be sold, how; limitations on sale.                                     |
| 5956. | Navigation board in cities and towns with special charters.                                               | 5979. | Chairman of navigation board to give bond.                                      |
| 5957. | Notice of hearing before navigation board.                                                                | 5980. | Expense and costs of proceedings to establish districts, how provided.          |
| 5958. | Proceedings to be recorded by county clerk.                                                               | 5981. | Taxes for interest and sinking fund.                                            |
| 5959. | Duties imposed without compensation.                                                                      | 5982. | Available sinking fund, how invested.                                           |
| 5960. | Objections and contest on hearing of application.                                                         | 5983. | Tax proceedings; tax assessors compensation under this chapter.                 |
| 5961. | Finding of board at hearing.                                                                              | 5984. | Compensation of tax collector; additional bond to be given.                     |
| 5962. | Election; form of ballot.                                                                                 | 5985. | Delinquents; tax sales.                                                         |
| 5963. | Election notice to contain, what.                                                                         | 5986. | County treasurer; duties under this chapter.                                    |
| 5964. | Election to conform to general election law.                                                              | 5987. | Treasurer to give bond; compensation of.                                        |
| 5965. | Electors and form of oath before voting.                                                                  | 5988. | Condemnation proceedings.                                                       |
| 5966. | Commissioners' court to canvass returns and declare result of election; form of order.                    | 5989. | May acquire property for navigation purposes.                                   |
| 5967. | Navigation commissioners, how appointed; qualification, compensation, term of office.                     | 5990. | Commissioners may enter land to make surveys, etc.                              |
| 5968. | Oath of commissioners.                                                                                    | 5991. | Work, how done; contracts, how let when U. S. government fails to act.          |
| 5969. | Bond of commissioners.                                                                                    | 5992. | Bids for work, how awarded.                                                     |
| 5970. | Organization of commission; quorum.                                                                       | 5993. | Contracts for work to be in writing and filed.                                  |
| 5971. | Engineers appointed; duties, compensation; U. S. government aid and co-operation; proceedings in case of. | 5994. | Contractor's bond.                                                              |
| 5972. | Commissioners' court to issue bonds, when and how.                                                        | 5995. | Work to be done under supervision of engineer; his report.                      |
| 5973. | Bonds, when to issue; limitations as to assessments on valuation.                                         | 5996. | Commissioners to inspect work; payment, how made.                               |
| 5974. | Form, denomination and term of bonds.                                                                     | 5997. | Commissioners' report of work to contain, what.                                 |
| 5975. | Attorney general to certify to validity of bonds.                                                         | 5998. | Commissioners to employ assistant engineers and legal counsel; compensation of. |
| 5976. | Effect of certificate of attorney general on bonds.                                                       | 5999. | Unlawful for officers to be interested in contracts.                            |
| 5977. |                                                                                                           | 6000. | Commission may sue and be sued.                                                 |
|       |                                                                                                           | 6001. |                                                                                 |

**Article 5955. Districts may include, what.**—One or more districts may be established in the several counties of this state, to be known as navigation districts, in the manner hereinafter provided; and such districts may or may not include within their boundaries and limits villages, towns and municipal corporations, or any parts thereof. Such navigation districts, when so established, may make improvement of rivers, bays, creeks, streams and canals running or flowing through such districts, or any part thereof, and may construct and maintain canals and waterways to permit of navigation or in aid thereof, may issue bonds in payment thereof as hereinafter provided. [Acts 1909, p. 32, sec. 1.]

**Art. 5956. Application to commissioners' court to contain what; notice given.**—Upon the presentation to the county commissioners' court of any county of this state of a petition, accompanied by the deposit provided for in article 5981 of this chapter, signed by twenty-five of the resident property taxpayers, or in the event there are less than seventy-five resident property taxpayers in the proposed district, then by one-third of such resident property taxpayers of any proposed navigation district, praying for the establishment of a navigation district, and setting forth the boundaries of the proposed district, accompanied by a map thereof, the general nature of the improvement or improvements proposed, and an estimate of the probable cost thereof, and praying for



the issuance of bonds and levy of tax in payment thereof, and designating a name for such navigation district, which name shall include the name of the county, said petitioners shall make affidavit to accompany said petition of their said qualification; and the said commissioners' court shall, at the same session when said petition is presented, set same down for hearing at some regular term of said court, or at some special session of said court called for the purpose, not less than thirty nor more than sixty days from the presentation of said petition, and shall order the clerk of said court to give notice of the date and place of said hearing by posting a copy of said petition, and the order of the court thereon, in five public places in said county, one of which shall be at the court house door of said county, and four of which shall be within the limits of said proposed navigation district, which said notices shall be posted not less than twenty days prior to the time set for the hearing. The said clerk shall receive as compensation for such services one dollar for each such notice and five cents per mile for each mile necessarily traveled in posting such notices. [Id. sec. 2.]

**Art. 5957. Navigation boards in cities and towns with special charters.**—In the event the boundaries of the proposed district shall include a city or cities, or a part or parts thereof, acting under special charter granted by the legislature, the hearing of said petition, hereinafter provided for, shall be had before the county judge and members of the commissioners' court and the mayor and aldermen or commissioners, as the case may be, of said city or cities; and said persons shall constitute a board to be known and designated as the navigation board, to pass upon the petition aforesaid. Each individual member of the said board shall be entitled to a vote. A majority in number of the individuals composing said board shall constitute a quorum, and the action of a majority of the quorum shall control. [Id.]

**Art. 5958. Notice of hearing before navigation board.**—In the event, the hearing of said petition shall be had before the navigation board, the commissioners' court of said county shall set the petition down for hearing not less than thirty nor more than sixty days from the date of the presentation of said petition without reference to any term of the commissioners' court, but said hearing shall be held at the regular place of meeting of the commissioners' court, and notice shall be given of the hearing in the manner and for the time as hereinbefore provided. [Id.]

**Art. 5959. Proceedings to be recorded by county clerk.**—The county clerk shall enter and record the proceedings of the navigation board in a record book kept for this purpose, which record shall be a public archive. [Id.]

**Art. 5960. Duties imposed without compensation.**—The duties and powers herein conferred upon the county judge and members of the commissioners' court, and upon the mayor and aldermen or commissioners of cities, and upon the county clerk and other officers, are made a part of the legal duty of said officials, which they shall render and perform without additional compensation, unless otherwise provided herein. [Id.]

**Art. 5961. Objections and contest on hearing.**—Upon the day set by said county commissioners for the hearing of said petition, any person who has taxable property within the proposed district, or who may be affected thereby, may appear before the said court, or navigation board, as the case may be, and contest the creation of said district, or contend for the creation of said district, and may offer testimony in favor of or against the boundaries of the said district, to show that the proposed improvement or improvements would or would not be of any public utility and would or would not be feasible or practicable, and the probable cost of such improvement or improvements, or as to any

other matter pertaining to the proposed district. Said county commissioners' court, or navigation board, shall have exclusive jurisdiction to hear and determine all contests and objections to the creation of such districts, and all matters pertaining to the creation and establishment of the same, and shall have exclusive jurisdiction in all subsequent proceedings of the district when organized, except as hereinafter provided, and may adjourn hearing on any matter connected therewith from day to day; and all judgments or decisions rendered by said court, or navigation board, in relation thereto shall be final, except as herein otherwise provided. [Id. sec. 3.]

**Art. 5962. Finding of board at hearing.**—If, at the hearing of said petition, it shall appear to the commissioners' court, or navigation board, as the case may be, that the proposed improvement is feasible and practicable, that it would be a public benefit and a public utility; and, if the court, or navigation board, as the case may be, shall approve the boundaries of the proposed district as set out in said petition, then the court, or navigation board, shall so find, and shall also find the amount of money necessary for said improvement or improvements and for all expenses incident thereto, and shall determine whether to issue bonds for said full amount or in the first instance for a less amount, and shall specify the amount of bonds to issue, the length of time the bonds shall run, and the rate of interest said bonds shall bear, and cause its findings to be recorded in the records of the commissioners' court, or minutes of the navigation board, as the case may be. If the court, or navigation board, shall find that the proposed improvement is feasible and practicable, that it would be a public benefit and a public utility, but does not approve the boundaries of the proposed district as set forth in the petition, the court, or navigation board, shall so find, and shall also find the amount of money necessary for said improvement or improvements, and for all expenses incident thereto, and shall determine whether to issue bonds for said full amount or in the first instance for a less amount, and shall specify the amount of bonds to issue, the length of time the bonds shall run, and the rate of interest said bonds shall bear, and cause its findings to be entered of record, together with a map thereof. Providing, however, that before any change is made by said court, or navigation board, as the case may be, of the boundaries, notice and a hearing thereof shall be given and had as provided for in article 5956 of this chapter. If the court, or navigation board, shall find that the proposed improvement is not feasible or practicable, or that it would not be a public benefit or public utility, and that the establishment of such navigation district is therefore unnecessary, then the court, or navigation board, shall enter such findings of record and dismiss the petition at the cost of petitioners, but the order dismissing said petition shall not prevent or conclude the presentation at a later date of a similar petition. [Id. sec. 4.]

**Art. 5963. Election; form of ballot.**—After the hearing upon the petition, as herein provided, if the court, or navigation board, as the case may be, shall find in favor of the petitioners for the establishment of a navigation district according to the boundaries as set out in said petition, or as changed or modified as above provided by the said court, or navigation board, the commissioners' court of said county shall order an election, in which order provision shall be made for submitting to the qualified property taxpaying voters resident in said district whether or not such navigation district shall be created, and whether or not a tax shall be levied sufficient to pay the interest and provide a sinking fund sufficient to redeem said bonds at maturity, said order specifying the amount of bonds to be issued, together with the length of time the bonds shall run, and the rate of interest said bonds shall bear as said matters have been determined by the commissioners' court, or naviga-

tion board, as the case may be, under the provisions of article 5962 of this chapter. Said election to be held within such proposed navigation district at the earliest legal time; at which election there shall be submitted the following propositions and none other: "For the navigation district, and issuance of bonds and levy of tax in payment thereof;" "Against the navigation district, and issuance of bonds and levy of tax in payment thereof." Provided, that said bonds shall not exceed in amount one-fourth of the assessed valuation of the real property of such district as made by the last annual assessment thereof for state and county taxation. [Id.]

**Art. 5964. Election notice.**—Notice of such election, stating the time and place of holding the same, shall be given by the clerk of the county court by posting notices thereof in four public places in such proposed navigation district, and one at the court house door of the county in which such district is situated, for thirty days prior to the date set for the election. Such notices shall contain the proposition to be voted upon as set forth in article 5963 of this chapter, and shall also specify the purpose for which said bonds are to be issued, and the amount of said bonds, and shall contain a copy of the order of the court ordering the election. [Id. sec. 6.]

**Art. 5965. Election to conform to general election law.**—The manner of conducting said election shall be governed by the election laws of the state of Texas, except as herein otherwise provided. None but resident property taxpayers, who are qualified voters of said proposed district, shall be entitled to vote at any election on any question submitted to the voters thereof by the county commissioners' court at such election. The county commissioners' court shall create and define, by an order of the court, the voting precincts in the proposed navigation district, and shall name a polling place or places within said precincts, taking into consideration the convenience of the voters in the proposed navigation district, and shall also select and appoint the judges and other necessary officers of the election, and shall provide one and one-half times as many ballots as there are qualified resident property tax-paying voters within such navigation district. Said ballot shall have printed thereon the words and none others: "For the navigation district, and issuance of bonds and levy of tax in payment thereof;" "Against the navigation district, and issuance of bonds and levy of tax in payment thereof." [Id. sec. 7.]

**Art. 5966. Electors; form of oath before voting.**—Every person who offers to vote in any election held under the provisions of this chapter shall first take the following oath before the presiding judge of the polling place wherein he offers to vote, and the presiding judge is hereby authorized to administer same: "I do solemnly swear (or affirm) that I am a qualified voter of . . . . . county, and that I am a resident property taxpayer of the proposed navigation district voted on at this election, and I have not voted before at this election." [Id. sec. 8.]

**Art. 5967. Commissioners' court to canvass returns; declare result.**—Immediately after the election, the presiding judge at each polling place shall make return of the result in the same manner as provided for in elections for state and county officers, and return the ballot boxes to the county clerk, who shall keep same in a safe place and deliver them, together with the returns from the several polling places, to the commissioners' court at its next regular session, or special session called for the purpose of canvassing the vote, and the county commissioners shall, at such session, canvass the vote; and, if it be found that a two-thirds majority of those voting at such election shall have been cast in favor of the navigation district and the issuance of bonds and levy of tax, then the court shall declare the result of said election to be in favor of

said navigation district, and shall enter same in the minutes of the court as follows:

"Commissioners' court of ..... county, Texas ..... term, A. D. ...., in the matter of petition of ..... and ..... others, praying for the establishment of a navigation district, and issuance of bonds and levy of taxes in said petition fully described and designated by the name of ..... Navigation District ..... Be it known that an election called for that purpose in said district, held on the .... day of ....., A. D. ...., a two-thirds majority of the resident property taxpayers voting thereon voted in favor of the creation of said navigation district, and the issuance of bonds and the levy of a tax. Now, therefore, it is considered and ordered by the court that said navigation district be, and the same is hereby established by the name of ..... Navigation District, and that the bonds of said district in the amount of ..... dollars be issued, and a tax of ..... cents on the hundred dollars of valuation, or so much thereof as may be necessary, be levied upon all property within said navigation district, whether real, personal, mixed or otherwise, sufficient in amount to pay the interest on such bonds and provide a sinking fund sufficient to redeem them at maturity, and that if said tax shall at any time become insufficient for such purposes, same shall be increased until same is sufficient. The metes and bounds of said district, being as follows, to wit: [Giving the metes and bounds]. [Id. sec. 9.]

**Art. 5968. Navigation commissioners, how appointed; qualifications; compensation, term of office.**—After the establishment of any navigation district, as herein provided, the commissioners' court, or navigation board, as the case may be, shall appoint three navigation and canal commissioners, all of whom shall be residents of the proposed navigation district, who shall be freehold property taxpayers and legal voters of the county, whose duties shall be as hereinafter provided, and who shall each receive for their services such compensation as may be fixed by the commissioners' court and made of record. Said navigation and canal commissioners shall hold office for the term of two years, and until their successors have qualified, unless sooner removed by a majority vote of the county commissioners, or navigation board, as the case may be, for malfeasance or nonfeasance in office. Upon the expiration of the term of office of said navigation and canal commissioners, the commissioners' court, or navigation board, as the case may be, shall appoint their successors by a majority vote. Should any vacancy occur through the death or resignation or otherwise of any commissioner, the same shall be filled by the commissioners' court, or the navigation board, as the case may be. [Id. sec. 10.]

**Art. 5969. Oath of commissioners.**—Before entering upon their duties, all navigation and canal commissioners shall take and subscribe before the county judge an oath to faithfully discharge the duties of their office without favor or partiality, and to render a true account of their doings to the court, or navigation board, by which they are appointed whenever required to do so, which oath shall be filed by the county clerk and preserved as a part of the records of said navigation district. [Id. sec. 11.]

**Art. 5970. Bond of commissioners.**—Before entering upon their duties, each of the navigation and canal commissioners shall make and enter into a good and sufficient bond in the sum of one thousand dollars, payable to the county judge for the use and benefit of said navigation district, and conditioned upon the faithful performance of their duties. [Id. sec. 12.]

**Art. 5971. Organization; quorum.**—Said commissioners shall also organize by electing one of their number chairman and one secretary, and two of the commissioners shall constitute a quorum, and a concur-

rence of two shall be sufficient in all matters pertaining to the business of said district. [Id. sec. 13.]

**Art. 5972. Engineers appointed; duties; compensation; U. S. government aid; proceedings in case of.**—Said commissioners shall have authority to employ a competent engineer, whose term of office shall be at the will of said commissioners, and who shall receive such compensation as may be determined by said commissioners. It shall be the duty of the engineer to make all necessary surveys, examinations, investigations, maps, plans and drawings with reference to the proposed improvements. He shall make estimate or estimates of the cost of same, shall supervise the work of improvement, and shall do and perform all such duties as may be required of him by the commissioners. Provided, that if the river, creek, stream, bay, canal, or waterway, to be improved is navigable or the improvement proposed be of such nature as requires the permission or consent of the government of the United States, or any department or officer of the government of the United States, the navigation and canal commissioners shall be authorized to obtain the required permission or consent of the government of the United States, or any proper officer or department thereof; and, in lieu of the employment of an engineer as herein provided, or in addition thereto, the navigation and canal commissioners shall have power to adopt any survey of the river, creek, canal, stream, bay, or waterway theretofore made by the government of the United States, or any department thereof, and to arrange for surveys, examinations and investigations of the proposed improvement, and for supervision of the work of improvement by the government of the United States, or the proper department or officer thereof; provided, that said commissioners shall have full power and authority to co-operate and act with the government of the United States, or any officer or department thereof, in any and all matters pertaining to or relating to the construction and maintenance of said canals, and the improvement and navigation of all such navigable rivers, bays, creeks, streams, canals, and waterways, whether by survey, work or expenditure of money made or to be made either by said navigation and canal commissioners, or by said government of the United States, or any proper officer or department thereof, or by both; and, to the end that the said government of the United States may aid in all such matters, the said commissioners shall have authority to agree and consent to the said government of the United States entering upon and taking management and control of said work, in so far as it may be necessary or permissible under the laws of the United States, and the regulations and orders of any department thereof. [Id. sec. 14.]

**Art. 5973. Commissioners' court to issue bonds, when and how.**—When said commissioners shall have determined the cost of the proposed improvement or improvements, all of the expenses incident thereto and cost of maintenance thereof, they shall certify to the commissioners' court of the county in which such district is situated the amount of bonds necessary to be issued; and thereupon the said court, at a regular or special meeting, shall make an order directing the issuance of navigation bonds for such navigation district in the amount so certified; provided, that the amount of bonds shall not exceed the amount authorized by the election theretofore held. In the event the proceeds of bonds issued by such navigation district should be insufficient to complete the proposed improvement or construction, or in the event said commissioners shall determine to make other and further construction or improvements, or shall require additional funds with which to maintain the improvements made, they shall certify to the commissioners' court of the county in which such district is situated the necessity for an additional bond issue, stating the amount required and the purpose of the same, the rate of interest of said bonds and the time for which they are to run;

whereupon the commissioners' court shall issue such bonds, unless the amount previously authorized shall have been exhausted, in which case the commissioners' court shall order an election on the issuance of said bonds to be held within such navigation district at the earliest possible legal time, and in the manner hereinbefore provided for the original issue of bonds, at which election there shall be submitted the following propositions and none other: "For the issuance of bonds, and levy of tax in payment thereof;" "Against the issuance of bonds, and levy of tax in payment thereof." Notices of such election shall be given as provided in article 5964 of this chapter; and the election shall be held and conducted in the manner provided in articles 5965 and 5966 of this chapter. Only those who are qualified property taxpaying voters, as provided in this chapter, shall vote at such election, and the returns of such election shall be canvassed as provided in article 5964 [5967] of this chapter. [Id. sec. 15.]

**Art. 5974. Bonds, when issued; assessments, limitation of.**—If, upon a canvass of the vote, the commissioners' court shall determine that a two-thirds majority of the votes cast at said election shall have been cast in favor of the issuance of bonds and levy of tax, the said court shall make an order directing the issuance of said bonds and levy of tax; provided, however, that the outstanding bonds and the additional bonds so ordered shall not exceed in amount one-fourth of the assessed value of the real property in such district, as shown by the last annual assessment thereof made for state and county taxation. [Id. sec. 15a.]

**Art. 5975. Bonds, form of; denominations, term.**—All bonds issued under the provisions of this chapter shall be issued in the name of the navigation district, signed by the county judge and attested by the clerk of the county court, with the seal of the commissioners' court affixed thereto, and such bonds shall be issued in denominations of not less than one hundred dollars nor more than one thousand dollars each, and such bonds shall bear interest at a rate not to exceed five per cent per annum. Such bonds and interest shall by their terms be made payable at the county treasurer's office of the county in which such navigation district is located, or elsewhere, as may be fixed by said navigation and canal commissioners; and no bonds shall be made payable more than forty years after date. [Id. sec. 16.]

**Art. 5976. Attorney general to certify to validity of.**—Any navigation district in the state of Texas desiring to issue bonds in accordance with this chapter shall, before such bonds are offered for sale, forward to the attorney general a copy of the bonds to be issued, a certified copy of the order of the commissioners' court levying the tax, copy of the order of the commissioners' court levying the tax to pay interest and provide a sinking fund, and a statement of the total bonded indebtedness of such navigation district as such, including the series of bonds proposed and the assessed value of property for the purpose of taxation, as shown by the last official assessment by the county, together with such other information as the attorney general may require; whereupon it shall be the duty of the attorney general to carefully examine said bonds in connection with the facts and the constitution and laws on the subject of the execution of such bonds; and, if as the result of such examination the attorney general shall find that such bonds were issued in conformity with the constitution and laws, and that they are valid and binding obligations upon such navigation district by which they are issued, he shall so officially certify. [Id. sec. 17.]

**Art. 5977. Certificate of attorney general; effect of.**—When said bonds have been examined by the attorney general, and his certificate issued to that effect, they shall be registered by the state comptroller, in a book to be kept for that purpose; and the certificate of the attorney general to the validity of such bonds shall be preserved of record for

use in the event of litigation. Such bonds, after being approved by the attorney general, and after having been registered in the comptroller's office as herein provided, shall thereafter be held in every action, suit or proceeding in which their validity is or may be brought in question, prima facie valid and binding obligations. And, in every action brought to enforce collection of said bonds or interest thereon, the certificate of the attorney general, or a duly certified copy thereof, shall be admitted and received as prima facie evidence of the validity of such bonds, together with the coupons thereto attached; provided, that the only defense that can be offered against the validity of said bonds or coupons shall be forgery or fraud. But this article shall not be construed to give validity to any such bonds or coupons as may be issued in excess of the limit fixed by the constitution, or contrary to its provisions, but all such bonds shall, to the extent of such excess, be held void. [Id. sec. 18.]

**Art. 5978. Record of bonds to be kept; duties and fees of clerk.**—Before issuing any bonds under the provisions of this chapter, the county commissioners' court shall provide a well bound book, in which a record shall be kept by the county clerk of all bonds issued, with their numbers, amount, rate of interest, and date of issue, when due, where payable, and amount received for the same, and the annual rate per cent assessment made each year to pay the interest on said bonds and provide a sinking fund for their payment. And said book shall at all times be open to the inspection of all parties interested in said district, either as taxpayers or bond holders or otherwise; and, upon the payment of any bond, an entry thereof shall be made in said book. The county clerk shall receive for his services in recording all bonds and other instruments of the navigation district the same fees as provided by law for other like records. [Id. sec. 19.]

**Art. 5979. Bonds sold, how; limitations on sale.**—When such bonds have been registered, as provided for in the preceding article of this chapter, the chairman of the navigation and canal commission shall offer for sale and sell said bonds on the best terms and for the best price possible, but none of said bonds shall be sold for less than the face par value thereof and accrued interest thereon; and, as fast as said bonds are sold, all moneys received therefor shall be paid to the county treasurer, and shall by him be placed to the credit of such navigation district. [Id. sec. 20.]

**Art. 5980. Chairman to give bond.**—Before the said chairman of the navigation and canal commissioners shall be authorized to sell any of the navigation bonds, he shall execute a good and sufficient bond, payable to the county judge or his successors in office, to be approved by the county commissioners' court of said county, for an amount not less than the amount of the bonds issued, conditioned upon the faithful discharge of his duties. [Id. sec. 21.]

**Art. 5981. Cost of proceedings to establish district; how provided.**—All expenses of any kind, after the filing of the original petition, necessarily incurred in connection with the creation, establishment and maintenance of any navigation district organized under the provisions of this chapter, shall be paid out of the "Construction and Maintenance Fund" of such navigation district; which fund shall consist of all moneys received from the sale of bonds and all other amounts received by said district from whatever source, except the tax collections applied to the sinking fund and payment of interest on the navigation bonds; provided, that, should the proposition of the creation of such navigation district and issuance of bonds be defeated at the election called to vote upon same, then all expenses up to and including said election shall be paid in the following manner: When the original petition praying for the establishment of a navigation district is filed with the county commission-

ers' court, it shall be accompanied by five hundred dollars in cash, which shall be deposited with the clerk of said county commissioners' court, and by him held until after the result of the election for the creation of said navigation district has been declared and entered of record by the commissioners' court, as hereinbefore provided; and, should the result of said election be in favor of the establishment of said district, then the said five hundred dollars shall be by said clerk returned to the signers of said original petition, or their agent or attorney; but, should the result of said election be against the establishment of said district, then the said clerk shall pay out of the said five hundred dollars, upon vouchers signed by the county judge, all costs and expenses pertaining to the said proposed district up to and including the said election, and shall return the balance, if any, of said five hundred dollars to the signers of said original petition, or their agent or attorney. [Id. sec. 22.]

**Art. 5982. Taxes for interest and sinking fund.**—Whenever any such navigation district bonds shall have been voted, the commissioners' court shall levy and cause to be assessed and collected improvement taxes upon all property within said navigation district, whether real, personal, mixed or otherwise, and sufficient in amount to pay the interest on such bonds, together with an additional amount to be annually placed in a sinking fund sufficient to discharge and redeem said bonds at their maturity. [Id. sec. 23.]

**Art. 5983. Available sinking fund, how invested.**—If advisable, the sinking fund shall, from time to time, be invested by the commissioners' court of the county in such county, municipal, district or other bonds as shall be approved by the attorney general of the state. [Id.]

**Art. 5984. Tax proceedings; compensation of assessor.**—The county commissioners' court shall provide all necessary additional books for the use of the assessor and collector of taxes and the county clerk for such navigation district, and charge the cost of same to the said navigation district. It shall be the duty of the county tax assessor, when ordered to do so by the commissioners' court, to assess all property within such navigation district and list the same for taxation in the books or rolls furnished him by said commissioners' court for that purpose, and return said books or rolls at the same time when he returns the other books or rolls of the state and county taxes for correction and approval; and, if the said commissioners' court shall find said books or rolls correct, they shall approve the same, and, in all matters pertaining to the assessment of property for taxation in said district, the tax assessor and board of equalization of the county in which said district is located shall be authorized to act, and shall be governed by the laws of Texas for assessing and equalizing property for state and county taxes, except as herein provided. All taxes authorized to be levied by this chapter shall be a lien upon the property upon which said taxes are assessed, and said taxes may be paid and shall mature and be paid at the time provided by the laws of this state for the payment of state and county taxes; and all the penalties provided by the laws of this state for the non-payment of state and county taxes shall apply to all taxes authorized to be levied by this chapter. The tax assessor shall receive for said services such compensation as the said navigation and canal commissioners shall deem proper; provided, that said county assessor shall in no event be allowed more than he is now allowed by law for the like services. Should the tax assessor fail or refuse to comply with the orders of the commissioners' court requiring him to assess and list for taxation all the property in such navigation districts, as herein provided, he shall be suspended from the further discharge of his duties by the commissioners' court of his county, and he shall be removed from office in the mode prescribed by law for the removal of county officers. [Id. sec. 24.]



**Art. 5985. Compensation of tax collector; additional bond required.**—The tax collector of the county shall be charged by the county commissioners' court with the assessment rolls of the navigation district, and he shall be allowed no more compensation for the collection of said taxes than he is now allowed for the collection of other taxes, same to be fixed by the navigation and canal commissioners. The county commissioners' court shall require the tax collector of the county to give an additional bond or security in such a sum as they may deem proper and safe to secure the collection of said taxes; and, in all matters pertaining to the collection of taxes levied under the provisions of this chapter, the tax collector shall be authorized to act and shall be governed by the laws of Texas for the collection of state and county taxes, except as herein provided; and suits may be brought for the collection of said taxes and the enforcement of the tax liens created by this chapter. Should any collector of taxes fail or refuse to give such additional bond or security, as herein provided, when requested by the commissioners' court, within the time prescribed by law for such purposes, he shall be suspended from office by the commissioners' court of his county, and immediately thereafter be removed from office in the mode prescribed by law. [Id. sec. 25.]

**Art. 5986. Delinquents; tax sales.**—It shall be the duty of the tax collector to make a certified list of all delinquent property upon which the navigation tax has not been paid, and return the same to the county commissioners' court, which shall proceed to have the same collected by the sale of such delinquent property in the same manner, both by suit and otherwise, as is now provided for the sale of property for the collection of state and county taxes; and, at the sale of any property for any delinquent tax, the navigation and canal commissioners may become the purchasers of the same for the benefit of the navigation district. [Id. sec. 26.]

**Art. 5987. County treasurer; duties.**—It shall be the duty of the county treasurer to open an account with the navigation district, and to keep an accurate account of all moneys received by him belonging to such district and of all amounts paid out by him. He shall pay out no money, except upon a voucher signed by the chairman or any two of the said navigation and canal commissioners, and he shall carefully preserve on file all orders for the payment of money; and, as often as required by the said commissioners, or the county commissioners' court, he shall render a correct account to them of all matters pertaining to the financial condition of such district. [Id. sec. 27.]

**Art. 5988. Treasurer to give bond; compensation.**—The county treasurer shall execute a good and sufficient bond, payable to the navigation and canal commissioners of such district, in a sum equal to twice the amount of bonds issued, conditioned for the faithful performance of his duty as treasurer of such district, which bond shall be approved by said commissioners, and the treasurer shall be allowed such compensation for his services as such treasurer as may be determined by said commissioners, not exceeding the same per cent as is now allowed by the county for his services as county treasurer. [Id. sec. 28.]

**Art. 5989. Condemnation proceedings.**—The right of eminent domain is hereby conferred upon all navigation districts established under the provisions of this chapter for the purpose of condemning and acquiring the right of way over and through any and all lands, private or public, except property used for cemetery purposes, necessary for the improvement of any river, bay, creek, or stream, and the construction and maintenance of any canal or waterway, and for any and all purposes authorized by this chapter. All such condemnation proceedings shall be instituted under the direction of the navigation and canal commissioners, and in the name of the navigation district, and the as-

sessing of damages shall be in conformity to the statutes of the state of Texas for condemning and acquiring the right of way by railroads; provided, that no appeal from the finding and assessment of damage by the commissioners appointed for that purpose shall have the effect of causing a suspension of work by the navigation commissioners in prosecuting the work of improvement in all of its details; provided, that no right of way can be condemned through any part of an incorporated city or town without the consent of the lawful authorities of such city or town. [Id. sec. 29.]

**Art. 5990. May acquire property for navigation purposes.**—The navigation and canal commissioners of any district are hereby empowered to acquire the necessary right of way and property of any kind for all necessary improvements contemplated by this chapter by gift, grant, purchase or condemnation proceedings. [Id. sec. 30.]

**Art. 5991. Commissioners may enter lands to make surveys.**—The navigation and canal commissioners of any district, and the engineers, from the time of their appointment, are hereby authorized to go upon any lands lying within said district for the purpose of examining the same, making plans, surveys, maps and profiles, together with all necessary teams, help, tools and instruments, without subjecting themselves to action of trespass. [Id. sec. 31.]

**Art. 5992. Work, how done; contracts, how let when U. S. government fails to act.**—If the improvement or improvements be not carried out and performed by the government of the United States, as herein provided, the contract or contracts for such improvement or improvements shall be let by the navigation and canal commissioners, and the same shall be awarded to the lowest and best responsible bidder, after giving notice by advertising the same in one or more newspapers of general circulation in the state of Texas once a week for four consecutive weeks, and by posting notices for at least thirty days in five public places in the county, one of which shall be at the court house door, and at least two of which shall be within said navigation district. Nothing herein contained shall prevent the making of more than one improvement, and where more than one improvement is to be made, the contract may be let separately for each or one contract for all such improvements. [Id. sec. 32.]

**Art. 5993. Bids for work, how awarded.**—Any person, corporation, or firm, desiring to bid on the construction of any work advertised for as provided under the preceding article of this chapter, shall, upon application to the navigation and canal commissioners, be furnished the survey, plans and estimates for the said work, and all bids or offers for any of such work shall be in writing and sealed and delivered to the chairman of the navigation and canal commissioners, together with a certified check for at least five per cent of the total amount bid, which shall be forfeited to the district in case the bidder refuses to enter into a proper contract, if his bid is accepted. Any and all bids may be rejected at the discretion of the navigation and canal commissioners. [Id. sec. 33.]

**Art. 5994. Contracts to be in writing and filed.**—All contracts made by the navigation and canal commissioners shall be reduced to writing and signed by the contractors, and navigation and canal commissioners, or any two of said commissioners, and a copy of same filed with the county clerk for reference. [Id. sec. 34.]

**Art. 5995. Contractor's bond.**—The party, firm, or corporation, to whom any such contract is let, shall give bond, payable to the navigation and canal commissioners for said district, in twice the amount of the contract price, conditioned that he, they or it, will faithfully perform the obligations, agreements and covenants of their contract, and that in default thereof will pay to said district all damages sustained by

reason thereof. Said bond shall be approved by such navigation and canal commissioners. [Id. sec. 35.]

**Art. 5996. Work supervised by engineer; his report.**—All work contracted for by the navigation and canal commissioners, unless done under the supervision of the government of the United States, or the proper department or officer thereof, shall be done under the supervision of the engineer; and, when the work is completed according to contract, the engineer shall make a detailed report of the same to the navigation and canal commissioners, showing whether the contract has been fully complied with, according to its terms, and if not in what particular it has not been so complied with. [Id. sec. 36.]

**Art. 5997. Commissioners to inspect work; payment, how made.**—The commissioners shall have the right, and it is hereby made their duty, during the progress of the work being done under contract, to inspect the same; and, upon the completion of any contract, they shall draw a warrant on the county treasurer for the amount of the contract price in favor of the contractor or his assignee, which warrant shall be paid out of the construction and maintenance fund of such district; provided, that, if the navigation and canal commissioners shall deem it advisable, they may contract for the work to be paid for in partial payments as the work progresses; but such partial payments shall not exceed in the aggregate eighty per cent of the total amount to be paid under the contract, the amount of work completed to be shown by a certificate of the engineer; and provided, further, that nothing in this article shall affect the provisions of this chapter providing for the carrying out and performing of the improvement or improvements by the government of the United States. [Id. sec. 37.]

**Art. 5998. Commissioners' report of work to contain what.**—The commissioners shall make an annual report of their acts and doings as such commissioners, and file the same with the clerk of the county court on or before the first day of January each year; which report shall show in detail the kind, character and amount of work done in the district, the cost of same, and the amount paid out on order, for what purpose paid, and other data necessary to show the condition of improvements made under the provisions of this chapter. [Id. sec. 38.]

**Art. 5999. Commissioners may employ assistant engineers and legal counsel.**—The commissioners are hereby authorized and empowered to employ such assistant engineers and other employés as may be necessary, paying such compensation as they may determine; and the said commissioners are authorized to employ counsel to represent such district in the preparation of any contract, or the conducting of any proceedings in or out of court, and to be the legal adviser of the navigation and canal commissioners on such terms and for such fees as may be agreed upon by them; and such commissioners shall have the authority to draw warrant or warrants in payment of such legal services, and for the salary of the engineer, his assistant, or any other employés, and for all expense incident and pertaining to the navigation district. [Id.]

**Art. 6000. Unlawful for officers to be interested in contracts.**—Neither the county judge, nor any county commissioner, nor member of the navigation board, nor the navigation and canal commissioners or engineer shall be directly or indirectly interested for themselves, or as agents for any one else, in the contract for the construction of any work to be performed by such navigation district. [Id. sec. 40.]

**Art. 6001. Commission may sue and be sued.**—All navigation districts established under this chapter may, by and through the navigation and canal commissioners, sue and be sued in all courts of this state in the name of such navigation district; and all courts of this state shall take judicial notice of the establishment of all such districts. [Id. sec. 41.]

## TITLE 97

## NOTARIES PUBLIC

Art.		Art.	
6002.	Governor shall appoint.	6010.	Powers, etc.
6003.	Bond and oath.	6011.	Shall keep book, etc.
6004.	To be removed, when.	6012.	May take depositions, etc.
6005.	Office to become vacant, when.	6013.	Copies of records, etc.
6006.	Seal, and what it shall contain.	6014.	Printed lists to be sent to county clerks by secretary of state.
6007.	Duty of county clerk when office becomes vacant.	6015.	To qualify, when.
6008.	Their powers.	6016.	Clerk shall notify secretary of state, when, etc.
6009.	Duty on vacating office.		

**Article 6002. Governor shall appoint; tenure; additional notaries; proviso.**—There shall be appointed by the governor, by and with the advice and consent of the senate, a convenient number of notaries public for each organized county, and not to exceed six notaries public for each unorganized county in this state, who shall hold their office for the term of two years from the first day of June after appointment at a regular session of the legislature; provided, that the governor by and with the advice and consent of the senate may appoint additional notaries public at any special session of the legislature, who shall hold their office until the first day of June succeeding the next regular session of the legislature after their appointment. Provided that nothing herein be so construed as to exempt them from jury service. [Acts 1889, p. 89. Acts 1885, p. 1. Acts 1903, p. 158. Acts 1913, S. S., p. 2, sec. 1, amending Art. 6002, Rev. St. 1911.]

**History of legislation.**—Section 2 of the act of April 11, 1879 (16th Leg., p. 89), reads as follows: "The governor is hereby authorized to appoint, with the advice and consent of the senate, one notary public and one cattle and hide inspector in each of the unorganized counties of the state." The act of April 1, 1881 (17th Leg., p. 94), provided for the appointment of notaries public, and with subsequent amendments as given in the text is the law now in force. Section 15 of this act reads as follows: Sec. 15. "All laws and parts of laws in conflict herewith are hereby repealed."

By the act of December 20, 1836 (1st Cong., p. 148), the chief justices of the several county courts were ex officio notaries public for their respective counties. The seal of the county court was the notarial seal, and required to be fixed to all instruments and attestations of the respective notaries.

By the act of June 12, 1837 (1st Cong., p. 273), an associate justice was authorized to act as notary public in case of the absence or inability of the chief justice to act.

Under the act of November 16, 1837 (2d Cong., p. 16), a notary public was appointed for each of the ports of entry of the republic. He was required to have a seal of office, to be affixed to his certificate. Under the act of May 15, 1838 (2d Cong., p. 126), two notaries public were appointed for the county in which the seat of government was located, and one notary in each other county.

By the act of February 5, 1844 (8th Cong., p. 105), and the act of January 10, 1845 (9th Cong., p. 13), additional notaries were appointed for certain counties named in those acts. By the act of January 10, 1845, a notary was required to use a seal of office with the words "notary public" and the name of the county around the margin, and no notarial act was valid unless the seal of office of such notary was appended.

By the act of May 13, 1846 (1st Leg., p. 341), the governor, by and with the advice and consent of the senate, was authorized to appoint a convenient number of notaries, not exceeding six in number, for each county. He was also authorized to fill vacancies during the recess of the senate.

The seal had engraved in the center a star of five points and the words "Notary Public, County of —, Texas," around the margin, with which all official acts must be authenticated.

The first section of the act of May 13, 1846, was amended by the act of March, 1863 (9th Leg., S. S. p. 14).

By the act of June 24, 1876 (15th Leg., p. 29), former laws were repealed and an act passed to regulate the appointment and define the duties of notaries public, which was substantially incorporated in the Revised Statutes. The act passed April 1, 1881 (17th Leg., p. 94), did not purport to be an amendment of the Revised Statutes, but repealed all laws and parts of laws in conflict therewith, and was entitled: "An act to regulate the appointment and define the duties of notaries public, to require them to procure and use legal seals, and to punish them for failing to do so." This act, with subsequent amendments was substituted for the original title to the Revised Statutes. The act was again amended by the act of 1881, page 94, the act of 1889, page 89, and the act of 1885, page 1.

**Art. 6003. [3504] Bond and oath.**—Every person who may be appointed a notary public, before he enters on the duties of his office, shall

execute a bond, with two or more good and sufficient sureties, to be approved by the clerk of the county court of his county, payable to the governor and his successors in office, in the sum of one thousand dollars, conditioned for the faithful performance of the duties of his office; and shall also take and subscribe the oath of office prescribed by the constitution, which shall be indorsed on said bond, with the certificate of the officer administering the same; said bond shall be recorded in the office of the clerk of the county court, and deposited in said office, and shall not be void on the first recovery, and may be sued on in the name of any party injured from time to time until the whole amount thereof has been recovered. [Acts 1881, p. 94.]

**Art. 6004. [3505] To be removed, when.**—Every notary public who shall be guilty of any wilful neglect of duty or malfeasance in office may be removed from office in the manner provided by law. [Id. sec. 3.]

**Removal from office.**—See Arts. 6058, 6059.

**Art. 6005. [3506] Office to become vacant, when.**—Whenever any notary public shall remove permanently from the county for which he was appointed, or an ex officio notary public from his precinct, his office shall thereupon be deemed vacant. [Id. sec. 4.]

**Art. 6006. [3507] Seal, and what it shall contain.**—Every notary public shall provide a seal of office, whereon shall be engraved in the center a star of five points, and the words, "Notary Public, County of . . . . ., Texas," around the margin (the blank to be filled with the name of the county for which the officer is appointed), and he shall authenticate all his official acts therewith; and any notary public or other officer required by law to keep and use a seal, who shall us, in attesting any instrument any seal not such as is required by law to keep and use for that purpose, or shall fail or refuse to deliver to the county clerk of his county his seal, record books and all public papers pertaining to his office, or any of them, in case of his resignation or removal from the county, shall be punished as provided in the Penal Code. [Id. sec. 5.]

Acts of notaries public, authenticated by a seal not conforming to the requirements of this article, were made valid by an act of 1889. See Acts 1889, p. 121.

**History of legislation.**—See notes under Art. 6002.

**Use of seal on envelope containing depositions.**—Under Art. 3660, requiring the officer before whom depositions are taken to certify on the envelope inclosing the depositions that he in person deposited the same in the mail for transmission, etc., and this article, providing that every notary public shall authenticate his official acts with his seal of office, the certificate of a notary on the envelope inclosing depositions must be authenticated by his official seal. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

**Art. 6007. [3508] Duty of county clerk when office becomes vacant.**—Whenever the office of notary public shall be vacated by resignation, removal or death, it shall be the duty of the county clerk of the county where said notary resides to obtain and deposit in his office the seal, record books and all public papers belonging in the office of said notary; provided, that the seal of any notary vacating his office may be sold by the owner thereof to any qualified notary public in the county. [Id. sec. 6.]

**Art. 6008. [3509] Their powers.**—Notaries public may take acknowledgments or proof of all instruments of writing in the manner provided by law, to entitle them to registration, and give certificates of all such acknowledgments and proof under their hand and official seals; they may take the examination and acknowledgments of married women to all deeds and instruments of writing, conveying or charging their separate property, of their interest in the homestead, in the manner provided by law. [Id. sec. 7.]

**Disqualification by interest.**—A managing agent of a building association who is a stockholder held disqualified to take an acknowledgment of a mortgage to the association. *Miles v. Kelley*, 16 C. A. 147, 40 S. W. 599.

The acknowledgment of the execution of a contract with a building association, taken before a notary who is a stockholder therein, is of no effect. *Bexar Building & Loan Ass'n v. Heady*, 21 C. A. 154, 50 S. W. 1079.

**Acknowledgment before a notary, who is a director of a corporation, held void.** Workman's Mut. Aid Ass'n v. Monroe (Civ. App.) 53 S. W. 1029.

**Form of certificate.**—A notary's certificate is not rendered insufficient by the fact that the caption of the instrument acknowledged differs from that of the certificate. First Nat. Bank v. Hicks, 24 C. A. 269, 59 S. W. 842.

**Recital of notary's certificate, stating that "personally came and appeared H., to him personally known, who acknowledged that he signed the instrument," held to be a sufficient identification of the person executing the instrument.** Id.

**Where a notary shows his official character as notary public for a certain county and state in the first part of his certificate of acknowledgment, he need not repeat such showing after his signature.** Kane v. Sholars, 41 C. A. 154, 90 S. W. 937.

**Attestation of authority.**—Assignment of policy is not bad because authority of notary taking acknowledgment was not attested. Burges v. New York Life Ins. Co. (Civ. App.) 53 S. W. 602.

**Void acknowledgment cannot be reformed.**—An acknowledgment void because taken before a notary who is interested cannot be reformed. Bexar Building & Loan Ass'n v. Heady, 21 C. A. 154, 50 S. W. 1079.

**Evidence of acknowledgment.**—See, also, Art. 6013 and notes.

**A notary public may properly testify that he took an acknowledgment of a deed of trust.** Cassidy v. Scottish-American Mortg. Co., 27 C. A. 211, 64 S. W. 1023.

**Fees.**—See Art. 3878.

**Clerk of county court may take acknowledgments, etc.**—See Art. 1751.

**Art. 6009. [3510] Duty on vacating office.**—Whenever any notary public shall vacate his office in any manner, his record books and all public papers in his office shall be deposited with the clerk of the county court of his county.

**Art. 6010. [3511] Shall have power to administer oaths, etc.**—Every notary public shall have power to administer oaths and give certificates thereof under his hand and official seal. He may take the proof or acknowledgments of all instruments of writing relating to commerce and navigation, and also letters of attorney and other instruments of writing, make declarations and protest, and certify under his hand and seal the truth of the matters or things done by virtue of his office. [Id. sec. 8.]

**Authority to take oaths.**—A notary public has authority to swear persons whether it be to necessary affidavits and those required by law or those which are purely voluntary. Campbell v. State, 43 Cr. R. 602, 68 S. W. 514.

**He has authority to swear a chattel mortgagor to an affidavit stating that he is the owner of the property and that it is not incumbered.** Id.

**Fees.**—See Art. 3878.

**Art. 6011. [3512] Shall keep a well-bound book.**—Every notary public shall procure and keep a well-bound book, in which shall be entered the date of all instruments acknowledged before him, the date of such acknowledgments, the name of the grantor or maker, the place of his residence or alleged residence, whether personally known or introduced, and, if introduced, the name and residence or alleged residence of the party introducing him; if the instrument be proved by a witness, the residence of such witness, whether such witness is personally known to him or introduced; if introduced, the name and residence of the party introducing him; the name and residence of the grantee; if land is conveyed or charged by such instrument, the name of the original grantee thereof shall be kept, and the county where the land is situated. The book herein required to be kept, and the statements herein required to be entered, shall be an original public record, and the same shall be open to inspection by any citizen at all reasonable times; and such notary public shall give a certified copy of any record in his office to any person applying therefor on payment of all fees thereon. [Id. sec. 9.]

**Certified copy of notarial record as evidence.**—See notes under Art. 6013.

**Art. 6012. [3513] May take depositions.**—Notaries public shall have power to take the depositions of witnesses in the manner prescribed by law; to attest the oath of any person to a petition or answer in any suit, and the same when so attested shall be valid in all the courts of this state. [Id. sec. 10.]

**Fees.**—See Art. 3878.

**Clerk of county court may take depositions, etc.**—See Art. 1752.

**Art. 6013. [3514] Copies of records.**—Copies of all records, declarations, protests and other official acts of notaries public may be certified by the county clerk with whom they are deposited, and shall have the same authority as if certified by the notary by whom they were originally made. [Id. sec. 11.]

**Certified copy of notarial record as evidence.**—It is competent for district clerk to make and certify to copy of entry in notarial record deposited in his office so as to make such copy admissible in evidence. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 401.

In the absence of proof of the loss of a deed, or of plaintiffs' inability to produce it, secondary evidence of its execution, consisting of a certified copy of the entries of the notary, who took the acknowledgment, in his notary's book, which he was required to keep, and in which he was required to make entries of acknowledgments by Art. 6011, which certificate was made as authorized by this article, was inadmissible to prove the execution of the deed. *Trice's Heirs v. McCaleb* (Civ. App.) 138 S. W. 792.

**Art. 6014. [3515] Printed list to be furnished by secretary of state.**—When notaries public have been appointed by the governor and shall have qualified, it shall be the duty of the secretary of state to furnish to the clerks of the county courts a printed list of all notaries public so appointed and qualified; and it shall be the duty of said clerks to preserve said list for public inspection and post a copy thereof on the court house door. [Id. sec. 12.]

**Art. 6015. [3516] To qualify, when.**—When a notary is appointed, the secretary of state shall forward the commission to the clerk of the county court of the county where the party resides; and the said clerk shall immediately notify said party to appear before him within ten days, pay for his commission, and qualify according to law; provided, that, if said party be absent from the county, or sick at the time of reception of said commission by the clerk, then he shall have ten days from his return to said county in which to appear and qualify. [Id. sec. 13.]

**Art. 6016. [3517] Clerk shall notify secretary of state.**—The clerk receiving the commission shall indorse thereon the day on which notice was given, and, if the party pay the state fee for commission and qualify according to law, the said clerk shall notify the secretary of state of his qualification, giving date of same, and remit the fee to said officer; but if the party fails to qualify and pay the fee within the limited time the appointment shall be void, and the clerk shall certify on the back of the commission that the party has failed to qualify, and return it to the secretary of state. [Id.]

## TITLE 98

## OFFICERS—REMOVAL OF

- Chap.  
 1. Removal of State and Certain District Officers.  
 2. Removal of County and Certain District Officers.

- Chap.  
 3. Removal of Certain Other Officers.  
 4. Removal of Mayors and Aldermen.  
 5. Removal of Officers Guilty of Nepotism.

## CHAPTER ONE

## REMOVAL OF STATE AND CERTAIN DISTRICT OFFICERS

- |                                                                                                                    |                                                                             |
|--------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| Art.<br>6017. State and district officers removable by impeachment.                                                | Art.<br>6023. Preceding article shall apply to the criminal district judge. |
| 6018. Judges of supreme, appellate and district courts, and commissioner of agriculture, etc., removed by address. | 6024. Jurisdiction of supreme court in such cases.                          |
| 6019. Cause for removal to be set out.                                                                             | 6025. Presentment shall be founded upon what.                               |
| 6020. Notice to be given.                                                                                          | 6026. Supreme court may issue process, etc.                                 |
| 6021. Vote, how taken.                                                                                             | 6027. State officers appointed by the governor removed, how.                |
| 6022. District judges removed by supreme court.                                                                    |                                                                             |

**Article 6017. [3518] State and district officers removable by impeachment.**—The governor, lieutenant-governor, attorney general, treasurer, commissioner of the general land office, comptroller, commissioner of agriculture, the commissioner of insurance and banking and the judges of the supreme court, court of criminal appeals, courts of civil appeals and district courts, and the judges of the criminal district court of Galveston and Harris counties and of Dallas county, shall be removable from office by impeachment in the manner provided in the constitution. [Const., art. 15, secs. 1, 2. Act Aug. 21, 1876, p. 226, sec. 26.]

**Art. 6018. [3519] Judges of supreme, appellate and district courts, and commissioner of agriculture, etc., removed by address.**—The judges of the supreme court, court of criminal appeals, courts of civil appeals, district courts, the judge of the criminal district court of Galveston and Harris counties and of Dallas county, and the commissioner of agriculture, and commissioner of insurance and banking, shall be removed from office by the governor on the address of two-thirds of each house of the legislature, for wilful neglect of duty, incompetency, habitual drunkenness, oppression in office, breach of trust, or other reasonable cause, which shall not be sufficient ground for impeachment. [Const., art. 15, secs. 7, 8. Id.]

**Art. 6019. [3520] Cause for removal to be set out.**—The cause for such removal shall be stated at length in such address, and entered on the journals of each house. [Id.]

**Art. 6020. [3521] Notice to be given.**—The officer so intended to be removed shall have notice of the cause assigned for his removal, and shall be admitted to a hearing in his own defense before any vote for such address shall be heard. [Id.]

**Art. 6021. [3522] Vote, how taken.**—In all such cases, the vote shall be taken by yeas and nays and entered on the journals of each house respectively. [Id.]

**Art. 6022. [3523] District judges removed by supreme court.**—Any judge of the district court who is incompetent to discharge the duties of his office, or who shall be guilty of partiality or oppression, or



other official misconduct, or whose habits and conduct are such as to render him unfit to hold such office, or who shall negligently fail to perform his duties as judge, or who shall fail to execute in a reasonable measure the business of his court, may be removed by the supreme court. [Const., art. 15, sec. 6.]

**Art. 6023. [3524] Preceding article shall apply to the criminal district judge.**—The provisions of the preceding article shall also apply to the criminal district judge of the counties of Galveston and Harris and the criminal district judge of Dallas county. [R. S. 1879.]

**Art. 6024. [3525] Jurisdiction of supreme court in such cases.**—The supreme court shall have original jurisdiction to hear and determine the causes aforesaid when presented in writing, upon the oaths taken before some judge of a court of record of not less than ten lawyers practicing in the courts held by such judge, and licensed to practice in the courts of civil appeals. [Id.]

**Art. 6025. [3526] Presentment shall be founded upon what.**—The presentment provided for in the preceding article shall be founded either upon the knowledge of the person making it, or upon the written oaths, as to facts, of credible witnesses. [Id.]

**Art. 6026. [3527] Supreme court may issue process, etc.**—The supreme court may issue all needful process, and prescribe all needful rules to give effect to the four preceding articles, and such cases shall have precedence and be tried as soon as practicable. [Id.]

**Art. 6027. [3528] State officers appointed by the governor, how removed.**—All state officers appointed by the governor, or elected by the legislature, where the mode of their removal is not otherwise provided by law, may be removed by him for good and sufficient cause, to be spread on the records of his office, and to be reported by him to the next session of the legislature thereafter. [Id.]

## CHAPTER TWO

### REMOVAL OF COUNTY AND CERTAIN DISTRICT OFFICERS

Art.	Art.
6028. Certain convictions work a removal from office.	6042. Requisites of petition.
6029. Appeal supersedes order of removal.	6043. General issues alone submitted—Verdict.
6030. Officers removable by the district judge, etc.	6044. Citation, how and when to issue.
6031. Causes to be set forth in writing.	6045. Application made in vacation.
6032. "Incompetency," what is.	6046. Citation shall issue.
6033. "Official misconduct," what is.	6047. Time to answer.
6034. Two preceding articles apply to mayors and aldermen.	6048. How trial shall be conducted.
6035. "Habitual drunkenness," what is.	6049. May be suspended from office, how.
6036. Further defined.	6050. Appeal or writ of error.
6037. "Drunkenness not habitual," defined.	6051. Bond for costs, when.
6038. Must be three times convicted.	6052. Relator to give security for costs.
6039. Three convictions sufficient ground for removal, etc.	6053. Against district attorney, where commenced.
6040. Failure to give bond ground for removal.	6054. Criminal district attorney included in district attorney.
6041. Proceedings, how commenced and by whom.	6055. Not to be removed for acts done prior to his election.
	6056. Appeal and writ of error.
	6057. Mandate, when to issue.

**Article 6028. [3529] Certain convictions work a removal from office.**—All convictions by a petit jury of any county officers for any felony, or for any misdemeanor involving official misconduct, shall work an immediate removal from office of the officer so convicted; and such judgment of conviction shall, in every instance, embody within it an order removing such officer. [R. S. 1879.]

**Art. 6029. [3530] Appeal supersedes order of removal.**—When an appeal is taken from such judgment by the officer removed, such appeal shall have the effect of superseding such judgment, unless the court rendering such judgment should deem it to the public interest to suspend such officer from the office pending such appeal; and in that case the court shall proceed as in other cases of the suspension of officers from office as provided in this chapter. [Id.]

**Art. 6030. [3531] Officers removable by the district judge.**—All district attorneys, county judges, commissioners, and county attorneys, clerks of the district and county courts, and single clerks in counties where one clerk discharges the duties of district and county clerks, county treasurer, sheriff, county surveyor, assessor, collector, constable, cattle and hide inspector, justice of the peace, and all other county officers now or hereafter existing by authority either of the constitution or laws, may be removed from office by the judges of the district court for incompetency, official misconduct, habitual drunkenness, or drunkenness not amounting to habitual drunkenness, as hereafter defined in this chapter. [Const., art. 5, sec. 24; art. 15, sec. 7. R. S. 1879.]

**One action to remove several commissioners.**—Under Const. art. 5, § 24, and the above article, several commissioners against whom the allegation is made of official misconduct, etc., with the charge that they conspired together in the acts complained of, may be joined in the same action. *Eberstadt v. State*, 92 T. 94, 45 S. W. 1007.

**Removal of school trustee.**—Each school trustee is an officer in and for the precinct of the county of which his precinct is a part, and consequently of the county itself, and can be removed from office by the district judge for incompetency, etc. *Hendricks v. State*, 20 C. A. 178, 49 S. W. 705.

**Removal of clerk of court—Grounds.**—Antedating by a clerk of a court of the filing of a paper filed out of time, so as to show filing within time, is official misconduct warranting his removal under this article. *Howard v. Gulf, C. & S. F. Ry. Co. (Civ. App.)* 135 S. W. 707.

**Art. 6031. [3532] Causes to be set forth in writing.**—In every case of removal from office for the causes named in the preceding article, the cause or causes thereof shall be set forth in writing, and the truth of said cause or causes be found by a jury. [Const., art. 5, sec. 24. R. S. 1879.]

**Art. 6032. [3533] “Incompetency,” what is.**—By “incompetency,” as used in this title, is meant gross ignorance of official duties, or gross carelessness in the discharge of them; or an officer may be found to be incompetent when, by reason of some serious physical or mental defect, not existing at the time of his election, he has become unfit or unable to discharge promptly and properly the duties of his office. [R. S. 1879.]

**Art. 6033. [3534] “Official misconduct,” what is.**—By “official misconduct,” as used in this title with reference to county officers, is meant any unlawful behavior in relation to the duties of his office, wilful in its character, of any officer intrusted in any manner with the administration of justice, or the execution of the laws; and under this head of official misconduct are included any wilful or corrupt failure, refusal or neglect of an officer to perform any duty enjoined on him by law. [R. S. 1879.]

Cited, *Trigg v. State*, 49 T. 645.

**Grounds for removal.**—See, also, notes under Art. 6030.

**Official misconduct.**—A petition which alleges that a county judge conspired with others to do an unlawful thing, and sets out specific, unlawful acts, and charges that he knowingly and wilfully acted in furtherance of the conspiracy, is good on demurrer under this article. *Perry v. State*, 44 C. A. 55, 93 S. W. 412.

The failure of the tax assessor of a county to make a report of the fees collected by him, as required by law, is “official misconduct” within Const. art. 5, § 8, conferring on district courts jurisdiction to try all misdemeanors involving official misconduct, and Code Cr. Proc. 1911, art. 90, giving the district court exclusive jurisdiction in cases involving official misconduct; and hence the county court had no jurisdiction of a prosecution for such failure, since “official misconduct” includes the failure of an officer to perform any and all acts required by law to be performed, especially in view of this article. *Bolton v. State (Cr. App.)* 154 S. W. 1137.

**Art. 6034. [3535] Two preceding articles apply to mayor and aldermen.**—The two preceding articles shall apply also to mayors and al-

dermen, whose removal is hereafter provided for in this title. [R. S. 1879.]

**Grounds for removal of mayor.**—See notes under Art. 6065.

**Art. 6035. [3536] “Habitual drunkenness,” what is.**—By “habitual drunkenness,” as used in this title in relation to county officers, is meant the frequent and customary use to excess of intoxicating drinks, resulting in that condition of the body and the mind produced by the excessive use of intoxicating liquors, spirituous, vinous or malt, confirmed by habit. [R. S. 1879.]

Cited, *Trigg v. State*, 49 T. 645.

**Art. 6036. [3537] Further defined.**—In order to constitute habitual drunkenness under this title, it shall not be necessary to show that the officer is incapable of discharging the duties of his office, or of taking care of himself; but the proof of the fact of habitual drunkenness to the satisfaction of the judge and jury shall be sufficient cause of removal without reference to his capacity or incapacity to discharge the duties of his office. [Act Aug. 16, 1876, p. 135, sec. 3.]

Cited, *Trigg v. State*, 49 T. 645.

**Art. 6037. [3538] “Drunkenness not habitual” defined.**—By “drunkenness not amounting to habitual drunkenness,” as named in this chapter in connection with county officers, is meant the immoderate use of any spirituous, vinous or malt liquors to such a degree as to incapacitate the officer for the time being or permanently from the discharge of the duties of his office. [Act July 31, 1876, p. 76, secs. 1, 4.]

Cited, *Trigg v. State*, 49 T. 645.

**Art. 6038. [3539] Must be three times convicted.**—No county officer shall be removed from office on the charge of drunkenness, as defined in the preceding article, until he shall have been three times convicted of such offense of drunkenness. [Act July 21, 1876, p. 76, sec. 4.]

**Art. 6039. [3540] Three convictions sufficient ground for removal, etc.**—The fact of a third conviction, as provided in the preceding article, shall be sufficient ground for his removal from office by the district judge, on the matter being brought before him in the manner provided in this chapter for bringing before him other causes of removal. [R. S. 1879.]

**Art. 6040. [3541] Failure to give bond ground for removal.**—All county officers who are required to give official bonds, who shall fail to execute their bonds within the time prescribed by law, or who, when required in accordance with law to give a new bond or additional bond or security, and shall fail to do so, may also be removed from office for such failure by the district judge, on the matter being brought before him in the manner hereinafter provided for bringing such matters before the court. [Id.]

**Time to qualify—Provision directory only.**—The provision as to the time within which an officer shall qualify is directory only, where, from reasons beyond his control, he cannot qualify within the time allowed; but such construction will not be given in a case of neglect or refusal. *Flatan v. State*, 56 T. 93. See *State v. Cocke*, 54 T. 482.

**Art. 6041. [3542] Proceedings, how commenced, and by whom.**—The proceedings for the removal of said officers may be commenced, either in term time or vacation, by first filing a petition in the district court of the county where the officer resides, by a citizen of the state who has resided for six months in the said county where he proposes to file such petition, and who is not himself at the time under indictment in said county. [Id.]

**Pleading plaintiff's disqualification.**—The disqualification to act is in the nature of a disability of a party plaintiff and must be pleaded when it does not appear on the face of the petition. *Eland v. State* (Civ. App.) 38 S. W. 252.

**Attorney to prosecute case.**—See notes under Arts. 6042, 6048.

**Art. 6042. [3543] Requisites of the petition.**—The petition shall be addressed to the district judge of the court in which it is filed, and

shall set forth in plain and intelligible words the cause or causes alleged as the grounds of removal, giving in each instance, with as much certainty as the nature of the case will admit of, the time and place of the occurrence of the alleged acts; the petition shall, in every instance, be sworn to at or before the filing of the same by at least one of the parties filing the same, and the proceedings shall be conducted in the name of "The State of Texas," upon the relation of the person filing the same. [Id.]

**Sufficiency of petition.**—Petition in proceedings to remove county commissioners held to sufficiently charge conspiracy between them and county treasurer to embezzle funds. *Eberstadt v. State*, 20 C. A. 164, 49 S. W. 654.

**Attorney to prosecute case.**—In a proceeding to remove a sheriff from office, the petition held not demurrable on the ground that the proceeding could only be conducted by the district attorney, or some other officer authorized to prosecute suits in the name of the state. *State v. Box*, 34 C. A. 435, 78 S. W. 982.

**Art. 6043. [3544] General issue alone submitted—Verdict.**—In these cases, the judge shall not submit special issues to the jury, but shall, under a proper charge applicable to the facts of the case, instruct the jury to find from the evidence whether the cause or causes of removal set forth in the petition are true in point of fact or not; and, when there are more than one distinct cause of removal alleged, the jury shall by their verdict say which cause they find sustained by the evidence before them, and which are not sustained. [R. S. 1879.]

Cited, *Trigg v. State*, 49 T. 645.

**Defenses.**—In a proceeding to remove a county judge for official misconduct in conspiring to defeat school land taxes held it is no defense that the lands were afterwards duly assessed and placed on the tax rolls. *Perry v. State*, 44 C. A. 55, 98 S. W. 411.

**Evidence.**—See, also, note under Art. 6055.

In a proceeding to remove a county judge for official misconduct in conspiring to defeat the collection of school tax lands, held, that as explanatory of the subsequent approval of the tax rolls by him and the county court it was competent to show that prior thereto suits to enforce such action had been instituted. *Perry v. State*, 44 C. A. 55, 98 S. W. 411.

In a suit to remove a county judge for official misconduct, it may be shown in evidence that he and the commissioners' court over which he presided approved tax rolls with taxes thereon charged against school lands in the name of unknown owners, when the court and the county judge knew to whom the lands belonged. *Id.*

**Sufficiency of verdict.**—In a proceeding for the removal of a sheriff for failure to qualify and give bond, a verdict containing a negative pregnant held insufficient to support a judgment in favor of defendant. *State v. Box*, 34 C. A. 435, 78 S. W. 982.

**Conviction of part of defendants.**—In a proceeding to remove several officers charged with conspiracy to embezzle funds, one or more of the defendants may be convicted. *Eberstadt v. State*, 20 C. A. 164, 49 S. W. 654.

**Art. 6044. [3545] Citation, how and when to issue.**—After the filing of such petition, the person or persons so filing the same shall make a written application to the district judge for an order for a citation and a certified copy of the said petition to be served on the officer against whom the petition is filed, requiring him at a certain day named, which day shall be fixed by the judge, to appear and answer to the said petition; and until such order is granted and entered upon the minutes of the court (if application is made during term time) no action whatever shall be had thereon; and, if the judge shall refuse to issue the order so applied for, then the petition shall be dismissed at the cost of the relator, and no appeal or writ of error shall be allowed from such action of the judge. [R. S. 1879.]

See *Smith v. Brennan*, 49 T. 681.

**Dismissal at relator's cost.**—Should the person presenting the petition not appear to be competent, the judge may refer the application at his cost. *Bland v. State* (Civ. App.) 38 S. W. 252.

**Art. 6045. [3546] Application made in vacation.**—If the application for said citation is made to the judge in vacation, he shall indorse his action, whatever it may be, on such petition, and shall order it spread on the minutes of the court at the next ensuing term. [R. S. 1879.]

**Art. 6046. [3547] Citation shall issue.**—Upon the order being granted, and, if granted during term time, also spread upon the minutes, the clerk shall issue the citation, accompanied with a certified copy of the petition. [Id.]

**Art. 6047. [3548] Time to answer.**—In no case whatever shall the period fixed by the judge in his order, in which the officer is to answer, be less than five days from the date of such service, to be computed as time is computed in other civil suits. [Id.]

**Art. 6048. [3549] How trial shall be conducted.**—The trial and all the proceedings connected therewith shall be conducted as far as it is possible in accordance with the rules and practice of the court in other civil cases. [Id.]

**Attorney to prosecute case.**—It is within the discretion of the district judge, in proceedings to remove a county officer, to require the district attorney to conduct the proceedings, or to appoint other attorneys for such purpose. *State v. Box*, 34 C. A. 435, 98 S. W. 982.

**Art. 6049. [3550] May be suspended from office, how.**—At any time after the issuance of the order for the citation, as herein provided, the district judge may, if he sees fit, suspend temporarily from office the officer against whom the petition is filed, and appoint for the time being some other person to discharge the duties of the office; but in no case shall such suspension take place until after the person so appointed shall execute a bond in such sum as the judge may name, with at least two good and sufficient sureties, on such conditions as the judge may see fit to impose, to pay the person so suspended from office all damages and costs that he may sustain by reason of such suspension from office, in case it should appear that the cause or causes of removal are insufficient or untrue. [Id.]

**Constitutionality.**—The provision of this article for the suspension without notice of an officer pending proceedings for removal from office, is not so clearly opposed to the constitution as to justify the supreme court in disregarding it, while admitting that the question is a debatable one. *Griner v. Thomas*, 101 T. 36, 104 S. W. 1058, 16 Ann. Cas. 944.

Where the constitution prescribes a mode for removing officers, the legislature may not authorize a removal in another mode, but a temporary suspension under this article is not a removal within that rule. *Id.*

**Removal bars action on officer's bond.**—The judgment removing an officer is a bar to an action on the bond for fees during his suspension. *Eberstadt v. State ex rel. Armistead*, Judge, 20 C. A. 164, 49 S. W. 654.

**Exemplary damages under indemnifying bond.**—Exemplary damages held not recoverable under a temporary sheriff's bond given by direction of court to secure the sheriff for all damages and costs sustained because of an unlawful suspension from office. *McMullin v. Ellis* (Civ. App.) 48 S. W. 217.

**Art. 6050. [3551] Appeal or writ of error will lie.**—An appeal or writ of error to the court of civil appeals may be sued out by either party from the final judgment in these cases as in other civil cases. [Id.]

**Appeal after expiration of term.**—Appeal by officer from conviction in proceeding to remove him, taken after his term has expired and new election had, will be entertained, where he was temporarily suspended and a bond for damages given. *Eberstadt v. State*, 20 C. A. 164, 49 S. W. 654.

**Art. 6051. [3552] Bond for costs, when.**—If the party has not been temporarily suspended from office, no other bond, when an appeal is taken or writ of error sued out by him, shall be necessary than a bond for all the costs that have or may accrue in the district and courts of civil appeals. [Id.]

**Art. 6052. [3553] Relator to give security for costs.**—On the order for citation being granted, the clerk of the district court will be authorized to demand of the relator security for costs as in other cases. [Id.]

**Art. 6053. [3554] Against district attorneys, where commenced.**—Proceedings under this title may be commenced against any district attorney either in the county of his residence or the county where the alleged cause of removal occurred, if in a county of his judicial district. [Id.]

**Art. 6054. [3555] Criminal district attorney included in district attorney.**—Under the name of "district attorney," as used in this chapter, is included the district attorney for the criminal district court of

Galveston and Harris counties; and the judge of said criminal district court shall have the same power as to his removal and proceed in the same manner as the district judges of the state have in reference to all county officers. [Id.]

**Art. 6055. [3556] Not to be removed for acts done prior to his election.**—No officer shall be prosecuted or removed from office for any act he may have committed prior to his election to office. [Id.]

**Acts prior to election.**—Evidence of his acts before his election held relevant, in a proceeding to remove a county judge for official misconduct consisting of conspiracy to delay and prevent collection of school land taxes. *Perry v. State*, 44 C. A. 55, 98 S. W. 411.

**Art. 6056. [3557] Appeal or writ of error.**—In these cases, an appeal may be taken or writ of error be made returnable to the court of civil appeals, and such cause shall have precedence of the ordinary business of the court and be decided with all convenient dispatch. [Amend. 1895, Sen. Jour. p. 480.]

**Art. 6057. [3558] Mandate when to issue.**—When so decided, unless the judgment be for some cause set aside or suspended, the mandate of the court shall issue within five days after the judgment of the court is rendered. [R. S. 1879.]

## CHAPTER THREE

### REMOVAL OF CERTAIN OTHER OFFICERS

<b>Art.</b>		<b>Art.</b>	
6058.	Notary public, how removed.	6062.	Removal of clerk of court of appeals.
6059.	Order of removal to be embodied in judgment.	6063.	Removal of clerk of district court.
6060.	Public weigher, how removed.	6064.	Order of removal to be embodied in judgment.
6061.	Removal of clerk of supreme court.		

**Article 6058. [3559] Notary public, how removed.**—Any notary public who shall be guilty of any wilful neglect of duty or official misconduct may be indicted by the grand jury, and, on conviction, shall be removed from office. [Act June 24, 1876, p. 29, sec. 4.]

**Art. 6059. [3560] Order of removal to be embodied in judgment.**—The order for his removal shall in each instance be embodied in the judgment of the court.

**Art. 6060. [3561] Public weigher, how removed.**—Any public weigher who shall be guilty of official misconduct, or who is incompetent, shall be removed by the governor, who shall keep a record of such removal, and report the same with his reasons therefor to the next legislature. [Act March 17, 1875, p. 162, sec. 1. See Acts 1879, ch. 108, sec. 1.]

**Art. 6061. [3562] Clerk supreme court, how removed.**—The clerk of the supreme court shall be subject to removal by said court for good cause entered of record on the minutes of said court. [Const., art. 5, sec. 4.]

**Art. 6062. [3563] Clerks of courts of appeals, how removed.**—The clerks of the court of criminal appeals, and courts of civil appeals, shall be subject to removal by their respective courts for good cause entered on the minutes of the court. [Const., art. 5, sec. 6. Amend. 1895, Sen. Jour. p. 480.]

**Art. 6063. [3564] Clerk of district court, how removed.**—The clerk of the district court may also be removed by information or by indictment of a grand jury and conviction by a petit jury. [Const., art. 5, sec. 9.]

**Art. 6064. [3565] Order of removal to be embodied in judgment.**—When so removed, the order for his removal shall be embodied in the judgment of conviction. [R. S. 1879.]

REMOVAL OF OTHER OFFICERS

- Assistant district attorneys.—See Art. 344.
- City health officer.—See Arts. 4549, 4550.
- City officers.—See Art. 796.
- County auditor.—See Art. 1497.
- Judge of county court of Tarrant county.—See Art. 1810.
- Judge of criminal district court.—See Art. 2206.
- Superintendent of lunatic asylum.—See Art. 122.

CHAPTER FOUR

REMOVAL OF MAYORS AND ALDERMEN

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| <p><b>Art.</b><br/>6065. Causes of removal.<br/>6066. Complaint against an alderman and proceedings thereon.<br/>6067. Who shall try an alderman.<br/>6068. Proceedings against a mayor.<br/>6069. Who shall try a mayor.</p> | <p><b>Art.</b><br/>6070. Rules which govern proceedings and trial.<br/>6071. Judgment.<br/>6072. Officer removed ineligible for two years.<br/>6073. This chapter does not apply, when.</p> |
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**Article 6065. [3566] Causes of removal.**—The mayor and aldermen of any incorporated town or city may be removed from office for official misconduct, wilful violation of any of the ordinances of such town or city, habitual drunkenness, incompetency, or for such other cause as may be prescribed by the ordinances of such town or city. [Act March 6, 1875, p. 63, secs. 1, 2.]

**Grounds for removal.**—See, also, Arts. 6032–6034.  
Refusal of mayor of city to sign checks for payment of certain claims against the city held misconduct in office. *Riggins v. Richards* (Civ. App.) 79 S. W. 84.  
A mayor held guilty of misconduct authorizing his removal by the council. *Riggins v. City of Waco*, 40 C. A. 569, 90 S. W. 657.  
Incompetency of a mayor within a charter authorizing removal of officers for such cause defined. *Id.*

**Art. 6066. [3567] Complaint against an alderman and proceedings thereon.**—When complaint in writing and under oath, charging any alderman with any act or omission which may be cause for his removal, shall be presented to the mayor, he shall file the same and cause the alderman so charged to be served with a copy of such complaint, and shall set a day for the trial of the case, and notify the alderman so charged and the other aldermen of such town or city to appear on such day. [*Id.* sec. 2.]

**Art. 6067. [3568] Who shall try an alderman.**—The mayor and aldermen of such town or city, except the aldermen against whom complaint is made, shall constitute a court to try and determine the case. [*Id.*]

**Art. 6068. [3569] Proceedings against a mayor.**—When any complaint, such as is prescribed in article 6066, is made against the mayor of any incorporated town or city it shall be presented to an alderman of such town or city, who shall file the same, and cause such mayor to be served with a copy thereof, and shall set a day for the trial of the case, and notify the mayor and other aldermen to appear on such day. [*Id.* sec. 3.]

**Art. 6069. [3570] Who shall try a mayor.**—A majority of the aldermen shall constitute a court to try and determine the complaint against the mayor, and they shall select one of their number to preside during such trial. [*Id.*]

**Alderman preferring charges not disqualified.**—Members of a city council, who had preferred charges against the mayor, held not thereby disqualified from participating in his trial before the council. Const. art. 5, § 11. *Riggins v. Richards*, 97 T. 229, 77 S. W. 946.

**Art. 6070. [3571] Rules which govern proceedings and trial.**—The rules governing other proceedings and trials in the courts of justices of the peace, mayors and recorders shall govern in the cases provided for in this chapter.

**Art. 6071. [3572] Judgment.**—If two-thirds of the members of the court present, upon the trial of the case, find the defendant guilty of the charges contained in the complaint, and find that such charges are sufficient cause for removal from office, it shall be the duty of the presiding officer of the court to enter judgment, removing such mayor or alderman, as the case may be, from office, and declaring such office vacant; but, should the party charged be found not guilty, judgment shall be entered accordingly. [Id. sec. 5.]

**Review by courts.**—The court held not deprived of the power to inquire whether or not the council of a city exceeded its authority in attempting to remove the mayor. *Riggins v. City of Waco*, 100 T. 32, 93 S. W. 426.

The action of the council of a city in removing the mayor for misconduct, after a hearing, will not be disturbed where the court cannot say that there was no evidence which the council, acting fairly, might not find sufficient to sustain the charges. *Id.*

**Art. 6072. [3573] Officer removed ineligible for two years.**—Any officer removed under the provisions of this chapter shall not be eligible to re-election to the same office for two years from the date of such removal. [Id.]

**Art. 6073. [3574] This chapter does not apply, when.**—The provisions of this chapter shall not apply to any town or city, except such as are incorporated under the general laws of this state. [Id.]

## CHAPTER FIVE

### REMOVAL OF OFFICERS GUILTY OF NEPOTISM

**Art. 6074.** Officers guilty of nepotism to be removed from office.

6075. Removals; proceedings.

**Art. 6076.** Suits by attorney general; venue.

6077. Attorney general to be assisted by district or county attorney.

**Article 6074. Officers guilty of nepotism; removal of.**—In addition to any other penalty imposed by law, any person who shall violate any of the provisions of the law contained in the Penal Code relating to the offense known as nepotism, and the inhibited acts connected therewith, shall be removed from his office, clerkship, employment or duty, as therein mentioned. [Acts 1909, p. 85, sec. 6, par. 2.]

**Art. 6075. Removals; proceedings.**—Such removal from office shall be made in conformity to the provisions of the constitution of this state concerning removal from office in all cases to which they may be applicable. All other removals from office under the provisions of this law shall be by quo warranto proceedings. All removals from any such position, clerkship, employment or duty aforesaid shall be summarily made, forthwith, by the appointing power in the particular instance, whenever the judgment of conviction in a criminal prosecution in the particular case shall become final; provided, that, if such removal be not so made within thirty days after such judgment of conviction shall become final, the person holding such position, clerkship or employment, or performing such duty, may be removed therefrom as herein provided with reference to removal from office. [Id.]

**Art. 6076. Suits by attorney general; venue.**—All quo warranto proceedings mentioned shall be instituted by the attorney general in one of the district courts of Travis county, or in the district court of the county in which the defendant may reside; and concurrent jurisdiction in such suits is hereby conferred upon such courts. [Id.]



**Art. 6077. Attorney general to be assisted by district or county attorney.**—In such suits, the district attorney, or the county attorney of the county in which such suit may be filed, shall assist the attorney general whenever he shall so direct. [Id.]

## DECISIONS RELATING TO OFFICERS IN GENERAL

**Nature of office.**—Office is property, and the legal incumbent is entitled to its emoluments during the term for which he was elected. *State v. Owens*, 63 T. 261; *Bastrop County v. Hearn*, 70 T. 563, 8 S. W. 302.

**Resignation.**—Acceptance of a second office is a resignation of the first. *State v. De Gress*, 53 T. 387.

## TITLE 99

## OFFICIAL BONDS

Chap. 1. The Record of Official Bonds and the Relief of Sureties Thereon.	Chap. 2. Of Obtaining New Sureties on Official Bonds.
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## CHAPTER ONE

## THE RECORD OF OFFICIAL BONDS AND THE RELIEF OF SURETIES THEREON

Art. 6078. Official bonds to be recorded. 6079. Sureties on may be relieved. 6080. Officer shall cease to act, etc.	Art. 6081. Must give new bond. 6082. Discharge of sureties.
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**Article 6078. [3575] Official bonds to be recorded.**—All official bonds of county officers that are required by law to be approved by the commissioners' court, and which have been so approved, shall be recorded by the clerk of the county court in a book kept for that purpose.

**Delay in filing bond.**—The fact that an officer's bond was not delivered to the county judge for approval and filing until more than 20 days after he had received his certificate of election will not render such bond void. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

**Art. 6079. [3576] Sureties on, to be relieved.**—Any surety on any official bond of any county officer may apply to the commissioners' court of the county to be relieved from his bond, and the clerk of the county court shall thereupon issue a notice to said officer, and a copy of the application, which shall be served upon said officer by the sheriff or any constable of the county. [Act Aug. 12, 1876, p. 132, sec. 1.]

**Waiver of application and notice.**—The application and notice are for the benefit of the officer and may be waived by him. *Kempner v. County of Galveston*, 73 T. 216, 11 S. W. 188.

**Art. 6080. [3577] Officer shall cease to act, etc.**—Upon the service of such notice, said officer so notified shall cease to exercise the functions of his office, except to preserve any records or property committed to his charge, and in case of sheriffs and constables, to keep prisoners, preserve the peace and execute warrants for the arrest of persons charged with offenses. [Id.]

**Art. 6081. [3578] Must give new bond.**—Said officer so notified shall give a new bond within twenty days from the time of receiving such notice, or his office shall become vacant. [Id.]

**Validity of new bond given without notice.**—A new bond made by the officer without the formal notice is legal and binding upon the principal and sureties. *Kempner v. County of Galveston*, 73 T. 216, 11 S. W. 188.

**Art. 6082. [3579] Discharge of sureties.**—If a new bond be given and approved, the former sureties shall be discharged from any liability for the misconduct of the principal after the approval of such new bond. [Id. sec. 2.]

**When sureties released.**—The sureties on the bond of a tax collector are not discharged until the new bond is approved by the comptroller of the state. *State v. Wells*, 61 T. 562.

Upon the death of one of the sureties upon the bond of a tax collector the county commissioners ordered the execution of a new bond. A new bond was made and approved by the county court, and was transmitted to the comptroller, and was by him rejected. The county court made no order removing the collector, and he continued in office. Held, the sureties on the first bond were not discharged by the proceedings looking to a new bond. *Approving State v. Wells, supra*. A like rule exists when a new bond is ordered by the county commissioners upon their own motion as when upon application of a surety to be relieved. Suit against heirs of one of the sureties—assets and no administration alleged, defendant only demurs; held not error to render judgment against the heirs, to be satisfied out of assets subject to execution. *Finch v. State*, 71 T. 52, 9 S. W. 85.

## CHAPTER TWO

## OF OBTAINING NEW SURETIES ON OFFICIAL BONDS

Art.  
6083. Commissioners' court may require  
new bond, etc.

Art.  
6084. Officer to be cited.  
6085. No appeal allowed.

**Article 6083. [3580] Commissioners' court may require new bond, etc.**—In all cases where by law the commissioners' court is required to approve the bond of any of the officers of their several counties, it shall be their duty, whenever they shall become satisfied that said bonds from any cause are insufficient, to require new bonds or additional sureties to be given, as the case may require. [Act July 22, 1876, p. 54, sec. 17.]

**Release of sureties on old bond.**—See note under Art. 6082.

**Art. 6084. [3581] Officer to be cited.**—The said court shall cause the officer whose bond is complained of to be cited to appear at a term of their court not less than five days after service of said citation, and shall take such action thereon as they may deem best for the interest of the state and county. [Id.]

**Art. 6085. [3582] No appeal allowed.**—From the decision of the commissioners' court in reference to said official bond no appeal shall be allowed, and their decision shall be final and conclusive.

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Form of bond.**—See, also, the articles dealing with bonds of particular officers.

It is a general rule that a statutory bond, to be valid as such, must strictly conform in every essential particular to the statute. But if the bond is in substantial compliance with the statute, or if the substituted words make the obligation less onerous, an action may be maintained on the bond. *Mays v. Lewis*, 4 T. 1; *Hanks v. Horton*, 5 T. 103; *Lawton v. State*, 5 T. 270; *Warren v. State*, 21 T. 510; *Janes v. Reynolds*, 2 T. 250; *Johnson v. Erskine*, 9 T. 1; *L. I. M. & C. Co. v. Roberts*, 62 T. 615; *Wooters v. Smith*, 56 T. 198; *Eichoff v. Tidball*, 61 T. 421; *Dignan v. Shields*, 51 T. 322; *King v. Frazer*, 2 App. C. C. § 788; *Walker v. Bennett*, 1 App. C. C. § 649; *Seeligson v. De Witt County*, 1 App. C. C. § 820.

**For what acts sureties responsible.**—See, also, the articles dealing with bonds of particular officers.

Sureties on bond of public officer held liable for all defaults of the officer within the limit of what the law authorizes or enjoins upon him as such officer, but not for acts not done in his official capacity. *Gold v. Campbell*, 54 C. A. 269, 117 S. W. 463.

Acts of officers "virtute officii" and "colore officii," defined. Id.

## TITLE 100

## PARDON ADVISERS—BOARD OF

Chap.  
1. Powers and Duties of Board.

Chap.  
2. Paroles, suspended and indeterminate sentences, etc.

## CHAPTER ONE

## POWERS AND DUTIES OF BOARD

Art.  
6086. Governor to appoint.  
6087. Shall keep record.

Art.  
6088. Shall examine applications for pardon, etc.

**Article 6086.** [3582a] **Governor shall appoint.**—The governor is hereby authorized to appoint two qualified voters of the state of Texas, and who shall perform such duties as may be directed by him consistent with the constitution, as he may deem necessary in disposing of all applications for pardon. The said two voters shall be known as the board of pardon advisers, and shall be paid out of any money in the treasury not otherwise appropriated a salary of two thousand dollars each per annum on monthly vouchers approved by the governor. [Amended Acts 1905, p. 68.]

**Art. 6087.** **Shall keep record.**—Said board shall be required to keep a record, in which will be entered every case sent it by the governor, giving the docket number of the convict, his name, when and where convicted, his sentence, his offense, when received from the governor, the action taken by said board, and the date of said action. [Id. sec. 2.]

**Art. 6088.** **Shall examine applications for pardons, etc.**—Said board shall be given a room in the capitol, properly furnished with necessary furniture and file cases, and provided with such stationery, letter books and other appliances which may be necessary for the speedy and proper transaction and dispatch of the business for which it is organized. In addition to the thorough examination of each application which the governor may refer to said board, and reporting its recommendation thereon to him, it shall perform any other work in connection with said business the governor may direct; and said board shall spend such time each year as may be necessary in personally looking into the condition of such convicts as it may desire, or as may be designated by either the governor, the superintendent of penitentiaries, or either of his assistants, or by the prison physician, or either of the commissioners, giving special attention to the cases of those of long service, who may be thus designated, and who have no means or facilities for getting a proper petition before the governor, to the end that the board may have before it such data as will enable it to judge the condition of each. All cases shall be taken up, considered and acted upon by said board in the regular order of reference by the governor, except when it appears to said board there is extraordinary emergency in any case. [Id. sec. 3.]

## CHAPTER TWO

## PAROLES, SUSPENDED AND INDETERMINATE SENTENCES, ETC.

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| <p><b>Art.</b><br/>6088a. Indeterminate sentences of persons convicted of certain felonies.<br/>6089. Convicts paroled, when.<br/>6090. Paroled prisoners to remain under control of board of prison commissioners; retaking warrants.<br/>6090a. Meetings of commissioners; prisoner may apply for parole or discharge, when.<br/>6091. Record of prisoner; transfer to other place of confinement; copy.<br/>6091a. Report by wardens as to prisoners entitled to parole.<br/>6091b. Action of prison commissioners on reports of wardens.<br/>6091c. Commissioners may authorize release on parole, when.<br/>6091d. Warrant for retaking of prisoner.<br/>6091e. Warrant, how executed; fees.<br/>6091f. Board to be notified of warrant; prisoner declared delinquent, when; imprisonment.<br/>6091g. Absolute discharge, when.<br/>6091h. Power of pardon or commutation not impaired.</p> | <p><b>Art.</b><br/>6091i. Commissioners to appoint agent or inspector; duties.<br/>6091j. Parole of prisoners serving under indeterminate sentence; continuance of supervision.<br/>6092, 6093. [Superseded.]<br/>6094. [Superseded.]<br/>6095. Restoration of citizenship.<br/>6095a. Application of article 6217 to prisoners not paroled under this act.<br/>6095b. Laws repealed.<br/>6095c. Suspended sentence.<br/>6095d. Testimony as to defendant's reputation and criminal history.<br/>6095e. Form of judgment; "good behavior" defined.<br/>6095f. Conviction of other felony; pronouncement of sentence.<br/>6095g. Expiration of suspension period; disposition of cause; effect of judgment of conviction.<br/>6095h. Pendency of other charge; extension of suspension period.<br/>6095i. Release on recognizance.<br/>6095j. Laws repealed.</p> |
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[In addition to the notes under the particular articles, see also notes on the subject of Pardons, at end of chapter.]

**Article 6088a. Indeterminate sentences of persons convicted of certain felonies.**—That whenever any person seventeen years of age or over shall be on trial for any felony, the jury trying said cause shall not only ascertain whether or not said person is guilty of the offense charged in the indictment, but shall also in the verdict assess the punishment or penalty within the period of time fixed by law as the maximum and minimum penalty for such offense, provided, if the jury shall assess the punishment for such offense at a longer period of time than the minimum period of imprisonment in the penitentiary for such offense, then the judge presiding in such cause, in passing sentence on such person, instead of pronouncing a definite time of imprisonment in the penitentiary on such person so convicted, he shall pronounce upon such person an indeterminate sentence of imprisonment in the penitentiary, fixing in such sentence the minimum and maximum terms thereof, fixing in said sentence as the minimum time of imprisonment in the penitentiary the time now or hereafter prescribed by law as the minimum time of imprisonment in the penitentiary, and as the maximum time of such imprisonment the term fixed by the jury in their verdict as punishment for such offense; provided, that if the punishment assessed by the jury shall be by pecuniary fine only, or imprisonment in the county jail, or both fine and imprisonment in the county jail, then the provisions of this act shall not apply. [Acts 1913, S. S., p. 4, sec. 1, superseding Acts 1913, p. 262, sec. 1.]

**Art. 6089. Convicts paroled, when.**—Meritorious prisoners who are now or may hereafter be in prison under a sentence to penal servitude may be allowed to go upon parole, outside of the building and jurisdiction of the penitentiary authorities subject to the provisions of this act, and to such regulations and conditions as may be made by the board of prison commissioners, with the approval of the governor of this state, and such parole shall be made only by the governor, or with his approval. [Article 6089, Rev. St. 1911. Acts 1911, p. 64, sec. 1. Acts 1913, S. S., p. 4, sec. 2, amending Acts 1913, p. 262, sec. 2.]

**Note.**—This article amends Acts 1913, p. 262, sec. 2, which superseded Art. 6089, Rev. St. 1911, and, it would seem, Acts 1911, p. 64, sec. 1, which reads as follows: "The board

of prison commissioners shall have power to make, establish and amend rules and regulations, subject to the approval of the governor, under which meritorious prisoners, who are now or hereafter may be imprisoned under a sentence to penal servitude, and who may have served the minimum term fixed by statute, for commission of offenses of which they were convicted, may be allowed to go upon parole outside the buildings and jurisdiction of the penitentiary authorities, subject to the exceptions hereinafter contained."

See amendment to constitution, adopted November 5, 1912 (Art. 17, § 58), ante, p. lix.

**Art. 6090. Paroled prisoners to remain under control of board of prison commissioners; retaking; warrants.**—While on such parole such prisoners shall remain under the control of the board of prison commissioners and subject at any time to be taken back within the physical possession and control of the said board of prison commissioners as under the original sentence, but such retaking shall be at the direction of the governor, and all orders and warrants issued by said board of prison commissioners under such authority for the retaking of such prisoners shall be sufficient warrants for all officers named therein to return to actual custody and parole convicts, and it is hereby made the duty of all officers to execute such orders as ordinary criminal processes. [Article 6090, Rev. St. 1911. Acts 1911, p. 64, sec. 2. Acts 1913, S. S., p. 4, sec. 3, amending Acts 1913, p. 262.]

See amendment to constitution, adopted November 5, 1912 (Art. 17, § 58), ante, p. lix.

**Art. 6090a. Meetings of commissioners; prisoner may apply for parole or discharge, when.**—The board of prison commissioners shall meet at each of the prisons of this state from time to time, as they shall deem necessary. At each meeting of said board held at any prison in this state, every prisoner confined in said prison whose minimum sentence has expired shall be given an opportunity to appear before said board and apply for his release upon parole or for an absolute discharge as hereinafter provided, and said board is hereby prohibited from entertaining any other form of application or petition for the release upon parole or absolute discharge of any prisoner; provided, that any prisoner now serving or who may hereafter be sentenced to serve a term of imprisonment in the state penitentiary shall be paroled, if the prisoner so desires, three months before the expiration of his term of service, after deducting from his sentence all commutations for good behavior, and such parole shall extend until such prisoner shall violate the parole rules or the expiration of such prisoner's original term of imprisonment, unless terminated by the restoration of citizenship by the governor. [Acts 1911, p. 64, sec. 3.]

**Art. 6091. Record of prisoner; transfer to other place of confinement; copy.**—The wardens or sergeants or guards of such prisoners, or who have in custody convicts subject to parole under this act, shall cause to be kept at such prison or place of confinement at which such convicts are confined an accurate record of each prisoner therein confined upon sentence, as aforesaid, which record shall include a biographical sketch covering such items as may indicate the cause of the criminal character or conduct of the prisoner, and also a record of the demeanor, education and labor of the prisoner while confined thereat, and whenever such prisoner is transferred from one prison or place of confinement to another, a copy of such record or an abstract of the substance thereof, together with certified copy of the sentence of such prisoner shall be transmitted with such prisoner to the prison or place of confinement to which he shall be transferred and delivered to the prison officer in charge thereof and retained by him as a part of the record of such prisoner. [Acts 1911, p. 64, sec. 4. Acts 1913, S. S., p. 4, sec. 4, amending Acts 1913, p. 262.]

*Note.*—This article and articles 6091a and 6091b would seem to supersede Art. 6091, Rev. St. 1911, which was substantially re-enacted by Acts 1913, p. 262, sec. 3. Section 3 in Acts 1913, p. 262, reads as follows: "No convict confined in the Texas penitentiaries shall be considered eligible for parole, and no application for parole shall be considered by the prison commissioners until such prisoner is recommended as worthy of such con-

sideration by a chaplain of the penitentiaries, and, before consideration by the prison commissioners, notice of such recommendation shall be published in a newspaper in the county from which such prisoner was sentenced, and, if none be there published, then in the county whose county site is nearest thereto, provided the expense of such publication shall not exceed one dollar; and in no case shall any prisoner be paroled, unless there is in the judgment of the prison commissioners reasonable ground to believe that he will, if released, live and remain at liberty, without violating the law, and that his release is not incompatible with the welfare of society; and such judgment shall be based upon the record and character of the prisoner established in prison, and his general reputation for honesty and peace prior to conviction. And no petition or other form of application for the release of any prisoner shall be entertained by the said commission, and no attorney or outside persons of any kind shall be allowed to appear before the prison commissioners as applicants for the parole of a prisoner. But these requirements shall not prevent the said prison commissioners from making such inquiries as they may deem desirable in regard to the previous history or environment of such prisoner, and in regard to his probable surroundings if paroled; but such inquiries shall be instituted by the prison commissioners, superintendent, and assistant superintendent, board of pardons, and all such information thus received shall be considered and treated as confidential."

**Art. 6091a. Report by wardens as to prisoners entitled to parole.**—It shall be the duty of the wardens of such prisoners to make or cause to be made to the board of prison commissioners a written report based upon the record of such prisoner as to whether or not such prisoner shall be paroled or pardoned, and such report shall be made with reference to each prisoner in charge of such warden, and shall give the reasons for such recommendations as are made, and if no recommendations are made the report shall so state, such reports to be made semi-annually. [Acts 1911, p. 64. Acts 1913, S. S., p. 4, sec. 5, amending Acts 1913, p. 262.]

See note under Art. 6091.

**Art. 6091b. Action of prison commissioners on reports of wardens.**—It shall be the duty of the board of prison commissioners to receive and preserve said reports and recommendations provided for in this act, and to consider the same and to approve or disapprove the same within three months after the same are received and to transmit a report of such recommendations for parole or pardon as they approve to the governor of this state without delay. [Acts 1911, p. 64. Acts 1913, S. S., p. 4, sec. 6, amending Acts 1913, p. 262.]

See note under Art. 6091.

**Art. 6091c. Commissioners may authorize release on parole, when.**—If it shall appear to said board of prison commissioners, from a report by the warden or sergeant of such prison, or upon an application by a convict for release on parole as hereinbefore provided, that there is reasonable probability that such applicant will live and remain at liberty without violating the law, then said board of prison commissioners may authorize the release of such applicant upon parole, and such applicant shall thereupon be allowed to go upon parole outside of said prison walls and enclosure, upon the terms and conditions as said board shall prescribe, but to remain while so on parol in the legal custody and under the control of the said board of prison commissioners until the expiration of the maximum term specified in his sentence as hereinbefore provided, or until his absolute discharge as hereinafter provided. [Acts 1911, p. 64, sec. 5.]

**Art. 6091d. Warrant for retaking of prisoner.**—If such board of prison commissioners, or any two members thereof, shall have reasonable cause to believe that a prisoner so on parole has violated his parole and has lapsed or is probably about to lapse into criminal ways or company, then such board, or any two members thereof, may issue their warrant for the retaking of such prisoner, at any time prior to the maximum period for which such prisoner might have been confined within the prison walls upon his sentence, which time shall be specified in such warrant. [Id. sec. 6.]

**Art. 6091e. Warrant, how executed; fees.**—Any officer of said prison, or any officer authorized to serve criminal process within this state.

to whom such warrant shall be delivered, is authorized and required to execute said warrant by taking said prisoner and returning him to said prison within the time specified in said warrant. Such officer, other than an officer of the prison, shall be entitled to receive the same fees therefor as upon the execution of a warrant of arrest at the place where said prisoner shall be retaken, and as for transporting a convict from the place of arrest to the prison, in case such officer also transports said prisoner to the prison. Such fees of the officer in executing said warrant shall be paid by the prison commissioners out of the funds of the prison. [Id. sec. 7.]

**Art. 6091f. Board to be notified of warrant; prisoner declared delinquent, when; imprisonment.**—At the next meeting of the board of prison commissioners held at such prison after the issuing of the warrant for the retaking of any paroled prisoner said board shall be notified thereof. If said prisoner shall have been returned to said prison he shall be given an opportunity to appear before said board and the said board may after such opportunity has been given, or in case said prisoner has not been returned, declare said prisoner to be delinquent, and he shall, whenever arrested by virtue of such warrant, be thereafter imprisoned in said prison for a period equal to the unexpired maximum term of sentence of such prisoner at the time of such delinquency is declared, unless sooner released on parole or absolutely discharged by the board of prison commissioners. [Id. sec. 8.]

*Note.*—A part of the subject-matter of this article was carried into section 4 of Acts 1913, p. 262, and on the amendment of that act by Acts 1913, S. S., p. 4, it was omitted. Section 4 of Acts 1913, p. 262, reads as follows: "Any prisoner violating the conditions of his parol, as prescribed by rules issued by said commissioners, when by a formal order entered in the proceedings of same, he is declared delinquent, shall thereafter be treated as an escaped prisoner, owing service to the state, and shall be liable when arrested to serve out the unexpired period, and the time from the date of his declared delinquency to the date of his arrest shall not be counted as any part or portion of time served. Any prisoner at large on parole committing a fresh crime, and, upon conviction thereof, being sentenced anew to the penitentiary, shall be subject to serve a second sentence after the first sentence is served or annulled, to commence from the date of termination of his liability upon the first or former sentence." The effect of the omission from the amendatory act of the subject-matter in question may present a matter for judicial construction.

**Art. 6091g. Absolute discharge, when.**—If it shall appear to the said board of prison commissioners that there is a reasonable probability that any prisoner so on parole will live and remain at liberty without violating the law, and that his absolute discharge from imprisonment is not incompatible with the welfare of society, then said board of prison commissioners shall issue to such prisoner an absolute discharge from imprisonment upon such sentence and which shall be effective therefor. [Id. sec. 9.]

**Art. 6091h. Power of pardon or commutation not impaired.**—Nothing herein contained shall be construed to impair the power of the governor of this state to grant pardon or commutation in any case. [Id. sec. 10.]

**Art. 6091i. Commissioners to appoint agent or inspector; duties.**—Said board of prison commissioners shall appoint an agent or inspector whose duty it shall be to aid and secure proper employment for all prisoners who have so conducted themselves as to be entitled to get out from such prison on parole, and to keep the said board informed of the conduct of such prisoner when out on parole, and to make a report as to each prisoner in such matters on the first day of each month for the preceding month. [Id. sec. 11.]

**Art. 6091j. Parole of prisoners serving under indeterminate sentence; continuance of supervision.**—Whenever any prisoner serving an indeterminate sentence, as provided in section 1 [Art. 6088a] of this Act shall have served for twelve months, on parole, in a manner acceptable to the board of prison commissioners, the said board shall certify



such fact to the governor, with the recommendation that the said prisoner be pardoned and finally discharged from the sentence under which he is serving. But it shall be the duty of the prison commission to continue its supervision and care over such paroled prisoner until such time as the governor shall pardon and finally discharge from custody the said prisoner; provided, that in no case shall any prisoner be held for a longer term than the maximum provided by the sentence for the crime of which the said prisoner was convicted. [Acts 1913, S. S., p. 4, sec. 7, amending Acts 1913, p. 262, sec. 5.]

**Arts. 6092, 6093.** These articles were superseded by Acts 1911, p. 64, secs. 12 and 13. The last-named sections seem to have been in turn superseded by Acts 1913, p. 262, sec. 2. The last-named act was amended by Acts 1913, S. S., p. 4, and the subject-matter of articles 6092, 6093, was omitted from the amendatory act.

**Art. 6094.** Superseded. The subject-matter of this Article was carried into Acts 1911, p. 64, sec. 14, and into Acts 1913, p. 262, sec. 4, but it was omitted from Acts 1913, S. S., p. 4, which in terms amended Acts 1913, p. 262.

**Art. 6095. Restoration of citizenship.**—When a convict who has been paroled shall have complied with the rules and conditions governing his parole until the end of the term to which he was sentenced, and without a revocation of his parole, he shall, upon a written or printed discharge from the superintendent and prison commissioners, setting forth these facts, be recommended by the board to the governor for restoration of his citizenship by the governor of the state of Texas. [Art. 6095, Rev. St. 1911. Acts 1911, p. 64, sec. 15. Acts 1913, S. S., p. 4, sec. 8, amending Acts 1913, p. 262, sec. 6.]

**Art. 6095a. Application of Art. 6217 to prisoners not paroled under this act.**—If a prisoner, sentenced to the penitentiary, shall not be paroled under the provisions of this Act, or if he shall only be sentenced to serve the minimum term of imprisonment fixed by law, then article 6217 of the Revised Civil Statutes of Texas shall apply to his sentence, and he shall be entitled to such commutation or reduction of time as in said article provided under the conditions therein named. [Id. sec. 9.]

**Art. 6095b. Laws repealed.**—No provision of this law shall in any manner be held to in anywise repeal, limit or affect in any manner the provisions of chapter seven (7) of the Acts of the thirty-third legislature [Arts. 6095c-6095j], providing for suspension of sentence in certain cases, and the provisions of said chapter 7 of the Acts of the thirty-third legislature shall apply to the trial of all cases under the conditions therein stipulated, and not specifically exempted from the operation thereof by the terms of said law. [Id. sec. 10.]

**Art. 6095c. Suspended sentence.**—That when there is a conviction of any felony in any district court of this state, except murder, perjury, burglary of a private residence, robbery, arson, incest, bigamy and abortion, the court shall suspend sentence upon application made therefor in writing by the defendant, which shall be sworn to and filed before the trial begins, when the punishment assessed by the jury shall not exceed five years confinement in the penitentiary; and in all cases where defendant is charged with felonies other than those named in section 1 hereof [this article], when the defendant has no counsel, it shall be the duty of the court to inform the defendant of his right to make such application, and the court shall appoint counsel to prepare and present same if desired by defendant; provided, that in no case shall sentence be suspended except when the proof shall show and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this state or any other state. This Act is not to be construed as preventing the jury from passing on the guilt or innocence of the

defendant, but he may enter his plea of not guilty at the same time with said affidavit. [Acts 1911, p. 67, superseded. Acts 1913, p. 8, sec. 1.]

**Constitutionality of prior act.**—Const. art. 4, § 11, provides that, in all criminal cases except treason and impeachment, the governor shall have power after conviction to grant reprieves, commutations of punishment, and pardons, etc. Acts 32d Leg. c. 44, provided that the district court judges may in prosecutions for certain offenses at defendant's request submit to the jury the issue as to whether or not the defendant has ever been charged with or convicted of crime, and, if the jury finds that he has not been, the judge may suspend the sentence on conviction. Such suspension is for an indefinite time with the power in the court to revoke on a violation of a requirement of good behavior, and compel the convict to undergo the penalty of the original sentence, or on good behavior for a time equal to double that of the sentence to bring the party into court and set aside and annul the former judgment. Held, that a pardon is an act of grace which exempts an individual on whom it is bestowed from the punishment the law inflicted for a crime which he has committed, and, although the word "pardon" is not used in the statute, as that is the effect of the statute, it is void within the constitutional provision prohibiting the exercise of powers delegated to one of the departments of government by either of the other two departments. *Snodgrass v. State* (Cr. App.) 150 S. W. 162, 41 L. R. A. (N. S.) 1144.

Such act is invalid as in contravention of Const. art. 16, § 2, which commands the legislature to enact laws to exclude from office, serving on juries, and the right of suffrage, those convicted of bribery, perjury, forgery, or other high crimes. *Id.*

Such act is not valid as an exercise of the court's power to grant a new trial, as it does not contemplate another trial of the defendant, but rather a discharge regardless of the fact that guilt has been established in a court of competent jurisdiction beyond question, and as it contemplates action by the court at a time after the end of the term at which the judgment was entered, since under Arts. 2023, 2025, no court may grant a new trial or change its judgment at a subsequent term. *Id.*

Such act is not unconstitutional in authorizing district courts to suspend sentences in certain cases as an invasion of the right to "reprieve" or grant "commutations of punishment" reserved to the governor by Const. art. 4, § 11, as a "reprieve" postpones the execution of a sentence to a day certain, whereas a "suspension" is for an indefinite time, and a "commutation" is the changing of the punishment assessed to a less punishment (citing 7 Words and Phrases, pp. 6115, 6116). *Id.*

Under Const. art. 5, § 5, which gives the right of appeal only under such regulations and restrictions as the legislature may prescribe, Acts 32d Leg. c. 44, is not unconstitutional as a suspension of the right of appeal, as the legislature has that power. *Id.*

The word "conviction," in Const. art. 4, § 11, which provides that in all criminal cases, except treason and impeachment, the governor shall have power after "conviction" to grant reprieves, commutations of punishment, and pardons, etc., means simply the determination of guilt by the jury, and does not embrace the sentence, so that a person becomes subject to pardon whenever that issue is finally determined, and a court has no inherent authority by postponement of sentence to relieve a person legally convicted of crime of the punishment fixed by law, and Acts 32d Leg. c. 44, is not constitutional as within that power. *Id.*

Const. art. 1, § 28, provides that no law shall be suspended except by the legislature itself. Held, Acts 32d Leg. c. 44, is unconstitutional as an authorization to the district courts to suspend a law or right of appeal. *Snodgrass v. State* (Cr. App.) 150 S. W. 178.

Such act confers upon the district courts the discretionary power not only to grant a "conditional pardon," which is an indefinite suspension of sentence on conditions, but also to set aside a conviction and restore the convict to all his rights, which is an essential element of the pardoning power, and it is unconstitutional as an invasion of the governor's prerogative. *Id.*

**Art. 6095d. Testimony as to defendant's reputation and criminal history.**—The court shall permit testimony and submit the question as to the general reputation of defendant to enable the jury to determine whether to recommend the suspension of sentence, and as to whether the defendant has ever before been convicted of a felony; such testimony shall be heard and such question submitted only upon the request in writing by the defendant; provided, that in all cases sentence shall be suspended if the jury recommends it in their verdict. Provided further, that in such cases, neither the verdict of conviction nor the judgment entered thereon shall become final, except under the conditions and in the manner and at the time provided for by section 4 [Art. 6095f] of this Act. [Id. sec. 2.]

**Art. 6095e. Form of judgment; "good behavior" defined.**—When sentence is suspended the judgment of the court on that subject shall be that sentence of the judgment of conviction shall be suspended during the good behavior of the defendant. By the term "good behavior" is meant that the defendant shall not be convicted of any felony during the time of such suspension. [Id. sec. 3.]

**Art. 6095f. Conviction of other felony; pronouncement of sentence.**—Upon the final conviction of the defendant of any other felony, pending the suspension of sentence, the court granting such suspension shall

cause a *caapias* to issue for the arrest of the defendant, if he is not then in the custody of such court, and upon the execution of a *caapias*, and during a term of the court shall pronounce sentence upon the original judgment of conviction, and shall cumulate the punishment of the first with the punishment of any subsequent conviction or convictions, and in such cases no new trial shall be granted in the first conviction. [Id. sec. 4.]

**Art. 6095g. Expiration of suspension period; disposition of cause; effect of judgment of conviction.**—In any case of suspended sentence, as provided herein, upon the expiration of the time assessed as punishment by the jury, the defendant may make his written and sworn application for a new trial and dismissal of such case, stating therein that since such former trial and conviction, he has not been convicted of any felony, and that there is not now pending against him any felony charge, which application shall be heard by the court during the first term time after same is filed, and, if it shall appear to the court, upon the hearing of such application, that the defendant has not been convicted of any other felony and that there is not then pending against him any other charge of felony, the court shall enter an order reciting the fact, and shall grant the defendant a new trial and shall then dismiss said cause; provided, further, that if the defendant is prevented from physical disability or other good cause from applying to the court to have the judgment of conviction set aside at the time provided for, he may make such application at the first term when such physical disability or other good cause no longer exists. After the setting aside and dismissal of any judgment of conviction as herein provided for, the fact of such conviction shall not be shown or inquired into for any purpose, except in cases where the defendant has been again indicted for a felony and invokes the benefit of this Act. [Id. sec. 5.]

**Art. 6095h. Pendency of other charge; extension of suspension period.**—If at the expiration of the time assessed by the jury as punishment, there be pending against the defendant any other charge of felony, the court shall, upon application of the defendant, (which shall be in writing, and shall state under his oath that he is not guilty of such charge), further suspend the sentence to await the final disposition of such other prosecution. [Id. sec. 6.]

**Art. 6095i. Release on recognizance.**—When sentence is suspended the defendant shall be released upon his recognizance in such sum as may be fixed by the court during such suspension. [Id. sec. 7.]

**Art. 6095j. Laws repealed.**—That all laws and parts of laws in conflict herewith be and the same are hereby repealed. [Id. sec. 8.]

#### PARDONS

**Governor's power to pardon for contempt.**—Governor has no power to pardon person committed for contempt, since a proceeding for contempt is not a "criminal case," within constitution. *Taylor v. Goodrich*, 25 C. A. 109, 40 S. W. 515.

**Validity of pardon in general.**—A pardon reciting that it is granted because the convict's testimony is needed in a criminal case is not invalid. *Locklin v. State* (Cr. App.) 75 S. W. 305.

**Pardon to restore citizenship.**—A pardon restoring the convict to rights of citizenship may be granted after the expiration of his term of service. *Locklin v. State* (Cr. App.) 75 S. W. 305.

The validity of a pardon restoring a convict to rights of citizenship is not affected by a recital of the grant of a previous pardon. *Id.*

**Conditional pardon.**—Condition permitting revocation of pardon held void. *Taylor v. State*, 41 Cr. R. 148, 51 S. W. 1106.

**Operation and effect of pardon.**—A pardon held not to operate as a release of the payment of costs adjudged against a misdemeanant. *Ex parte Mann*, 39 Cr. R. 491, 46 S. W. 828, 73 Am. St. Rep. 961.

A pardon of one who had been convicted in two cases held to be only in one of them, so that he was incompetent as a witness. *Miller v. State*, 46 Cr. R. 59, 79 S. W. 567, 3 Ann. Cas. 645.

A pardon of one convicted of burglary, which grants to the convict a full pardon and restores him to full citizenship to take effect at the expiration of the term of imprisonment, is a full pardon taking effect on the termination of the sentence. *Holmes v. State* (Cr. App.) 157 S. W. 487.

## TITLE 101

## PARTITION

[See Estates of Decedents, Title 52, Chapter 26.]

- Chap.  
 1. Partition of Real Estate.  
 2. Partition of Personal Property.

- Chap.  
 3. Miscellaneous Provisions.

## CHAPTER ONE

## PARTITION OF REAL ESTATE

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| <p>Art.<br/>         6096. Joint owner may compel partition.<br/>         6097. Petition for, and what it shall contain.<br/>         6098. Citation and service.<br/>         6099. Citation and service when defendant is unknown.<br/>         6100. Court shall determine, what.<br/>         6101. Decree of the court, and appointment of commissioners.<br/>         6102. Writ of partition.<br/>         6103. Service of writ of partition.<br/>         6104. Court may also appoint surveyor.<br/>         6105. Writ returnable when, and return thereof.<br/>         6106. Commissioner shall proceed to partition, etc.</p> | <p>Art.<br/>         6107. May cause land to be surveyed.<br/>         6108. Shall divide real estate, how.<br/>         6109. Shall allot shares.<br/>         6110. Report of commissioners, and what it shall contain.<br/>         6111. When property is incapable of division, same shall be sold.<br/>         6112. Objections may be filed to report, etc.<br/>         6113. Partition not prejudicial to reversioner, etc.<br/>         6114. Each party shall hold in severalty, subject, etc.<br/>         6115. Decree of court shall vest title.</p> |
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**Article 6096. [3606] Joint owner may compel partition.**—Any joint owner or claimant of any real estate, or of any interest therein, may compel a partition thereof between the other joint owners or claimants thereof, in the manner provided in the succeeding articles of this chapter. [R. S. 1879.]

Jurisdiction, parties and petition.—See Art. 6097 and notes.

Property and estates therein subject to partition.—There can be no partition between an owner and one having no interest. *Davis v. Agnew*, 67 T. 206, 2 S. W. 43, 376.

As to the power of the court to partition land between joint owners, see *Moore v. Blagge*, 91 T. 151, 38 S. W. 979, 41 S. W. 465.

On declaring a trust in land acquired by defendant as plaintiffs' attorney under an agreement for an equal division of the recovery, held proper to decree partition. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

This article authorizes any joint owner or claimant of any estate to compel a partition thereof. *Williamson v. McElroy* (Civ. App.) 155 S. W. 998.

— **Estates of decedents.**—See, also, Chapters 12, 14, 18 and 26 of Title 52.

The land belonging to an estate, there being no administration pending, can be partitioned in this proceeding. *Harris v. Reed*, 47 T. 523.

— **Community property.**—See, also, Arts. 3556-3559, 3612, which, however, only relate to partition after death of either husband or wife.

One who has purchased the community interest of the wife at sheriff's sale may bring suit for partition against the heirs of the husband. *Wooten v. Dunlap*, 20 T. 183.

Rule respecting partition of community property between separating husbands and wives stated. *Couch v. Schwalbe*, 51 C. A. 94, 111 S. W. 1046.

— **Life estates and reversions or remainders.**—See, also, Art. 6113.

Where a life estate extends to only a portion of a tract of land, the owner of the remaining interest, whether in fee or for life, may enforce partition. But where the right to possess the entire property exists in one holding a life estate therein, if such person has no other estate, no right to partition exists. If one, by purchase or otherwise, owns a life estate in land, and also owns a fee-simple interest in an undivided one-half thereof, he is entitled to have a partition thereof. *Tieman v. Baker*, 63 T. 641.

The right is given by this statute to the owner of any interest in any estate to compel a partition, and this includes the owner of a life interest. *Morris v. Morris*, 45 C. A. 60, 99 S. W. 874.

One claiming under a devise in a will held not entitled to sue in partition for a tract acquired by a purchaser from testator's surviving wife, owning an undivided half in the premises as survivor and owning a life estate in the remainder under the will. *McComas v. Curtis* (Civ. App.) 130 S. W. 594.

Grantors in a deed of trust held deprived during the life of the trust of the right to partition the property conveyed. *Cage & Crow v. Perry* (Civ. App.) 142 S. W. 75.

— **Personal property.**—See Chapter 2 of this title.

Partition of whole or part of property.—The husband and wife owned 2,600 acres of land in common, of which 200 acres was set apart as a homestead, and the balance sold

in bankruptcy proceedings. Held, that the wife could properly maintain an action for partition of the excess over the homestead tract, without including the homestead tract in the suit. *Battle v. John*, 49 T. 202.

A co-tenant in several lots who has not assented to a sale of one of them by the other co-tenant is not bound to seek a partition of that lot only with the purchaser, but may join him and the other co-tenant in a suit to partition all of the lots. *Ferguson v. Stringfellow & Hume*, 47 C. A. 449, 106 S. W. 762.

**Stale demands.**—Action by cotenants for partition of lands held as tenants in common, on a basis not asserted during the 50 years of their possession, does not embrace a stale demand. *Welder v. Lambert*, 91 T. 510, 44 S. W. 281.

In partition of certain alleged community property, the principle of stale demand held inapplicable to the husband's claim that a portion of the land was his separate property. *Letot v. Peacock* (Civ. App.) 94 S. W. 1121.

**Partition by act of parties.**—See notes under Art. 6122.

**Art. 6097. [3607] Petition for and what it shall state.**—Such joint owner or claimant may file his petition in the district court of the county in which the real estate sought to be partitioned, or a portion thereof, is situated, which petition shall state:

1. The names and residence, if known, of each of the other joint owners, or joint claimants, of such real estate.

2. The share or interest which the plaintiff and the other joint owners, or claimants, of said real estate own or claim so far as known to the plaintiff.

3. The real estate sought to be partitioned shall be described in such manner as that the same may be distinguished from any other real estate, and the estimated value thereof stated. [Id.]

See *Richardson v. Trout* (Civ. App.) 135 S. W. 677.

**Jurisdiction.**—Until the close of administration the county court has exclusive jurisdiction to decree a partition of the lands of an estate, when the title, as between the distributees, is clear, and no other party claims an interest adverse to the heirs. *Branch v. Hanrick*, 70 T. 731; 8 S. W. 539.

As to the jurisdiction of the district court of an ex parte proceeding in partition, see *Moore v. Blagge*, 34 S. W. 311.

District court held to have jurisdiction to partition estate of decedent, though an administrator with will annexed had been appointed. *Robb v. Robb* (Civ. App.) 41 S. W. 92.

District court held to have power to sell real property for partition. *Blagge v. Shaw* (Civ. App.) 41 S. W. 756.

A judgment in partition, ordering lands in two counties to be sold in one of the counties, and a sale thereunder held not subject to collateral attack, even though Arts. 3751, 3752, required each tract to be sold in the county where located. *Menard v. Macdonald*, 52 C. A. 627, 115 S. W. 63.

**Parties—In general.**—See, also, "Intervention," under Art. 6123.

Where in a proceeding for partition one party asserts superior title in himself, the suit is practically changed to an action of trespass to try title, and any one who claims title and asks an adjudication on an adverse interest in the land may become a party. *De La Vega v. League*, 64 T. 205.

The purchaser of a cotenant's interest held a proper defendant in a suit by the other cotenant to specifically perform a contract between the original cotenants for partition and, in the alternative, for a partition. *Ferguson v. Stringfellow & Hume*, 47 C. A. 449, 106 S. W. 762.

Whether the persons named in petition for partition as the only heirs of the deceased ancestor were the only heirs held for the jury. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

**Necessary parties.**—In a suit for partition, all interested in the estate must be made parties. *Oliver v. Robertson*, 41 T. 422; *Channel Co. v. Bruly*, 45 T. 6; *Newland v. Holland*, 45 T. 588; *Ellis v. Stewart* (Civ. App.) 24 S. W. 585; *Roller v. Reid* (Sup.) 25 S. W. 624.

Devises held necessary parties to a partition suit. *Shiner v. Shiner*, 15 C. A. 666, 40 S. W. 439.

In a suit for partition necessary parties determined. *Wipff v. Heder* (Civ. App.) 41 S. W. 164.

Attorneys of a wife, having a contract requiring the wife to convey a certain interest in community property, have no vested title therein which renders them necessary parties to a suit for partition. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

In partition, where defendant was a living man, he could have no heirs who should have been made parties. *Hughley v. Mosby*, 31 C. A. 76, 71 S. W. 395.

Where plaintiff in partition seeks to charge defendant's interest with another tract, which they had owned equally, but which defendant sold, applying the proceeds to his own use, the purchaser of such tract was not a necessary party; no relief being asked against him. *Campbell v. Campbell* (Civ. App.) 145 S. W. 638.

**Effect of defect of parties.**—See, also, "Petition—Parties and their interest," post.

Want of parties is not cured by failure to take action upon it in the trial. *Holloway v. McIlhenny Co.*, 77 T. 657, 14 S. W. 240; *Boone v. Knox*, 80 T. 642, 16 S. W. 448, 26 Am. St. Rep. 767; *McKinney v. Moore*, 73 T. 470, 11 S. W. 493; *Franks v. Hancock*, 1 U. C. 554.

Parties to a partition suit cannot complain, in an action against them to quiet title, that the partition decree is not binding by reason of the failure to make the wife of the decedent, whose property was partitioned, a party. *Hall v. Reese's Heirs*, 24 C. A. 221, 58 S. W. 974.

Assignee of an heir held not entitled to partition, where the wife of the ancestor was not made a party. *Franklin v. Moss* (Civ. App.) 64 S. W. 786.

Partition of land between heirs cannot be had after one is dismissed from the suit on her plea of coverture, where she was a necessary party thereto. *Black v. Black*, 95 T. 627, 69 S. W. 65.

Where in partition it becomes apparent that there are part owners of the property sought to be partitioned, who are not parties to the suit, the trial must be suspended until they are brought before the court. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

A judgment in partition should award the shares of certain of the heirs as shown by the evidence, and the judgment against defendant relying solely on limitations should stand, though the court erred in proceeding to decree a partition without having all of the parties in interest before it. *Id.*

**Petition—Sufficiency in general.**—In a suit brought by the heirs of the deceased mother against the administrator of the husband, who survived the wife, having charge as such of the community estate, it was incumbent on plaintiffs to allege facts showing that a general distribution of the estate was ready to be made, and that, after making the partition sought for, a sufficient amount of community assets would remain in the hands of the administrator to meet all community debts. *Hyatt v. Venters*, 41 T. 285.

A petition for partition did not allege possession or trespass by defendant nor set out the title under which the parties claim. A general exception was properly overruled. *Phillipson v. Flynn*, 83 T. 580, 19 S. W. 136.

A plaintiff in partition of land in possession of defendant who denies that plaintiff is a cotenant, and who asserts sole ownership, may maintain the suit brought in the statutory form; and he need not establish his interest in the land on a pleading in the form of trespass to try title. *Banks v. Blake* (Civ. App.) 143 S. W. 1183.

— **Parties and their interest.**—See, also, "Parties," ante.

The petition should set out the title of defendants as well as of the plaintiffs, and it must appear that the parties to the suit are entitled to the entire estate; if it appears that other parties are interested in the decision, an exception to the petition should be sustained. If such facts appear from the evidence, the court should stop the case and cause such other parties to be cited before decreeing partition. *Ship Channel Co. v. Bruly*, 45 T. 6; *De La Vega v. League*, 64 T. 205. It is not necessary that the petition should aver the extent of each defendant's interest; it is sufficient to allege that they are co-tenants of the whole tract of land, leaving it for the defendants to show their respective interests if they desire partition among themselves. *Glasscock v. Hughes*, 55 T. 461.

Plaintiffs suing in partition for the entire interests as heirs of the deceased ancestor held required to show that they are the only heirs of the ancestor. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

A petition in partition, failing to show what had become of the interest of an heir alleged to have died, held insufficient to sustain a decree. *Melde v. Melde* (Civ. App.) 132 S. W. 980.

In a suit by several upon equitable grounds to establish a tenancy in common with defendant, who was employed to protect their lands in severalty, it was not necessary to aver and establish the specific interest claimed by each plaintiff, as would be required if plaintiffs sued as tenants in common. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

— **Joinder of actions.**—In a suit by one against several defendants for partition, the plaintiff cannot join an individual claim against one of the parties interested. *Oliver v. Robertson*, 41 T. 422.

— **Prayer.**—In an action for an equitable accounting and for partition, the court may grant all the relief to which the parties may be entitled, either at law or equity, including partition, although no prayer for such relief be made in the petition. *Kalteyer v. Wipff*, 92 T. 673, 52 S. W. 63.

Not only is it proper under this article and Art. 6100 for the court in a partition suit to ascertain and determine the rights of the defendants and make partition between them, without any special pleading asking therefor, where they do not ask that there be no partition between, thus making the judgment conclusive between them, preventing one of them thereafter claiming separate ownership against the other of land which it was decreed should be partitioned; but under any system of pleading such adjudication, with such result, is proper, where one of the defendants by his answer sets up the interest of the other in all the lands, and as to the particular tract in question prays that in case of a partition it be set off to himself, because of improvements thereon made by him, and the other defendant adopts such answer so far as setting up his rights, and prays for affirmative relief, and that his title be quieted, and for general relief. *Gurley v. Hainrick's Heirs* (Civ. App.) 139 S. W. 721.

That a petition for partition did not pray costs, and the citation did not show a claim therefor, did not prevent a sale of interests of absent defendants for costs. *Cain v. Hopkins* (Civ. App.) 141 S. W. 834.

Where a party in partition asked that a definitely described part of the land be set apart to him, the court might, in the interest of justice, set apart other land, where his pleading also prayed for general equitable relief. *Wing v. Red* (Civ. App.) 145 S. W. 301.

— **Evidence admissible under petition.**—In suit for partition, evidence held such that there was no variance between proof and pleading as to the derivation of plaintiff's title. *Bartall v. Kelsey* (Civ. App.) 59 S. W. 631.

In partition plaintiffs are not required to allege common source of title in order to give evidence thereof. *Hughey v. Mosby*, 31 C. A. 76, 71 S. W. 395.

In trespass to try title and for partition, allegations in complaint held sufficient to authorize evidence that a certain defendant was liable to plaintiff for rent for the land in controversy. *Ford v. Boone*, 32 C. A. 550, 75 S. W. 353.

— **Decree authorized under petition.**—See, also, "Prayer," ante.

In a suit for partition, on the ground that the trustees had unreasonably delayed making partition as directed by the will, that a demurrer to the petition was not acted

upon, and evidence of such unreasonable delay was admitted without objection, did not authorize a judgment of partition on the ground of unreasonable delay, where such delay was not alleged. *Davis v. Davis*, 51 C. A. 491, 112 S. W. 948.

**Property and estates therein subject to partition.**—See notes under Art. 6096.

**State demands.**—See notes under Art. 6096.

**Pleading, practice and evidence.**—See Art. 6123 and notes for pleading, practice and evidence not covered by the matter under this article.

**Art. 6098. [3608] Citation and service.**—Upon the filing of a petition for partition, the clerk shall issue citation for each of the joint owners, or joint claimants, named therein, as in other cases, and such citations shall be served in the same manner and for the same length of time provided for the service of citation in other cases. [Id.]

**Parties.**—See notes under Art. 6097.

**Service by publication.**—See Art. 6099 and notes.

**Art. 6099. [3609] Citation and service where defendant is unknown.**—If the plaintiff, his agent or attorney, at the commencement of any suit, or during the progress thereof, for the partition of land, shall make affidavit that an undivided portion of the land described in the plaintiff's petition in said suit is owned by some person or persons unknown to affiant, the clerk of the court shall issue a citation to the proper officer, which shall contain a brief statement of the nature of the suit, and a description of the interest of the unknown owner or owners, commanding said officer to summon such unknown owner or owners by making publication of the citation in some newspaper in the county where the writ issued, if there be a newspaper published in said county, but if not, then in the nearest county where a newspaper is published, for four successive weeks previous to the return day of such process; when such notice is given, and no appearance is entered within the time prescribed for pleading, the court shall appoint an attorney to defend in behalf of such owner or owners, and proceed as in other causes where service is made by publication; and it shall be the special duty of the court in all such cases to see that its decree protects the rights of the unknown parties thereto; and the judge of the court shall fix the fee of the attorney so appointed, which shall be entered and collected as costs against said unknown owner or owners. [Acts 1879, p. 46.]

See *Cain v. Hopkins* (Civ. App.) 141 S. W. 834.

**Service by publication.**—See, also, note under Art. 6098.

In partition, jurisdiction of joint owners of the land, who neither joined in the application for partition nor appeared, could not be obtained by service by publication. *Walters v. Bray* (Civ. App.) 70 S. W. 443.

Where in partition the names and residences of all the heirs of the deceased ancestor cannot be given, resort may be had to the statute authorizing service by publication on unknown heirs. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

**Len for attorney's fee.**—See note under Art. 6125.

**Art. 6100. [3610] Court shall determine, what.**—Upon the hearing of the cause, the court shall determine:

1. The share or interest of each of the joint owners or claimants in the real estate sought to be divided.

2. All questions of law or equity affecting the title to such real estate, or any part thereof, which may arise. [R. S. 1879.]

See *Richardson v. Trout* (Civ. App.) 135 S. W. 677; *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

**Jurisdiction.**—See Art. 6097 and notes.

**Pleading, practice and evidence.**—See Art. 6123 and notes, but for the petition, the parties, and evidence admissible under the petition, see Art. 6097 and notes, and see the articles dealing with particular matters of procedure.

**Questions to be determined in general.**—In a suit for partition of land between partners it is proper to litigate and adjust by the decree all of the partnership transactions. *Morris v. Nunn*, 79 T. 125, 15 S. W. 230.

The court in partition must, as required by this article, determine all questions of law or equity affecting the title to the property involved. *Miller v. Odom* (Civ. App.) 152 S. W. 1185.

**Establishing title.**—In a suit for partition by the holder of the legal title, the defendants cannot defeat the plaintiff's title on the ground of a resulting trust or an equitable title in a third party, unless they show either that they had acquired that title or had some valid defense against it, and in the latter case the holder of such title must have been made a party to the suit. *Portis v. Hill*, 14 T. 69, 65 Am. Dec. 99; *Burleson v. Burleson*, 28 T. 383; *Walker v. Howard*, 34 T. 478; *Gullett v. O'Connor*, 54 T. 408; *De La Vega v. League*, 64 T. 205.

The rule of common source applies, though the action is one of partition, where defendants make a case for the test of titles. *Smith v. Davis*, 18 C. A. 563, 47 S. W. 101.

In partition, where the deed under which defendant claimed showed common source of title, it was not necessary for plaintiffs to show title deraigned from the sovereignty of the soil. *Hughey v. Mosby*, 31 C. A. 76, 71 S. W. 395.

In partition and for the removal of a cloud on the title, the court held authorized to enter judgment for defendants on their cross-petition. *Gray v. Tribue* (Civ. App.) 118 S. W. 808.

Partition between vendors retaining the legal title and a vendor's lien held not defeated by setting up the equitable title of the purchaser, acquired by foreclosure, without showing that one of the vendors had acquired and paid the purchase notes. *Schrivver v. Taylor* (Civ. App.) 143 S. W. 231.

**Adjustment of claims and equities.**—See, also, note under Art. 6111.

On recovery by a cotenant of land upon which improvements have been made in good faith under a claim of right, an account of the rents and profits should be taken, and the excess, if any above them, should be allowed to the party making such improvements. Subject to these limitations a cotenant may have his share allotted from any part of the tract of land, and so far as conflicting with this right, any conveyance by another cotenant to a purchaser of a part of the tract by metes and bounds is void. *Arnold v. Cauble*, 49 T. 527.

In a suit for partition the title was put in issue, defendants claiming separate parts of the land through a common vendor. An equity existed in favor of the common vendor which he assigned to one of the defendants, who pleaded the facts and asked relief. The other defendants pleaded not guilty. The facts supporting the equity were excluded. The judgment secured the defendant, holding the equity and pleading it, in all the land he claimed. On appeal by the other defendants, held (1) that, as the appellants had no pleadings to which the testimony was relevant, they could not complain at the exclusion of the testimony, and (2) that the defendant who pleaded the facts could not complain, having judgment in his favor for all he claimed. *Peak v. Brinson*, 71 T. 310, 11 S. W. 269.

Where there is a shortage in land allotted to heirs in the partition they are entitled to have it made good from the remainder of the estate, and on exhaustion of the estate, to reimbursement from the other heirs. *Harris et al. v. Hicks* (Civ. App.) 49 S. W. 110.

Defendant could not complain because plaintiffs relinquished their rights to land, conveyed by him, not included in that sought to be partitioned. *Harrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Where one party is adjudged entitled to contribution from the others for expenditures, he should either be compensated in land, or an order should secure to him reimbursement before the others obtain their shares. *Id.*

Husband held not entitled to charge on wife's share of community estate money voluntarily expended for care of minor daughter. *Moor v. Moor*, 31 C. A. 137, 71 S. W. 794.

Husband held not entitled to charge payment of interest on community debts on wife's portion of community property partitioned to her. *Id.*

Where a husband has so commingled his separate property with the community property as to be unable to identify it, he cannot, on the dissolution of the marriage, charge the community estate with the value of his separate estate. *Edelstein v. Brown* (Civ. App.) 95 S. W. 1126.

Where the conveyance by S. for the benefit of minors of part of a tract, in all of which she had an undivided interest, was but part of an attempted partition, and the deed on behalf of the minors, to her of another part of the tract was void, the court in a partition suit should adjust the equities so as to reimburse her for her interest in what she conveyed, should the minors plead limitations in bar of her effort to cancel her deed, and the court sustain her plea. *Schmittou v. Dunham* (Civ. App.) 142 S. W. 941.

All the parties being before the court in a partition suit, it is immaterial whether limitations pleaded as a bar to cancellation of a deed avail, the deed, a quitclaim, which, under the evidence, conveyed only the naked legal title, having no effect on the right to partition according to the equities. *Id.*

In partition of land owned in equal interests, plaintiff was entitled to charge defendant's interest with another tract, which they had owned equally, but which defendant had sold, applying the proceeds to his own use. *Campbell v. Campbell* (Civ. App.) 145 S. W. 638.

**Manner of division in general.**—See, also, Art. 6108 and notes.

Two deeds executed at the same time by the same vendor, each calling for the line of the other as a division line, and calling for land within but on opposite sides of the same survey, will be held to convey the entire tract, whether it be greater or less in quantity than estimated; such excess must be divided between the two in proportion to the quantity owned by each, irrespective of values, in the absence of facts showing that equity would require the application of a different rule. *Sellers v. Reed*, 46 T. 377.

A., the widow of B., sold the south half of a tract of land to C., and by a deed of later date sold the north half of the tract to D. In a suit by the heirs of B. for partition, the north half of the tract was set apart to them, and the court partitioned the south half between C. and D. Held, that the last part of the order of the judgment was erroneous. *Arnold v. Cauble*, 49 T. 527.

In a proceeding to repartition land by one who claims and is entitled to a larger proportion of the entire tract than was set aside to him in the former partition, the share to which he is entitled must be obtained by pro rata contributions from those cotenants who had received more than their just proportion of the land. *Peak v. Swindle*, 68 T. 242, 4 S. W. 478.

Where it appears, on partitioning community property, that the husband is more capable of managing the personal property than the wife, it is not error to allot the personal property to the husband and its equivalent in real estate to the wife. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

**Owely and liens therefor.**—See, also, notes under Art. 6115.

Where the community property of a husband and wife which is sought to be partitioned cannot be divided equally without impairing its value it may be divided into un-



equal shares, and the inequality corrected by a lien on the more valuable property in favor of the person to whom the less valuable is allotted. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

The payment of the amount so charged as a lien on the more valuable property in the case of an unequal division of community property in a partition suit is not a condition precedent to the vesting of the title of such property, but creates an incumbrance in the nature of a vendor's lien. *Id.*

Where community property is partitioned into unequal portions, and a charge on the portion of the greater value is made in favor of the party receiving the lesser portion, the lien is only a charge on the property, and not a personal charge against the person to whom it is allotted. *Id.*

A debt of one of the parties to a partition suit, charged against the land apportioned to other parties, held not owelty as to a creditor of such party not made a party to the proceeding. *Stone v. McGregor*, 99 T. 51, 87 S. W. 334.

A party to a partition suit held not to be entitled to reimbursement on payment of a debt of his charged as owelty against land apportioned to other heirs, unless so entitled on adjustment of all matters between him and other parties to the suit. *Id.*

— **Grantee of specific portion.**—Where but one or where several hold small parcels of the estate, equity would direct that the share or shares of each and his improvements be allotted as claimed, making such title good by allotting such tracts to the cotenants from whom such purchases were made. *Arnold v. Cauble*, 49 T. 527.

In analogy to the rule as to the rights of purchasers of parts of a tract or tracts of land covered by an incumbrance, requiring the enforcement of the incumbrance against the last purchasers first, it would seem equitable to give preference to the elder purchaser in partition, and the more so that the later purchaser had notice of the facts of the title. *Id.*

A sale by one tenant in common of a distinct part of a large tract of land will be protected, and the part so sold set apart to the vendee, when it can be equitably done, if it does not exceed the share to which the cotenant vendor was entitled. *Peak v. Swindle*, 68 T. 242, 4 S. W. 478.

A grantee from a tenant in common of a specific portion of the tract held in common held entitled on a partition to have allotted to him the specific portion conveyed. *Moonshine Co. v. Dunman*, 51 C. A. 159, 111 S. W. 161.

Where one tenant in common conveys a specific portion thereof, the purchaser on a partition should be allotted the portion conveyed, provided it can be done without detriment to the cotenants. *Id.*

Subsequent purchasers of undivided interests in land held to take subject to the right of the prior grantee of a specific portion thereof to have the specific portion allotted to him on partition. *Id.*

Appellants held not entitled to complain that the rule in partition that a part of the land conveyed by a common vendor to G. should be set off to him was not complied with. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

— **Improvements.**—It seems to be a rule in the partition of land, where one party owner has made improvements in good faith, to allot the part upon which the improvements are made to the party making them, or, if that cannot be done, then to allow compensation for such improvements. *Robinson v. McDonald*, 11 T. 385, 62 Am. Dec. 480; *Osborn v. Osborn*, 62 T. 495.

In adjusting the question of improvements between tenants in common, the land upon which improvements are made should be set apart to the tenant who made them, if it can be done without injury to the cotenants. *Taylor v. Taylor* (Civ. App.) 26 S. W. 889.

The decree should adjust the equities arising out of improvements, etc. *Branch v. Makeig*, 28 S. W. 1050, 9 C. A. 399.

In partition no equities held to arise between children of the vendor of her half of property owned by her and her deceased husband, together with improvements thereon erected with community funds. *Olschewske v. Summerville*, 43 C. A. 361, 95 S. W. 1.

Where defendants owned an undivided one-half of a tract of land, and placed their improvements on the north half, which, if anything, was less valuable than the south half, they were entitled to have the north half set off to them in partition. *Baker v. Hamblen*, 48 C. A. 529, 107 S. W. 577.

Persons in possession, who have made improvements on a part of land, are entitled on partition to have the part improved set off to them, if practicable. *Ord v. Waller* (Civ. App.) 107 S. W. 1166.

A tenant in common cannot make claim for improvements, where the part of the property containing the improvements is allotted to him. *Rosamond v. Rosamond*, 56 C. A. 173, 120 S. W. 520.

In a suit to recover a one-half interest in land and for partition, where defendant had been adjudged entitled to a one-half interest in a prior suit, he was entitled, on the rendering of a judgment giving plaintiffs a one-half interest in the land, with a decree of partition, to be compensated for improvements made pending the suit, since as tenant in common of the tract he had a right reasonably to improve it, and to either have the improvements set apart to him or be compensated therefor. *Whitmire v. Powell*, 103 T. 232, 125 S. W. 889.

Statement as to apportioning, on partition of common property, of property improved by one of the owners. *Higgins v. Higgins* (Civ. App.) 129 S. W. 162.

The rule that where one joint owner goes into possession of the common property, and makes permanent improvements thereon, the court in partition may set apart to him the part so improved if it can be done without impairing the rights of the other joint owners, does not authorize the court in partition of four lots to award to one joint owner a lot permanently improved by him where the only access to the other lots is over the lot so improved, and where to separate the lot improved from the others would seriously impair their value, and the court may order a sale of all the lots. *Bowen v. Hart Land & Improvement Co.* (Civ. App.) 132 S. W. 835.

A tenant in common, having improved land without intending to embarrass his cotenant, is entitled on partition to have the improvements set apart to him, if it can

be done in justice to the cotenant; otherwise, he is entitled to compensation. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

Defendant in partition held not to have lost his right to receive the part on which he had made improvements by his deed of the legal title to his co-owner of the interest to which he had hitherto held merely an equitable title. *Wentworth v. Wentworth* (Civ. App.) 142 S. W. 141.

Where a tenant in common occupied and improved as his homestead a part of the estate with the consent of his cotenant, he acquired a preference thereto on actual partition. *Id.*

A tenant in common is entitled to have improvements made by him without intent to embarrass his cotenant set apart to him in partition if it can be done without injury to the cotenant, and, if it cannot be done, he is entitled to compensation. *Holloway v. Hall* (Civ. App.) 151 S. W. 895.

— **Taxes.**—The decree should adjust the equities arising out of payment of taxes, etc. *Branch v. Makeig*, 9 C. A. 399, 28 S. W. 1050.

Grantor of undivided moiety, in partition against the grantee, held not entitled to reimbursement for half the taxes paid while he was sole owner. *Simpson v. Texas Tram & Lumber Co.*, 24 C. A. 362, 59 S. W. 811.

In partition, plaintiff held entitled to recover against infant defendants taxes paid by him on the land involved. *Olschewske v. Summerville*, 43 C. A. 361, 95 S. W. 1.

Though taxes are imposed during the life of the life tenant, held, that they may be paid by a remainderman under such circumstances that the shares of the others may on partition be charged with their proportion thereof. *Mateer v. Jones* (Civ. App.) 102 S. W. 734.

— **Expenditures to preserve property.**—A cotenant is entitled to a lien on the common property to secure a contribution for expenditures to preserve it. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

A cotenant held entitled to contribution for expenditures to preserve the property, though he had claimed to be the sole owner. *Id.*

A cotenant is not bound to accept additional land as reimbursement for expenditures to preserve the common property. *Id.*

An heir in a partition suit, seeking contribution for expenditures to preserve the property, need not account for moneys received by him as administrator of the ancestor's estate. *Id.*

Where, in a proceeding to execute a judgment of partition, making an allowance to one of the parties for an expenditure for preserving the common estate, it appears he had conveyed more than his share of the estate, held, the excess had conveyed should be applied on the compensation judgment. *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

— **Rents.**—A tenant in common who has put improvements upon the premises is not liable to his cotenant for the profits resulting from their use. *Neil v. Shackelford*, 45 T. 119.

The authorities are conflicting as to whether a tenant in common who uses the entire common property, though without claiming the right to its exclusive use, and who is not applied to by the other owners to be admitted to its enjoyment, will be liable for the value of the use, over and above the proportionate use of such tenancy in common. If, however, he rents the common property, or excludes his cotenants therefrom, under a claim of exclusive right, his cotenants are entitled to their pro rata share of the rents. *Osborn v. Osborn*, 62 T. 495.

In partition liens may be adjudged against the interest of a tenant who has collected the rents in favor of the cotenants. *Wipff v. Heder* (Civ. App.) 41 S. W. 164.

Defendants in partition held liable to plaintiff for rents accruing pending appeal and before sale on the basis of the rental value of the property. *Kalteyer v. Wipff* (Civ. App.) 65 S. W. 207.

In partition, plaintiff vendee of half interest in property held not entitled to recover against minor defendants rents alleged to have accrued through their occupancy of the premises. *Olschewske v. Summerville*, 43 C. A. 361, 95 S. W. 1.

— **Advancements.**—In a suit to partition community property, the survivor of the community held entitled to have advancements made to certain of the children considered in determining their interests. *Letot v. Peacock* (Civ. App.) 94 S. W. 1121.

In an action by heirs of a deceased mother for partition of community property, plaintiffs should not be required to account for the full value of advancements made to them by their deceased father out of the community property. *Clements v. Maury*, 50 C. A. 158, 110 S. W. 185.

Decree ordering partition.—See Art. 6101 and notes.

Division by commissioners.—See Arts. 6106-6109 and notes.

Sales in partition proceedings.—See Art. 6111 and notes.

Final decree.—See Art. 6115 and notes.

**Art. 6101. [3611] Decree of the court and appointment of commissioners.**—The court shall determine before entering the decree of partition whether the property, or any part thereof, is susceptible of partition; and, if the court determines that the whole of such property, or any part thereof, is susceptible of partition, then the court for that part of such property held to be susceptible of partition shall enter a decree directing the partition of such real estate, describing the same, to be made in accordance with the respective shares or interests of each of the parties entitled thereto, specifying in such decree the share or interest of each party, and shall appoint three or more competent and disinterested persons as commissioners to make such partition in accord-

ance with such decree and the law, a majority of which commissioners may act. [R. S. 1879. Amended Acts 1905, p. 95.]

**Adjustment of claims and equities.**—See notes under Art. 6100.

**Procedure in general.**—See, also, Art. 6123 and notes.

In a suit for partition the jury are not authorized to prescribe in the verdict how lands shall be divided. The verdict ascertains the rights of the parties. Decree for partition follows. Commissioners divide according to the decree, subject to the approval of the court. *Reed v. Howard*, 71 T. 204, 9 S. W. 109.

The jury in a partition suit cannot prescribe how lands shall be divided, nor find that they are incapable of division. They can only find the share or interest of each claimant. Commissioners will make the division, and if the property is incapable of division the commissioners will so report, and the court can order the property sold. *Kindlea v. Kosub* (Civ. App.) 110 S. W. 80.

**Determination as to divisibility.**—See, also, Art. 6111 and notes.

It is error for the court not to determine whether the land is susceptible of partition before the decree of partition is entered and commissioners appointed, but the case will not be reversed for such error, where it is manifest that partition can be made and everything is regular otherwise and that no injustice has been done. *Fagan v. Fagan*, 56 C. A. 175, 120 S. W. 551.

Under this article and Art. 6111, a general finding by the court in its decree that a portion of the property allotted to the defendants was not susceptible of partition was sufficient, without a recital of the testimony upon which such finding was based. *Gorman v. Campbell* (Civ. App.) 135 S. W. 177.

**Decree for partition—Sufficiency in general.**—In an action for partition of a city lot, a portion of the lot was set apart to plaintiffs, who were husband and wife, but the court found that the balance of the property was not susceptible of partition and set it apart to the defendants, and accorded them the right of sale, if they so desired. Held, that the decree was correct and in conformity to the statute, and a defendant could not complain thereof, in the absence of a prayer in his pleading for a sale, and in the absence of a showing that the portion set apart to plaintiffs was not a fair allotment. *Gorman v. Campbell* (Civ. App.) 135 S. W. 177.

On decreeing partition of land, one-half of which defendant was declared to hold in trust for plaintiffs, it was not error to authorize the commissioners to consider the value of the property; defendants not having requested submission of value to the jury as an issue. *Henyan v. Trevino* (Civ. App.) 137 S. W. 459.

Under these articles a decree which provides how the shares shall be determined, and which settles all questions affecting the title, and which directs that the partition shall be made in two parts, describing definitely the property to be partitioned, and which provides for commissioners to partition, for a surveyor to assist them, and which directs the commissioners to award to one of the parties the portion of the property on which improvements are situated, provided such division can be made so as to leave each moiety of equal value when each is taken as a whole, improvements included, etc., sufficiently determines the controversy, and the commissioners must divide the land and return proper description of their work in their report, with plats, field notes, and other description necessary to designate the shares, so that the court may enter the proper decree. *Wentworth v. Wentworth* (Civ. App.) 142 S. W. 141.

— **Description of land.**—It is not essential that a decree ordering partition accurately describe the land. *Black v. Black* (Civ. App.) 67 S. W. 928.

The description in the decree for partition must be so definite as to enable the commissioners to distinguish it from other real estate. *Black v. Black*, 95 T. 627, 69 S. W. 66.

— **Construction and effect.**—A decree ordering the partition of community property, which is affirmed on appeal, is a final judgment, and is conclusive on the parties as to all matters therein determined, which cannot be again raised in proceedings to confirm the report of the commissioners executing the decree of partition. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

The terms of a decree of partition held not to prevent commissioners from assigning to a widow personal property satisfactory to her in place of real property assigned by the decree. *Johnson v. Franklin* (Civ. App.) 76 S. W. 611.

The judgment in a partition decree that a party have a certain sum for expenditures for preserving the common estate, to be satisfied by setting aside land to him, having made no provision for interest, and there having been no provision as to the rents, held, that he, having between the decree and its execution had possession of the land, would not be allowed interest or charged rent. *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

The provision in the judgment in partition making an award to one of them for expenditure for preserving the common estate held conclusive as to his sole right thereto in a proceeding to execute the judgment. *Id.*

Under the decree in partition, held, that land improved by one of the parties being set aside to another in the proceeding for executing the decree, he should be charged with the then value of the improvements, but not with improvements made after the decree. *Id.*

Under a decree in partition, held a party who had previously conveyed part of the land was to be charged with its value at the time of the decree, without regard to what he obtained for it. *Id.*

**Appointment of commissioners.**—Where the judgment in partition vested in plaintiff an undivided half interest and in defendant an undivided half interest, but adjudged a lien on the whole in favor of a third person, and adjudged a lien on plaintiff's undivided half interest in favor of defendant, the failure to appoint commissioners to partition the land was not erroneous. *Miller v. Odom* (Civ. App.) 152 S. W. 1185.

— **New commissioners.**—For appointment of new commissioners after rejection of the commissioners' report, see Art. 6111 and notes.

In partition, a court did not err in appointing new commissioners and surveyor to make partition, when those first appointed failed or refused to act. *McShan v. Johnson* (Civ. App.) 151 S. W. 597.

— Motion for new commissioners.—See note under Art. 6123.

Manner of division.—See notes under Art. 6100 and Arts. 6106-6109 and notes.

Final decree.—See Art. 6115 and notes.

**Art. 6102. [3612] Writ of partition.**—The clerk shall issue a writ of partition, directed to the sheriff or any constable of the county, commanding such sheriff or constable to notify each of the commissioners of their appointment as such, and shall accompany such writ with a certified copy of the decree of the court directing the partition. [R. S. 1879.]

**Art. 6103. [3613] Service of writ of partition.**—The writ of partition shall be served by reading the same to each of the persons named therein as commissioners, and by delivering to any one of them the accompanying certified copy of the decree of the court. [Id.]

**Art. 6104. [3614] Court may also appoint surveyor.**—The court may also, should it be deemed necessary, appoint a surveyor to assist the commissioners in making the partition, in which case the writ of partition shall name such surveyor, and shall be served upon him in the same manner as upon a commissioner. [Id.]

Failure to act.—Where the commissioners and surveyor first appointed failed to act, the court properly appointed new ones. *McShan v. Johnson* (Civ. App.) 151 S. W. 597.

— Motion for new surveyor.—See note under Art. 6123.

**Art. 6105. [3615] Writ returnable, when, and return thereof.**—A writ of partition, unless otherwise directed by the court, shall be made returnable to the first day of the next term of the court from whence the same issues; and the officer serving the same shall indorse thereon the time and manner of such service. [Id.]

**Art. 6106. [3616] Commissioners shall proceed to partition, etc.**—The commissioners, or a majority of them, shall proceed to partition the real estate described in the decree of the court, in accordance with the directions contained in such decree and with the provisions of this chapter. [Id.]

Notice of time and place of meeting.—Commissioners appointed to partition community property are not required to give notice to the parties of the time and place of their meeting to perform their duties. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

Failure to act—Appointment of others.—See note under Art. 6101.

**Art. 6107. [3617] May cause land to be surveyed.**—Should the commissioners deem it necessary, they may cause to be surveyed the real estate to be partitioned into several tracts or parcels. [Id.]

Construction.—The words "several tracts or parcels," as used in this article, do not have the same meaning as the word "shares" used in Art. 6108. Each share may be composed of several of the tracts or parcels into which, in the discretion of the commissioners, the land may be divided, and the parcels finally set aside to the respective parties may not be contiguous. *Houston v. Blythe*, 71 T. 719, 10 S. W. 520.

**Art. 6108. [3618] Shall divide real estate, how.**—The commissioners shall divide the real estate to be partitioned into as many shares as there are persons entitled thereto, as determined by the court, each share to contain one or more tracts or parcels, as the commissioners may think proper, having due regard in the division to the situation, quantity and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled. [Id.]

See *Houston v. Blythe*, 71 T. 719, 10 S. W. 520; *Gorman v. Campbell* (Civ. App.) 135 S. W. 177; *Wentworth v. Wentworth*, 142 S. W. 141.

Notice of time and place of meeting.—See note under Art. 6106.

View of premises unnecessary.—Where commissioners appointed to make partition inform themselves of the character and value of the land, the fact that they do not go upon the land and view it is not sufficient ground for setting aside their report. *Robb v. Robb* (Civ. App.) 62 S. W. 125.

Manner of division.—See, also, notes under Art. 6100; and see Arts. 6106, 6107, 6109, and notes.

Where community property sought to be partitioned is in several parcels, the owners are not entitled to a share of each parcel, but only to an equal portion of the entire property. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

— **Division according to value.**—On decreeing partition of land one-half of which defendant was declared to hold in trust for plaintiffs, held not error to authorize the commissioners to consider the value of the property. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

Under the judgment in partition, held, the land would be valued as of the date thereof as between two parties whose appeal delayed execution of the judgment. *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

Under this article the duty of dividing the land as to value is confided to the commissioners, and they may divide it according to value, although the court determines that each of the parties is entitled to one-half. *McShan v. Johnson* (Civ. App.) 151 S. W. 597.

— **Adjustment of claims and equities, improvements, etc.**—See notes under Art. 6100.

**Art. 6109. [3619] Shall allot shares.**—The commissioners shall then proceed by lot to allot and set apart to each of the parties entitled one of said shares, as determined by the decrees of the court. [Id.]

**Adjustment of claims and equities, improvements, etc.**—See notes under Art. 6100.

**Failure of decree to provide for assignment by lot.**—Where the decree does not require the commissioners to assign the shares by lot they are not bound to do so. If there is error, it is the error of decree, and as the decree is not appealed from the error will not avail on an appeal from a judgment confirming the commissioners' report. *Moor v. Moor* (Civ. App.) 63 S. W. 351.

**Art. 6110. [3620] Report of commissioners and what it shall contain.**—When the commissioners have completed the partition, they shall report the same in writing and under oath to the court, which report shall show:

1. The real estate divided, describing the same.
2. The several tracts or parcels into which the same was divided by them, describing particularly each of such tracts or parcels.
3. The number of shares and the land which constitutes each share, and the estimated value of each share.
4. The allotment of each share.
5. The report shall be accompanied by such field-notes and maps as may be necessary to make the same intelligible. [Id.]

**Description of land.**—See notes under Art. 6115.

**Art. 6111. [3621] When property is incapable of division, same shall be sold, etc.**—Should the court be of the opinion that a fair and equitable division of the real estate, or any part thereof, can not be made, it shall order a sale of so much of such real estate as is incapable of partition, which sale shall be for cash, or upon such other terms as the court may direct, and shall be made as under execution, or by private sale through a receiver, if the court so order, and the proceeds thereof shall be returned into court and be partitioned among the persons entitled thereto, according to their respective interests. [R. S. 1879. Amended Acts 1905, p. 95.]

See *Gorman v. Campbell* (Civ. App.) 135 S. W. 177.

**Power to order sale.**—There was no statute law until 1879 authorizing the district court to order a sale to effect a partition; but it is held that the power has existed since the adoption of the common law in 1840. *Blagge v. Shaw* (Civ. App.) 41 S. W. 756; *Moore v. Blagge*, 91 T. 151, 38 S. W. 979, 41 S. W. 465.

Where a judgment in partition orders two tracts of land situated in different counties to be sold in one of them and sale is made thereunder neither the judgment nor sale is subject to collateral attack, although the statutes require land to be sold under execution in the county wherein situated. It is the judgment which protects the sale from collateral attack. *Menard v. MacDonald*, 52 C. A. 627, 115 S. W. 64, 65.

Before the court is authorized to divest title by sale, all the requirements of the statute must be complied with. *Fagan v. Fagan*, 56 C. A. 175, 120 S. W. 550.

The court in a suit for partition held authorized to order a sale of the property. *Bowen v. Hart Land & Improvement Co.* (Civ. App.) 132 S. W. 835.

**When sale to be ordered.**—See, also, notes under Art. 6101.

The question whether the land is susceptible of partition is decided first by the commissioners, and only after their report that a fair and equitable division cannot be made is the court empowered to order a sale to effect partition. *Tieman v. Baker*, 63 T. 641; *Keener v. Moss*, 66 T. 181, 18 S. W. 447. But see notes under Art. 6101, "Determination as to divisibility."

The court cannot order a sale in the absence of an application therefor. *Kremer v. Haynie*, 67 T. 450, 3 S. W. 676.

In equitable action for partition, the court may order a sale of the property, and a distribution of the proceeds, whenever the necessities of the case require it, without first appointing commissioners and receiving their report that no division can be made. *Kalteyer v. Wipff*, 92 T. 673, 52 S. W. 63.

Where the evidence shows that land sought to be partitioned cannot be equitably partitioned in kind, the court may order a sale thereof without first appointing a com-

mission to determine if the land is capable of division. *Saunders v. Saunders* (Civ. App.) 62 S. W. 797.

**Sale on credit.**—Where there is no showing in a partition suit of the necessity of a credit sale of the land, it is error to direct the commissioner to sell the land partially on credit. *Saunders v. Saunders* (Civ. App.) 62 S. W. 797.

**Proceeds of sale.**—A purchaser at a partition sale is not bound to see that the proceeds are received by the parties to the suit. *Blagge v. Shaw* (Civ. App.) 41 S. W. 756.

**Sale without confirmation.**—A judgment in partition is not void because it authorizes a conveyance after sale and without confirmation. *Blagge v. Shaw* (Civ. App.) 41 S. W. 756.

**Title acquired by purchaser.**—A purchaser during the term at which a decree of partition is entered holds subject to further orders of the court during such term. *Sharp v. Elliott*, 70 T. 66, 8 S. W. 488.

A confirmed sale of a land certificate sold pursuant to a decree in partition, held valid and binding on all parties to the suit and their heirs. *Hall v. Reese's Heirs*, 24 C. A. 221, 58 S. W. 974.

A purchaser at a partition sale of property, the legal title to which stands in part in the name of a married man, may rely on the assumption that he has at least a community interest in the property, and he is not chargeable with an undisclosed equitable title held in trust by the husband for his wife. *Holt v. Love* (Civ. App.) 131 S. W. 857.

The rule that one who purchases at an execution sale can claim the protection of an innocent purchaser for value, and that he has a right superior to those claiming the property through an undisclosed trust, applies to sales in partition, and a purchaser under a partition decree acquires a right superior to one claiming under an undisclosed trust. *Id.*

**Adjustment of claims and equities between parties.**—See notes under Art. 6100.

**Art. 6112. [3622] Objections may be filed to report, etc.**—Either party to the suit may file objections to any report of the commissioners in partition, and in such case a trial of the issues thereon shall be had as in other cases; and, if the report be found to be erroneous in any material respect, or unequal and unjust, the same shall be rejected, and other commissioners shall be appointed by the court, and the same proceedings had as in the first instance. [R. S. 1879.]

**Review of commissioners' report.**—The action of commissioners in partitioning community property will not be disturbed, in the absence of evidence of their partiality or unfairness. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

**Right to offer proof.**—Parties objecting to report are entitled to introduce proof, no matter how well satisfied the court may have been with the report. *Hensel v. Sturn* (Civ. App.) 25 S. W. 817.

**Adjustment of claims and equities.**—See, also, notes under Art. 6100.

Where a decree partitioning community property provides for the adjustment of community debts, and such decree is affirmed on appeal, it is not error to instruct, in a proceeding to confirm the report of commissioners making the partition, that they were not authorized to take into consideration the debts created by the parties. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

**Appointment of new commissioners.**—Regarding appointment of new commissioners when the first appointees fail to act, see note under Art. 6101.

When the report of the commissioners is not approved, others may be appointed with more specific instructions. *Houston v. Blythe*, 71 T. 719, 10 S. W. 520. See *Alston v. Emmerson*, 83 T. 231, 18 S. W. 566, 29 Am. St. Rep. 639.

**Appeal.**—Under Art. 2078, which prevents appeal, except from a final judgment, no appeal lies from an order in a partition suit rejecting a report of commissioners and appointing new commissioners. *Meyers v. Riley* (Civ. App.) 150 S. W. 479.

**Final decree.**—See notes under Art. 6115.

**Art. 6113. [3623] Partition not prejudicial to reversion, etc.**—When a partition is made between a joint owner who holds an estate for a term of years or for life with others who hold equal or greater estates, such partition shall not be prejudicial to those entitled to the reversion or remainder of such estates. [*Id.*]

**Art. 6114. [3624] Each party shall hold in severalty, subject, etc.**—When any partition is made, each party to whom a share has been allotted shall hold the same in severalty under the same conditions and covenants that it was held before such partition was made; and no warranty, lease or right whatsoever shall be impaired or affected by such partition. [*Id.*]

**Extent of implied warranty.**—The warranty which is implied in compulsory partition between heirs extends only to the title under which each received his distributive interest. *Grigsby v. Peak*, 68 T. 235, 4 S. W. 474, 2 Am. St. Rep. 487.

**Attornment by lessee.**—Where a lessee of oil land participates in the partition of the land, and recognizes the several ownership of the parties of their respective tracts, the character of its holding is changed from that of lessee from the joint owners of the whole tract to lessee from each owner of the respective tracts. *J. M. Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 48 C. A. 555, 107 S. W. 609.

**Trust.**—A decree in a partition suit brought by a trustee for the benefit of the beneficiaries held not to have divested them of their title to land decreed to the trustee, without any mention of the trust. *Tinsley v. Magnolia Park Co.* (Civ. App.) 59 S. W. 629.

**Liens on property partitioned.**—A tenant in common held barred by laches from enforcing an equitable lien on his co-tenant's share, for rents collected and unpaid, as against the holder of a deed of trust on such co-tenant's interest. *Flach v. Zanderson* (Civ. App.) 91 S. W. 348.

Evidence held to justify a finding that a co-tenant had notice that money secured by a deed of trust on his co-tenant's interest was given to pay vendor's lien notes thereon, and continued the lien for the benefit of the lender. *Id.*

**Setting apart wife's land to husband.**—Though commissioners in partition set apart to the husband all the land which belonged to him and his wife, it did not vest the title in him. *O'Connor v. Vineyard*, 91 T. 488, 44 S. W. 485.

**Art. 6115. [3625] Decree of court shall vest title.**—The decree of the court confirming the report of the commissioners in partition, when a partition has been made shall vest the title in each party to whom a share has been allotted, to such share as against the other parties to such partition suit, their heirs, executors, administrators or assigns, as fully and effectually as the deed of such parties could vest the same, and shall have the same force and effect as a full warranty deed of conveyance from such other parties and each of them. [R. S. 1879.]

Cited, *Ross v. Armstrong*, 25 T. Sup. 355, 78 Am. Dec. 574; *Gurley v. Hanrick's Heirs* (Civ. App.) 139 S. W. 721.

**Jurisdiction, parties and petition.**—See notes under Art. 6097.

**Property and estates therein subject to partition.**—See notes under Art. 6096.

**Questions to be determined, title, claims and equities.**—See notes under Art. 6600.

**Decree ordering partition.**—See Art. 6101 and notes.

**Final decree—In general.**—Interest acquired on partition determined. *Moore v. Blagge*, 91 T. 151, 38 S. W. 979, 41 S. W. 465.

In an action for partition held that a money judgment, on the ground of certain parties having sold their interests to other parties, could not be had. *Kindlea v. Kosub* (Civ. App.) 110 S. W. 79.

— **Validity and propriety.**—Judgment in partition decreeing plaintiff an interest in certain land previously partitioned by mistake held proper. *Cartmell v. Chambers* (Civ. App.) 54 S. W. 362.

A judgment in proceedings for the partition of the real estate of a decedent approving the report of the commissioners recommending a sale, if rendered before the service of citations on the heirs, is premature, but not void. *Rye v. J. M. Guffey Petroleum Co.*, 42 C. A. 185, 95 S. W. 622.

Where in partition it did not appear that plaintiffs were the only heirs of the deceased ancestor, it was error to permit them to recover any more than their respective interests in the premises. *Hess v. Webb* (Civ. App.) 113 S. W. 618.

In partition and for the removal of a cloud on the title, the court held without authority to render judgment for plaintiffs for the part of the land disclaimed by defendants filing a cross-petition for the balance. *Gray v. Tribue* (Civ. App.) 118 S. W. 808.

A judgment failing to dispose of the case as to two codefendants was void. *Uher v. Cameron State Bank* (Civ. App.) 125 S. W. 321.

— **Decree authorized under petition.**—See notes under Art. 6097.

— **Description of land.**—Contention that a decree of partition was void for insufficiency of description of the allotments held without merit; it appearing that the parties making such claim had taken possession of the allotment under the decree. *Taffinder v. Merrill* (Civ. App.) 61 S. W. 936.

A judgment in partition, directing certain land which had been sold to be charged to two of the parties, held not invalidated for failure to contain a description of such land. *Hanrick v. Hanrick*, 98 T. 269, 83 S. W. 181.

A judgment in partition should be so specific as to show on its face without the aid of the pleadings the land intended to be partitioned. *Massie v. Massie*, 54 C. A. 617, 118 S. W. 219.

In case of repugnancy as to a description in a partition decree, the report of the commissioners may be considered. *Morse's Heirs v. Williams* (Civ. App.) 142 S. W. 1186.

Where a plat, made part of the report of commissioners in partition and of the decree of court, covered all the land intended to be partitioned, but field notes in the report did not do so, the question was as to the intent of the commissioners in their report and the court's intention in its adoption by decree. *Rosenthal v. Sun Co.* (Civ. App.) 156 S. W. 513.

— **Conclusiveness.**—The fairness of a partition cannot be collaterally attacked in trespass to try title. *Moore v. Blagge*, 91 T. 151, 38 S. W. 979, 41 S. W. 465.

Decree partitioning community estate held *res judicata* of right to charge money expended for minor child on other party's portion. *Moor v. Moor*, 31 C. A. 137, 71 S. W. 794.

A judgment approving the report of commissioners in partition for the sale of a decedent's real estate held not open to collateral attack. *Rye v. J. M. Guffey Petroleum Co.*, 42 C. A. 185, 95 S. W. 622.

Plaintiff, in trespass to try title, was a minor at the death of her father, and was entitled to one-half of the community property and to all of her father's separate estate, subject to the life interest and homestead rights of her stepmother; and by her guardian she then petitioned for partition, claiming an undivided one-half interest in all the property, including the separate estate, and erroneously alleging that she was an equal owner of such property with her stepmother. An actual partition was made, as prayed, and confirmed, and the parties took possession of the shares allotted them, and after the stepmother's death plaintiff claimed reversion in her share and against her heirs. Held, that the decree of partition was *res judicata* as to plaintiff's rights and interests in the property involved. *Richardson v. Trout* (Civ. App.) 135 S. W. 677.

— **Persons bound.**—A sale of a minor's interest in certain lands held in common under authority of the court in 1855 held not to operate as a partition of the tract as against other tenants in common. *Broom v. Pearson*, 98 T. 469, 85 S. W. 790, 86 S. W. 733.

A third person made a party in partition by intervention, who filed after judgment and pending motion for a new trial a disclaimer in favor of his son, was bound by the judgment. *Ivy v. Ivy*, 51 C. A. 397, 112 S. W. 110.

A judgment in a suit for partition held to dispose of the rights of all the parties. *Whitmire v. Powell* (Civ. App.) 117 S. W. 433; *Id.*, 103 T. 232, 125 S. W. 889.

Where a suit to partition land, one-half of which belonged to the estate of a decedent, subject to the life interest of her husband, and the other half of which was owned by a third person as separate property, was brought against the third person and his wife, a judgment disposing of the rights of the parties to the land effectually disposed of the rights of the wife of the third person, so as to be a final judgment, though it did not mention her name; the fact that she was given nothing being in effect an adverse judgment. *Whitmire et ux. v. Powell et al.*, 103 T. 232, 125 S. W. 889.

If a partition is final as to some of the parties, it is final as to all, except as between those to whom there is a joint allotment. *Parks v. Knox* (Civ. App.) 130 S. W. 203.

A partition decree held not an adjudication of the claims of heirs in the estate of their deceased mother. *Moss v. Slack* (Civ. App.) 141 S. W. 1063.

— **Persons benefited.**—One not a party to a partition suit held entitled to enforce a lien given him by the decree. *Stone v. McGregor* (Civ. App.) 84 S. W. 399.

Lien of a party to a partition suit on land awarded to other parties for the amount of a debt as owelty held not to pass to the creditor by the judgment. *Stone v. McGregor*, 99 T. 51, 87 S. W. 334.

A judgment in partition held to protect a purchaser from an owner of an undivided interest of his interest in the timber on the tract. *Hunter v. Hodgson* (Civ. App.) 95 S. W. 637.

— **Estoppel by participation or acquiescence.**—A party who takes part in a partition is estopped from afterwards setting up the superior title as a basis of recovery against one of his co-tenants, who also took part in the partition. *De La Vega v. League*, 64 T. 205.

A decree of partition acquiesced in and acted upon and recognized by the parties having an interest in the land cannot be impeached in a collateral proceeding. *Deik v. Punchard*, 64 T. 360, citing *Grassmeyer v. Beeson*, 18 T. 763, 70 Am. Dec. 309; *Sawyer v. Boyle*, 21 T. 38.

One who conveys by deed the interest in land set apart to him in partition between himself as an heir of his father and other heirs of his father is not estopped thereby from asserting title to a larger interest in the same land inherited from his mother, who was not a party to the proceedings and the interest of whose estate was not adjudicated therein. *Grigsby v. Peak*, 68 T. 235, 4 S. W. 474, 2 Am. St. Rep. 487.

Parties by acceptance and appropriation of parcels set apart to them are estopped after great lapse of time. *Lemons v. Stratton*, 24 S. W. 370, 5 C. A. 403; *Wilson v. Helms*, 59 T. 680; *Stone v. Ellis*, 69 T. 329, 7 S. W. 349; *Conner v. Huff*, 48 T. 364.

Where a party to a suit to partition community property appears before the court and moves that the decree in partition be approved, such party cannot afterwards deny its validity; and hence it is not necessary to compel her to execute a bill of sale for personal property which is partitioned. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

— **Acquisition of adverse title.**—The rule that one party to a partition decree may not acquire the title of a stranger and set it up against the other party has no application where the decree was procured by fraud of the latter party. *Clevenger v. Mayfield* (Civ. App.) 86 S. W. 1062.

— **Notice of recitals.**—Where a partition decree recites that it is made without prejudice to rights of plaintiff, one who takes a mortgage from one to whom the land is adjudged is put on notice of plaintiff's rights. *Gray v. Cockrell*, 20 C. A. 324, 49 S. W. 247.

— **Construction.**—A decree in partition construed to have effected the partition of a land certificate, though not specifically mentioned in the original decree. *Hall v. Reese's Heirs*, 24 C. A. 221, 58 S. W. 974.

A decree in partition held not to impose a personal liability to pay a debt charged as owelty. *Stone v. McGregor*, 99 T. 51, 87 S. W. 334.

A decree in partition held to give certain property to minor heirs, subject to lien of a trust deed thereon executed by another heir to secure a debt, charged as owelty against the property apportioned. *Id.*

A partition by decree of court is the act of the court, and its intention governs. *Rosenthal v. Sun Co.* (Civ. App.) 156 S. W. 513.

— **Effect in general.**—A partition decree held insufficient to constitute a divestiture of title in fee to the tract set off to the widow, and vest in her simply a life estate with remainder to the husband's heirs. *Drew v. Morris* (Civ. App.) 82 S. W. 321.

A partition decree between heirs held not to deprive the county court of jurisdiction within four years after intestate's death to grant administration and sell the property to pay debts as against creditors not parties to the partition. *Salas v. Mundy* (Civ. App.) 125 S. W. 633.

A judgment in partition whereby the title to lands are vested in a widow and her children jointly, in fee simple, created an equality of interest in her and her children, and she holds an undivided interest in the land as a tenant in common with them. *Parks v. Knox* (Civ. App.) 130 S. W. 203.

— **Costs.**—See notes under Art. 6125.

— **Power to alter.**—One who purchases land allotted to one of several joint owners at the term of court when a decree of partition is entered determining the interest of each owner, and after the entry of such decree, must be held to have purchased with notice that the court could exercise its authority to alter its judgment at any time during the term, on proper notice. *Sharp v. Elliott*, 70 T. 666, 8 S. W. 488.

— **Assignment of judgment.**—An agreement transferring all interest in judg-



ment in partition held not to preclude recovery for rents not involved in the judgment and subsequently accruing. *Kalteyer v. Wipff* (Civ. App.) 65 S. W. 207.

— **Use as evidence.**—A decree in a partition suit held not admissible against one not a party to it and whose deed was received prior to the suit. *Miller v. Freeman* (Civ. App.) 127 S. W. 302.

Partition decree, though invalid for uncertainty, held admissible to show that both plaintiff and defendant claimed from a common source. *Caruthers v. Hadley* (Civ. App.) 134 S. W. 757.

## CHAPTER TWO

### PARTITION OF PERSONAL PROPERTY

Art.	Art.
6116. Part owner may compel partition.	6119. Decree of court, executed how.
6117. Suit shall be commenced in what court.	6120. Property shall be sold, when.
6118. Court shall ascertain, what.	6121. How sold, and partition of proceeds.

**Article 6116. [3626] Part owners may compel partition.**—Part owners of personal property may be compelled to make partition between them in the manner provided in the succeeding articles of this chapter. [Act Dec. 24, 1851. P. D. 4711.]

**Partition of estates of decedents.**—See Chapter 12, 14, 18 and 26 of Title 52.

**Partition of intermingled cattle.**—This chapter is applicable in a case as to two or more mortgagees, where there has been an intermingling and confusion of the mortgaged property where neither is to blame. This chapter does not exclude every other method of partition, but it is sufficient in a case of mortgaged cattle, when it is impossible to identify the precise stock covered by each mortgage. *Belcher v. Cassidy Bros. Live Stock Commission Co.*, 26 C. A. 60, 62 S. W. 924.

**Property outside of state.**—See notes under Art. 6117.

**Art. 6117. [3627] Suit shall be commenced, in what court.**—Suit for partition shall be commenced in the court having jurisdiction of the value of such property, in the same manner as other civil suits are commenced, and the several owners or claimants of such property shall be cited as in other cases. [Id.]

**Property outside state—Jurisdiction.**—Where the court has jurisdiction of the parties in a suit to partition community property, it may render a valid decree partitioning their personal property situated outside the state. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

— **Presumption.**—Where a decree of partition orders the sale of personal property situated on a certain ranch, the location of which is not determined, it will be presumed, on confirming the report of the commissioners partitioning such property, that the property was situated within the state. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

— **Time to object.**—The objection that community property ordered to be partitioned by a decree which has been affirmed is not situated within the state cannot be raised for the first time by objections to the report of the commissioners appointed to execute the decree of partition. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

**Art. 6118. [3628] Court shall ascertain, what.**—The separate value of each article of such personal property, and the allotment, in kind to which each owner is entitled, shall be ascertained by the court, with or without a jury. [Id. P. D. 4712.]

**Art. 6119. [3629] Decree of court executed, how.**—When partition in kind of personal property is ordered by the judgment of the court, a writ shall be issued in accordance with such judgment, commanding the sheriff or constable of the county where the property may be to put the parties forthwith in possession of the property allotted to each respectively. [Id. P. D. 4713.]

**Art. 6120. [3630] Property shall be sold, when.**—When personal property will not admit of a fair and equitable partition, the court shall ascertain the proportion to which each owner thereof is entitled, and shall order the property to be sold. [Id. P. D. 4714.]

**Art. 6121. [3631] How sold and partition of proceeds.**—In the case provided for in the preceding article, execution shall be issued to the sheriff or any constable of the county where the property may be, describing such property and commanding such officer to sell the same as

in other cases of execution, and pay over the proceeds of sale to the parties entitled thereto, in the proportion ascertained by the judgment of the court. [Id. P. D. 4715.]

## CHAPTER THREE

### MISCELLANEOUS PROVISIONS

<p>Art. 6122. Provisions of this title shall not affect, what.</p> <p>6123. Rules of pleading, practice and evidence.</p>	<p>Art. 6124. Pay of commissioners.</p> <p>6125. Costs to be adjudged, how.</p>
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**Article 6122. [3632] Provisions of this title shall not affect, what.**  
—The provisions of this title shall not affect the mode of proceeding prescribed by law for the partition of estates of decedents among the heirs and legatees, nor shall such provisions preclude partition in any other manner authorized by the rules of equity; which rules shall govern in proceedings under this title in all things not provided for in this title. [R. S. 1879.]

**Partition of estates of decedents.**—See Chapters 12, 14, 18 and 26 of Title 52.

**Partition of community property.**—See Arts. 3556-3559, 3612, which, however, only relate to partition after the death of one of the parties.

**Original equitable jurisdiction.**—The statute does not take away or in any degree abridge the original and inherent powers of the court of chancery in respect to the partitioning of estates. The statute prescribes a procedure, but it is not obligatory. Our courts, possessing the powers of courts of chancery, may proceed to administer relief upon the principles of equity without the aid of the statute. It is usual to provide in the decree for the commissioners to report, etc., but it is competent for the court to direct the manner of making the partition, and to decree the making of the conveyances, without the necessity of a report and decree of confirmation. The court may, in the first instance, direct conveyances to be made in pursuance of the allotments of the commissioners, if that be deemed proper. *Grassmeyer v. Beeson*, 18 T. 763, 70 Am. Dec. 309; *Payne v. Benham*, 16 T. 364. But see *Tieman v. Baker*, 63 T. 641; *Keener v. Moss*, 66 T. 181, 18 S. W. 447; *Kremer v. Haynie*, 67 T. 450, 3 S. W. 676; post, Art. 6122.

**Partition by act of parties—In general.**—Land acquired under a contract for its joint acquisition may be partitioned by parol by the owners. *Gibbons v. Bell*, 45 T. 418.

A verbal partition of land is valid. *Johnson v. Johnson*, 65 T. 87; *Shannon v. Taylor*, 16 T. 413; *Stuart v. Baker*, 17 T. 417; *Houston v. Sneed*, 15 T. 307; *Gibbons v. Bell*, 45 T. 418. Possession under it is not necessary to its validity. When those who it is alleged made it are dead, when it is of ancient date, all the conduct and acts of the parties, and every circumstance of acquiescence in such acts as are consistent only with the fact that a partition had been made, should be admitted in evidence. The payment of taxes by one claiming under such a partition may be shown. *Glasscock v. Hughes*, 55 T. 461.

Where the heirs make deeds one to the other of the lands allotted to them, the question whether the commissioner's partition was invalid becomes immaterial. *Kempner v. Beaumont Lumber Co.*, 20 C. A. 307, 49 S. W. 412.

— **What constitutes.**—If one entitled to a locative interest of one-third of a tract of land verbally agrees with another that he shall appropriate a portion of the survey in satisfaction of his claim, this, as between the parties, amounts to a parol partition of the land. *Huffman v. Cartwright*, 44 T. 296.

A license by parol by one party to the other, being interested in a disputed division line, to occupy part of the land in dispute to a designated line, is not equivalent to an agreement upon such line as a division line. *Wright v. Lassiter*, 71 T. 640, 10 S. W. 295.

Parol agreement by husband and wife, after permanent separation, held an equitable partition of the community property, which, having been fully executed, would be upheld. *Moore v. Moore*, 28 C. A. 600, 68 S. W. 59.

— **Acquiescence.**—When a partition of land has been acquiesced in and acted upon, it will not be set aside after a great lapse of time. *Conner v. Huff*, 48 T. 364; *Wilson v. Helms*, 59 T. 680; *Stone v. Ellis*, 69 T. 325, 7 S. W. 349; *Wardlow v. Miller*, 69 T. 395, 6 S. W. 292; *Lemons v. Stratton*, 24 S. W. 370, 5 C. A. 403.

A parol partition of a land certificate before its issuance, between several entitled to an interest therein, which was acted on by them and recognized, conveyances made in pursuance thereof, and possession taken, is binding on the parties thereto. *Parker v. Spencer*, 61 T. 155.

After seven years' acquiescence by parties in interest to a verbal partition of land fairly made, and under which the parties have held possession in severalty of the parcels allotted, the partition was held valid and conferred title. *Mitchell v. Allen*, 69 T. 70, 6 S. W. 745.

— **Quitclaim deed.**—A partition deed is intended to pass the land itself to the grantee, and not merely a claim to it; and one who claims through it is an innocent pur-

chaser though it be in form a quitclaim. *Kempner v. Beaumont Lumber Co.*, 20 C. A. 307, 49 S. W. 412.

— **Married woman.**—A parol partition of land is valid when a wife, having an interest therein, gave her consent in a written instrument, joined by her husband, to a partition thereof, accepted the land allotted to her, and clearly manifested by her acts an intention not to avoid the partition; the fact that the written instrument was not signed in the manner regulating the conveyance of the property of married women was immaterial. *Wardlow v. Miller*, 69 T. 395, 6 S. W. 292.

A parol partition of land by married women is valid. *Martin v. Harris* (Civ. App.) 26 S. W. 91.

— **Upon whom binding.**—If one entitled to a locative interest of one-third of a tract of land verbally agrees with another that he shall appropriate a portion of the survey in satisfaction of his claim, this, as between the parties, amounts to a parol partition of the land, and its validity cannot afterwards be objected to by one who afterwards acquires title, on the ground that when the agreement was made he had no title. *Huffman v. Cartwright*, 44 T. 296.

A purchaser under a voluntary partition is not affected by a mistake made by one of the parties thereto as to the extent of his interest in the property, though the facts recited in the paper which evidences the partition may show that such party was entitled to a larger interest than he consented to receive. The purchaser, while chargeable with notice that the party had received less than his share, would not be charged with notice as to whether the party was mistaken as to his legal rights. *Wardlow v. Miller*, 69 T. 395, 6 S. W. 292.

In the absence of evidence showing that those in interest, who were not parties to a partition of land, assented to the partition made, or participated in it, such partition is, as to them, a nullity. *House v. Brent*, 69 T. 27, 7 S. W. 65.

Two tenants in common in a tract of land made a parol partition. After the partition one leased a building lot for a term of years, receiving rents therefor. The right of the other was sold under execution, the purchaser having no notice of the partition. The holders of the term were in possession of the lot at the execution sale. In suit by such purchaser, held: 1. That the partition was valid between the owners. 2. That the lessees under one, after the partition, were protected under the partition; and 3. A purchaser while the lessees were in possession under the lease was chargeable with notice of the partition to the extent necessary to protect the lessees, etc.; that on recovery by the execution purchaser it was error to allow rents against the lessees so holding. *Whitaker v. Allday*, 71 T. 623, 9 S. W. 483.

— **Agreements within statute of frauds.**—See notes under Art. 3965.

**Art. 6123. [3633] Rules of pleading, practice and evidence.**—The same rules of pleading, practice and evidence which govern in other civil causes shall govern in suits for partition, when not in conflict with any provisions of this title. [Id.]

**Parties, petition, evidence and decree authorized by petition—Joinder of actions.**—See notes under Art. 6097.

**Procedure in general.**—See, also, notes under Art. 6101 and other articles dealing with particular matters of procedure.

The strict rules of chancery do not prevail in proceedings for the partition of land. In such proceedings questions involving conflicting claims to title by parties thereto may be determined. Where it appears from the pleadings that one of the plaintiffs with whom partition is sought claims the entire land, and asks judgment therefor, the partition proceeding must be delayed until the question of title is adjudicated. *De La Vega v. League*, 64 T. 205. See Art. 6115.

Where the pleadings in a partition suit do not raise the question of the liability of an occupying tenant for certain rents, a refusal of the trial court to require an accounting for such rents is not erroneous. *Saunders v. Saunders* (Civ. App.) 62 S. W. 797.

**Intervention.**—See, also, "Parties," under Art. 6097.

A purchaser of a specific portion of land pending a partition suit between his vendors and others as tenants in common held to have the right to intervene in the suit, and ask to have the property conveyed set apart to his grantors. *Rosborough v. Cook* (Civ. App.) 148 S. W. 1120.

**Sufficiency of motion.**—Motion for appointment of surveyor and commissioners upon failure of those previously appointed to act held sufficient, although defendant did not state that a writ of partition, accompanied by a certified copy of the decree, was ever issued to the sheriff. *McShan v. Johnson* (Civ. App.) 151 S. W. 597.

**Establishing title.**—See notes under Art. 6100.

**Burden of proof.**—See, also, Art. 3687.

The burden was on plaintiffs in partition to prove, as they alleged, that a deed under which defendant claimed, and which was produced and shown to be genuine, was executed only for the temporary purpose of making defendant eligible for an office. *Ivy v. Ivy* (Civ. App.) 128 S. W. 682.

A plaintiff in partition held required to establish his right as to an interest in the land. *Banks v. Blake* (Civ. App.) 143 S. W. 1183.

**Questions for jury.**—See, also, Chapter 13 of Title 37; and see "Parties—In general," under Art. 6097.

Where, in an action for partition, a deed to plaintiff from one of defendants alleged to be of unsound mind was sought to be set aside, it was discretionary with the trial court to inquire into the mental condition of defendant in limine, or to submit the question to the jury with the other issues. *Lindly v. Lindly* (Civ. App.) 109 S. W. 467.

**Admissibility of evidence.**—See, also, Art. 3687; and see notes under Art. 6097.

In partition, certain evidence held inadmissible as not within the issues. *Jennings v. Borton*, 44 C. A. 280, 98 S. W. 445.

In partition wherein a deed, under which defendant claimed, was alleged to have been executed by the latter's mother merely to make him eligible for an office, to repel the im-

putation cast on the deed, and as well as to show the consideration, he should have been allowed to testify that he paid a part of the purchase price for the land when it was conveyed to her. *Ivy v. Ivy* (Civ. App.) 128 S. W. 682.

**Sufficiency of evidence.**—See, also, "Establishing title," under Art. 6100; and see articles dealing with particular questions.

In partition, evidence held to justify a supposition that the description in a deed to plaintiffs' ancestor was a typographical error, and sufficient to support a judgment for the recovery of a lot other than that described in the deed. *Hughey v. Mosby*, 31 C. A. 76, 71 S. W. 395.

**Art. 6124. [3634] Pay of commissioners.**—The commissioners in partition and the surveyor, if any has been appointed, shall receive for their services three dollars each per day for each day they are engaged in making and returning such partition, and the same shall be taxed and collected as other costs in the case. [Id.]

**Pay of commissioners in non-statutory partition.**—The commissioners appointed by the court to partition community property, in a partition made under the court's general powers, rather than the statutory partition, are entitled to a reasonable value for their services, and are not limited to the statutory fee of three dollars per day. *Moor v. Moor* (Civ. App.) 63 S. W. 347.

**Art. 6125. [3635] Costs to be adjudged, how.**—The court shall adjudge the costs in a partition suit to be paid by each party to whom a share has been allotted in proportion to the value of such share. [Id.]

**Prayer for costs.**—See note under Art. 6097.

**When to be assessed.**—Under this article the court cannot be compelled to pass on any question of costs until the case is finally disposed of. *Wentworht v. Wentworth* (Civ. App.) 142 S. W. 141.

**Apportionment.**—Where there is no contest as to the title, all parties are liable for costs to be apportioned according to their respective interests. If the defendant contests the right of the successful plaintiff, he is liable for the costs thereby incurred. The costs subsequent to the decree ascertaining the rights of the parties are to be apportioned. *Johns v. Northcutt*, 49 T. 444; *Keener v. Moss*, 66 T. 181, 18 S. W. 447.

In partition suits, defendants are liable for all costs incurred by them in contesting the rights of the successful plaintiffs. *Powell v. Naylor*, 32 C. A. 340, 74 S. W. 338.

**Sale on partition, of improvements on separate estate of wife, to enforce collection of judgment at suit of trustee in bankruptcy held to subject the wife and trustee to the costs in proportion to their respective shares.** *Collins v. Bryan*, 40 C. A. 88, 88 S. W. 432.

**Under the facts in an action to partition property of an estate and to foreclose a mortgage, held not an abuse of discretion to tax seven months of the costs against plaintiff.** *Nelson v. Brown* (Civ. App.) 111 S. W. 1106.

**Costs incurred in establishing contested title in partition held chargeable against the defendants.** *Richmond v. Sims* (Civ. App.) 144 S. W. 1142.

**Lien for costs.**—In partition, costs awarded against absent defendants, including a fee to an attorney appointed for them, were properly made a lien against their share. *Cain v. Hopkins* (Civ. App.) 141 S. W. 834.

**Execution.**—It is not error to award execution for the costs against parties taking in partition in decreeing partition. That parties so taking as heirs are also parties as legal representatives does not prevent such order. *Peak v. Brinson*, 71 T. 310, 11 S. W. 269.

## TITLE 102

## PARTNERSHIPS AND JOINT STOCK COMPANIES

Chap.

1. Partnerships—Limited.

Chap.

2. Unincorporated Joint Stock Companies  
—Permitting Suit in Company Name.

## CHAPTER ONE

## PARTNERSHIPS—LIMITED

<p>Art. 6126. Limited partnership authorized. 6127. General and special partners. 6128. General partners only to act. 6129. Such partnerships, how formed. 6130. Certificate to be acknowledged. 6131. And filed and recorded. 6132. General partner to file affidavit. 6133. Prerequisites indispensable. 6134. Terms to be published. 6135. Publisher's affidavit. 6136. Renewals to be with like formalities. 6137. Certain alterations a dissolution. 6138. Firm name. 6139. Suits by and against.</p>	<p>Art. 6140. Capital of special partner not to be withdrawn. 6141. If reduced, to be made good. 6142. Powers of special partner. 6143. Partners to account, and liability for fraud. 6144. Assignments by partnership, when void. 6145. Assignments in contemplation of insolvency. 6146. Effect of concurrence by special partner. 6147. Partnership creditors preferred. 6148. Dissolution before time agreed upon.</p>
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[In addition to the notes under the particular article, see also notes of decisions relating to partnerships in general, at end of chapter.]

**Article 6126. [3583] Limited partnerships authorized.**—Limited partnerships for the transaction of any mercantile, mechanical, manufacturing or other business, except banking or insurance, may be formed by two or more persons, upon the terms, with the rights and powers, and subject to the conditions and liabilities herein prescribed. [Act May 12, 1846, p. 279, sec. 1. P. D. 4717 et seq.]

**Partnership.**—For decisions relating to common-law partnerships, see notes at end of this chapter.

**Art. 6127. [3584] General and special partners.**—Such partnerships may consist of one or more persons, who shall be called the general partners, and who shall be jointly and severally responsible as general partners now are by law; and of one or more persons who shall contribute in actual cash payments a specific sum as capital to the common stock, who shall be called special partners, and who shall not be liable for the debts of the partnership beyond the fund so contributed by him or them to the capital. [Id. sec. 2.]

**Defective articles.**—See notes under Art. 6129.

**Art. 6128. [3585] General partners only to act.**—The general partners only shall be authorized to transact business and sign for the partnership and to bind the same. [Id. sec. 3.]

**Art. 6129. [3586] Such partnerships, how formed.**—The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:

1. The name or firm under which the partnership is to be conducted.
2. The general nature of the business intended to be transacted.
3. The names of all the general and special partners interested therein, distinguishing which are general and which are special partners, and their respective places of residence.
4. The amount of capital which each special partner shall have contributed to the common stock.

5. The period at which the partnership is to commence, and the period at which it is to terminate. [Id. sec. 4.]

**Defective articles.**—Mere formal defects in the articles of partnership which do not mislead third parties to their injury will not render the limited partner liable as a gen-

eral partner. *Carhart v. Killough*, 1 App. C. C. § 113, citing *Monroe v. Arledge*, 23 T. 478. A person dealing with a partnership with notice of the limited liability of one of the firm is bound by such limitation. *Carhart v. Killough*, 1 App. C. C. § 112; *Gallagher v. Heidenheimer*, 3 App. C. C. § 133.

When articles are not made in conformity with the statute, the record is not notice. *Gallagher v. Heidenheimer*, 3 App. C. C. § 133.

**Art. 6130. [3587] Certificate to be acknowledged.**—The certificate shall be acknowledged by the several persons signing the same, before any officer authorized to take acknowledgments for record, and such acknowledgment shall be made and certified in the same manner as the acknowledgment of the conveyances of land. [Id. sec. 5.]

**Art. 6131. [3588] And filed and recorded.**—The certificate so acknowledged and certified shall be filed in the office of the clerk of the county court of the county in which the principal place of business of the partnership shall be situated, and shall also be recorded by him at large in a book to be kept for that purpose, open to public inspection. If the partnership shall have places of business situated in different counties, the certificate and acknowledgment thereof shall be filed and recorded in like manner in the office of the clerk of the county court of every such county. [Id. sec. 6.]

**Art. 6132. [3589] General partner to file affidavit.**—At the time of filing the original certificate with the evidence of the acknowledgment thereof, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the sums specified in the certificate to have been contributed by each of the special partners, to the common stock, have been actually and in good faith paid in cash. [Id. sec. 7.]

**Art. 6133. [3590] Prerequisites indispensable.**—No such partnership shall be deemed to have been formed until a certificate shall have been made, acknowledged, filed and recorded, nor until an affidavit shall have been filed as above directed; and, if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners. [Id. sec. 8.]

**Defective articles.**—See notes under Art. 6129.

**Art. 6134. [3591] Terms to be published.**—The partners shall publish the terms of the partnership when registered for at least six weeks immediately after such registry, in such newspapers as shall be designated by the clerk in whose office such registry shall be made; and if such publication be not made the partnership shall be deemed general. [Id. sec. 9.]

**Art. 6135. [3592] Publisher's affidavit.**—An affidavit of the publication of such notice by the publisher of the newspapers in which the same shall be published may be filed with the clerk directing the same, and shall be evidence of the facts therein contained. [Id. sec. 10.]

**Art. 6136. [3593] Renewals to be with like formalities.**—Every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged and recorded, and an affidavit of a general partner be made and filed, and notice given in the manner herein required for its original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership. [Id. sec. 11.]

**Art. 6137. [3594] Certain alterations a dissolution.**—Every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership; and every such partnership which shall in any manner be carried on after any such alteration shall have been made shall be deemed a general partnership, unless renewed as a special partnership according to the provisions of the last article. [Id. sec. 12.]

**Art. 6138. [3595] Firm name.**—The business of the partnership shall be conducted under a firm in which the names of the general partners only shall be inserted, without the addition of the word “company,” or any other general term; and if the name of any special partner be used in such firm, with his privity, he shall be deemed a general partner. [Id. sec. 13.]

**Art. 6139. [3596] Suits by and against.**—Suits in relation to the business of the partnership may be brought and conducted by and against the general partners, in the same manner as if there were no special partners. [Id. sec. 14.]

**Art. 6140. [3597] Capital of special partner not to be withdrawn.**—No part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the character of dividends, profits or otherwise, at any time during the continuance of the partnership; but any partner may annually receive lawful interest on the sum so contributed by him, if the payment of such interest shall not reduce the original amount of such capital; and if, after the payment of such interest, any profits shall remain to be divided he may also receive his portion of such profits. [Id. sec. 15.]

**Art. 6141. [3598] If reduced, to be made good.**—If it shall appear that by the payment of interest or profits to any special partner the original capital has been reduced, the partner receiving the same shall be bound to restore the amount necessary to make good his share of the capital, with interest. [Id. sec. 16.]

**Art. 6142. [3599] Powers of special partner.**—A special partner may from time to time examine into the state and progress of the partnership concerns, and may advise as to their management. [Id. sec. 17.]

**Art. 6143. [3600] Partners to account, and liability for fraud.**—The general partners shall be liable to account to each other, and to the special partners, for the management of the concern, both in law and equity, as other partners are by law; and every partner who shall be guilty of any fraud in the affairs of the partnership shall be liable, civilly, to the party injured to the extent of his damage. [Id. secs. 18, 19.]

**Art. 6144. [3601] Assignments by partnership void, when.**—Every sale, assignment or transfer of any property or effects of the partnership made by such partnership when insolvent, or in contemplation of insolvency, or after, or in contemplation of insolvency of any partner, with the intent of giving a preference to any creditor of such partnership, or insolvent partner, over other creditors of such partnership, and every judgment confessed, lien created, or security given, by any such partnership under the like circumstances and with like intent, shall be void as against the creditors of such partnership. [Id. sec. 20.]

**Art. 6145. [3602] Assignments in contemplation of insolvency.**—Every such sale, assignment, or transfer of any of the property or effects of a general or special partner made by such general or special partner when insolvent, or in contemplation of insolvency, or after, or in contemplation of the insolvency of the partnership, with the intent of giving to any creditor of his own, or of the partnership, a preference over the creditors of the partnership, and every judgment confessed, lien created, or security given, by any such partner under like circumstances and with like intent, shall be void as against the creditors of the partnership. [Id. sec. 21.]

**Art. 6146. [3603] Effect of concurrence by special partner.**—Every special partner who shall violate any provision of the last two preceding articles, and who shall concur in or assent to any such violation

of the partnership by any individual partner, shall be liable as a general partner. [Id. sec. 22.]

**Art. 6147. [3604] Partnership creditors preferred.**—In case of the insolvency or bankruptcy of the partnership, no special partner shall, under any circumstances, be allowed to claim as creditor until the claims of all other creditors of the partnership shall be satisfied. [Id. sec. 23.]

**Art. 6148. [3605] Dissolution before the time agreed on.**—No dissolution of such partnerships by the acts of the parties shall take place previous to the time specified in the certificate of its formation, or in the certificate of its renewal, until a notice of such dissolution shall have been filed and recorded and published once in each week for four weeks in a newspaper printed in each of the counties where the partnership may have a place of business, if there be such papers, and if there be no newspapers published in such county, then in a newspaper published in the nearest county where there is one. [Id. sec. 24.]

#### DECISIONS RELATING TO PARTNERSHIPS IN GENERAL

##### I. Creation and existence of relation.

1. Partnership distinguished from other relations.
2. Creation and existence of relation in general.
3. Secret partnership.
4. Ostensible partner.
5. Community of interest in profits and losses—In general.
6. — Sharing profits as interest on loans or advances.
7. — Sharing profits as compensation for services.
8. — Sharing profits, but not losses.
9. Subject-matter and purpose.
10. Capacity of parties.
11. Fraud or misrepresentations.
12. Creation of partnership as to third persons.
13. — Sharing profits.
14. — Acquiescence.
15. — Particular agreements and transactions.
16. Estoppel by holding out as partner—In general.
17. — Conduct constituting holding out.
18. — Knowledge and reliance of third person.
19. Defective corporations.
20. Evidence to show relation—Admissibility.
21. — Weight and sufficiency.

##### II. Name, powers and property of firm.

22. Firm name.
23. Powers of firm as a body.
24. What is firm property in general.
25. Partnership real estate.
26. Conversion of joint property into separate property.

##### III. Mutual rights, duties and liabilities of partners.

27. Construction of articles of partnership in general.
28. Interest on debts from one to another.
29. Interests of partners in firm property.
30. Books of account.
31. Accounting as to firm business.
32. Interests in profits.
33. Liabilities for expenses and losses.
34. Dealings between partners.

35. Purchase of copartner's interest in firm.
36. Individual profits or benefits from firm business.
37. Fraud as to firm or copartners.
38. Engaging in other business.
39. Partnership in different firms.
40. Contribution between partners.
41. Actions between partners.
42. — Pleading and practice.
43. — Evidence.
44. — Damages.

##### IV. Rights and liabilities as to third persons.

45. Representation of firm by partner—Powers of partners in general.
46. — Commercial character of partnership.
47. — Scope of firm business.
48. — Limitations on liability.
49. — Partner in different firms.
50. — Individual credit or interest of partner in general.
51. — Use of firm name.
52. — Disposition of firm property in general.
53. — Contracts in general.
54. — Purchases and sales.
55. — Mortgages or deeds of trust.
56. — Collections in general.
57. — Payment of individual debts with partnership funds.
58. — Borrowing money.
59. — Negotiable instruments.
60. — Suretyship and guaranty.
61. — Compromises and releases.
62. — Wrongful acts.
63. — Estoppel to deny partner's authority.
64. — Ratification.
65. — Rights acquired by firm.
66. — Notice of partner's transactions.
67. — Undisclosed partnership.
68. — Misrepresentation as to partnership.
69. — Dormant or secret partners.
70. Acts of agent of firm.
71. Application of assets to liabilities in general.
72. — Priority of partnership debts.



**IV. Rights and liabilities as to third persons—Cont'd.**

- 73. — To debts of individual partners.
- 74. — Transactions by or between partners affecting creditors' rights.
- 75. Actions by or against firms or partners.
- 76. — Process.
- 77. — Parties.
- 78. — Pleading.
- 79. — Presumptions, burden of proof and admissibility of evidence.
- 80. — Sufficiency of evidence.
- 81. — Instructions.
- 82. — Judgment against partners when all not served.
- 83. — Execution and enforcement of judgment.

**V. Retirement and admission of partners.**

- 84. Withdrawal from firm in general.
- 85. Transfer of partner's interest to copartner.
- 86. Transfer of partner's interest to third person.
- 87. Assets of old firm.
- 88. Obligations of old firm.
- 89. — Liabilities of retiring partners.
- 90. — Liabilities of continuing partners or new firm.
- 91. — Liabilities of incoming or succeeding partners.
- 92. Assumption of obligations of old firm.
- 93. Liabilities of retiring partner for acts and obligations of continuing partner or new firm.
- 94. Actions after change of membership.
- 95. — Pleading and practice.

- 96. — Presumptions, burden of proof and admissibility of evidence.

**VI. Dissolution, settlement and accounting.**

- 97. Presumption of continuance of relation.
- 98. Causes of dissolution—Transfer of partner's interest.
- 99. — Misconduct of partner.
- 100. — Marriage of feme sole.
- 101. — Death of partner.
- 102. Rights, powers and liabilities after dissolution—Effect of dissolution as to rights and liabilities of third persons.
- 103. — Collections and payments.
- 104. — Sale with stipulation to refrain from competition.
- 105. — Contracting new obligations in general.
- 106. — Making or indorsing negotiable instruments.
- 107. — Rights and liabilities of survivor as to estate of deceased.
- 108. — Wrongful acts.
- 109. — Actions by or against partners after dissolution.
- 110. Distribution and settlement between partners and their representatives.
- 111. — Necessity of settlement in general.
- 112. — Who entitled to require accounting.
- 113. — Division of profits.
- 114. — Private accounting and settlement.
- 115. — Fraud.
- 116. Actions for dissolution and accounting—In general.
- 117. — Conditions precedent.
- 118. — Pleading.
- 119. — Charges and credits.
- 120. — Evidence on accounting in general.

**I. CREATION AND EXISTENCE OF RELATION**

**1. Partnership distinguished from other relations.**—Persons associated under articles of incorporation are not deemed partners. *Cattle Co. v. Burns*, 82 T. 50, 17 S. W. 1043.

Partnership distinguished from a lease. *Railway Co. v. Davis*, 23 S. W. 301, 4 C. A. 468.

Partnership distinguished from co-tenancy. *Worsham v. Vignal*, 24 S. W. 562, 5 C. A. 471.

**2. Creation and existence of relation in general.**—A partnership exists where two or more persons combine their property, labor or skill for the purpose of business for their own benefit. *Brinkley v. Harkins*, 48 T. 225.

As to partnership, see *Buzard v. McAnulty*, 77 T. 438, 14 S. W. 138.

A refrigerator car company held not the partner of a carrier. *American Refrigerator Transit Co. v. Chandler* (Civ. App.) 93 S. W. 243.

A surety on a note given for the price of corporate stock bought by the maker held not a partner with the maker in the transaction. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

Parties held partners in a business so that one of them, who used his position to take advantage of the other, was liable therefor. *Armstrong v. Simms* (Civ. App.) 132 S. W. 500.

In an action to recover debts, an instruction held not objectionable as authorizing recovery upon the theory of a partnership among defendants. *Curtis v. First Nat. Bank* (Civ. App.) 138 S. W. 795.

Contracts as contemporaneously construed by the parties held severable, and not to create a partnership between plaintiff and defendant, each being subject to the losses occurring in its own business as previously conducted. *El Paso Ice & Refrigerator Co. v. Consumers' Ice & Cold Storage Co.* (Civ. App.) 141 S. W. 551.

Arrangement held merely a conditional agreement, under which the partnership would not come into existence until the conditions had been complied with. *O'Marrow v. State* (Cr. App.) 147 S. W. 252.

**3. Secret partnership.**—A secret partnership exists when one is really participating in the profits and losses of an enterprise carried on by another, and withholds a knowledge of the fact from the public. *Harris v. Crary*, 67 T. 383, 3 S. W. 316.

**4. Ostensible partner.**—An ostensible partner is one who holds himself out as a partner, or knowingly permits another in any manner to use his name as a member of the firm in order to obtain credit, when in point of fact he is not a partner. *Harris v. Crary*, 67 T. 383, 3 S. W. 316; *Gribble v. Harry*, 2 App. C. C. § 800.

5. **Community of interest in profits and losses**—In general.—One who charters a ship for another, under an agreement for a share of the profits, is an agent and not a partner. *Heidenheimer's Ex'rs v. Walthew*, 21 S. W. 981, 2 C. A. 501.

A contract by which one furnishes cattle to another, who is to keep them for a definite period, at the end of which they are to be sold, their cost repaid, and the profits and loss to be shared equally, constitutes a partnership. *Stratton v. O'Connor* (Civ. App.) 34 S. W. 158.

One who furnished another with property for carrying on a business in consideration of a share of the profits is a partner in the business. *Fouke v. Brengle* (Civ. App.) 51 S. W. 519.

The test of a partnership held to be the co-ownership of the profits of a business. *Altgelt v. Alamo Nat. Bank* (Civ. App.) 79 S. W. 582.

A contract held not to create a partnership, but to make the parties thereto joint owners. *Beaumont Rice Mills v. Bridges*, 45 C. A. 439, 101 S. W. 511.

On stated facts an existing partnership and a corporation held to be partners in a transaction. *Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Civ. App.) 134 S. W. 294.

Where defendants engaged in a theatrical venture, two of them to contribute money and all three to share equally in the profits, they were partners, and equally liable for debts. *Danforth, Roos & Eppstein v. Levin* (Civ. App.) 156 S. W. 569.

6. — **Sharing profits as interest on loans or advances**.—Where one furnishes money to another under an agreement that he who receives it as agent for the owner is to use it in a designated business and receive a part of the net profits as compensation for his services, he who thus receives the money is not thereby constituted a partner of him who advances it. *Buzard v. Bank of Greenville*, 67 T. 85, 2 S. W. 54, 60 Am. Rep. 7.

One who loans money to be used in a business, under an agreement to receive interest and a share of the profits, held a partner as to a creditor of the borrower, whose debt arose subsequent to the loan and in the course of the business. *Dilley v. Abright*, 19 C. A. 487, 48 S. W. 548.

Facts held insufficient to establish a partnership between the parties. *Altgelt v. Elmendorf* (Civ. App.) 86 S. W. 41.

7. — **Sharing profits as compensation for services**.—One who advances nothing, and receives a stipulated portion of the profits as compensation for his services as clerk, is not a partner. *Cothran v. Marmaduke*, 60 T. 370; *Stevens v. Gainesville Nat. Bank*, 62 T. 499; *Grabenheimer v. Rindskoff*, 64 T. 49.

The fact that a real estate broker promises a third person part of his commission if he can obtain a purchaser held not to make such third person a partner of the broker. *Brackenridge v. Claridge* (Civ. App.) 42 S. W. 1005.

A contract held not to create a partnership, but an agency. *Murray Ginning-System Co. v. Exchange Nat. Bank* (Civ. App.) 61 S. W. 508.

The sharing of the profits on a certain shipment with an assistant in lieu of wages does not constitute a partnership. *Texas & P. Ry. Co. v. Smissen*, 31 C. A. 549, 73 S. W. 42.

Proof held insufficient to establish partnership. *Bauer v. Wilson* (Civ. App.) 79 S. W. 364.

A widow held to be the sole owner of the business founded and owned by her husband and bequeathed to her. *Altgelt v. Alamo Nat. Bank* (Civ. App.) 79 S. W. 582.

Where a partnership buys lumber, and then contracts with a corporation or its representative to sell the stock for it for a compensation or commission of one-third of the net profits, the parties are not partners. *Ramsey & Montgomery v. Empire Timber & Lumber Co.* (Civ. App.) 134 S. W. 294.

An employé of a piano dealer, receiving a part of the profits of a special sale, with no interest in the stock, and bearing none of the expenses of the sale, is not a partner. *McBrayer v. Smith* (Civ. App.) 145 S. W. 1053.

An agreement, whereby a storekeeper agrees to give another 20 per cent. of the profits to attend to the business and do the buying, creates merely the relation of employer and employé, and not a partnership. *O'Marrow v. State* (Cr. App.) 147 S. W. 252.

8. — **Sharing profits, but not losses**.—It is not essential to constitute a partnership as to third persons that the parties are by agreement to share in the losses of the business; it is sufficient if they are to have a community of interest in the profits as such. *Goode v. McCartney*, 10 T. 195; *Cothran v. Marmaduke*, 60 T. 370; *Stevens v. Gainesville Nat. Bank*, 62 T. 499; *Bradshaw v. Apperson*, 36 T. 133; *Cleveland v. Anderson*, 2 App. C. C. § 147.

One held an agent for certain cotton dealers, and not their partners. *Shute & Limont v. McVitie* (Civ. App.) 72 S. W. 433.

An agreement between land brokers held not to make them partners so as to render notice to one of defects in the title to land listed for sale notice to the other. *Montgomery v. Amsler*, 57 C. A. 216, 122 S. W. 307.

9. **Subject-matter and purpose**.—A partnership may be formed for the purpose of a single transaction of purchasing land with a view to selling it for profit. *Spencer v. Jones*, 92 T. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

10. **Capacity of parties**.—As between the parties to the contract, a partnership in fact can only exist where there is a voluntary agreement between persons competent to contract made for that purpose. *Cleveland v. Anderson*, 2 App. C. C. § 146.

A married woman cannot become a partner in business. *Purdum v. Boyd*, 82 T. 130, 17 S. W. 606; *Mitchell v. Mitchell*, 80 T. 101, 15 S. W. 705; *Miller v. Marx*, 65 T. 131, citing *Wallace v. Finberg*, 46 T. 35; *Cox v. Miller*, 54 T. 16. And see *Bradford v. Johnson*, 44 T. 381; *Cockrum v. McCracken*, 1 App. C. C. § 65.

An agreement of partnership between the father and his minor son is binding on the former. *Washington v. Washington* (Civ. App.) 31 S. W. 88.

11. **Fraud or misrepresentations**.—Evidence held to sustain findings that defendant was induced by fraudulent representations to enter into a partnership agreement with plaintiff. *Caplen v. Cox*, 42 C. A. 297, 92 S. W. 1048.

A partnership agreement having been induced by false representations will be rescinded. *Id.*

Statement as to liability of parties on an accounting, where a partnership agreement is rescinded for fraudulent representations inducing the making of it. *Id.*

Recitals as to value in a contract which defendant was induced by false representations to make held not binding on him on rescission thereof. *Id.*

12. **Creation of partnership as to third persons.**—Persons may form a partnership, though not intending so to do. *Freeman v. Huttig Sash & Door Co.*, 105 T. 560, 153 S. W. 122.

13. — **Sharing profits.**—A partner entitled to share in profits must bear losses, and is liable for firm debts. *Freeman v. Huttig Sash & Door Co.* (Civ. App.) 135 S. W. 740.

14. — **Acquiescence.**—Existence of a partnership held subject to proof through acquiescence of the parties. *Freeman v. Huttig Sash & Door Co.* (Civ. App.) 135 S. W. 740.

15. — **Particular agreements and transactions.**—Evidence held to establish a partnership as to vendors of one of the parties thereto so as to bind the other to the terms of sale. *Buchanan v. Edwards* (Civ. App.) 51 S. W. 33.

Where one loans money to another to be used in his business, the lender to receive part of the net profits, held a partnership. *Rahl v. Parlin & Orendorff Co.*, 27 C. A. 72, 64 S. W. 1007.

Transaction between parties held not to constitute them partners, so as to render erroneous instruction, in action on note in which they were sought to be charged as partners, ignoring effect of such transaction. *Moore v. Williams*, 31 C. A. 287, 72 S. W. 222.

A contract for the division of profits of certain municipal improvement contracts, held to constitute defendant a partner rendering him liable for supplies furnished to carry on the work. *Kelley Island Lime & Transport Co. v. Masterson*, 100 T. 38, 93 S. W. 427.

A purchaser of a partner's interest in a going firm with the intention that the business should be incorporated held a partner in a new firm, where the business was not incorporated, but was conducted in the firm name. *Freeman v. Huttig Sash & Door Co.*, 105 T. 560, 153 S. W. 122.

16. **Estoppel by holding out as partner—In general.**—The liability of a partner may be shown by his acts or declarations from which it might reasonably be concluded that he was such partner. *White v. Whaley*, 1 App. C. C. § 102.

Where a surviving widow continued to carry on the mercantile business of her deceased husband under the old name, with the consent of the husband's heirs, she receiving the profits and some of the heirs assisting her in the business, and holding themselves out to the world as being interested in it, the widow and those heirs engaged in conducting the business would be liable as partners. Administration having been afterwards granted a creditor who had furnished goods after the husband's death could garnish the administrator for property acquired in the business after the death of the husband. *Cleveland v. Harding*, 67 T. 396, 3 S. W. 537.

The liability of a partner may be shown by his acts or declarations. *National Bank v. Daugherty*, 81 T. 301, 16 S. W. 1028.

One permitting himself to be held out as a partner becomes liable as such. *Southern A. W. v. Sims* (Civ. App.) 26 S. W. 514.

One not a partner is not liable for partnership debts, unless it is shown that he has by his acts led the firm's creditors to believe that he is a partner. *Altgelt v. D. Sullivan & Co.* (Civ. App.) 79 S. W. 333.

Liability as a partner to a third person by holding out as such is based on the doctrine of estoppel. *Hamner v. Barker* (Civ. App.) 144 S. W. 1180.

17. — **Conduct constituting holding out.**—The fact that defendant B. said he had authority to buy wood for a firm was not a representation that he was a member of the firm. *Armstrong v. King* (Civ. App.) 130 S. W. 629.

18. — **Knowledge and reliance of third person.**—The fact that certain persons allowed themselves to be held out as partners held not to render them liable to one not extending credit on the faith thereof. *Burrows v. Grover Irr. Co.* (Civ. App.) 41 S. W. 822.

Estoppel cannot be invoked against a private corporation in favor of a bank seeking to hold it liable for holding a third party out as partner. *Murray Ginning-System Co. v. Exchange Nat. Bank* (Civ. App.) 61 S. W. 508.

In a chattel mortgage foreclosure suit to charge one as a dormant partner of the maker of the note and mortgage, the former may show that the plaintiff knew there was no partnership. *Morris v. Moon* (Civ. App.) 120 S. W. 1063.

19. **Defective corporations.**—Continuation of a corporate business under a new name, without complying with the law in such case makes the stockholders liable as partners. *Robinson v. First Nat. Bank* (Civ. App.) 79 S. W. 103.

Plaintiffs who purchased stock from defendant in erroneous belief that company was incorporated, held not responsible as partners for depreciation in value of company's property, and entitled to rescission without placing defendant in statu quo. *Bolton v. Prather*, 35 C. A. 295, 80 S. W. 666.

A contract of sale with a supposed corporation held not invalidated by the fact that there was no corporation, since the holders of the interest in the concern would take as partners. *Smith v. Texas & N. O. R. Co.*, 101 T. 405, 108 S. W. 819.

20. **Evidence to show relation—Admissibility.**—See notes under Art. 3687.

21. — **Weight and sufficiency.**—An affidavit to a sworn account against a partnership proves the partnership, unless the same is denied under oath, as well as all other facts necessary to make out a prima facie case. *Carder v. Wilder*, 1 App. C. C. § 14; *Persons v. Frost*, 25 T. Sup. 129.

It is not competent to prove a partnership by general reputation, common rumor, or the opinion or belief of a witness founded on such hearsay testimony. *White v. Whaley*, 1 App. C. C. § 103; *Cleveland v. Duggan*, 2 App. C. C. § 86.

Partnership may be proven by *ex parte* declarations of a copartner, in connection with competent evidence aliunde tending to establish such partnership. *Bush v. Chas. P. Kellogg Co.* (Civ. App.) 34 S. W. 1056.

Evidence held to sustain a finding that a partnership existed. *Houston, E. & W. T. Ry. Co. v. Granberry*, 16 C. A. 391, 40 S. W. 1062; *Miller v. Laughlin* (Civ. App.) 147 S. W. 711.

Evidence held insufficient to warrant a finding that defendant was a member of a partnership. *Lowenstein v. Keller* (Civ. App.) 46 S. W. 878.

The carrying on of business under a name distinct from the name of the person or persons engaged therein held not necessarily to import a partnership. *Altgelt v. Alamo Nat. Bank* (Civ. App.) 79 S. W. 582.

A certain fact held without probative force on the issue of a partnership. *Robinson v. First Nat. Bank*, 98 T. 184, 82 S. W. 505.

In an action by a bank which had gone into voluntary liquidation against a banking firm which had assumed its debts for money which the bank had been compelled to pay to a depositor on failure of the banking firm to do so, evidence examined, and held to show that the banking firm was a partnership. *Hoskins v. Velasco Nat. Bank*, 48 C. A. 246, 107 S. W. 598.

Facts held insufficient to establish a partnership between defendants B., M., and S. in the purchase of land, so as to render the latter liable for B.'s breach of contract to plaintiff in the purchase of certain land for defendants' benefit. *Bass v. Tolbert*, 51 C. A. 437, 112 S. W. 1077.

In an action against two defendants to recover compensation based on a contract alleged to have been made by one of the defendants, evidence held insufficient to show a partnership relation existing between the defendants. *Hughes v. McFarland* (Civ. App.) 128 S. W. 172.

In an action by a firm for commissions for furnishing defendant with a tenant, evidence held to show that a certain person was a member of plaintiff firm when the services were rendered. *Floore v. J. T. Burgher & Co.* (Civ. App.) 128 S. W. 1152.

A partnership may be proved by circumstantial evidence. *Miller v. Laughlin* (Civ. App.) 147 S. W. 711.

## II. NAME, POWERS AND PROPERTY OF FIRM

**22. Firm name.**—Facts held not inconsistent with a finding that all the business of a banking partnership was done in the firm name of the "Bank of L." *Masterson v. Mansfield*, 25 C. A. 262, 61 S. W. 505.

**23. Powers of firm as a body.**—A power may be conferred on a firm to execute a conveyance of land. *McCulloch County Land & Cattle Co. v. Whitefort*, 21 C. A. 314, 50 S. W. 1042.

**24. What is firm property in general.**—Where A. contracted for the purchase of a storehouse and merchandise, and by articles of partnership with B. and C. admitted them to equal interest with himself in the storehouse and merchandise, they stipulating that they would pay their proportion of the purchase-money, held, that the property thereby became partnership property of the firm. *Rogers v. Nichols*, 20 T. 719.

The fact that a conveyance of land is made to parties who are partners, and that it may be used after being thus conveyed for partnership purposes, does not necessarily impress on it the character of partnership property. *Griffie v. Maxey*, 58 T. 210.

The widow of a deceased husband, who at the time of his death owned with his wife as community property a stock of goods, continued without administration to carry on a mercantile business under the old name with the consent of the husband's heirs, the widow receiving the profits, and some of them assisting in the business and holding themselves out to the world as being interested in it. The stock was from time to time replenished. Afterwards administration on the estate was begun, and a creditor who had furnished goods after the husband's death sued the widow and children as partners and garnished the administrator. Held: 1. For debts contracted in keeping up the mercantile business the property of the widow and of those heirs engaged in conducting it was liable, whether it consisted of the stock in trade or other means. 2. The court should have ascertained what effects held by the administrator belonged to the deceased husband at the time of his death, and what had been since acquired by defendants. As to the former the garnishee could not be charged, as they were to be administered under orders of the county court. As to the latter they formed no part (presumably) of the estate of the deceased, and unless it be clearly shown that they were acquired with the property of the deceased by exchange or purchase they would be liable to plaintiff's garnishment. *Cleveland v. Harding*, 67 T. 396, 3 S. W. 537.

Whether land belonging to a firm is to be considered as part of the partnership stock will depend on the intention of the partners, to be ascertained by their acts or agreements, either express or implied. It may be made partnership stock by the parol agreement of the partners. *Murrell v. Mandelbaum*, 85 T. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

Property purchased by partners and solely used in their business held partnership property. *Williams v. Meyer* (Civ. App.) 64 S. W. 66.

Property purchased with money withdrawn by a partner from the business is firm property, where it is withdrawn in bad faith, without the knowledge and consent of the other partner, but not where the other partner knows of and consents to such transaction. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

**25. Partnership real estate.**—Where a partner incurs a debt to secure money to buy land, and subsequently pays such debt out of partnership funds, the partnership does not thereby acquire any claim on the land. *Hengy v. Hengy* (Civ. App.) 151 S. W. 1127.

**26. Conversion of joint property into separate property.**—Where, on a settlement of a partnership transaction, notes given the firm were divided between the partners, such notes held to become individual property. *Spencer v. Jones*, 92 T. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

### III. MUTUAL RIGHTS, DUTIES AND LIABILITIES OF PARTNERS

27. **Construction of articles of partnership in general.**—A partnership under articles providing no definite time for its dissolution held to be a partnership at will. *Wright v. Ross*, 30 C. A. 207, 70 S. W. 234.

Partnership contract construed, and a partner held not liable for one-half the losses. *Johnston v. Steele*, 48 C. A. 335, 107 S. W. 631.

28. **Interest on debts from one to another.**—Sums due by one partner to another do not bear interest until after settlement; but if the parties agree that interest shall be paid, such agreement will govern. *McKay v. Overton*, 65 T. 82.

29. **Interests of partners in firm property.**—In the absence of evidence as to the respective shares of partners in the capital stock the presumption is that they hold an equal interest. *Johnson v. Ballard*, 83 T. 486, 18 S. W. 686.

Where a partner's creditor levies on firm property, in an action by the other partner for conversion, he need not show his interest in the partnership property, the presumption being that the interests of the partners are equal. *Leonard v. Worsham*, 18 C. A. 410, 45 S. W. 336.

A partner's right in the firm property is in effect a right to share in the surplus after discharging the firm debts, including reimbursements for advancements in excess of his proportional share. *Sherk v. First Nat. Bank (Civ. App.)* 152 S. W. 832.

30. **Books of account.**—A partner held entitled to the absolute right to inspect books disclosing firm transactions, which the court will enforce by any reasonable method. *Rush v. Browning*, 103 T. 649, 132 S. W. 763.

A partner held to possess an absolute right to inspect account books of the firm kept by a bank of which the copartner is president. *Id.*

31. **Accounting as to firm business.**—Three partners engaged in a contract made in the name of one of them. A suit by the other two to compel an accounting for money earned can be maintained. *Flanders v. Wood*, 83 T. 277, 18 S. W. 572.

32. **Interests in profits.**—Under partnership agreement alleged by plaintiff, plaintiff held not required to show that defendant received commission on sale of his own stock in order to entitle plaintiff to recover his share of commissions. *Goodwin v. Mortsen (Civ. App.)* 128 S. W. 1182.

Transaction held to constitute a sale, rather than an exchange, as affecting the defendant's liability for commissions. *Id.*

Where plaintiff formed a partnership for the sale of lands, with the agreement that he should receive one-half of the commissions to which the firm would be entitled upon the sale of the land by it, and the other members of the firm sold to themselves individually land procured by plaintiff, the transaction was a partnership transaction, in the profits of which plaintiff was entitled to participate. *Burns v. Russell Bros. (Civ. App.)* 146 S. W. 707.

33. **Liabilities for expenses and losses.**—Where two partners agreed to furnish \$10,000, the three to share profits equally, and the third partner contracted debts, they were equally liable therefor, in absence of proof that any part of the \$10,000 remained available, and he could not recover over against his partners prior to an accounting. *Danforth, Roos & Eppstein v. Levin (Civ. App.)* 156 S. W. 569.

34. **Dealings between partners.**—The assignment of a negotiable note as collateral security for a pre-existing debt due from one partner to another is a transfer in due course of trade, for a valuable consideration. *Liddell v. Crain*, 53 T. 549.

35. **Purchase of copartner's interest in firm.**—A partner may rescind a sale of his partnership interest to his copartner on the ground of the latter's false representations. *Butler v. Edwards (Civ. App.)* 50 S. W. 1045.

A partner's right to share in the surplus and to have the assets applied to the firm debts is property which can be sold and is sold by a transfer of his interest in the property either to a copartner or to a stranger. *Sherk v. First Nat. Bank (Civ. App.)* 152 S. W. 832.

36. **Individual profits or benefits from firm business.**—A partner is not permitted to do anything to his own advantage which will sacrifice the interest of the firm, and when he uses partnership funds so that profits accrue, the profits belong to the partnership, and equity will not permit him to hold more than his proportionate share thereof. *Gill v. Wilson*, 2 App. C. C. § 382.

Liability to the other partners of member of a firm conducting a real estate brokerage business on the purchase of land in his own name. *Henson v. Byrne (Civ. App.)* 41 S. W. 494.

37. **Fraud as to firm or copartners.**—The rule that the members of a firm owe to each other the most scrupulous good faith held to apply to all classes of partnership. *Armstrong v. Simms (Civ. App.)* 132 S. W. 500.

Where one, ignorant of the oil business, trusted in the superior knowledge of another, the latter held liable for defrauding the former. *Id.*

38. **Engaging in other business.**—A partner in a firm owning and operating a telephone exchange held not, under the evidence, liable to the copartner for damages to his individual toll lines connected with the exchange. *Bishop v. Riddle*, 51 C. A. 317, 113 S. W. 151.

39. **Partnership in different firms.**—A sale by one who was the surviving partner in a dissolved partnership to a firm of which he was a member, if made in good faith, held not invalid as a sale to himself. *Morris v. Owen (Civ. App.)* 143 S. W. 227.

40. **Contribution between partners.**—When under a partnership contract the proceeds of the enterprise constitute the primary fund from which a partner is to be reimbursed for any advances, and the partnership is by consent terminated before they are sufficient, the partner who has advanced in excess of the amount due from him may maintain an action for the excess. *Merriwether v. Hardeman*, 51 T. 436.

Ordinarily an action will not lie by one partner against another, during the continuance of the partnership, to recover money alleged to have been contributed by the plaintiff to the firm which should have been paid in by his copartner. *O'Neil v. Brown*, 61 T. 34.

A defendant in an action on a note by the maker held not entitled to show failure of consideration. *Martin v. Taylor* (Civ. App.) 141 S. W. 1009.

41. **Actions between partners.**—Where there has been no accounting between partners, the liability of one for contribution cannot be made the subject of a set-off in an action at law. *Worley v. Smith*, 26 C. A. 270, 63 S. W. 903.

The right of contribution between partners obtains only after a full settlement or accounting has been had which shows inequalities in the partners' accounts. *Danforth, Roos & Eppstein v. Levin* (Civ. App.) 156 S. W. 569.

42. — **Pleading and practice.**—See Title 37.

43. — **Evidence.**—See, also, Art. 3687.

A verdict for defendant in an action between partners held not against the great weight of evidence. *Marrast v. Smith* (Civ. App.) 53 S. W. 707.

44. — **Damages.**—For breach of a partnership contract to purchase and herd cattle, plaintiff held not entitled to recover a sum equal to his interest when the cattle were to be purchased. *Shropshire v. Adams*, 40 C. A. 339, 89 S. W. 448.

#### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS

45. **Representation of firm by partner—Powers of partners in general.**—One partner cannot withdraw a portion of the assets of the firm beyond the reach of creditors to their injury. *B. C. Evans Co. v. Kingsbury* (Civ. App.) 25 S. W. 729.

46. — **Commercial character of partnership.**—When a firm is non-trading partnership. *Huey v. Fish*, 15 C. A. 455, 40 S. W. 29.

A member of a "trading partnership" held empowered to execute a note for its debt. *Hatchett & Large v. Sunset Brick & Tile Co.* (Civ. App.) 99 S. W. 174.

47. — **Scope of firm business.**—Where one dealing with a partner knows the contract not to be in the usual course of dealing of the firm, the firm is not bound. *Goode v. McCartney*, 10 T. 193.

A note executed in the firm name by one partner does not bind the other partner where it is given for a consideration disconnected with the business of the partnership. *Burleigh v. Parton*, 21 T. 585.

When the subject-matter of a contract is consistent with the partnership business, or incident thereto, an act of one partner is binding upon all. *Richardson v. Thacker*, 1 App. C. C. § 138.

The implied authority of a partner to contract so as to bind the firm relates only to the business in which the firm is engaged. *S. W. Slayden & Co. v. Palmo* (Civ. App.) 90 S. W. 908.

A contract held within the scope of a partnership, and binding on the firm. *Hatchett & Large v. Sunset Brick & Tile Co.* (Civ. App.) 99 S. W. 174.

A contract by a partner in the firm name held not within the scope of the firm business, and not binding on the firm unless ratified. *S. W. Slayden & Co. v. Palmo*, 53 C. A. 227, 117 S. W. 1054.

48. — **Limitations on liability.**—A person who deals with a partnership, after he has express notice of the limited liability of one of the firm, is bound by such limitation. *Carhart v. Killough*, 1 App. C. C. § 112; *Gallagher v. Heidenheimer*, 3 App. C. C. § 133.

Whenever credit is given to a firm within the scope of the business of that firm, whether the partnership be of a general or limited nature, it will bind all the partners, notwithstanding any secret reservation between them, which is unknown to those that give the credit. *Franklin v. Hardie*, 1 App. C. C. § 1220.

49. — **Partner in different firms.**—One who sells goods to another knowing him to be a member of two different firms of the same name must ascertain by inquiry with which firm he is dealing. He cannot hold the firm for which the goods were not purchased responsible. *Cushing v. Smith*, 43 T. 261.

Where one member of a firm, engaged in banking under one name and in the real-estate business under another, borrowed money in the name of the real-estate firm, it is not liable, unless under such partnership such power is implied. *Masterson v. Mansfield*, 25 C. A. 262, 61 S. W. 505.

In an action on notes for borrowed money, made by one partner in the name of a firm in the real-estate business, evidence held sufficient to sustain a finding that he had no implied power to bind the firm. *Id.*

50. — **Individual credit or interest of partner in general.**—Liability of firm for conversion by member thereof in a transaction by the firm, in the ordinary course of business, determined. *Filter v. Meyer*, 16 C. A. 235, 41 S. W. 152.

Where a partner contracted for the purchase of goods, and they were sold to him on his own credit, he was an original promisor and liable therefor without reference to his connection with the firm. *Brown v. Brown* (Civ. App.) 155 S. W. 551.

51. — **Use of firm name.**—A bond executed in a partnership name, which does not pertain to the ordinary business of the firm or in settling up its affairs, which is executed by one member of the firm without the knowledge or consent of the others, and when nothing has been done by the other partners that would estop them from denying the authority, will not bind the firm. A subsequent ratification will supply authority. When the firm name is used as surety for a third person, the presumption prevails that such use is outside of the firm business. *Fore v. Hitson*, 70 T. 517, 8 S. W. 292.

A member of a firm cannot bind the firm by the use of its name outside of the partnership business. *Nolan County v. Simpson*, 74 T. 218, 11 S. W. 1098; *Patty v. Hillsboro Roller Mills Co.*, 23 S. W. 336, 4 C. A. 224.

A single member of a firm may exercise a power of attorney conferred on the firm to execute a deed. *McCulloch County Land & Cattle Co. v. Whitefort*, 21 C. A. 314, 50 S. W. 1042.

The estate of one partner is not liable for money loaned to another partner as an individual. *Altgelt v. Elmendorf* (Civ. App.) 84 S. W. 412.

A firm held liable on a note given for it in the name of one of the partners. *Dockery v. Faulkner* (Civ. App.) 101 S. W. 501.

52. — **Disposition of firm property in general.**—One partner may sell the entire stock of goods of the firm for the purpose of paying its indebtedness. *Schneider v. Sansom*, 62 T. 201, 50 Am. Rep. 521. And see *Ellis v. Valentine*, 65 T. 532.

A conveyance of partnership lands, having in the body only the individual name of one partner, held valid. *Barnet v. Houston*, 18 C. A. 134, 44 S. W. 689.

53. — **Contracts in general.**—An ostensible partner is liable to a creditor who contracts with the firm. *Crozier v. Kirker*, 4 T. 252, 51 Am. Dec. 724; *Burnley v. Rice*, 18 T. 481; *Lewis v. Wade*, 1 App. C. C. § 697.

A contract on partnership account, and on the joint credit of the partners, is binding, although made in the individual name of one of the partners. *Burnley v. Rice*, 18 T. 481.

Partnership held not liable for individual undertaking of a member. *Beatty v. Bulger*, 28 C. A. 117, 66 S. W. 893.

54. — **Purchases and sales.**—Where land procured by one of the members of a firm was listed with the firm upon the agreement that he should receive a commission on its sale or exchange, and was afterwards, without his knowledge or consent, or his waiver of his right to a commission, bought by the other two members of the firm individually, their agreement, as part of the consideration and contract of sale, that the vendor should pay no commission, bound the third partner, under the rule that each member of a partnership in partnership transactions is an authorized agent of all the members. *Burns v. Russell Bros. (Civ. App.)* 146 S. W. 707.

Where goods are purchased by a partnership and the firm obligation given, agreements between the partners as to their liabilities are not binding on the payee. *Barton v. R. P. Ash & Co. (Civ. App.)* 154 S. W. 608.

55. — **Mortgages or deeds of trust.**—One partner, with the consent of the other, may, by deed of trust, create a valid lien on land and convey the entire title. Where there is a power of sale in such deed it is not affected by the death of a partner. *Schwab Clothing Co. v. Claunch (Civ. App.)* 29 S. W. 922.

When one partner may not mortgage the entire assets of the firm without the consent of copartner. *Huey v. Fish*, 15 C. A. 455, 40 S. W. 29.

A trust deed for benefit of firm creditors by one partner alone held not invalid. *Keller v. Smith*, 20 C. A. 314, 49 S. W. 263.

56. — **Collections in general.**—It seems that a partner has not, in general, authority to receive payment of the partnership debt in property; the exceptions being where from the nature of the partnership business, the course of partnership dealing, or the acquiescence of the other partners, such authority is implied. *Lee v. Hamilton*, 12 T. 413.

A firm held bound by collections made by a partner, though he may afterward have used the money for his individual benefit. *Progressive Lumber Co. v. Rogers & Croley (Civ. App.)* 120 S. W. 260.

The implied power of each partner to receive payment of and collect firm debts results from his general agency for the firm. *Id.*

57. — **Payment of individual debts with partnership funds.**—One partner cannot apply the partnership funds or securities to the discharge of his own private debts, without the consent of the other members of the firm, whether the separate creditor knew the property to be partnership property or not (*Goode v. McCartney*, 10 T. 193; *Lee v. Hamilton*, 12 T. 413; *Powell v. Messer*, 18 T. 401; *Young v. Read*, 25 T. Sup. 113; *Daugherty v. Haynes [Civ. App.]* 28 S. W. 692; *Sanger v. Ker*, 1 App. C. C. § 1086); and such transfer passes no title to the transferee, at least in the absence of the consent of the other partners. (*Anderson v. Boyd*, 64 T. 108).

58. — **Borrowing money.**—Evidence held to justify the inference that borrowing money was within the scope of a partnership. *Harris County v. Donaldson*, 20 C. A. 9, 48 S. W. 791.

Where it is the general usage of a firm for one partner in his own name to borrow money for the firm, it will be presumed as between the firm and persons dealing with it that the members of the firm intended the power to be exercised by the acting partner. *Progressive Lumber Co. v. Rogers & Croley (Civ. App.)* 120 S. W. 260.

59. — **Negotiable instruments.**—Every partner has an implied authority to bind his copartners by the making of notes and the drawing and accepting of bills for commercial purposes, consistent with the object of the partnership, and to rebut this presumption of authority there must be proof of fraud or of a knowledge of the want of authority or of notice. *Crozier v. Kirker*, 4 T. 252, 51 Am. Dec. 724; *Nunn v. Lackey*, 1 App. C. C. § 1331; *Richie v. Levy*, 69 T. 133, 6 S. W. 685.

Parol evidence admissible to show that a note for the purchase of land given in the name of a firm was binding on the firm. *Morrison v. Faulkner*, 80 T. 123, 15 S. W. 797.

A partnership in a land venture construed as to its scope and to the power of a partner. *Spencer v. Jones (Civ. App.)* 47 S. W. 29.

Partnership to purchase and sell tract of land held to exist after the land is sold and notes received for the price. *Spencer v. Jones*, 92 T. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

A note executed by a member of a trading partnership is binding on the partnership. *Wallace & Reed v. Reed Bros.*, 54 C. A. 457, 117 S. W. 1019.

A note given by one of a firm held not necessarily an individual obligation. *Barton v. R. P. Ash & Co. (Civ. App.)* 154 S. W. 608.

60. — **Suretyship and guaranty.**—A member of a commercial partnership has no implied authority to bind the firm as sureties or guarantors of the obligations of others. *Buchard v. Cavins*, 77 T. 365, 14 S. W. 388; *Olive v. Morgan*, 28 S. W. 572, 8 C. A. 654.

61. — **Compromises and releases.**—A partner may bind his firm by the release of a debt due the partnership of which he is a member, if the debtor has neither knowledge nor notice that the partner is acting in violation of his obligation and duties to the firm, or for purposes disapproved of by the firm, or in fraud of its rights. *Stout v. Bank*, 69 T. 384, 8 S. W. 808.

Either member of a partnership has authority to settle, collect and compromise debts before or after the dissolution of the firm. *Weir Plow Co. v. Evans (Civ. App.)* 24 S. W. 38.

A collusive settlement with one partner in fraud of the others is of no effect against the firm. *Loftus v. Ivy*, 14 C. A. 701, 37 S. W. 766.

Members of a firm who received a sum as full settlement of the indebtedness due to the firm held precluded from afterwards asserting that more was due. *Storrie v. Ft. Worth Stockyards Co.* (Civ. App.) 143 S. W. 236.

62. — **Wrongful acts.**—One partner is chargeable with fraud of another partner in procuring a note, whether he had actual knowledge or not. *Gill v. First Nat. Bank* (Civ. App.) 47 S. W. 751.

Under the facts, held that a landlord, to the amount of his claim for which he had a lien, could recover of firm a member of which had appropriated the tenant's crop. *Thomas v. Tucker, Zeve & Co.*, 40 C. A. 337, 89 S. W. 802.

A conspiracy between a partner and an employé of the firm to slander an individual held not to render the firm liable for the slander. *Wheless v. W. Y. Davis & Son* (Civ. App.) 122 S. W. 929.

One member is not responsible for the torts of another. *Frizzell v. Woodman Pub. Co.* (Civ. App.) 130 S. W. 659.

63. — **Estoppel to deny partner's authority.**—A partner held estopped to deny that his copartner had power to borrow money on notes due the firm. *Spencer v. Jones* (Civ. App.) 47 S. W. 665.

A partner selling and indorsing notes due the partnership, which had been allotted to him on a settlement, held not to bind the other partner by representations as to such notes. *Spencer v. Jones*, 92 T. 516, 50 S. W. 118, 71 Am. St. Rep. 870.

64. — **Ratification.**—A contract executed in the name of a firm by a partner held ratified by his copartner. *Hatchett & Large v. Sunset Brick & Tile Co.* (Civ. App.) 99 S. W. 174.

65. — **Rights acquired by firm.**—In proceedings to restrain defendant from re-engaging in the photograph business, defendant held bound by a statement made to plaintiff's partner, whether plaintiff was present or not. *Parrish v. Adwell* (Civ. App.) 124 S. W. 441.

66. — **Notice of partner's transactions.**—Each member of a firm is chargeable with notice of the transactions of the others, within the scope of the partnership business, but not of the sale by a partner of his individual interest in partnership property, or of his representations in making the sale. *Liddell v. Crain*, 53 T. 549.

Knowledge of a partner executing a note and mortgage in the firm name held not notice to the copartner and third persons purchasing the partner's interest. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 146 S. W. 1191.

67. — **Undisclosed partnership.**—Partners, although not known to be such, are liable for firm debts. *Devine v. Martin*, 15 T. 25; *Ford v. McBryde*, 45 T. 498; *Mann v. Clapp*, 1 App. C. C. § 509.

Partners are liable for articles furnished for the benefit of the firm to an individual member, though the vendor does not know of the existence of the firm, and though he supposed himself dealing with and giving credit to an individual partner, by charging him alone on his books. *Ford v. McBryde*, 45 T. 498; *Devine v. Martin*, 15 T. 25; *Mann v. Clapp*, 1 App. C. C. § 505; *Strauss v. Jones*, 37 T. 313.

68. — **Misrepresentation as to partnership.**—A partner feeding cattle under contract with his copartner held not entitled to recover therefor from the sellers of the cattle to the copartner, who did not know of the partnership, and retook the cattle for nonpayment. *Buchanan v. Edwards* (Civ. App.) 51 S. W. 33.

69. — **Dormant or secret partners.**—A secret partner, when discovered, is liable for the debts of the firm. *Franklin v. Hardie*, 1 App. C. C. § 1221, citing *Devine v. Martin*, 15 T. 31; *Coons v. Renick*, 11 T. 134, 60 Am. Dec. 230.

Where persons were doing business under a firm name, all of the partners were liable on notes signed by the partner in whose name the business was transacted. *Moore v. Williams*, 26 C. A. 142, 62 S. W. 977.

70. **Acts of agent of firm.**—Partners are bound by the acts of their agent acting within the scope of the agency as well as by the acts of each partner acting within the scope of the firm. *Autrey v. Linn* (Civ. App.) 138 S. W. 197.

71. **Application of assets to liabilities in general.**—The claim of the owner of goods transferred to a person subsequently entering a partnership held not to be a partnership liability. *Holder v. Shelby* (Civ. App.) 118 S. W. 690.

72. — **Priority of partnership debts.**—Partnership debts claim a priority of payment out of the partnership effects before the individual debt of one of the members of the firm. *Converse v. McKee*, 14 T. 20; *Rogers v. Nichols*, 20 T. 719; *Warren v. Wallis*, 38 T. 225; *De Forest v. Miller*, 42 T. 34; *Moore v. Steele*, 67 T. 435, 3 S. W. 448. See *Dulaney v. Walshe*, 22 S. W. 131, 3 C. A. 174.

Where one sells his interest in the partnership property bona fide to his copartners, upon the terms that his copartners shall pay the debts of the firm, and pay him a certain price for his interest, the assets of the firm immediately become the separate property of the purchasing partner, discharged of any lien in favor of the partnership debts, and, upon the decease of the purchasing partner, go to his administrator subject to the ordinary rules of administration, and cannot be claimed by the selling partner, as surviving partner of the firm; nor can the latter claim that such assets shall be applied first to the payment of the partnership debts. *White v. Parish*, 20 T. 688, 73 Am. Dec. 204.

Partnership creditors will not be heard to complain of an application of the partnership assets to the payment of the individual debts of the members of the firm, unless it be made to appear that there is not enough partnership property to satisfy both the creditors of the firm and of the individual members thereof. *De Causey v. Baily*, 57 T. 665.

Equity subrogates a partnership creditor to the partner's right to have the partnership property applied to the payment of the partnership debts. This right of subrogation applies only where there is a real partnership. *Grabenheimer v. Rindskoff*, 64 T. 49.

Though partnership transactions are in violation of public policy, the proceeds belong to the firm as against individual creditors. *Patty-Joiner Co. v. City Bank of Sherman*, 15 C. A. 475, 41 S. W. 173.



Partnership assets will be applied to the payment of partnership debts notwithstanding the fact that the surviving partner turned them over to the administrator of the deceased partner with the knowledge of the firm's creditor. *Levy's Estate v. Archenthal* (Civ. App.) 44 S. W. 46.

Each partner has the right to require the application of all the firm assets to the payment of the firm debts. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

73. — **To debts of individual partners.**—See *Batchelor v. Sanger et al.*, 15 C. A. 110, 38 S. W. 359.

When the creditor has taken a judgment against one partner, as on his individual contract, equity will not aid him to subject the partnership property to its satisfaction, especially where he shows that the partnership property will not satisfy the partnership liabilities. *Gaut v. Reed*, 24 T. 46, 76 Am. Dec. 94.

A separate interest of a partner may be seized and sold under execution, subject to the rights of other parties, and the creditors are not bound to wait until these rights are ascertained, but may require the sheriff to proceed and sell. *De Forest v. Miller*, 42 T. 34; *Warren v. Wallis*, 42 T. 472; *Bradford v. Johnson*, 44 T. 381; *Weaver v. Ashcroft*, 50 T. 427; *Schley v. Hale*, 1 App. C. C. § 930.

The separate creditor of a partner may by an attachment acquire a lien on the debtor partner's interest in the copartnership property, and may by execution subject it to sale. *Lee v. Wilkins*, 65 T. 295.

Partnership credits cannot be reached by garnishment process for the individual debt of a member of such partnership. *Seaton v. Brooking*, 1 App. C. C. § 1044.

In a suit by partners the defendant may plead and set off an individual debt due him from one of the members of the firm who is insolvent. *Hahn v. Cook*, 1 App. C. C. § 689; *Singer Manufacturing Co. v. Wood*, 1 App. C. C. § 1179.

As to application of partnership assets to payment of individual debts, see *Wiggins v. Blackshear*, 26 S. W. 939; *Sanchez v. Goldfrank* (Civ. App.) 27 S. W. 204.

Simple partnership creditors have no specific lien, either legal or equitable, upon the partnership property. *Waples-Platter Co. v. Mitchell*, 12 C. A. 90, 35 S. W. 200; *Stansell v. Fleming*, 81 T. 294, 16 S. W. 1033; *Wiggins v. Blackshear*, 36 T. 665, 26 S. W. 939; *Johnston v. Shoe Co.*, 5 C. A. 398, 24 S. W. 580.

74. — **Transactions by or between partners affecting creditors' rights.**—Where one of two partners makes an absolute sale of his interest to the other, the property may be immediately taken in execution for the debts of the purchasing partner; but where the selling partner stipulates that he shall obtain a lien of the partnership property to secure payment of the partnership debts, and the agreement is duly recorded, or the separate creditor has actual notice, the lien, and remedy thereon, remain the same as where there is a dissolution without sale. *Rogers v. Nichols*, 20 T. 719.

After the levy of an execution on partnership property to satisfy a separate debt of one partner, the copartners cannot dissolve the partnership, make a settlement of their joint effects, in which the debtor partner is paid for his share an amount in property (other than that levied on) greater than the amount of the executions, and thereby defeat the levy so made. *Thompson v. Tinnin*, 25 T. Sup. 56.

Effect of agreement by purchaser of firm interest to pay firm debts on insolvency of new firm, as between creditors of the different firms, determined. *Bell v. Beazley*, 13 C. A. 639, 45 S. W. 401.

A purchaser held not estopped from claiming ownership against the seller's creditors because he was a secret partner of the seller. *Texas Drug Co. v. Baker*, 20 C. A. 634, 50 S. W. 157.

Waiver of breach of right to have interest of deceased partner applied to partnership debts held established. *Luck v. Hopkins* (Civ. App.) 54 S. W. 429.

In an action to foreclose a firm mortgage on land which afterwards became the sole property of one partner, evidence that on the dissolution of the firm the other partner assumed all the firm debts, including such note, was inadmissible. *Eastham v. Patty*, 29 C. A. 473, 69 S. W. 224.

Where a partner conveys his interest in the firm property to his copartner, thereby dissolving the firm, without in any manner reserving the quasi lien of the firm creditors, the quasi lien is lost. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 146 S. W. 1191.

A firm while a going concern may transfer its property to an honest purchaser for value. *Id.*

75. **Actions by or against firms or partners.**—On a trial of the right to property in possession of and claimed by a partnership firm, neither the rights of the partners, nor the equities between the partners themselves, nor between the firm and its creditors, can or will be adjudicated. *Grant v. Williams*, 1 App. C. C. § 364.

A charge authorizing recovery by one partner of all damages for levy on the partnership property held erroneous. *P. B. Haight & Co. v. Turner & Pierce*, 44 C. A. 595, 99 S. W. 196.

76. — **Process.**—See Art. 1863.

77. — **Parties.**—See, also, chapter 5 of Title 37.

An ordinary suit for debt is maintainable by one firm against another, irrespective of the fact that the same person is a member of both firms, and thus appears as both plaintiff and defendant. *Douglass v. Neil*, 37 T. 528.

A dormant partner who is not privy to the contract need not be joined in a suit against the firm. *Garrett v. Muller*, 37 T. 589; *McIlhenny v. Lee*, 43 T. 205; *Speake v. Prewitt*, 6 T. 252; *Jackson v. Alexander*, 8 T. 109.

An incoming partner is not a necessary party to a pending suit. *Gill v. Bickel*, 10 C. A. 67, 30 S. W. 919.

Where member of a firm contracts in his own name, for his own benefit, and assigns to the firm, a suit thereon must be brought by the partners. *Cleveland v. Heidenheimer*, 92 T. 108, 46 S. W. 30.

One who sells goods to H. without knowing that B. was his partner, which fact was concealed, may sue H. alone, and seize the goods as his. *Davis v. Bingham* (Civ. App.) 46 S. W. 840.

Where a contract of insurance was made with a mercantile firm composed of two partners, both partners are proper parties plaintiff to an action to recover for a loss thereunder, though one of them is a merely nominal partner, has no interest in the property, and is working for the other on a salary. *Lion Fire Ins. Co. v. Heath*, 29 C. A. 203, 68 S. W. 305.

78. — **Pleading.**—See Chapters 2, 3 and 8 of Title 37.

79. — **Presumptions, burden of proof and admissibility of evidence.**—See Art. 3687.

80. — **Sufficiency of evidence.**—In an action against an alleged firm on notes signed by one of the alleged partners, where the partnership was denied, held that the evidence tended to show a firm, and hence it was error to direct for defendants. *Moore v. Williams*, 26 C. A. 142, 62 S. W. 977.

Evidence held insufficient to show that a person was a member of a firm. *Bartholomew v. Shepperd*, 41 C. A. 579, 93 S. W. 218.

81. — **Instructions.**—See Chapter 13 of Title 37.

82. — **Judgment against partners when all not served.**—See Art. 2006.

83. **Execution and enforcement of judgment.**—See, also, Art. 3743.

If a judgment be obtained against a partnership, the judgment creditor is not required to first exhaust the partnership property before he can levy upon the outside or separate property of a partner. *Webb v. Gregory*, 49 C. A. 282, 108 S. W. 478.

#### V. RETIREMENT AND ADMISSION OF PARTNERS

84. **Withdrawal from firm in general.**—One partner cannot exclude another from a partnership. While he himself can withdraw from it, and thus terminate the partnership, he would be liable to his copartner for damages sustained by his improper withdrawal from the partnership. *Ball v. Britton*, 58 T. 57.

85. **Transfer of partner's interest to copartner.**—The doctrine of caveat emptor held not to apply to a certain transaction between partners. *Seal v. Holcomb*, 48 C. A. 330, 107 S. W. 916.

86. **Transfer of partner's interest to third person.**—A person who was induced to buy an interest in a partnership because of the misrepresentations of the members of the firm as to the firm indebtedness held entitled to rescind on the ground of fraud. *Beene & Trotter v. Rotan Grocery Co.*, 50 C. A. 448, 110 S. W. 162.

Promise in contract of leasing held without consideration. *Schroeter v. Bowdon*, 53 C. A. 135, 115 S. W. 331.

A partner's right to share in the surplus and to have the assets applied to the firm debts is property which can be sold and is sold by a transfer of his interest in the property either to a copartner or to a stranger. *Sherk v. First Nat. Bank (Civ. App.)* 152 S. W. 832.

87. **Assets of old firm.**—Where, after the dissolution, notes pledged to the retiring member were by the remaining partners transferred to a bank, if it knew of the dissolution, it could not presume that the full title of the claims was in the new firm. *First Nat. Bank v. Watson (Civ. App.)* 66 S. W. 237.

Continuing partner held entitled to recover penalty provided by statute for payment of usurious interest on firm note. *Lasater v. First Nat. Bank*, 96 T. 345, 72 S. W. 1057.

In a suit on a partnership obligation after dissolution of firm, evidence held not to show that a partner agreed that the assets retained by him should be burdened with lien in favor of retiring partner to secure payment of firm debt. *Blackwell v. Farmers' & Merchants' Nat. Bank*, 97 T. 445, 79 S. W. 518.

88. **Obligations of old firm.**—Rights of creditors where a new firm is formed by entry of an additional member. *Schneider v. Roe (Civ. App.)* 25 S. W. 58.

89. — **Liabilities of retiring partners.**—A dormant contractor is not liable for a debt contracted after he has retired, unless he had been previously known as a partner. *Speake v. Prewitt*, 6 T. 252; *Jackson v. Alexander*, 8 T. 109; *Bradshaw v. Apperson*, 36 T. 133.

When one member of a partnership retires from a firm and the remaining members agree with him to pay the firm debts, and these facts are known to the creditor, the member so retiring will be considered in law a surety. *Gourley v. Tyler*, 4 App. C. C. § 215, 15 S. W. 731.

While a firm was in existence a creditor was notified by the active member of the name of his secret partner. The creditor, relying upon the solvency of the secret partner, opened an account with the firm, which account was kept up after the dissolution. Held, that the secret partner cannot claim to have been a dormant partner against such creditor, and he is liable to such creditor for debts subsequently incurred in the name of the firm before the creditor had notice of its dissolution or of the retirement of such member. *Bank v. Bergstrom*, 1 C. A. 151, 20 S. W. 836.

Forbearance to sue continuing partner of a firm held not pursuant to a binding agreement to extend the time of payment sufficient to discharge the retiring partner. *Barlow v. Frederick Stearns & Co.*, 44 C. A. 321, 98 S. W. 455.

90. — **Liabilities of continuing partners or new firm.**—Partnership property held liable for firm debts, though one partner bought the interest of the other without knowing of the indebtedness. *Dockery v. Faulkner (Civ. App.)* 101 S. W. 501.

91. — **Liabilities of incoming or succeeding partners.**—An incoming partner does not by his entry into the firm per se become liable for the existing debts of the firm. He becomes a member of the firm for the future, and is bound for its future liabilities only. If the incoming partner agree with the firm to pay the existing liabilities of the firm, such agreement is binding between the parties to it, but does not extend to a creditor, and does not confer upon him the right to fix the debt upon the new partner. *Heidenheimer v. Franklin*, 1 App. C. C. § 840.

Incoming partner held liable for a precedent firm debt if he binds himself to pay it. *Baptist Book Concern v. Carswell (Civ. App.)* 46 S. W. 858.

The fact that a new partner, induced to enter a firm by fraud, authorized his partner to pay off debts of the old firm with firm money on hand, held not to authorize the part-

ner to give notes of the new firm for the debt, nor did it show an abandonment of the defense of fraud against any one seeking to hold him liable individually for the old firm's debts. *Beene & Trotter v. Rotan Grocery Co.*, 50 C. A. 448, 110 S. W. 162.

Defendant held liable for debts of a partnership, whether incurred before or after his purchase of an interest. *Freeman v. Huttig Sash & Door Co.* (Civ. App.) 135 S. W. 740.

One becoming a partner of a going firm does not thereby become liable for debts previously incurred in the absence of an agreement, express or implied, to that effect. *Freeman v. Huttig Sash & Door Co.*, 105 T. 560, 153 S. W. 122.

A purchase by a third person of a partner's net interest in a going firm is not of itself sufficient to create an assumption of his individual liability for existing firm debts. *Id.*

A purchaser of a partner's interest in a going firm is not liable for existing firm debts for goods purchased merely because the new firm receives and uses them for its own benefit. *Id.*

A purchaser of a partner's interest in a going firm is not personally liable for firm debts merely because he recognized that the firm property was subject thereto, and did not expect to obtain the partner's interest free therefrom. *Id.*

A purchaser of a partner's interest in a going firm held liable for goods ordered by the firm before the change in the firm, and thereafter delivered, but not liable for goods ordered and delivered before the change. *Id.*

Persons purchasing a two-thirds interest in partnership realty, with knowledge of breach by the firm of contracts for the sale of the land, were responsible for the entire liability of the firm, and not only to the extent of their interest. *Kinney County Land Co. v. Cabbage* (Civ. App.) 155 S. W. 591.

A new partner of an existing firm is not liable for debts previously incurred, in the absence of agreement to that effect. *Rodgers-Wade Furniture Co. v. Wynn* (Civ. App.) 156 S. W. 340.

92. **Assumption of obligations of old firm.**—In suit against a firm, contention of plaintiff that agreement whereby one of the partners had been released from his liability was without consideration held without merit. *Texas Drug Co. v. Coulter* (Civ. App.) 62 S. W. 110.

A buyer of a partner's interest in a firm under an agreement binding the partner to pay firm debts held required to maintain actions for damages for wrongful attachments of the property. *Davis v. Sisk*, 49 C. A. 193, 108 S. W. 472.

A partner selling his interest in a firm and agreeing a pay firm debts held liable to the buyer on a failure to pay the firm debts. *Id.*

A party to a transaction involving an exchange of property held entitled to a cancellation of notes given by him to the adverse party. *Id.*

A partner transferring his interest in the firm to a third person may, as a part of the consideration, require the third person to assume the outstanding indebtedness of the firm. *Rodgers-Wade Furniture Co. v. Wynn* (Civ. App.) 156 S. W. 340.

A retiring partner, who sought to escape liability for firm debts accruing prior to notice given of the retirement, had the burden of showing that the purchaser of his interest assumed the firm debts, and, where he failed to do so, payments made by the new firm could not be applied to the debts incurred prior to the retirement and notice. *Id.*

93. **Liabilities of retiring partner for acts and obligations of continuing partner or new firm.**—When persons have held themselves out to the public as partners, and authorized others to contract and deal with them on the faith or their joint liability, those who thus deal with them are authorized to act upon the presumption that such relations continue until notice is given of the dissolution of the partnership, or such facts are shown as will raise the presumption that it was known; and whether a party who deals with one member of a firm upon the credit or in the name of the firm, after it has been dissolved, had either actual or constructive notice of such dissolution, is a question of fact and must be determined by the jury. *Tudor v. White*, 27 T. 584; *Davis v. Willis*, 47 T. 154; *Long v. Garnett*, 59 T. 229; *Grabenheimer v. Rindskoff*, 64 T. 49; *Blanks v. Halfin* (Civ. App.) 30 S. W. 941.

The signing of a note with the firm name in liquidation is of itself notice to the taker of the note that the partnership has been dissolved. *Haddock v. Crocheron*, 32 T. 276, 5 Am. Rep. 244; *Cock v. Carson*, 45 T. 429.

When the parties occupy the relation of dealer and customer, a retired partner must show notice of the dissolution to relieve himself from subsequent liability, which may be done by direct or circumstantial evidence sufficient to establish the fact that the party seeking to enforce the liability knew of the dissolution. *Laird v. Ivens*, 45 T. 621, citing *White v. Tudor*, 24 T. 639, 76 Am. Dec. 126; *Mann v. Clapp*, 1 App. C. C. § 504; *Miller v. Schneider*, 2 App. C. C. § 371.

A retiring partner can only relieve himself from liability for debts thereafter incurred in the firm name by giving express notice to all persons dealing with the firm, and the world in general, of the dissolution of the partnership. *Dunham v. Simon*, 1 U. C. 548.

The rule as to notice to creditors of a dissolution does not apply to dormant or secret partners. *Bank v. Bergstrom*, 1 C. A. 151, 20 S. W. 836.

Publication in a newspaper of dissolution five days before making a contract with remaining members does not show notice. *Gilbough v. Stahl Bldg. Co.*, 16 C. A. 448, 41 S. W. 535.

To relieve the retiring members from liability on subsequent contracts with remaining members, notice of dissolution must be shown. *Id.*

A dormant partner, leaving a firm without notifying one who is ignorant of his being a partner, held not liable for contracts subsequently entered into with such person. *Baptist Book Concern v. Carswell* (Civ. App.) 46 S. W. 858.

Retiring partner held not liable on a firm note given by the continuing partner in the firm name, after dissolution, where payee's agent had notice of the dissolution before the note was made. *Bonnet v. Tips Hardware Co.* (Civ. App.) 59 S. W. 59.

Where immediately after the dissolution, the continuing partners borrowed from a bank, it was not error to refuse to charge that, if the bank agreed to loan the money to the firm before the dissolution, then the debt would be that of the old firm. *First Nat. Bank v. Watson* (Civ. App.) 66 S. W. 232.

A partnership once proved to exist continues so far as liability against the partners is concerned until dissolution and notice is brought home to one seeking to charge the partners. *Miller v. Laughlin* (Civ. App.) 147 S. W. 711.

Retiring partners giving no notice of their retirement held liable for obligations thereafter incurred. *Thompson v. Harmon* (Civ. App.) 152 S. W. 1161.

A partner who retires from the firm is not liable on a firm note subsequently executed to a payee having notice of the retirement. *Rodgers-Wade Furniture Co. v. Wynn* (Civ. App.) 156 S. W. 340.

A partner, who retires from the firm, is liable to a creditor for the part of the account charged until notice of the retirement. *Id.*

**94. Actions after change of membership.**—A partner who bought another's interest held entitled to recover only one-half the amount of funds appropriated and not charged on the books by the other, and only one-half the difference between the actual indebtedness of the firm and the amount as represented by the other. *Seal v. Holcomb*, 48 C. A. 330, 107 S. W. 916.

In an action against retiring partners in a bank, evidence held to sustain a finding that such partners gave no notice to the bank's customers of their retirement. *Thompson v. Harmon* (Civ. App.) 152 S. W. 1161.

Evidence held sufficient to sustain a finding that depositors in a partnership bank made their deposits in the belief that the partnership was composed of the same persons who originated it. *Id.*

Evidence, including a bill of sale and a deed, held sufficient to show that parties purchasing a two-thirds interest in a firm engaged in selling a large tract of land assumed the obligations of their assignors, not only with respect to the uncompleted contracts transferred to them, but as to all of the firm's contracts with purchasers. *Kinney County Land Co. v. Cabbage* (Civ. App.) 155 S. W. 591.

95. — Pleading and practice.—See Title 37.

96. — Presumptions, burden of proof and admissibility of evidence.—See Art. 3687.

## VI. DISSOLUTION, SETTLEMENT AND ACCOUNTING

**97. Presumption of continuance of relation.**—When it has been proven that a partnership existed at a given date, it is presumed to continue until it has been proved to have been dissolved. *Devine v. Martin*, 15 T. 25.

**98. Causes of dissolution—Transfer of partner's interest.**—A voluntary assignment or sale of the interest of a partner dissolves the partnership. *Carroll v. Evans*, 27 T. 262.

Sale under execution of the interest of one member of a firm in partnership property creates a dissolution of the partnership, and makes the purchaser a tenant in common with the remaining member. The purchaser is not bound to become a partner in a partnership enterprise, nor the remaining member to admit the purchaser as a partner, but if the partner refuses to recognize the purchaser's interest in the property, the purchaser has a right of action to recover joint possession and partition, or to sue for damages for conversion, in which case the value of the property at the time of the conversion is the measure of damages. *Carter v. Roland*, 53 T. 540; *Moore v. Steele*, 67 T. 435, 3 S. W. 448.

A sale by a partner to his copartner of his interest dissolves the partnership and converts the property into the individual property of the purchaser free from the equities of the seller. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

**99. — Misconduct of partner.**—A partner excluded from the management of or from a participation in the profits of a partnership held entitled to a dissolution thereof. *Rische v. Rische*, 46 C. A. 23, 101 S. W. 849.

Exclusion of a partner from participation in the management and profits of a partnership held ground for dissolution. *Holder v. Shelby* (Civ. App.) 118 S. W. 590.

**100. — Marriage of feme sole.**—A partnership is dissolved by the marriage of a member who was a feme sole. *Brown v. Chancellor*, 61 T. 437.

**101. — Death of partner.**—An agreement that upon the death of one of two partners the title of the partnership property shall vest in the survivor, and he shall become indebted as therein stipulated to the representative of the deceased, if made bona fide and for a valuable consideration, is valid. *Gaut v. Reed*, 24 T. 46, 76 Am. Dec. 94.

By operation of law a partnership is dissolved by the death of any of its members. An agreement taking the partnership out of this rule must be shown distinctly, and by evidence satisfactory. *Alexander v. Lewis*, 47 T. 481; *Kottwitz v. Alexander*, 34 T. 689.

By express agreement a partnership may be continued by the survivor after the death of one partner. *Lewis v. Alexander*, 51 T. 578.

A partnership can be extended by will so as to continue after the death of the testator. *Mason v. Slevin*, 1 App. C. C. § 13.

A partnership is dissolved on the death of a partner, in the absence of a contrary intention expressed in the partnership agreement or in the will of the partner dying. *Altgelt v. D. Sullivan & Co.* (Civ. App.) 79 S. W. 333.

The death of one of a firm dissolves the partnership, and devolves upon the surviving partner the duty of winding up the firm business. *Morris v. Owen* (Civ. App.) 143 S. W. 227.

**102. Rights, powers and liabilities after dissolution—Effect of dissolution as to rights and liabilities of third persons.**—On the death of a partner upon whose individual credit goods were sold to the partnership, the vendor may exercise the right of stoppage in transitu. *Fulton v. Thompson*, 18 T. 278.

If during the existence of the partnership there was a request to pay certain subsisting bills on maturity, and the plaintiff so paid them after the dissolution, and with notice thereof, the partnership would be liable, unless there had been a revocation of the request; but if the only request was by one of the firm after dissolution, the other member of the firm would not be liable, unless before the dissolution there had been a similar course of business between the firms, and the payments were made without notice of the dissolution. *Lee v. Stowe*, 57 T. 444.

It could not affect a bailor's right to recover against two bailees for the value of a colt that the bailees during the bailment dissolved partnership, and one agreed to stand

responsible for all animals left with them for pasturage. *Bagley v. Brack* (Civ. App.) 154 S. W. 247.

103. — **Collections and payments.**—After a dissolution of the partnership by death, the surviving partner is authorized to close up the affairs of the firm, and to this end may receive the debts due to the partnership, and apply the partnership assets and effects in discharge of its debts. *Fulton v. Thompson*, 18 T. 278; *Weir Plow Co. v. Evans* (Civ. App.) 24 S. W. 38.

There must be an actual payment of a firm debt by one partner after dissolution before he can maintain an action for contribution against the other. *Long v. Garnett*, 59 T. 229.

Before a division of assets a partner is entitled to receive a sufficient sum to reimburse him for all debts paid by him and sums advanced beyond his share of capital. *Moore v. Steele*, 67 T. 435, 3 S. W. 448.

104. — **Sale with stipulation to refrain from competition.**—W. Bros. sold out their undertakers' goods in D., and further stipulated by the firm name "not to start the undertaking in D. so long as their vendee is in business." Held, that the obligation bound each member of W. Bros. It was competent in a suit upon the contract to prove the estimated value of business done by the defendant who had broken his contract by starting again in business. *Welsh v. Morris*, 81 T. 159, 16 S. W. 744, 26 Am. St. Rep. 801.

105. — **Contracting new obligations in general.**—After the dissolution of a partnership the individual members cannot bind the other members by due bill for the purchase of goods, or by other express contract. *Kendall v. Riley*, 45 T. 20; *Speake v. White*, 14 T. 364; *White v. Tudor*, 24 T. 639, 76 Am. Dec. 126; *Lacoste v. Bexar County*, 28 T. 420; *Haddock v. Crocheron*, 32 T. 276, 5 Am. Rep. 244; *Seward v. L'Estrange*, 36 T. 295; *Cavitt v. James*, 39 T. 189; *Willis v. Morrison*, 44 T. 27; *Laird v. Ivens*, 45 T. 621; *Long v. Garnett*, 59 T. 229.

After dissolution of a partnership, one partner cannot bind the firm by a new contract. But when one dealing with the firm, without notice of dissolution, continues so to deal, the partnership is bound. *White v. Hudson* (Civ. App.) 36 S. W. 332.

Where after dissolution a partner changes time of payment of a note and rate of interest, he makes it his personal debt. *Baptist Book Concern v. Carswell* (Civ. App.) 46 S. W. 858.

106. — **Making or indorsing negotiable instruments.**—A note executed after the dissolution of the firm by one of the partners does not extinguish the partnership debt for which it was given, and a recovery may be had upon the account, notwithstanding the execution of the note. *Seward v. L'Estrange*, 36 T. 295.

While one of two or more partners cannot impose a new obligation on the firm after its dissolution, or vary, so as to bind the firm, the character of its existing contracts, yet, when one who has dealt with the firm during its continuance as such receives from one of its members, after its dissolution, but ignorant thereof, a note in payment of a firm debt, the firm will be bound for its payment. It is always a fact for the jury to determine whether the payee had notice. *Long v. Garnett*, 59 T. 229; *Davis v. Willis*, 47 T. 154; *Tudor v. White*, 27 T. 534.

A general authority given by one partner, on the dissolution of the firm, to his late partner, to settle up the business of the late firm, does not authorize him to give a note in the firm name for a firm debt, or to renew one that had been given before dissolution of the firm. *Brown v. Chancellor*, 61 T. 437.

After the dissolution of a partnership, a note executed by a member in the name of the firm in payment of a firm debt is not binding on other members of the firm, unless authorized or received in ignorance of dissolution. *Funck v. Heintze* (Civ. App.) 23 S. W. 417.

After dissolution of firm, a partner indorsing note payable to firm, to creditor who had notice of dissolution, held liable as indorser. *Tarver v. Evansville Furniture Co.*, 20 C. A. 66, 48 S. W. 199.

After dissolution of firm, one partner indorsed a note payable to firm to creditor who had notice of dissolution. Held, that other partner could not be held liable as indorser. *Id.*

107. — **Rights and liabilities of survivor as to estate of deceased.**—Upon a dissolution of a partnership, the surviving partners must cease carrying on the trade or business; if they continue the business it is at their own risk, and they will be liable at the option of the representatives of the deceased partner to account for the profits, or be charged with interest upon the deceased partner's share of the profits, besides bearing all the loss. *Franklin v. Tonjourns*, 1 App. C. C. § 507.

On the dissolution of a partnership by death, the surviving partner cannot recover from the administrator of the deceased partner money or property belonging to the partnership, unless needed to pay partnership debts, and can only recover his share of the same on a settlement of the partnership accounts. *Id.*

A partner, after death of his associate, has no right, as survivor, to claim a portion of a fee which was segregated to deceased with the survivor's consent; the partnership having been dissolved previous to the death of deceased. *Stanton v. Nugent*, 22 C. A. 163, 54 S. W. 793.

108. — **Wrongful acts.**—A surviving partner who claims the entire firm property and appropriates it to his own use as sole owner by virtue of an unauthorized sale by the temporary administratrix of the deceased partner, which sale the court refuses to confirm, is guilty of a conversion thereof. *Goldstein v. Susholtz*, 46 C. A. 582, 105 S. W. 219.

109. — **Actions by or against partners after dissolution.**—For pleading and practice, see Title 37; and for presumptions, burden of proof and admissibility of evidence, see Art. 3687.

The executor of the deceased partner has no right to intervene in a suit brought by the survivor to collect the debt, when the only object of the intervention is to join in the recovery. *Watson v. Miller*, 55 T. 289.

Where suit is instituted against a partnership, service of process upon one of the parties, or an appearance and answer by one partner, will authorize a judgment against

the firm, which can be enforced by execution against the partnership property and the property of the partner who is served (Art. 1863); and it is immaterial that the partnership had been dissolved before suit, if there is partnership property which may be subjected to execution. *Sanger v. Overmier*, 64 T. 57; *Patten v. Cunningham*, 63 T. 666; *Alexander v. Stern*, 41 T. 193; *Rhodus v. Storey*, 1 App. C. C. § 337; *Farris v. Seisfield*, 1 App. C. C. § 350; *Sanger v. Ker*, 1 App. C. C. § 1085. See *Bright v. Sampson*, 20 T. 21.

A suit may be maintained by the executrix of a deceased partner against another partner, without having a settlement of the partnership affairs, if the obligation sued upon shows an indebtedness by the defendant independent of the state of the partnership accounts. *McKay v. Overton*, 65 T. 82.

In a suit by the executrix of one partner against the surviving partner on a promissory note, the defendant cannot plead and set off a demand arising from a single partnership transaction; he should have prayed for settlement of the partnership affairs, and that any sum found due him should be allowed as a set-off. *Id.*

When one of three partners dies, and another is insolvent and ceases to pay any attention to the affairs of the firm, and withdraws from all connection with it, the third person, who is solvent, and gives his active attention to the business of the firm, cannot sue on the note in his own name as surviving partner. *Hines v. Dean*, 1 App. C. C. § 690.

It is the right of a maker of a note to joint partners to have all the partners bound by the judgment, and if one of two surviving partners refuse to join in the action to recover the debt due the firm, he may be made a party defendant, and thus be concluded by the judgment. *Id.*

Where an insolvent partner misapplies and devotes to his own use partnership assets, which he delivers to his wife without consideration, the other partner may recover such assets from the wife. *Gloor v. Allen*, 47 C. A. 519, 105 S. W. 539.

Partnership liabilities are joint and several. *Webb v. Gregory*, 49 C. A. 282, 108 S. W. 478.

The right of a surviving partner to a portion of the salary due and unpaid the deceased partner at the time of his death, for services rendered such surviving partner as receiver of a railroad, could be determined only on a partnership accounting. *Jones v. Gardner* (Civ. App.) 112 S. W. 826.

110. **Distribution and settlement between partners and their representatives.**—Rights of partner on final accounting determined. *Veck v. Culbertson* (Civ. App.) 42 S. W. 253.

111. — **Necessity of settlement in general.**—An action cannot be maintained by one partner against another for contribution of expenditures incurred by a partner for the use of the partnership, without going into a settlement of the partnership accounts, in the absence of a special agreement or a separation of the transaction from the partnership accounts. *Lockhart v. Lytle*, 47 T. 452; *Merriwether v. Hardeman*, 51 T. 436.

The adjustment of the accounts of a partnership is necessary to a determination of the rights of the partners in the property of the firm. The interest of a partner consists in his proportion of whatever balance may ultimately be left after the payment of the partnership debts and statement of accounts between the partners, and neither party has any exclusive right to any portion of the joint effects for any sum due him until a balance of accounts be struck. *Moore v. Steele*, 67 T. 435, 3 S. W. 448; *Hines v. Dean*, 1 App. C. C. § 691.

112. — **Who entitled to require accounting.**—Unless it is made to appear that a person owned some substantial interest in the assets of a company, the fact that he is excluded from participation in its business will not entitle him to an accounting. *Bryant v. Galbraith* (Civ. App.) 43 S. W. 833.

113. — **Division of profits.**—In an action by remaining partners against a former partner for a share of commissions, held, that a termination of the partnership before the deed was executed was no defense, where with that exception the deal was complete before dissolution. *Hampton v. Wooley* (Civ. App.) 136 S. W. 1140.

114. — **Private accounting and settlement.**—In the absence of fraud or deceit a settlement of partnership matters will not be set aside, although it is harsh and unequal. *Cameron v. Thurmond*, 56 T. 35; *Moore v. Bivins* (Civ. App.) 33 S. W. 881.

The trial court found that the firm assets had been about equally divided between two partners upon a settlement between them, one taking his share in money, the other taking property, of which the land in controversy was part. In connection with other facts, held, that the land belonged to the party to whom it was allotted in the parol division of assets. *Murrell v. Mandelbaum*, 85 T. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

A partner agreeing on the dissolution of the firm to assume all liabilities of the firm held to have assumed the liability of the firm to an employé injured through its negligence. *Binyon v. Smith*, 50 C. A. 398, 112 S. W. 138.

After a final settlement between two parties, one of them is in no attitude to receive relief at the hands of the court with reference to dealing by the other in futures. *Dyer v. Adams*, 56 C. A. 400, 120 S. W. 946.

Where the personal representative of a deceased partner was induced by the misrepresentations of the surviving partner to make a settlement, the question of damages from the misrepresentations in determining the validity of the settlement must be determined by the partnership affairs at the time of the settlement. *Morris v. Owen* (Civ. App.) 143 S. W. 227.

115. — **Fraud.**—The rights of one fraudulently induced to buy an interest in a business and to become a partner therein determined. *Peterson v. Barrow* (Civ. App.) 105 S. W. 212.

116. **Actions for dissolution and accounting—In general.**—A certain claim in a partnership accounting held not to be a partnership matter. *Santleben v. Froboese*, 17 C. A. 626, 43 S. W. 571.

Statement as to what individual claims may be considered in an action for partnership accounting. *Barber v. Morgan* (Civ. App.) 76 S. W. 319.

That the only asset of a partnership incapable of partition is exempt cannot prevent a partner maintaining a suit for dissolution. *Watson v. Williamson* (Civ. App.) 76 S. W. 793.

117. — **Conditions precedent.**—No formal notice to dissolve a partnership at will is necessary before an action for dissolution. *Wright v. Ross*, 30 C. A. 207, 70 S. W. 234.

118. — **Pleading.**—See Chapters 2, 3 and 8 of Title 37.

119. — **Charges and credits.**—Payments made after suit brought to dissolve the firm, and to determine the debt of a third party to the firm, made by such third party to defendant, could not prejudice plaintiff. *Storrie v. Hamilton* (Civ. App.) 42 S. W. 235.

A partner drawing a salary in addition to profits is entitled thereto after the expiration of the period for which the partnership was formed, where the business is continued without any new agreement. *Gresham v. Harcourt* (Civ. App.) 50 S. W. 1058.

In an action against a surviving partner for an accounting, defendant should be charged with what he has received, and credited with what he has lawfully paid out, on partnership business. *Gresham v. Harcourt*, 93 T. 149, 53 S. W. 1019.

In an action for a partnership accounting, defendant held erroneously twice credited with the same item. *Barber v. Morgan* (Civ. App.) 76 S. W. 319.

120. — **Evidence on accounting in general.**—See Art. 3687.

In an action between partners, evidence held to sustain a verdict for a share of commissions earned by defendant on the sale of land. *Goodwin v. Mortsen* (Civ. App.) 128 S. W. 1182.

## CHAPTER TWO

### UNINCORPORATED JOINT STOCK COMPANIES—PERMITTING SUIT IN COMPANY NAME

Art.		Art.	
6149.	May sue or be sued in its company name.	6152.	Effect of judgment, where agent of company only is cited.
6150.	Citation, upon whom served.	6153.	Effect of judgment where individual stockholders are also cited.
6151.	Judgment against, conclusive against stockholders.	6154.	This chapter cumulative; not to impair existing rights.

[In addition to the notes under the particular articles, see also notes of decisions relating to unincorporated associations in general, at end of chapter.]

**Article 6149. May sue or be sued in its company name.**—Hereafter any unincorporated joint stock company or association, whether foreign or domestic, doing business in this state, may sue or be sued in any court of this state having jurisdiction of the subject matter in its company or distinguishing name; and it shall not be necessary to make the individual stockholders or members thereof parties to the suit. [Acts 1907, p. 240, sec. 1.]

**To whom applicable.**—Under Acts 31st Leg. 2d Ex. Sess. c. 22, relating to fraternal beneficiary associations, and this article, a voluntary unincorporated association doing business as a fraternal life insurance association may sue and be sued and a judgment was properly rendered against it in an action against it and its directors for a wrongful refusal to pay the amount of a policy to the beneficiary of a deceased member. *Home Benefit Ass'n No. 3 of Coleman County v. Webster* (Civ. App.) 146 S. W. 1022.

**Unincorporated associations.**—See notes at end of this chapter.

**Art. 6150. Citation, upon whom served.**—In suits against such companies or associations, service of citation may be had on the president, secretary, treasurer or general agent of such unincorporated companies. [Id. sec. 2.]

**Who may be served.**—Service of process against an unincorporated association in 1906, on a member who had charge of its affairs and was acting as manager, agent, or secretary pro tem., was sufficient service, especially in view of this article, which was thereafter enacted. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

**Art. 6151. Judgment against, conclusive against stockholders.**—In suits by or against such unincorporated companies, whatever judgment shall be rendered shall be as conclusive on the individual stockholders and members thereof as if they were individually parties to such suits. [Id. sec. 3.]

**Art. 6152. Effect of judgment where agent of company only is cited.**—Where suit shall be brought against such company or association, and the only service had shall be upon the president, secretary, treasurer or general agent of such company or association, and judgment shall be rendered against the defendant company, such judgment shall be binding on the joint property of all the stockholders or members thereof, and may

be enforced by execution against the joint property; but such judgment shall not be binding on the individual property of the stockholders or members, nor authorize execution against it. [Id. sec. 4.]

**Art. 6153. Effect of judgment where individual stockholders are also cited.**—In a suit against such company or association, in addition to service on the president, secretary, treasurer or general agent of such companies or associations, service of citation may also be had on any and all of the stockholders or members of such companies or associations; and, in the event judgment shall be against such unincorporated company or association, it shall be equally binding upon the individual property of the stockholders or members so served, and executions may issue against the property of the individual stockholders or members, as well as against the joint property; but executions shall not issue against the individual property of the stockholders or members until execution against the joint property has been returned without satisfaction. [Id. sec. 5.]

**Debts of joint-stock company.**—The indebtedness of a joint-stock company will be charged pro rata to the solvent members. *Cameron v. First Nat. Bank* (Civ. App.) 34 S. W. 178.

**Art. 6154. This chapter cumulative; not to impair existing rights.**—The provisions of this chapter shall not affect nor impair the right allowed unincorporated joint stock companies and associations to sue in the individual names of the stockholders or members, nor the right of any person to sue the individual stockholders or members; but the provisions of this chapter shall be construed as cumulative merely of other remedies now existing under the law. [Id. sec. 6.]

#### DECISIONS RELATING TO UNINCORPORATED ASSOCIATIONS IN GENERAL

**Partnerships.**—See notes at end of Chapter 1 of this title.

— **Limited partnerships.**—See Arts. 6126-6148 and notes.

**Joint-stock companies.**—See Arts. 6149-6154 and notes.

**By-laws.**—By-laws adopted by voluntary associations are regarded as a contract of the members with each other, and determine their individual rights. *Gaines v. Farmer*, 55 C. A. 601, 119 S. W. 874.

**Property and funds of association.**—The assets of a defunct voluntary association do not constitute a trust fund for the benefit of creditors in the hands of purchasers of such assets. *Industrial Lumber Co. v. Texas Pine Land Ass'n*, 31 C. A. 375, 72 S. W. 875.

Members of a voluntary unincorporated association can hold property in no other way than through the medium of trustees acting as depositaries of the legal title, and the equitable interest entitles each beneficiary to the same voice in the management and control of the property as if he were a joint owner and holder of the legal title. *Clark v. Brown* (Civ. App.) 108 S. W. 421.

The rights of members of churches and other voluntary associations not organized for commercial purposes in the property held for the common use held one of user only. *Id.*

**Liability of members for acts and debts of association.**—An unincorporated association is not a person, and has not the power to sue or be sued; but when it has been organized and conducted for profit it will be treated as a partnership, and its members held liable as partners. *Slaughter v. American Baptist Publication Society* (Civ. App.) 150 S. W. 224.

**Officers and committees.**—The right of a person to hold office in a purely benevolent society carrying no salary cannot be the basis of an election contest by a civil suit. *Gaines v. Farmer*, 55 C. A. 601, 119 S. W. 874.

Civil courts will not review the internal operations of a voluntary association except to protect a civil or property right of the complaining party. *Id.*

Mere receipt by one of the candidates for office in an association of a majority of the ballots cast did not vest in him any right to the position. *Id.*

Unauthorized false representations of one member of building committee of a lodge to a materialman held not binding upon the lodge or upon an individual jointly interested with the lodge. *Kuteman v. Lacy* (Civ. App.) 144 S. W. 1184.

**Actions by or against association.**—The question of the validity of the grant of an interest in land to an unincorporated association held not involved in an action by a voluntary association to recover the cost of improvements put on the land by the association. *Ackermann v. Ackermann Schuetzen Verein* (Civ. App.) 60 S. W. 366.

The rule that a petition by the members of an association to recover on a contract in the name of the company was insufficient, unless incorporation was alleged, held not applicable to plaintiff's petition. *Id.*

A complaint by a voluntary association held not demurrable on the ground that it was brought in the name of the association, instead of the names of its members. *Id.*

A petition by a voluntary association held not open to the objection that some of its alleged members were not in fact shown to be members. *Id.*

Members of a voluntary association may maintain an action on a contract executed for the benefit of the association. *Id.*



Where bondholders of an electric company formed an association to reconstruct certain of the company's lines under permission of its receiver, it could be sued for injuries to a servant only in the names of the members. *Standard Light & Power Co. v. Muncey*, 33 C. A. 416, 76 S. W. 931.

A voluntary association cannot be subjected to an ordinary judgment for debt. *Methodist Episcopal Church South v. Clifton*, 34 C. A. 248, 78 S. W. 732.

An unincorporated, voluntary association organized for charitable, and not for business purposes, can neither sue nor be sued, except where it be a joint stock association, or where individuals are held liable either in person or as agents for debts incurred for the benefit of the association, or where the plaintiffs have shown themselves entitled to subject the general, or some particular, property of the association to their claims by virtue of an equitable lien or some species of trust. *Home Benefit Ass'n No. 3 of Coleman County v. Wester* (Civ. App.) 146 S. W. 1022.

Unincorporated voluntary associations organized for the purpose of insuring its members, and not for charitable purposes, might be sued, though not possessed of any property. *Id.*

## TITLE 103

## PAWNBROKERS

<b>Art.</b>		<b>Art.</b>	
6155.	Definition of "pawnbroker."	6163.	Within what hours sales shall be made.
6156.	Pawnbroker shall give bond, and its requisites.	6164.	Report of sale to be made, and what the same shall show.
6157.	Bond shall be recorded, and new bond shall be given every twelve months.	6165.	What expenses shall be allowed and deducted.
6158.	Shall keep a register, and what the same shall show.	6166.	Owner or depositor entitled to surplus for thirty days after sale.
6159.	Book shall be open for inspection, etc.	6167.	Surplus shall be paid to county treasurer, when.
6160.	Property pawned shall be sold after notice, when.	6168.	Suit upon bond for surplus and damages.
6161.	How notice shall be given.	6169.	Party injured may sue upon bond.
6162.	Advertisements shall state what, and copy shall be filed in office of county clerk.	6170.	Injured party may sue officer.
		6171.	Common law shall govern, except, etc.

**Article 6155. [3636] Definition of "pawnbroker."**—A "pawnbroker" is one who pursues the business of lending money upon interest and receiving upon deposit, as security for the payment of such loan and interest, any personal property. [R. S. 1879.]

Pledges in general.—See Title 86, Chapter 8.  
License taxes.—See Title 126, Chapter 1.

**Art. 6156. [3637] Pawnbroker shall give bond, and its requisites.**—No person shall pursue the business of a pawnbroker without first having given bond, with at least two good and sufficient sureties, in the sum of one thousand dollars, payable to the state of Texas, and approved by and filed with the clerk of the county court of the county in which such person proposes to pursue said business, conditioned that such person will faithfully comply with each and every requirement of the law governing such business. [Act April 28, 1874, p. 153. P. D. 7168p.]

**Art. 6157. [3638] Bond shall be recorded and new bond shall be given every 12 months.**—The bond required by the preceding article shall be recorded and safely kept in the office of the clerk of the county court of the county in which such pawnbroker pursues such business, the recording fees thereof to be paid by such pawnbroker; and a new bond shall be given, filed and recorded in the same manner as the first one every twelve months during the continuance of such business. [Id. P. D. 7168q.]

**Art. 6158. [3639] Shall keep a register, and what the same shall show.**—Each pawnbroker shall keep a well-bound book, in which he shall register all his transactions as a broker at the time the same occurs. Such register shall show:

1. The article of property received, giving an accurate description of the same.
2. From whom received.
3. The time and the amount for which the article is pawned.
4. The probable value of the article.
5. The rate of interest agreed upon.
6. The final disposition made of such property, and, if sold, to whom sold and the amount for which each article was sold. [Id. P. D. 7168p.]

**Art. 6159. [3640] Book shall be open for inspection, etc.**—Such book shall be kept open for inspection and the broker shall give, to the party pledging, a ticket corresponding to the entry on the book of registry. [Id.]

**Art. 6160. [3641] Property pawned shall be sold after notice, when.**—If any article deposited with such broker as a pawn shall not be redeemed at or before the time agreed upon, the broker shall sell the same at public auction to the highest bidder for cash, at his usual place of business, after giving at least five days' notice of such sale. [Id. P. D. 7168q.]

**Evidence as to sale.**—Facts held insufficient to show such good faith on the part of a pawnbroker in selling pledged property as to render the sale valid. *Uncle Sam's Loan Office v. Emery*, 49 C. A. 236, 107 S. W. 1155.

Where a pawnbroker purchases pledged property at his own sale, the burden is upon him to show as against the pledgor that the sale was made according to law and with the utmost good faith. *Id.*

**Art. 6161. [3642] How notice shall be given.**—Such notice of sale shall be given by posting written or printed advertisements at not less than three public places in the county where such sale is to take place, one of which places shall be the court house of such county. [Id. P. D. 7168q.]

**Art. 6162. [3643] Advertisement shall state what, and copy shall be filed in office of county clerk.**—The written advertisements of sale shall state the time and place of such sale, and shall contain a full description of the article or articles to be sold, and the name or names of the person or persons depositing the same; and a copy thereof shall be filed in the office of the clerk of the county court of the county where such sale takes place. [R. S. 1879.]

**Art. 6163. [3644] Within what hours sales shall be made.**—All sales made by a pawnbroker shall be made between the hours of ten o'clock a. m. and four o'clock p. m., and no sales shall be made upon Sunday or upon a legal holiday. [Id.]

**Art. 6164. [3645] Report of sales to be made, and what the same shall show.**—When a sale has been made, the pawnbroker shall, within five days thereafter, file with the clerk of the county court of the county where such sale was made, a report in writing and under oath, showing:

1. The time and place of such sale.
2. The notice given thereof.
3. A full description of the property sold and by whom deposited.
4. By whom purchased and the amount which each article was sold for.
5. The amount due the broker, principal, interest and expenses upon each article sold.
6. The amount of surplus of the proceeds of sale of each article, if any, after deducting the amount due the broker of principal, interest and expenses. [Id.]

**In general.**—The purpose of the statute is to give publicity to the sale in all its respects. It does not in terms prohibit a sale upon failure to comply with any requirement of law governing the business of pawnbrokers. *Uncle Sam's Loan Office v. Emery*, 49 C. A. 236, 107 S. W. 1155.

**Art. 6165. [3646] What expenses shall be allowed and deducted.**—The expenses named in the preceding article shall be such expenses as have been agreed upon by the parties to the contract; or, if there be no agreement in regard thereto, then the reasonable expenses of the sale only, such as reasonable auctioneer's commissions, shall be allowed and deducted. [Id.]

**Art. 6166. [3647] Owner or depositor entitled to surplus for thirty days after sale.**—The owner or depositor of the property so sold shall be entitled upon demand to receive from such broker the surplus of the proceeds of such sale at any time within thirty days after such sale; and, if no demand therefor be made within thirty days after such sale, such surplus shall become the property of the county where such sale was made. [Id.]

**Art. 6167. [3648] Surplus shall be paid to county treasurer, when.**—Should there be any surplus of the proceeds of any sale made by a broker, he shall, at the expiration of thirty days from the day of such sale, pay such surplus to the county treasurer of the county where such sale was made, or he shall file with such county treasurer the receipt of the owner or depositor of the property sold, for such surplus, at the expiration of said thirty days. [Id. P. D. 7168q.]

**Art. 6168. [3649] Suit upon bond for surplus and damages.**—Suit may be brought upon the bond of the pawnbroker by the county, or by any party entitled to the surplus of any sale made by him; and upon recovery judgment shall be rendered against such pawnbroker and the sureties upon his bond for the amount of such surplus, together with ten per cent per month on such amount for each month or fraction of a month that such surplus has been illegally withheld by such pawnbroker. [Id. P. D. 7168r.]

**Art. 6169. [3650] Party injured may sue upon bond.**—Any person injured by the failure of a pawnbroker to comply faithfully with his contract, or with any requirement of law governing the business of pawnbrokerage, may sue upon the bond of such pawnbroker and recover such damages as he may prove himself entitled to, not to exceed the penalty of such bond. [R. S. 1879.]

**Art. 6170. [3651] Injured parties may sue officer, when.**—Any person injured by the failure, refusal or neglect of any officer whose duty it is to comply with any of the provisions of the law governing pawnbrokerage shall have a right of action against such officer so failing, refusing or neglecting, for the recovery of all damages resulting from such failure, refusal or neglect. [Id. P. D. 7168s.]

**Art. 6171. [3652] Common law shall govern, except, etc.**—The rules of the common law pertaining to and governing the business of pawnbrokerage shall govern the civil liability of pawnbrokers, except in so far as the same may be contrary to or inconsistent with any statute. [R. S. 1879.]

## TITLE 104

## PENITENTIARIES AND CONVICTS

[For Parole of Convicts, see Pardon Advisers, Chap. 2.]

Chap.	1. System of Prison Government.	Chap.	3. Workhouse and County Convicts.
	2. Prison Regulations and Discipline.		4. Hiring of County Convicts.

## CHAPTER ONE

## SYSTEM OF PRISON GOVERNMENT

Art.	6172. Policy of prison system.	Art.	6186. Modern buildings to be erected and equipped.
6173.	Prison system includes what.	6187.	Farm and factory products, movable and real property, how sold.
6174.	Prison labor not to be leased to private parties.	6188.	Prison funds.
6175.	Board of prison commissioners; appointment; term.	6189.	Commission may make regulations.
6176.	Commissioners to give bond.	6190.	Commissioners to visit camps and farms.
6177.	Salary.	6191.	Inventories.
6178.	Commissioners to devote whole time to office.	6192.	Prison accounts, how kept.
6179.	Shall have exclusive management.	6193.	Auditor, appointment and duties.
6180.	Appointment of under-officer.	6194.	Commissioners may administer oaths and examine witnesses.
6181.	Quorum; chairman; assignment of duties.	6195.	Commissioners, removal of.
6182.	May discharge under-officers and employés.	6196.	Salaries and qualifications of under-officers and employés.
6183.	May purchase instrumentalities for employment of convicts.	6197.	Fraudulent conversion of prison property; penalty.
6184.	Purchases of land, how made.	6198.	Dishonesty of officers or employés; penalty.
6185.	Lands to be bought sufficient for employment of prisoners.	6199.	Unauthorized punishments; penalty.
		6200.	Seal of commission.

**Article 6172. Policy of prison system.**—It shall be the policy of this state, in the operation of its prison system, to so manage and conduct the same that those convicted of violating the law and sentenced to a term in the penitentiary shall have humane treatment and shall be given opportunity, encouragement and training in the matter of reformation. [Acts 1910, 4 S. S., p. 143, sec. 1.]

License of convict as attorney.—See Attorney at Law.

**Art. 6173. Prison system includes what.**—The prison system of this state, as referred to in this title, shall include the state penitentiary at Huntsville, the state penitentiary at Rusk, and such other penitentiaries as may hereafter be established, and all farms or camps where state prisoners are or may be kept or worked, together with all property of every character belonging thereto or connected therewith. [Id. sec. 2.]

**Art. 6174. Prison labor not to be leased to private parties.**—It is hereby declared the policy of this state to work all prisoners within the prison walls, and upon farms owned by the state, and in no event shall the labor of a prisoner be sold to any contractor or lessee to work on farms or elsewhere, nor shall any prisoner be worked on any farm or otherwise upon shares, or upon any other farm or place other than that owned or controlled by the state of Texas, after January 1, 1914; provided, that all contracts for prison labor in existence January 20, 1911, shall terminate not later than January 1, 1914; and no contract for any prison labor shall be made which would extend beyond January 1, 1914; provided, further, that the board of prison commissioners shall change from the system of leasing and hiring out of prisoners at the earliest practicable time. [Id. sec. 3.]

**Art. 6175. Board of prison commissioners; appointment; term.**—To better carry out such policy, the management and control of the prison system of the state of Texas shall be vested in a board to be known as the board of prison commissioners, and for the purposes of this title shall be referred to as the prison commission. Said board of prison commissioners shall be composed of three men, to be appointed by the governor, with the advice and consent of the senate, whose term of office shall be two years from date of appointment, except those first appointed under this act, who shall hold their offices respectively for eight, sixteen and twenty-four months from the date of their appointment and qualification. In the appointment of said commissioners first to be appointed under this chapter, the governor shall designate the term each one shall hold under such appointment; provided, however, that in the event of a change in the constitution, extending the term of office of the prison commissioners, then the members of said board of prison commissioners then in office shall adjust their terms of office by lot or in conformance with the provisions of such constitutional amendment without the necessity of further legislative enactment. [Id. sec. 4.]

**Art. 6176. Commissioners to give bond.**—Each member of said commission shall, within ten days after his appointment, execute a bond payable to the governor of this state and his successors in office for the use of the state in the sum of fifty thousand dollars, and conditioned that he will faithfully execute the duties of his office, which said bond shall be executed with two or more good and sufficient sureties, or with some indemnity, fidelity or bonding companies authorized to do business in Texas; the form of which bond shall be prepared by the attorney general, and the sufficiency of the sureties thereon approved by, and the same shall be filed with, the secretary of state; which said bond shall not be void on the first recovery of part or of the whole of the penalty, but shall thereafter continue in force for the whole amount of the penalty thereof, and may be sued on from time to time, and shall be deemed to extend to the faithful performance of the duties of his trust, until his successor shall be duly qualified, and shall have entered upon the duties of his office. And it shall be the duty of the attorney general, upon notice of default or failure to perform the duties as contemplated by law by any member of said prison commission, to bring suit in any court of competent jurisdiction in Travis county, Texas, for the forfeiture and collection of said bond; and, before entering upon the duties of his office, each member of said board shall take and subscribe the oath of office prescribed by the constitution of this state. [Id. sec. 5.]

**Art. 6177. Salary.**—Each member of the board of prison commissioners shall receive as compensation for his services the sum of three hundred dollars per month, to be paid at the end of each month; and in addition thereto he shall be allowed all reasonable and necessary traveling expenses actually incurred when traveling on business of the prison system, to be paid, together with said salary, out of the funds of the prison system, all such expense accounts to be itemized and sworn to in duplicate, and approved by the board of prison commissioners, or a majority of said board, one copy to be kept with the records of the board of prison commissioners, and one copy to be filed with the comptroller of public accounts. Each member of said board of prison commissioners shall reside at Huntsville, in Walker county, Texas, which is hereby designated as the headquarters of the prison system, and shall be permitted to occupy free of rent the residence houses belonging to the state at Huntsville. [Id. sec. 6.]

**Art. 6178. Commissioners to devote whole time to office.**—Each member of the prison commission shall devote his entire time to the discharge of the duties of said office, and shall not engage in any other occupation or business during his term of office, nor shall either of the

members of said board be directly or indirectly connected with or interested in any contract, sale or purchase of any property or thing whatsoever which may be made during his term of office, and in which either the state or the prison system are interested. And any violation of any of the provisions of this article shall be sufficient ground for his removal from office. [Id. sec. 7.]

**Art. 6179. Shall have exclusive management.**—Said prison commission shall be vested with the exclusive management and control of the prison system of this state, and shall be held responsible for the proper care, treatment, feeding, clothing and management of the prisoners confined therein, and at all times for the faithful enforcement of the spirit, intent and purpose of the laws and rules governing said system; provided, that the prison commission shall be held responsible for maltreatment of prisoners, and, if permitted, it shall be grounds for removal from office. [Id. sec. 8.]

**Art. 6180. Appointment of under-officers.**—The said prison commission shall have the power, and it shall be their duty, to appoint all necessary officers, all physicians, chaplains, teachers, and all clerical help needed in conducting said prison system, including a secretary of the prison commission; and they shall require all appointees, who, in discharging their duties, are charged with handling any funds of the system or state, to execute bond in such amount as may be fixed by the prison commission, payable to the prison commission for the use and benefit of the state, to be conditioned for the faithful performance of their duties. [Id. sec. 9.]

**Art. 6181. Quorum; chairman; assignment of duties.**—A majority of said prison commission shall constitute a quorum for the transaction of business. The commissioners shall select one of their number as chairman. They shall designate one member to have supervision over the finances and financial transactions of the prison system, one who shall supervise the feeding, clothing, care and treatment of the prisoners, and one who shall supervise the work of all the officers and employés of the prison system, and who shall also be known and designated as the superintendent of parole, and shall direct the enforcement of any parole law, or indeterminate sentence law, which may now or hereafter be in force in this state, unless otherwise directed by law; provided, that the work of each member so designated shall be under the general supervision of and he shall report his actions to the prison commission. The provisions of this article are intended to facilitate the work of the prison commission, and shall not be construed as relieving the full board of prison commissioners of any authority or general responsibility for the management of the prison system. The prison commission shall keep, or cause to be kept, in a well-bound book a minute of the proceedings of all meetings held by them. [Id. sec. 10.]

**Art. 6182. May discharge under-officers and employés.**—The prison commission shall have the authority at all times to discharge any officer or any employé of the prison system for failure to comply with the rules, regulations or laws governing the prison system, or for any dereliction in duty, or whenever they may deem it to be for the best interests of the service. [Id. sec. 11.]

**Art. 6183. May purchase instrumentalities for employment of convicts.**—The prison commission shall have the power to purchase, or cause to be purchased, with such funds as may be at their disposal, any lands, buildings, machinery, tools or supplies for the benefit of said prison system, and may establish such factories as in their judgment may be practicable and that will afford useful and proper employment to prisoners confined in the state prison, under such regulations, conditions and restrictions as may be deemed best for the welfare of the state and

the prisoners, it being the purpose of this title to clothe said board of prison commissioners with all power and authority necessary for the proper management of the prison system of this state. [Id. sec. 12.]

**Art. 6184. Purchases of land, how made.**—The prison commission shall have power, with the approval of the governor, to purchase such land as may, in their judgment, be necessary in the operation of said system, and the employment of prisoners confined in said prison; and in the purchase thereof they may pay such sum in cash as may be agreed upon with the vendor; and, for the unpaid purchase money to become due upon said land, they shall execute to the vendor notes payable in such sum and at such time as may be agreed upon between the parties, and the payment of which shall be secured by a deed of trust upon such land in the usual form, and containing such covenants as may be agreed upon between the parties, and may pledge a sufficient amount of the net revenues of the property so purchased to pay the deferred installments of purchase money thereon; and it shall be expressly provided in the conveyance to said land, the notes executed for the unpaid purchase money and the deed of trust, that the vendor relies alone upon the lien created by the deed of trust upon said land and the net revenues so pledged, and that no personal liability against the prison commission or the state of Texas shall arise out of said transaction beyond said liens; and the purchase money paid originally, as well as the installments paid upon the deferred payments, may be paid out of any funds belonging to said prison system. The title to all lands purchased by the prison commission under the terms of this chapter shall be examined, passed upon and approved as good and sufficient by the attorney general; and all conveyances, notes and trust deeds and other instruments executed under the provisions of this chapter shall be prepared, passed upon and approved by the attorney general. The title to all lands so purchased shall vest in the prison commission, and their successors in office, as trustees for the state. [Id. sec. 13.]

**Art. 6185. Lands to be bought sufficient for employment of prisoners.**—The prison commission may buy annually so many acres of land as will, not later than January 1, 1914, or sooner if practicable, enable all prisoners hired out or employed on share or contract farms, and who are not otherwise employed by the state, to be employed directly on farms belonging to the prison system. [Id. sec. 14.]

**Art. 6186. Modern buildings to be erected and equipped.**—The prison commission is authorized, and it shall be its duty, to cause to be constructed upon land now belonging to the prison system, and upon such land as may be bought hereafter, all necessary modern fireproof, well ventilated prison buildings, providing a separate cell or room for each prisoner, as far as conditions and the welfare of the prisoners demand, with proper bathing facilities and all necessary sanitary water closets and other sanitary arrangements within such buildings; also sanitary kitchens, dining rooms, hospitals, school rooms, and chapels, and other necessary conveniences for the benefit of the prisoners. The provisions of this article shall be carried out to completion as rapidly as is practicable, so that the same shall be completed in the entire prison system within six years from January 20, 1911. [Id. sec. 15.]

**Art. 6187. Farm and factory products, movable and real property, how sold.**—The prison commission shall have power to sell and dispose of all farm products and the products of all factories connected with the prison system, and all personal and movable property, at such prices and on such terms as may be deemed best by them, and they may, with the approval of the governor, sell or lease any real estate or other fixed property and appurtenances belonging thereto, upon such terms as to them seem best; and upon the sale thereof they shall have power to



execute proper conveyances to the title thereto; which instruments of conveyance shall be prepared and approved by the attorney general. The prison commission shall in the purchase or sale of all real estate, or in the purchase or sale of any machinery or equipment for the prison system, exceeding in value the sum of five thousand dollars, advertise in the manner prescribed by the prison commission for bids for such property in at least three daily papers in this state having a general circulation, and shall give all such bids received to the public press at least thirty days before any such contract is let. [Id. sec. 16.]

**Art. 6188. Prison funds.**—On Monday of each week, the prison commission shall remit to the state treasurer all moneys received by them as such, from whatever source during the preceding week and belonging to the system. The treasurer shall hold such fund as bailee for the prison commission, which fund shall be known as the prison commission account; and he shall give to the prison commission a deposit receipt for same, and shall pay out same on draft drawn by the officer designated by article 6192. The prison commission is authorized to draw upon the prison commission account with the state treasurer such sum or sums of money and at such time or times, as in their judgment may be necessary for the transaction of the business of the system; provided, they shall not draw for a sum that will give them in hand and in bank, subject to disbursement, a sum in excess of twenty-five thousand dollars; and provided, further, the account of the prison system with the state treasurer shall in no event be overdrawn, and in no event shall the state treasurer ever permit an overdraft against the prison commission account to be paid. On December 1 of each year the state treasurer shall ascertain the interest earned by the fund belonging to the prison system from the state depositories, and place said sum to the credit of the prison commission account and send deposit receipt to the prison commission. [Id. sec. 17.]

**Art. 6189. Commission may make regulations.**—The prison commission may at any time issue such orders and prescribe such rules and regulations for the government of the prison system of this state, not inconsistent with the law, as it may deem proper, or to provide such details not embraced herein, and for such contingencies as may at any time arise concerning the management of the prison system, or its proper and effective operation; and such rules and regulations shall be made with a view of carrying out the general principles on which the penal laws are founded, and for which the prison system is established, and shall be binding on all under-officers, employés, and all persons whomsoever in any way connected with the state prisons, or its management, or its prisoners within and without the walls. The prison commission shall have all laws, rules and regulations of the prison printed in pamphlet form for the information and guidance of all connected with the management of the prison system; and such parts of said rules as relate to the duties of subordinate officers and prisoners shall be printed in suitable form and posted in conspicuous places about the prison, or wherever prisoners may be confined, for the information of all concerned. All officers, employés and guards having supervision of prisoners shall be furnished with a copy of the law, rules and regulations governing the prison system, and shall give a receipt therefor; and the prison commission shall from time to time require examination of such officers, employés and guards as will ascertain their knowledge of such law, rules and regulations; and any such officer, employé or guard, who shall fail to familiarize himself with the law, rules and regulations of the prison system, shall be dismissed from the service. [Id. sec. 18.]

**Art. 6190. Commissioners to visit camps and farms.**—It shall be the duty of some member or members of the prison commission to spend

at least one whole day each month, without notice, at each prison, camp or farm where prisoners are kept or worked, and to carefully inspect same with reference to the food, clothing and treatment of the prisoners, the general sanitary conditions existing at such prisons, camps or farms, reporting upon such conditions, the efforts at reformation, the general conduct of all officers and employes connected therewith, and punishment administered for the enforcement of prison discipline; provided, that the various prisons, camps and farms where prisoners are kept may be divided for the purpose of this inspection between two or more members of the prison commission, or such other person as may be designated by the prison commission. [Id. sec. 19.]

**Art. 6191. Inventories.**—The prison commission shall cause to be made annually, on January 1, a full and complete inventory of all lands, buildings, machinery, tools, live stock, and all other property of every description, belonging to the prison system, and shall cause to be set opposite each item the book value, and also the actual value of the same so as to afford an easy comparison with the previous annual statement. And the prison commission shall cause to be kept in the accounting department of the prison system a system of books, showing a separate account with each industry and farm and for the system as a whole, showing the losses, profits, and net earnings of each industry and farm connected with the system, and shall make a report of the same annually on January 1 to the governor; which report shall be published by the governor in a sufficient number of copies to give general publicity to such report; such report to include the rules and regulations in force for the management of said system, and the methods of dealing with the convicts thereof. [Id. sec. 21.]

**Art. 6192. Prison accounts, how kept.**—The member of the prison commission designated by the board to have supervision over the finances and financial transactions of the prison system shall keep, or cause to be kept, correct and accurate accounts of each and every financial transaction of the prison system, including all receipts and disbursements of every character. He shall receive and receipt for all money paid to the prison commission from every source whatsoever, and shall sign all vouchers or warrants authorizing the payment or disbursement of any sum or sums on account of the prison system; and no money shall be paid out on any account of the prison system, except upon a warrant or voucher signed by him. He shall keep full and correct accounts with each industry, department and farm, and with all firms, persons or corporations having financial transactions with the prison system. He shall have power to require all necessary reports from any department, officer or employe at stated intervals. All deposits of prison funds with banks shall be kept in the name of the officer in his official capacity, and all funds of the prison system shall be kept separate from private funds. Such accountants and clerical assistance as may be necessary to carry out the provisions of this article shall be provided by the prison commission, in order that a full, complete and correct account may be kept of all financial transactions of the prison system. In the absence of such officer, one of the other prison commissioners may sign such receipts, warrants or vouchers. [Id. sec. 22.]

**Art. 6193. Auditor, appointment and duties.**—On the taking effect of this act, and annually thereafter, there shall be appointed by the comptroller of public accounts, the attorney general and the state treasurer, a permanent auditor for the prison system, who shall hold his office for a term of one year, subject to discharge at any time, as hereinafter provided. It shall be the duty of such auditor to audit all accounts, vouchers, payrolls and all other business transactions of the prison system, and to check all property, material and supplies received and disposed of by or distributed within the prison system, and he shall make

a full report thereof to the governor on the first day of January of each year. Such auditor shall be subject to discharge at any time by the comptroller of public accounts, attorney general, and state treasurer, or by a majority of said officers, for any incompetency, neglect, failure or refusal to discharge the duties of his office, or for any wrongful conduct that, in the judgment of the comptroller of public accounts, attorney general, and state treasurer, renders him unfitted for said office; and, in the case of the discharge or resignation of any auditor, another shall be appointed by said officers or a majority of said officers. During the term of his services, such accountant shall be paid monthly a salary of two hundred dollars per month and all actual and necessary traveling expenses, to be paid at the end of each month, out of any moneys belonging to the prison system, such traveling expenses to be evidenced by an itemized sworn statement by the auditor filed with the board. [Id. sec. 23.]

**Art. 6194. Commissioners may take oaths and examine witnesses.**—Each member of the board of prison commissioners in the discharge of his duties is authorized to administer oaths, to summon and examine witnesses, and take such other steps as he deems necessary to ascertain the truth of any matter about which he may have the right to inquire. [Id. sec. 24.]

**Art. 6195. Commissioners, removal of.**—If any member of the board of prison commissioners shall be guilty of malfeasance or nonfeasance in office, or shall become incapable or unfit to discharge his official duties, or shall wilfully fail, refuse or neglect to discharge the duties of his office, such member shall be subject to removal from office as provided by article 6027. [Id. sec. 28.]

**Art. 6196. Salaries and qualifications of under-officers and employés.**—The prison commission shall, except as provided in this title, fix the salaries of all officers and employés of the prison system upon such basis as the labor and ability of the officer or employé entitles him to, such salary to be paid monthly at the end of each month. They shall pay to those employed as guards of the convicts a salary of not less than thirty-five dollars per month, and furnish them board and lodging free; provided, that, for meritorious service and adaptability to the work, the prison commission may increase the pay of any guard to an amount not to exceed forty dollars per month. No person shall be employed as a guard to guard convicts who is not at least twenty-one years of age, of good moral character, and who is not able to read and write and has not a fair knowledge of the English language; and the prison commission may provide such other qualifications as they may deem expedient; provided, that no person shall be employed as a guard who is in any way addicted to the use of alcoholic or intoxicating liquors; and the prison commission shall require all officers and employés connected with the prison system to familiarize themselves with and conform to the rules and regulations and laws governing the prison system of this state; provided, the prison commission shall require all officers and employés connected with the prison system of this state to take and subscribe to the oath of office prescribed by the constitution. [Id. sec. 29.]

**Art. 6197. Fraudulent conversion of prison property; penalty.**—Any officer or employé of the prison system, who shall fraudulently convert to his own use and benefit any food, clothing, or other property belonging to or under control of the prison system, shall be guilty of theft, and, upon conviction, be punished as prescribed by law. [Id. sec. 55.]

**Art. 6198. Dishonesty of officers or employés; penalty.**—Any officer, agent or employé in any capacity connected with the prison system of this state, who shall be financially interested, either directly or indi-

rectly, in any contract for the furnishing of supplies or property to the prison system, of the purchase of supplies or property for the prison system, or who shall be financially interested in any contract to which said prison system is a party, or who shall knowingly and fraudulently sell or dispose of any property belonging to said prison system below its reasonable market value, or who shall be financially interested in any other transaction connected with the prison system, shall be guilty of a felony, and, upon conviction thereof, shall be punished as provided by the Penal Code, and each transaction shall constitute a separate offense. [Id. sec. 56.]

**Art. 6199. Unauthorized punishments; penalty.**—Any sergeant, guard or other officer or employé of the prison system of this state, who shall inflict any punishment upon a prisoner not authorized by the rules of the prison system, shall be guilty of an assault, and, upon conviction thereof, shall be punished as prescribed by law; and it shall be the duty of the prison commission to make complaint before the proper officer of any county in which such assault was committed upon such prisoner. Provided, that, in all cases where any person is charged by complaint or indictment with an offense against a prisoner, prisoners and ex-prisoners shall be permitted to testify. [Id. sec. 57.]

**Art. 6200. Seal of commission.**—The prison commission shall provide a seal whereon shall be engraved in the center a star of five points and the words, "Board of Prison Commissioners of Texas," around the margin, which seal shall be used to attest all official acts. [Id. sec. 59.]

## CHAPTER TWO

### PRISON REGULATIONS AND DISCIPLINE

Art. 6201.	After conviction prisoners must first be sent to Huntsville.	Art. 6217.	Rewards for good conduct; relaxation of discipline; parole; commutation.
6202.	Prison uniforms.	6218.	Commutation of life or long term sentence.
6203.	Instruction and recreation of prisoners.	6219.	Clothing.
6204.	Religious services.	6220.	Restrictions of the amount of labor required.
6205.	Food.	6221.	Physical condition.
6206.	Monthly reports to board shall contain what.	6222.	Prisoners searched; disposition of money in their possession.
6207.	Prison register to show what.	6223.	Death of prisoner; disposition of remains.
6208.	Classification of prisoners; uniforms, punishments.	6224.	Proceedings in case of death of prisoner.
6209.	Female prisoners shall be kept separate.	6225.	Medical attention.
6210.	Labor for female prisoners; physical condition.	6226.	Dentists.
6211.	Whites and negroes kept separate.	6227.	Discharge of prisoner.
6212.	Only married men employed as guards.	6228.	Visitors admitted, when.
6213.	Children of female prisoners.	6229.	Reward for escaped convict.
6214.	Compensation paid prisoners, when.	6230.	Gambling forbidden; penalty.
6215.	Sunday labor.	6231.	Convicts employed on public or private works, when.
6216.	Intent of prison law.		

**Article 6201. After conviction prisoners must first be sent to Huntsville.**—It shall be the duty of the prison commission to make suitable provision and regulation for the safe and speedy transportation of prisoners from counties where sentenced to the penitentiary at Huntsville, by the sheriffs of such respective counties, if such sheriffs are willing to perform such service as cheaply as said commission can have it done otherwise. Said transportation shall be on state account; and in no instance shall the prisoners be carried direct from the county jails to the state farms, but shall first be carried to the penitentiary at Huntsville, where the character of labor which each prisoner may reasonably per-

form shall be determined. Upon the arrival of each prisoner at the penitentiary at Huntsville, the prison commission shall cause a statement to be made by the prisoner, giving a brief history of his life, and showing where he has resided, the names and postoffice addresses of his immediate relatives, and such other facts as will tend to show his past habits and character; and the prison commission shall, by correspondence or otherwise, verify or disprove such statements, if practicable, and shall preserve the record and information so obtained for future reference. [Id. sec. 20.]

**Art. 6202. Prison uniforms.**—Except for third class prisoners, within a reasonable time and not later than six months after January 20, 1911, the prison commission shall abolish striped or checked clothes for prisoners, except as a mode of punishment for the violation of prison discipline, substituting therefor some suitable uniform. [Id. sec. 25.]

**Art. 6203. Instruction and recreation of prisoners.**—The prison commission shall, as soon as practicable, provide at each prison, farm and camp where prisoners are kept or worked, schools for instruction of prisoners in elementary branches of the English language and industrial education, and such other instruction as they may prescribe, and shall provide suitable recreation for the prisoners at reasonable hours, including music; and they shall employ such number of competent teachers to instruct the prisoners in the same, as in the judgment of the prison commission may seem necessary; and the prison commission shall make reasonable rules and regulations whereby the prisoners may attend such schools. The prison commission shall prescribe and furnish to the prisoners suitable books and other reading matter, and to this end may establish and operate among the prisoners a circulating library, and may adopt such other means of distributing among the prisoners good and wholesome literature as in the judgment of the prison commission will best enable the prisoners to avail themselves of the same; provided, that all teachers herein provided for shall, as far as practicable be taken from the convicts, and such teachers may be excused from further labors. The chaplain shall be ex officio librarian of the penitentiary, passing upon all library books, and direct such other work as may be prescribed for such library management. [Id. sec. 26.]

**Art. 6204. Religious services.**—The prison commission shall provide for religious services at prisons, farms, and camps where prisoners are kept or worked. They shall employ such chaplains as may be necessary to afford all prisoners an opportunity to attend at least two religious services each month, said chaplains to devote their entire time to religious and moral training and education of the prisoners under their care, teaching them the principles and practice of every Christian and moral duty; provided, that chaplains may also be teachers as provided for in this chapter. [Id. sec. 27.]

**Art. 6205. Food.**—The prison commission shall see that all state prisoners are fed good and wholesome food, properly prepared under wholesome, sanitary conditions, and in sufficient quantity and reasonable variety, and they shall hold all under-officers performing this work strictly to account for any failure to carry out this provision. That the food may be properly prepared, the prison commission shall provide for the training of prisoners as cooks. [Id. sec. 30.]

**Art. 6206. Monthly reports to board shall contain what.**—The prison commission shall require, at the end of each month, reports showing fully the condition and treatment of the prisoners, and the changes in prison population during the month, including itemized statements of all different items of food, clothing and utensils used and on hand in each of the units of the prison system, and such other matters as they may require. [Id. sec. 31.]

**Art. 6207. Prison register to show what.**—The prison commission shall keep a register of all prisoners belonging to the prison system, showing the number of each prisoner, giving the aliases, name, age, height, color of hair, color of eyes, complexion, marks on person, sex, nativity, residence, county where convicted, offense of which convicted, date of sentence, date of receipt, previous occupation and habits, if known, and may adopt such other means of identification as they may deem proper and necessary. They shall keep a record of the general conditions and conduct of each prisoner, noting all punishments, forfeitures, bad conduct, changes and incidents of importance that may occur during his confinement; and, to the end that complete records may be kept, they may require from all under-officers such monthly and other reports as they may deem proper. They shall issue discharges to such prisoners as are entitled thereto by expiration of sentence or otherwise. [Id. sec. 32.]

**Art. 6208. Classification of prisoners; uniforms; punishments.**—That persons confined in the state prisons of this state may have every opportunity and encouragement for moral reform, it shall be the duty of the prison commission, in addition to the requirements of this title, to provide every reasonable and practicable means for the encouragement of such reforms. To this end, the prison commission shall provide for the classification of all prisoners, separating them into the following classes: In the first class shall be included young men, first offenders, those appearing to be corrigible, or less vicious than others, and likely to observe the laws, and to maintain themselves by honest industry after their discharge. In the second class shall be included those appearing to be less corrigible, or more vicious, but content to work and reasonably obedient to prison discipline as not to seriously interfere with the productiveness of their labor, or with the labor or conduct of those with whom they may be employed. In the third class shall be included those appearing to be incorrigible or so insubordinate or so vicious in their nature as to seriously interfere with the labor and moral development of those with whom they must come in contact. The prison commission shall make rules and regulations for the promotion and reduction of the prisoners from one class to another, and shall transfer them from one class to another, from time to time, as they may seem to merit promotion or reduction. The prisoners in each of the classes hereinbefore named shall be kept in or upon different or separate prisons or farms. Any prisoner, upon entering the prison system, shall be assigned to one of its institutions according to his class, as hereinbefore provided, and shall be entered in said institution in a neutral grade which shall be known as grade No. 2, and in which he shall be furnished with a suitable uniform designated for that grade. The prison commission shall adopt rules for a higher grade which shall be known as grade No. 1, as a reward for obedience to prison discipline and good conduct, and shall provide a suitable uniform for this grade; and they shall provide for a lower grade as a punishment for misconduct and violation of prison discipline, which grade shall be known as No. 3, and in which the prisoner shall be clothed in stripes. The uniforms for grades Nos. 1 and 2 shall not be stripes. The prison commission shall provide rules for promotion of prisoners from any grade to another for good conduct and obedience to prison discipline, and for demotion of prisoners for misconduct and violation of prison discipline. The prison commission shall provide specifically for the extension or denial of privileges for the various grades herein provided. In order that prison discipline may be enforced, the prison commission may adopt such modes of punishment as may be necessary, such punishment being always humane; and placing prisoners in stocks shall be prohibited. Whipping with not exceeding

twenty lashes on the bare rump and thighs may be resorted to with prisoners of the third class, who can not be made to observe the rules by milder methods of punishment. The strap to be used must be of leather, not over two and one-half inches wide, and twenty-four inches long, attached to a wooden handle; no convict shall be whipped until same has been authorized by at least two members of the prison commission upon their written order; and such order so issued shall be executed only in the presence of a prison physician, and a sworn report shall be made by the officer executing such order to the penitentiary commission, who shall keep a record of all such reports in a well-bound book to be kept for that purpose, which shall be at all times open to public inspection; and such report so to be made by such officer executing the order of the penitentiary commission shall state the name of the convict whipped, the number of strokes administered, the size of the strap used, the time and place thereof, in whose presence same was done, and the cause thereof. It shall further be the duty of the penitentiary commission to make a semi-annual report of the whipping of convicts to the district judge of the county where such whippings occurred, who shall report [same to the grand jury, which is hereby authorized to make investigation] thereof, if they deem same advisable. The utmost care must be used by the officer executing the order of the commission not to break the skin of the prisoner whipped; and any person guilty of whipping a prisoner more lashes or other than as provided herein, or striking a prisoner, except in self-defense, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than twenty-five dollars nor more than two hundred and fifty dollars, and imprisoned in the county jail not less than thirty days nor more than six months. White and negro prisoners shall not be worked together when it can be avoided, and shall be kept separate when not at work. [Id. sec. 33.]

**Art. 6209. Female prisoners shall be kept separate.**—All female prisoners shall be kept separate and apart from the male prisoners. Where practicable, the prison commission shall keep the female prisoners upon a separate farm, or at a separate prison, from the male prisoners, and shall provide reasonable rules and regulations for the government of the same. [Id. sec. 34.]

**Art. 6210. Labor for female prisoners; physical condition.**—The prison commission shall provide such labor for said female prisoners as in their judgment they can reasonably perform, but the prison physician for such female prisoners shall at any time have the authority to say whether the physical condition of said female prisoners is such that they can perform any physical labor; provided, that in the absence of the physician the matron shall pass upon the physical condition of said female prisoners. [Id. sec. 35.]

**Art. 6211. Whites and negroes kept separate.**—The prison commission shall keep the white female prisoners separate and apart from the negro female prisoners, and shall select and place over said female prisoners a matron or matrons, whose duty it shall be to give her personal attention to the welfare of such female prisoners. The matron or matrons so employed to look after the welfare of the female prisoners shall reside at the place where female prisoners are kept. [Id. sec. 36.]

**Art. 6212. Only married men employed as guards.**—At the place where female prisoners are kept, none but married men shall be employed as guards; and the houses for such guards and their families shall be provided by the state, in which the families of the guards shall live. And said guards shall be allowed ten dollars per month in addition to his salary in lieu of his board, said houses not to be situated further than one hundred yards from the main prison building where such female prisoners are kept. [Id. sec. 37.]

**Art. 6213. Children of female prisoners.**—If a female prisoner be received with an infant, or if any child be born in the penitentiary, the child shall be permitted to remain with its mother until three to six years of age, in the discretion of and as prescribed by the prison commission. [Id. sec. 38.]

**Art. 6214. Compensation paid prisoners, when.**—Every prisoner who shall become entitled to a diminution of his term of sentence by good conduct shall receive compensation from the earnings of the state prison to the amount of ten cents per day for the time said prisoner is confined in prison; provided, that, whenever any prisoner shall forfeit any part of his good time for misconduct or violation of the rules or regulations of the prison, he shall forfeit out of the compensation allowed under this section twenty-five cents per day for each day of such good time so forfeited; provided, that, when such prisoner has a family or relatives within the second degree of consanguinity or affinity dependent upon him, such saving shall be paid semi-annually to such of them as may be designated by the prisoner; but if he have no such dependent relatives, then said saving shall be paid to him upon his discharge from prison. And if he be a life term prisoner such saving may be paid as directed by him, with the approval of the prison commission. But if he should die in prison without such dependent relations such saving shall revert to the state. [Id. sec. 39.]

**Art. 6215. Sunday labor.**—No prisoner shall be worked on Sunday, except in cases of extreme necessity; and all prisoners so required to work on Sunday shall be paid out of the funds of the prison system the sum of one dollar per day for each Sunday so worked. [Id. sec. 40.]

**Art. 6216. Intent of law.**—The various provisions of this title are designed to secure to the prisoners humane treatment, suitable moral instruction, to provide for their health, and to extend to them such comforts and privileges as may be consistent with their situation, and at the same time to require of them a due attention to their various duties and a strict observance of the discipline, rules and regulations of the prison. [Id. sec. 41.]

**Art. 6217. Reward for good conduct; relaxation of discipline; parole; commutation.**—In order to encourage prison discipline, a distinction may be made in the treatment of prisoners so as to extend to all such as are orderly, industrious and obedient comforts and privileges according to their deserts. The rewards to be bestowed on prisoners for good conduct shall consist of such relaxation of strict prison rules and extension of social privileges as may not be inconsistent with proper discipline. Commutation of time for good conduct shall be granted by the prison commission, and the following deductions shall be made from the term or terms of sentences when no charge of misconduct has been sustained against a prisoner, viz.: Two days per month off the first year of sentence; three days per month off the second year of sentence; four days per month off the third year of sentence; five days per month off the fourth year of sentence; six days per month off the fifth year of sentence; seven days per month off the sixth year of sentence; eight days per month off the seventh year of sentence; nine days per month off the eighth year of sentence; ten days per month off the ninth year of sentence; fifteen days per month off the tenth year and all succeeding years of sentence. A prisoner under two or more cumulative sentences shall be allowed commutation as if they were all one sentence. For each sustained charge of misconduct in violation of any rule known to the prisoner, in any year of the term, the commutation allowed for one month of such year may be forfeited; for any sustained charge of escape, or attempt to escape, mutinous conduct, or other serious misconduct, all the commutation which shall have accrued in favor of the prisoner up to



that day shall be forfeited, unless in case of escape the prisoner voluntarily returns without expense to the state, such forfeiture may be set aside by the prison commission. For extra meritorious conduct on the part of any prisoner, he shall be recommended to the favorable consideration of the governor for increased commutation or pardon; and, in the case of any prisoner who shall have escaped and been captured, part or all of his good time thereby forfeited may be restored by the prison commission, if in their judgment his subsequent conduct entitles him thereto. [Id. sec. 42.]

**Art. 6218. Commutation of life or long term sentence.**—Hereafter, life or long term prisoners who have actually served fifteen years and have no sustained charges of misconduct, and have a good prison record, and who shall be favorably recommended to the governor, may receive at the hands of the governor a reasonable commutation of sentence; and, if a life sentence is commuted to a term of years, then such convict shall have the benefit of the ordinary commutation, as if originally sentenced for a term of years, except the governor shall otherwise direct. [Id. sec. 43.]

**Art. 6219. Clothing.**—Suitable clothing of substantial material, uniform make and reasonable fit, and such footwear as will be substantial and comfortable, shall be furnished the prisoners; and no prisoner shall be allowed to wear other clothing than that furnished by the prison authorities, except in case of extra meritorious conduct only, the prison commission may allow the prisoners to wear citizen underwear. Sufficient food of wholesome quality and variety and wholesomely prepared shall be furnished to all, and such provisions shall be made for serving the food to prisoners as will tend to encourage and elevate them. It shall be the duty of every officer charged with the preparation and serving of food to the prisoners to post in the dining room each Monday morning for the coming week the bill of food for that week, and the rules promulgated by the prison commission shall prescribe the quality, kind and variety of food to be furnished. Prisoners shall not be allowed spirituous, vinous or malt liquors, except upon the prescription of the physician. [Id. sec. 44.]

**Art. 6220. Restrictions on amount of labor required.**—Prisoners shall be kept at work under such rules and regulations as may be adopted by the prison commission; provided, that no prisoner shall be required to work more than ten hours per day, except in case of an extreme and unavoidable emergency, which time shall include the time spent in going to and returning from their work, but not to include the intermission for dinner, which shall not be less than one hour. And in case of such extreme and unavoidable emergency, said prisoner shall receive out of the funds of the prison system the sum of ten cents per hour for such work so performed more than ten hours per day. In going to and returning from work, prisoners shall not be required to travel faster than a walk. No greater amount of labor shall be required of any prisoner than his physical health and strength will reasonably permit, nor shall any prisoner be placed at such labor as the prison physician may pronounce him unable to perform. No prisoner upon his admission to the prison shall be assigned to any labor until first having been examined by the prison physician. Any officer or employé violating any provision of this article shall be dismissed from the service. [Id. sec. 45.]

**Art. 6221. Physical condition.**—Prisoners who have been reported by the physician or other officer in charge as in a condition of health which requires their removal to some other place shall be accordingly removed. [Id. sec. 46.]

**Art. 6222. Prisoners searched; disposition of money in their possession.**—Prisoners when received into the penitentiary shall be carefully

searched. If money be found on the person of the prisoner, or received by him at any time, it shall be taken in charge by the prison commission and placed to the prisoner's credit, and expended for the prisoner's benefit on his written order, and under such restrictions as may be prescribed by law or the rules. Any officer or employé having charge of a prisoner's money who misappropriates the same, or any part thereof, shall be deemed guilty of a felony, and, upon conviction thereof, shall be confined in the penitentiary for a term of not more than five years. [Id. sec. 47.]

**Art. 6223. Death of prisoner; disposition of remains.**—If any prisoner shall die while in prison, the officer in charge of the prisoner at the time of his death shall immediately report the same to the prison commission, and, if he knows the address or place of residence of any relative within the third degree, either by consanguinity or affinity, shall also notify by wire said relative of the death of such prisoner; and, if the relative of such prisoner claim the body or will take charge of same, then the body of such prisoner shall be turned over to such relative, and the expense of shipping the body to where it is to be buried, provided it is within this state, shall be paid by the prison commission out of any available penitentiary funds on hand upon the request of such relative. If the residence and address of the relative of such prisoner is unknown, such prisoner shall be decently buried in citizen's clothes, and the grave marked by a stone with the name of said prisoner, date of death and age, if known, inscribed thereon. If the body of such prisoner is not claimed by the relatives, the prison commission shall at once notify the county judge of the county from which the prisoner was sentenced of his death, the date and cause of death and place of burial. The prison commission shall cause to be made and kept a record of the deaths of prisoners; and certified copies of same made by the custodian thereof shall be admissible in evidence under the rules of law applying to official records. Any officer or employé of the prison system of whom any duties are required by this article, who shall fail to discharge such duties, shall be guilty of a misdemeanor, and, upon conviction, shall be punished as provided by the Penal Code [article 1612.] [Id. sec. 48.]

**Art. 6224. Proceedings in case of death of prisoner.**—The prison commission, or other person in charge of prisoners, upon the death of any prisoner under their care and control, shall at once notify the nearest justice of the peace of the county in which said prisoner died, of the death of said prisoner; and it shall be the duty of such justice of the peace, when so notified of the death of such prisoner, to go in person and make a personal examination of the body of such prisoner, and inquire into the cause of the death of such prisoner; and said justice of the peace shall reduce to writing the evidence taken during such inquest, and shall furnish a copy of the same to the district judge of the county in which said prisoner died; and the copy so furnished to said district judge shall be turned over by the district judge to the succeeding grand jury; and the said judge shall charge the grand jury, if there should be any suspicion of wrong doing shown by the inquest papers, to thoroughly investigate the cause of such death. Any officer or employé of the prison system having charge of any prisoner at the time of the death of such prisoner, who shall fail to immediately notify a justice of the peace of the death of such prisoner, shall be guilty of a misdemeanor, and, upon conviction thereof, shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, and by confinement in the county jail not less than sixty days nor more than one year; provided, that the justice of the peace making such examination shall be paid a fee as is now provided by law for holding inquests, said fee to be on sworn account therefor approved by the prison commission. [Id. sec. 49.]

**Art. 6225. Medical attention.**—The prison commission shall provide for competent medical attention for all prisoners, and shall establish rules

whereby all physicians shall be required to keep a record of all cases of sickness, accident or injury which they treat. The physicians so employed shall be reputable practicing physicians of not less than two years of experience in practice. Each physician employed in the prison system shall, at the end of each month, file with the prison commission a report in writing, subscribed and sworn to by him; which report shall state the names, race and sex of each prisoner treated or examined by him during said month, the malady or disease with which each was afflicted, and, if any shall be suffering with wounds or injuries inflicted by accident or some individual, he shall state the nature and extent of said injuries, by whom and by what means inflicted, or how the same occurred, and all such other information concerning said matters, and the condition of each prisoner treated or examined by him during said months, as he may possess; provided, further, that for a failure to make such a report, or any false statement knowingly made by any such physician in any such reports, he shall be prosecuted for the offense of perjury or false swearing, as provided by law. [Id. sec. 50.]

**Art. 6226. Dentists.**—The prison commission shall also provide a competent dentist or dentists, whose duty it shall be to care for the teeth of the prisoners. Such dentist or dentists shall, at the direction of the prison commission, visit the various places where prisoners are kept or worked, at such intervals as may be prescribed. [Id. sec. 51.]

**Art. 6227. Discharge of prisoner.**—When a prisoner is entitled to a discharge from prison, he shall be furnished with a written or printed discharge from the prison commission, with seal affixed, signed by the chairman of the board of prison commissioners, giving prisoner's name, date of sentence, from what county sentenced, amount of commutation received, if any, the trade he has learned, if any, his proficiency in same, and such other description as may be practicable. He shall be furnished with a decent outfit of citizen's clothing of good quality and fit, two suits of underwear, five dollars in money in addition to any money held to his credit, and unredeemable and non-transferable railroad transportation to the nearest depot from whence sentenced; but, if such prisoner prefers, he may receive such transportation to any point in this state designated by him. [Id. sec. 52.]

**Art. 6228. Visitors admitted, when.**—The governor and all other members of the executive and judicial departments of the state, and members of the legislature, shall be admitted into the prisons, camps and other places where prisoners are kept or worked, at all proper hours, for the purpose of observing the conduct thereof, and may hold conversation with the convicts, apart from all prison officers. Other persons may visit the penitentiary under such rules and regulations as may be established. [Id. sec. 53.]

**Art. 6229. Reward for escaped convict.**—The prison commission, with the governor's approval, may offer such reward for the apprehension of an escaped prisoner as may be fixed by the prison commission, and to be paid as directed by the prison commission. [Id. sec. 54.]

**Art. 6230. Gambling forbidden; penalty.**—No gambling shall be permitted at any prison, farm or camp where prisoners are kept or worked. Any officer or employé engaging in or knowingly permitting gambling at any such prison, farm or camp shall be immediately dismissed from the service. [Id. sec. 58.]

**Art. 6231. Convicts employed on public or private works, when.**—The prison commission, by and with the consent of the governor, shall have the power to work convicts on public works, when they can not employ them on the state farms or within the walls by reason of some unforeseen calamity, such as failure of crops, or the destruction of crops

by wind or flood. When convicts are worked on public works owned by the state, or a subdivision of the state, the humane provisions of this chapter shall be strictly complied with. [Id. sec. 60.]

## CHAPTER THREE

### WORKHOUSES AND COUNTY CONVICTS

Art.	Art.
6232. Commissioners' courts to establish workhouses.	6240. Refractory convicts to be punished.
6233. "County convict" defined.	6241. Female convicts.
6234. Certain convicts only to do manual labor.	6242. Aged or disabled convicts not to work.
6235. Commissioners' court to control workhouse.	6243. Their inability, how determined.
6236. All officers to obey their orders.	6244. Convicts to receive credit for labor.
6237. Overseers and guards.	6245. Mechanic, etc., to have extra credit.
6238. To labor upon public works, etc.	6246. Convicts to be guarded.
6239. Where confined when off duty.	6247. Costs to be paid officers.
	6248. Convict may commute his labor.

**Article 6232. [3727] Commissioners' courts to establish workhouses, etc.**—The commissioners' courts of the several counties may provide for the erection of a workhouse, and the establishment of a county farm in connection therewith, for the purpose of utilizing the labor of county convicts, in accordance with the provisions of the constitution. [Const., art. 16, sec. 3. Act Aug. 21, 1876, p. 9, sec. 229. Act to adopt and establish R. C. S., passed Feb. 21, 1879. R. S. 1879, 3585–3601.]

**In general.**—Under Code Cr. Proc. arts. 867, 868, and this chapter and the chapter following, one convicted of a misdemeanor and sentenced to jail may be confined in jail for the costs not more than one year in addition to the imprisonment imposed for the offense. *Ex parte Spiller*, 63 Cr. R. 93, 138 S. W. 1013.

**Art. 6233. [3728] "County convict" defined.**—A "county convict," within the meaning of the preceding article, is any person who may have been convicted of a misdemeanor or petty offense, and whose punishment has been assessed at imprisonment in the county jail for any term; or who, under a like conviction, has been adjudged to pay a pecuniary fine, and is unable so to do. [Id. p. 230, sec. 16.]

**Art. 6234. [3729] Certain convicts only to do manual labor.**—When the punishment assessed in a conviction for misdemeanor is confinement in the county jail for a period less than one day, the convict shall not be required to labor, either in the workhouse or elsewhere; but, when such punishment is confinement in the county jail for a longer time than one day, the convict shall be required to do manual labor in accordance with the provisions of this chapter. [Act to adopt and establish R. C. S., passed Feb. 21, 1879.]

**Validity of statute in general.**—Section 3, art 16, of the constitution, requiring a provision for manual labor on the part of convicts committed to jail "in default of payment of fine and costs," does not prohibit the enforcement of this article. The statute requires manual labor where the "punishment assessed" is confinement in the county jail, and is a valid exercise of legislative power without express authority in the constitution. *Ex parte Bates*, 37 Cr. R. 543, 40 S. W. 269.

**Art. 6235. [3730] Commissioners' court to control workhouses.**—County workhouses and farms shall be under the control and management of the commissioners' court; and such courts are authorized to adopt such rules and regulations not inconsistent with the laws, as they may deem necessary for the successful management and operation of said institutions and for effectively utilizing the labor of county convicts. [Id. sec. 10.]

**Art. 6236. [3731] Officers to obey their orders, etc.**—The sheriff and all other peace officers shall obey the orders and regulations of the commissioners' court, made in pursuance of the preceding article, shall execute such process as may be directed by said court, and shall render

all the aid possible in carrying out the provisions of this chapter, and the regulations made in pursuance thereof. [Id. sec. 13.]

**Art. 6237. [3732] Overseers and guards, etc.**—Such overseers and guards may be employed under the authority of the commissioners' court as may be necessary to prevent escapes and to enforce labor on the part of convicts, and they shall be paid out of the county treasury such compensation as said court may prescribe.

**Art. 6238. [3733] To labor on public works, etc.**—County convicts shall be put to labor upon the public roads, bridges, or other public works of the county, when their labor can not be utilized in the county workhouse or farm, and they shall be required to labor not less than eight nor more than ten hours each day, Sundays excepted. [Id. p. 228, sec. 1.]

Power of cities to compel convicts to labor on streets.—See Title 22, Chapter 4.

**Art. 6239. [3734] Where confined when off duty.**—When not at labor, county convicts may be confined in the county jail or workhouse, as may be most convenient, or as the regulations of the commissioners' court may prescribe.

**Art. 6240. [3735] Refractory convicts to be punished.**—When a convict refuses to labor, or is otherwise refractory or insubordinate, he may be punished by solitary confinement on bread and water, or in such other manner as the commissioners' court may direct.

**Art. 6241. [3736] Female convicts.**—Female convicts shall, under all circumstances, be kept separate and apart from male convicts; and they shall in no case be required to do manual labor, except in the workhouse, or when hired out as is hereinafter provided.

**Art. 6242. [3737] Aged or disabled convicts not to work.**—A convict who, from age, disease or other disability, physical or mental, is unable to do manual labor, shall not be required to work, but shall remain in jail until his term of imprisonment is ended, or until the fine and costs adjudged against him are discharged, at the rate of one dollar for each day of such confinement in jail.

**Art. 6243. [3738] Inability, how determined.**—The inability of the convict to do manual labor may be determined by the opinion of a competent physician appointed for that purpose by the county judge or commissioners' court, who shall be paid for such service such compensation as the commissioners' court may allow.

**Art. 6244. [3739] How to be credited on fine, etc.**—When a convict who has been committed to jail in default of payment of fine and costs is required to do manual labor, he shall be credited upon such fine and costs at the rate of fifty cents for each day he may labor, and upon satisfaction of such fine and costs in full at said rate he shall be discharged; provided, such work shall be performed on public streets or roads, or on county poor farms. No convict under this chapter shall ever be required to work or be hired for more than one year. [Acts 1889, p. 14.]

Cited. Ex parte Stephens, 59 Cr. R. 177, 127 S. W. 819. See Ex parte Dampier, 24 App. 561, 7 S. W. 330.

In general.—Under this article and Code Cr. Proc. arts 1135, 1136, one indicted for murder and convicted of aggravated assault and battery and punished by confinement in jail for 30 days may be confined in jail for the costs previously paid by the state. Ex parte Spiller, 63 Cr. R. 93, 138 S. W. 1013.

**Art. 6245. [3740] Mechanic, etc., to have extra credit.**—If a convict of the kind described in the preceding article be an artisan or mechanic, and be put to labor at his trade or calling in any workhouse, or on any public work, he may be credited upon the fine and costs against him with such extra compensation for his labor as the county judge may determine to be just and proper. [Id. sec. 2.]

**Art. 6246. [3741] Convicts to be guarded, etc.**—Convicts shall be so guarded while at work as to prevent escapes; and no convict shall be compelled to labor at any kind of work nor in any avocation that would endanger his life or health. [Acts 1876, p. 230, sec. 11.]

*In general.*—The above article does not make the county liable for the acts of the county officer imposing labor or work on a county convict that would endanger his life. *Crause v. Harris County*, 18 C. A. 375, 44 S. W. 616.

**Art. 6247. [3742] Costs to be paid officers.**—Whenever a convict, who has been committed to jail in default of payment of fine and costs adjudged against him, has satisfied such fine and costs in full by labor in the workhouse, on the county farm, on the public roads of the county, or upon any public works of the county, said county in which said conviction was had shall be liable to each officer and witness having costs in the case against said convict for only one-half of such costs; and the county judge of said county shall issue his warrant upon the county treasurer in favor of each officer and witness for one-half of all such legal costs as may have been taxed up against said convict, not to include commissions; and the same shall be paid out of the road and bridge fund of the county, or out of any other county funds not otherwise appropriated. [Id. p. 229, sec. 8. Amend. 1895, p. 179.]

*Former law.*—A county was liable under article 3600, Rev. St. 1879, before its amendment in 1895, embodied in this article, for such costs only as were legally adjudged against the convict. *Harris County v. Stewart*, 91 T. 133, 41 S. W. 650.

This article, which was article 3742, Rev. St. 1895, is an amendment to article 3600, Rev. St. 1879, and was enacted in 1895. County attorneys are entitled to commissions earned prior to the amendment of 1895, but not afterwards. *Fears v. Ellis County*, 20 C. A. 159, 49 S. W. 139.

**Art. 6248. [3743] Convict may commute his labor.**—A convict condemned to imprisonment in the county jail as the punishment, either in whole or in part, for his offense, may avoid manual labor in the workhouse or elsewhere by payment into the county treasury of one dollar for each day of the term of his imprisonment; and the receipt of the county treasurer to that effect shall be sufficient authority to the sheriff to detain such convict in jail without labor.

*In general.*—County attorneys are not entitled to commissions on money paid into the county treasury under this article. *Fears v. Ellis County*, 20 C. A. 159, 49 S. W. 139.

## CHAPTER FOUR

### HIRING COUNTY CONVICTS

Art.		Art.	
6249.	Convicts may be hired out.	6253.	Suit on bond.
6250.	Either publicly, privately or generally, etc.	6254.	Convict to receive full credit for labor.
6251.	Hirer shall give bond, and its requisites.	6255.	Record in relation to county convicts.
6252.	Liability when convict escapes.	6256.	Officers' costs, how paid.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 6249. [3744] Convicts may be hired out.**—Any person who may be convicted of a misdemeanor, or petty offense, and who shall be committed to jail in default of the payment of the fine and costs adjudged against him, may be worked upon the public roads, or upon the county farms, of the county in which such conviction is had, or be hired out to any individual, company or corporation within the county of conviction, to remain in said county; and the proceeds of said hiring, when collected, shall be applied, first, to the payment of the costs, and second, to the payment of the fine; and every convict shall be entitled to a credit of twenty-five cents on his fine and costs for each day he may serve under such hiring, including Sunday; and he shall be discharged at any time upon payment of the balance due on his fine and costs, or upon the expiration of his term of service, his term of service

in no event to be greater than one day for each fifty cents of fine and costs; provided, that in no case shall the counties be responsible to the officers for their costs, and in no case shall such convicts be hired out for a longer period than one year for failure to pay a fine and costs; and on the expiration of said time, unless by his hire such fine and costs have been sooner paid off, said convicts shall be finally discharged. [Acts 1882, ch. 15. Acts 1887, p. 11. R. S. 1879, 3602-3609.]

**Former law.**—Article 3600 of the Revised Statutes of 1879, being in force at the time the service was rendered, was not repealed by this article, and a county attorney can recover in an action against the county for his cost worked out by convicts on the public roads. *Smith v. Grayson County*, 18 C. A. 153, 44 S. W. 921.

**Rights and liabilities of hirers of convicts.**—The hirer of a convict cannot receive the amount of the convict's fine and costs and release him. The fine and costs are the property of the county. *Flewellen et al. v. Ft. Bend County*, 17 C. A. 155, 42 S. W. 775.

The amount of the convict's fine and costs was \$40.40. The hirer gave bond to pay \$7.50 per month until the whole of said fine and costs were paid. The bond recited that the convict should be credited 25 cents for each day he might serve under the hiring contract. The convict was discharged at the end of 81 days, this being one day for each 50 cents of the fine and costs. The hirer was compelled to pay amount of bond (\$40.40) notwithstanding it provided that convict should be credited 25 cents per day for each day be worked. This was surplusage, and the law providing that the fine and costs are paid by service for sufficient length of time to discharge same at rate of 50 cents a day became part of the contract. *Gonzales County v. Houston (Civ. App.)* 81 S. W. 118.

**Residence of parties in county of conviction.**—*Ex parte Medaris*, 38 Cr. R. 493, 43 S. W. 517.

**Fees for hiring out convicts.**—See Title 58, Chapter 3.

**Art. 6250. [3745] Either publicly or privately, generally or especially.**—Such hiring may be either by private contract or at public auction, as may be deemed best for the interest of the county, or it may be by general contract for any specified term, embracing the labor of all county convicts of the class prescribed in the preceding article, at some fixed rate per day, week or month.

**Art. 6251. [3746] Hirer shall give bond and its requisites.**—Hirers of convicts shall execute bond payable to the county judge of the county, with two or more good and sufficient sureties, in the amount of hire agreed upon, conditioned as follows:

1. That the hirer will promptly and faithfully pay the amount of money mentioned in the bond when the same becomes due, and it shall be stated in the bond when the same becomes due.

2. That he will treat the convict humanely while in his employment.

3. That he will furnish the convict with a sufficient quantity of good and wholesome food, with comfortable clothing and medicine when sick.

4. That he will not require the convict to work at unreasonable hours, or for a longer time during any one day than other laborers doing the same kind of labor are accustomed to work.

Such bond shall be approved by the county judge and filed in the office of the clerk of the county court. [Id. pp. 228-230, secs. 4, 12.]

**Liability on bond.**—See notes under Art. 6249.

County can recover on bonds given in accordance with this article for amount of fine and costs adjudged against county convict. *Hill County v. Atchison*, 19 C. A. 664, 49 S. W. 141.

Recovery on the bond can be had only for failure to pay the hire agreed on and not for inhuman treatment. *Ellis v. Ft. Bend Co.*, 31 C. A. 596, 74 S. W. 45.

Even if the bond could be treated as a common law obligation so as to permit a recovery thereon for inhuman treatment, the amount of recovery must be limited to the actual damage resulting to the county. *Id.*

**Effect of arrest of convict.**—The arrest of a convict on a *capias pro fine* held not to estop the county judge from denying the release of, nor to release, the obligors on the convict's hiring bond. *Salyer v. Wilcox (Civ. App.)* 107 S. W. 654.

**Requisites of bond.**—A bond for hiring out a convict was held invalid where the parties to it did not reside in the county where the conviction occurred. *Ex parte Medaris*, 38 Cr. R. 493, 43 S. W. 517.

A convict bond having but one surety is invalid. *Ex parte Millsap*, 39 Cr. R. 93, 45 S. W. 20.

**Discharge of bonds in general.**—Methods whereby bonds for the hire of certain convicts may be discharged stated. *Salyer v. Wilcox (Civ. App.)* 107 S. W. 654.

**Art. 6252. [3747] Liability of hirer when convict escapes.**—If a convict, hired out, escapes from the hirer, such hirer shall nevertheless be liable for the full amount of the bond, unless such convict is rear-

rested and placed in the custody of the sheriff of the county in which he was convicted before such bond becomes due; in which case such hirer shall only be liable to pay for the time that such convict remained with him. [Id. p. 229, sec. 4.]

**Art. 6253. [3748] Suit on bond.**—Upon the breach of such bond, the county judge, or commissioners' court, shall cause such bond to be sued upon in any court having jurisdiction thereof; and the amount collected thereon, after deducting therefrom the collection fees and costs, shall be paid into the county treasury by the officer collecting the same, and constitute a part of the road and bridge fund of the county. [Id. sec. 5. Const., art. 16, sec. 24.]

**Evidence.**—Where the obligors on a convict hiring bond defend an action thereon on the ground the convict had escaped and was rearrested and redelivered, the burden is on them to establish the escape. *Salyer v. Wilcox* (Civ. App.) 107 S. W. 654.

In an action on a convict hiring bond, evidence held insufficient to show the convict had escaped from the hirer when a *capias pro fine* upon which he was rearrested was issued. *Id.*

**Art. 6254. [3749] Convict shall receive full credit for labor.**—All moneys arising from hiring out convicts shall be paid over to the county judge, and by him paid into the county treasury, and in every case the convict shall receive full credit for the amount of his labor, to be counted and entered in discharge of the fine and costs adjudged against him; and, whenever his earnings shall be sufficient to pay in full such fine and costs, he shall be discharged. [Id. sec. 6.]

**Discharge of convict.**—One who worked under a convict bond which had not been approved by the court held nevertheless liable to arrest for his fine. *Ex parte Ransom*, 38 Cr. R. 141, 41 S. W. 637.

Where a convict bond is invalid, and not paid, the convict can be arrested, though he has paid to the principal the fine and costs. *Ex parte Millsap*, 39 Cr. R. 93, 45 S. W. 20.

A person released from custody on a convict bond is not entitled to habeas corpus. *Ex parte Chestnutt*, 39 Cr. R. 624, 47 S. W. 649.

Where a convict bond is given, and a prisoner released from custody by virtue thereof, he may nevertheless be returned to custody by agreement between the hirer and the judge. *Ex parte Miller*, 44 Cr. R. 422, 72 S. W. 183.

**Art. 6255. [3750] Record in relation to convicts shall be kept.**—County judges shall cause a record of all proceedings in relation to the employment or hiring out of convicts to be kept in well-bound books to be provided for that purpose. Said record shall contain:

1. A descriptive list of all persons known as "county convicts."
2. How such convict has been or is employed.
3. The name of the party hiring a convict.
4. The time when and the price at which such convict has been employed or hired out.
5. The amount credited such convict for such employment or hire.
6. The amount of such hire collected.
7. The amount of fine and costs due by such convict.
8. Such other information as may be necessary and requisite under the rules adopted by the commissioners' court. [Act Aug. 21, 1876, p. 230, sec. 15.]

**Art. 6256. [3751] Officer's costs, how paid.**—Whenever the amount realized from the hire of a convict is sufficient to discharge in full the fine and costs adjudged against him, the county judge shall issue a warrant upon the county treasurer in favor of each officer, to whom costs may be due, for the amount of his costs, and the same shall be paid out of the road fund of the county, or out of any other funds in the county treasury not otherwise appropriated. [Id. sec. 8.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Right of hired convict to recover for negligent injury.**—Convict hired out to railroad company held entitled to recover for negligent injury. *San Antonio & A. P. Ry. Co. v. Gonzales*, 31 C. A. 321, 72 S. W. 213.

Fact that convict was working for state held not to preclude recovery for negligent injury by railroad company. *Id.*

Disobedience of state officer held not to prevent recovery by convict for negligent injury by railroad company to which he was hired. *Id.*



## TITLE 105

## PENSIONS

Chap.

1. Veterans of Mexican War.

Chap.

2. Confederate Soldiers and Sailors.

## CHAPTER ONE

## VETERANS OF MEXICAN WAR

Art.

6257. Who entitled to pensions.

6258. Application.

6259. Proceedings to obtain.

6260. Proceedings to be filed with comp-  
troller.

6261. Must be indigent.

Art.

6262. Pension shall begin, when.

6263. Proof to be made each quarter.

6264. Grand jury to investigate.

6265. Attorneys' fees.

6266. List of, to be printed, etc.

**Article 6257. [3752] To whom granted.**—To every surviving indigent soldier, or indigent volunteer, who was in the actual military or naval service of Texas at the time of the siege of Bexar, in December, 1835, or at the time of the battle of San Jacinto, in April, 1836, or who actually participated in any battle in Texas in 1836, or who was in such actual military service for as much as six weeks between the commencement of the revolution at Gonzales in 1835, and the first day of January, 1837, and to every indigent surviving signer of the declaration of independence of Texas, and to every indigent surviving widow of any such soldier, volunteer or signer, who is and has always been unmarried since the death of such soldier, volunteer or signer, and so long as such widow may remain unmarried, there shall be and is hereby granted an annual pension of one hundred and fifty dollars as hereinafter provided. [Acts 1889, p. 43, sec. 1.]

**Art. 6258. [3753] Application.**—Each applicant for a pension under this law shall make application in writing for the same to the county judge of the county of his or her residence, and shall post a copy of such application on the court house door of the county for at least thirty days before the application is acted on by the county judge. Such application shall state the name, age and residence of the applicant, whether or not this applicant received any pension or veteran donation land certificate under any previous law, a list of the real and personal property owned by the applicant, and the present value of the same, and what property and the value thereof that such applicant has sold or conveyed within twelve months prior to the date of such application; and shall further state that the applicant is in indigent circumstances, and is dependent upon his or her labor or on the charity of others for a support; provided, that the word "indigent," within the meaning of this law, shall not allow the ownership of property to exceed one thousand dollars; and that the applicant has not transferred to others any property or values of any kind for the purpose of becoming a beneficiary under this law; and still further, that such applicant is and was for one year preceding the date of the passage of this law a bona fide resident citizen of this state. And in addition to the foregoing, each male applicant shall further state the time he rendered such service, and the command he served in; and each female applicant shall state the name of her deceased husband, the date of his death; that she is unmarried, and has so remained since the death of the husband for whose services she claims a pension; and shall further state, as accurately as she can, the time her said deceased husband rendered such service, and the command he served in. Should the applicant be a signer of such declaration of independence,

or a widow of such signer, he or she shall state all that is hereinbefore required, except as to the military service, and in lieu of which it shall state that the applicant was a signer of such declaration of independence, or is the widow of such signer, which application shall be subscribed and sworn to by the applicant, and the same shall be supported by affidavits of at least two credible witnesses who reside in the state, and shall show that the facts stated by the applicant is known and regarded in his or her neighborhood as a Texas veteran or signer of the declaration of independence, or the widow of a Texas veteran or signer of the declaration of independence. Any veteran whose application and proof heretofore made to the comptroller are in compliance with the requirements of this law shall be entitled to his or her pension on presenting such application and proof to the comptroller, without further proof being made; and, where such application and proof has been returned to the applicant by the comptroller, said applicant may refile the same as if made under this law; provided, that such application has not heretofore been declared fraudulent. [Id. sec. 2.]

**Art. 6259. [3754] Proceedings to obtain.**—Such application so signed and sworn to by the applicant and two credible witnesses shall be presented to the county judge, who shall in open court, at a regular term thereof, hear evidence as to the truth of the statements made in such application; and if he believe from the evidence that the applicant really performed the service for which the pension is claimed, or is a widow of a soldier or volunteer of the Texas revolution, or a signer of the declaration of Texas independence; that he or she is now, and was at the time of the passage of this law, and for ten years previous thereto, a bona fide resident of the state of Texas; that the applicant is in indigent circumstances, and is dependent on his or her labor or on the charity of others for a support, and has not at any time transferred any property for the purpose of becoming a beneficiary under this law; then he shall make his certificate under the seal of his office, attested by the county clerk, reciting the facts as shown by the evidence. Upon the hearing of such application, the state shall be represented by the county or district attorney; and it shall be the duty of such attorney to summon witnesses to testify in behalf of the state who know the pecuniary condition of the applicant, or any other facts affecting the rights of the applicant to obtain a pension, and to examine the assessor's rolls and the records of his county, and any other source of information which may seem to him advisable; and he shall prepare a statement of the testimony given by each witness, including the name of such witness, and also of the facts disclosed by investigating any other source of information, which statements shall be approved by the county judge. For his services in behalf of the state, the attorney shall be allowed a fee of ten dollars, to be paid as follows: He shall present his account for the same to the county judge, who shall approve it if he find it correct, shall date and sign the same officially, and shall cause it to be filed in the office of the county clerk. The said judge shall thereupon give the attorney a draft upon the county treasurer, and the same when presented to the treasurer shall be paid out of any moneys in his hands not otherwise legally appropriated, in the same manner as jury certificates are paid; provided, that, if the applicant shall be proved not to be an indigent, and shall have his application defeated on that ground, then the attorney representing the state shall be entitled to an additional fee of ten dollars, to be taxed against the applicant as costs of suit. [Acts 1885, p. 94, sec. 3.]

**Art. 6260. [3755] To be filed with comptroller.**—Such application so prepared and certified to, together with the statements of the county judge and attorney hereinbefore provided for, shall be filed with the comptroller of public accounts, whose duty it shall be to examine criti-

cally such application and statements, and any other accessible evidence that may prove or disprove the right of the applicant to claim a pension, and may require further proof of the statements made in such application; and if in his opinion the applicant has not established his or her legal right to a pension, then he shall refuse such application and file reasons therefor in his office; provided, no pension shall be granted to any one under this title whose claim has been rejected by the veteran board of this state as fraudulent. [Acts 1885, p. 94, sec. 4.]

**Art. 6261. [3756] Must be indigent.**—No person shall be entitled to receive a pension under this title, unless it shall be made to appear to the comptroller, from the evidence, that said person is in indigent circumstances, and is dependent upon his labor or the charity of others for a support. [Id. sec. 5.]

**Art. 6262. [3757] Shall commence, when.**—The pension herein provided for shall begin at the date when the comptroller receives the application, and shall be paid quarterly in advance. The comptroller shall draw his warrant for the same on the treasurer, and, upon presentation, the treasurer shall pay the same out of any money in the treasury which may be appropriated for this purpose. [Id. sec. 6.]

**Art. 6263. [3758] Proof to be made each quarter.**—On or after the first of each quarter, the pensioner shall make his affidavit stating the county of his residence, and that he is the identical person to whom a pension has been granted under this law; which affidavit shall be supported by the affidavit of some other credible person to the same fact, and which affidavit may be made before any one authorized to administer oaths, which affidavit shall be filed with the comptroller, and, upon the filing of the same, the comptroller shall draw his warrant for the quarter found to be due. [Id. sec. 7.]

**Art. 6264. [3759] Investigated by grand jury.**—It shall be the duty of the district judges of this state to specially charge every session of the grand jury to investigate violations of this law. [Id. sec. 8.]

**Art. 6265. [3760] Attorney's fee.**—No person shall receive a greater fee than ten dollars to procure a pension for another, and any contract for a larger sum shall not be enforced by the courts. [Id. sec. 9.]

**Art. 6266. [3761] Lists to be sent county judges for posting.**—It shall be the duty of the comptroller, at least once in each year, to forward to the county judge a printed list of the pensioners in their respective counties, which list shall be posted in a conspicuous place in the office of said judge. It shall also be the duty of the comptroller, on the application of a grand jury, to forward to it, through the district clerk of the county in which the grand jury is convened, copies of any or all original papers on file in his office connected with an application for a pension which said grand jury may desire to investigate; and such copies, with their correctness attested by the comptroller, shall have the same force and value in a court of law that the original papers would have had. [Id. sec. 10.]

## CHAPTER TWO

### CONFEDERATE SOLDIERS AND SAILORS

Art. 6267. Tax; fund for payment of pensions.	Art. 6271. Soldier applying for pension shall have served honorably; evidence, how taken.
6267a. Pension, to whom granted.	6272. What constitutes indigency.
6268. Application, how made.	6273. Payments, to be made when.
6269. Widow not be granted pension, unless, etc.	6274. Pensions denied to whom.
6270. Widow may make proof of certain facts by affidavit, etc.	

<p>Art. 6275. District judges shall charge the grand jury. 6276. Fees limited. 6277. County judge to be allowed fee for hearing application. 6278. Inmates of Confederate Home, asylums, etc., not entitled to pension. 6279. Appropriation shall be prorated.</p> <p style="text-align: center;">PERPETUATION OF EVIDENCE</p> <p>6280. Veteran may cause certain persons to make statement under oath.</p>	<p>Art. 6281. Statement to be filed with secretary of state. 6282. Widow of veteran may establish identity in same way.</p> <p style="text-align: center;">COMMISSIONER OF PENSIONS</p> <p>6283. Salary and general duties of. 6284. Shall strike certain persons from roll. 6285. Copies of certain instruments accepted as evidence before grand jury.</p>
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**Article 6267. Tax; fund for payment of pensions.**—There shall be levied and collected in the same manner and at the same time that other taxes are levied and collected for the year 1913, and annually thereafter, an ad valorem tax of five cents on the one hundred dollar valuation thereof on all property owned in the state on the first day of January of the year 1913 and of every year thereafter, and on all property sent out of the state prior to the first day of January of any of said years for the purpose of evading the payment of taxes thereon and afterwards returned to the state, except so much thereof as may be exempted by the constitution and laws of this state or of the United States, which valuation shall be made in the manner prescribed by law for the assessment, levy and collection of other state and county taxes, which said tax so levied and collected shall be paid into the treasury of the state of Texas in the same manner as other state taxes and shall constitute a special fund for the payment of pensions for service in the Confederate army and navy, frontier organizations, militia of the state of Texas, and for the widows of said Confederate soldiers or sailors serving in said armies, navies and organizations or militia, in the manner and under the rules and regulations prescribed herein and prescribed in existing law not repealed hereby and as may be hereafter prescribed by law. Which said fund is hereby expressly appropriated by the legislature of the state of Texas for the purpose herein stated. [Art. 6267, Rev. St. 1911, repealed. Acts 1913, p. 282, sec. 1.]

*Note.*—Acts 1913, p. 282, sec. 6, repeals Arts. 6267, 6268, 6272, 6279, Rev. St. 1911, and all other laws in conflict, but provides that said act shall be cumulative of all existing laws not in conflict.

**Art. 6267a. Pension, to whom granted.**—Out of the fund to be created under the provisions of section 1 [Art. 6267] hereof, there shall be paid an annual pension of eight and one-third dollars per month, the same to be paid quarterly on the first days of September, December, March and June of each year to every disabled and indigent soldier who under special laws of the state of Texas during the war between the states served for a period of at least six months in organizations for the protection of the frontier against Indian raids and Mexican marauders, and to every indigent and disabled soldier of the militia of the state of Texas who was in active service for a period of at least six months during the war between the states, and to every widow of such soldier who is in indigent circumstances and who was married to such soldier prior to January 1, 1900, and has never re-married, and to every indigent and disabled Confederate soldier or sailor who served for a period of at least three months of active service in the armies or navies of the Confederate States of America during the war between the states, and who became a resident of the state of Texas prior to January 1, 1900, and who has been a bona fide resident of the state of Texas continually since January 1, 1900; and to every widow of such a Confederate soldier or sailor who is in indigent circumstances and who became a resident of the state of Texas prior to January 1, 1900, and has been a bona fide resident of said state continually since January 1, 1900, and who was married to such soldier or sailor prior to January 1, 1900, and who has never re-married; and provided that the word "widow" as used in this Act and in the exist-

ing law shall not apply to nor include women born since 1861, and provided that in the event the appropriation made by the state legislature out of such special fund for any one year shall prove insufficient to pay in full said pensions, there shall not thereby be created a deficiency outstanding as a valid claim against the state of Texas, and each pensioner shall only receive, except as herein or in existing law otherwise provided for, his or her pro rata according to the amount appropriated for that year. [Id. sec. 2.]

**Art. 6268. Application, how made.**—Every person entitled to a pension, under the foregoing section of this Act [Art. 6272], shall make application in writing and under oath for the same to the county judge of the county of his residence. Such application shall state the name, age and residence of the applicant, and his or her occupation, if able to engage in one, his or her physical condition, and each and every fact necessary to qualify and entitle the applicant to a pension under the foregoing section of this Act [Art. 6272]; provided that persons now on the pension rolls of the state shall not be required to file a new application under this Act.

In the event the applicant is such a soldier or sailor as is prescribed in the foregoing section [Art. 6272] of this Act, in said application he shall state the company and regiment in which he was enlisted in the Confederate army or the militia of Texas, or, in the event he served in an organization for the protection of the frontier against Indian raids or Mexican marauders, he shall name and identify such organizations, or if he were an officer commissioned by the president of the Confederate States, or by the governor, or other competent authorities of the state of Texas, in said army, navy, militia or frontier organization, he shall state the date of his commission and his rank therein; and if he were detailed directly under the provisions of the conscript law for duty in any of the armories or shops of the Confederate government or for any other labor necessary for the maintenance of the army in the field, and, if he served in the Confederate navy, he shall state the time of service in each case. Each applicant shall also state in his application what property, effects and income he possesses and shall furnish the testimony of at least two credible witnesses who personally know that he enlisted in the service and performed the duties of a soldier or of a sailor claimed by him; provided, however, that if an applicant for a pension cannot secure the testimony of two witnesses then he may furnish documents or evidence in connection with his service in the army or navy or militia, or such organization as may establish his claim for a pension. These proofs shall be made under oath and in writing before the county judge of the county of the residence of the applicant; and in case the applicant or the witnesses from disability or other circumstances beyond his control cannot appear before the county judge at the court house of the county or office of the judge, such judge may, and it shall be his duty, to go before such applicant, and such witnesses for the purpose of hearing such proofs. The county judge shall certify to the trustworthy character of the witnesses and to the citizenship of the applicant, who must have been a bona fide resident of the county in which he makes his or her application for a period of six months next before the date of said application. He shall in every case administer an oath to each applicant and witness before they sign the affidavit. Provided, further, that if it be necessary for the applicant to go outside of the county or state for proof to establish such application, such proof may be submitted in the form of affidavits made in due form before some officer authorized to administer oaths and take the depositions of witnesses and accompanied by certificates from the county judge of the county where made, that the witnesses are of trustworthy character and entitled to credit. In case the applicant be a widow of a soldier or sailor, who if living would

be entitled to a pension under the provisions of section 2 [Art. 6267a] of this Act, she shall make written application for such pension and therein state, under oath, that she is in fact the widow of such soldier or sailor, and shall as near as possible therein state the facts showing her to be entitled to receive a pension under the provisions of section 2 [Art. 6267a] of this Act, in the same manner as an applicant who is such a soldier or sailor must make such proof as herein stated, and thereupon such widow shall be entitled to receive such pension on the same terms as other pensioners. In the event such widow cannot make such proof she may by complying with the provisions of article 6270 Revised Statutes, become entitled to receive a pension on the terms and conditions stated in said article. [Art. 6268, Rev. St. 1911, repealed. Id. sec. 4.]

**Art. 6269. Widow not to be granted pension, unless, etc.**—No widow shall be entitled to a pension should her husband, if living, be debarred by reason of his inability to comply with the requisites described in this chapter as to his service in the Confederate army or navy. [Acts 1909, p. 231, sec. 3.]

**Art. 6270. Widow may make proof by affidavit, etc.**—Any widow of a Confederate soldier or sailor, entitled to a pension under the provisions of this chapter, may make oath to the county judge in writing that she is in fact the widow of a Confederate soldier or sailor, that her said husband rendered valuable service to the Confederacy as such, that he did not desert, and was either killed or died, or was honorably discharged from the army; that she has made diligent search for all information as to the number of regiment and company in which her deceased husband served, and has been unable to learn same; which affidavit shall be filed with the county clerk; whereupon the county judge may proceed to take such other evidence as he may deem necessary; and, if in his judgment he finds that she is the widow of a Confederate soldier or sailor, that all witnesses to the said fact are dead, or their whereabouts unknown to said widow and are unascertainable, he may, upon his own motion, recommend to the pension commissioner the grant of a pension to the said widow; and, if the pension commissioner is satisfied that said widow is entitled to a pension under the provisions of this chapter, he may grant same. [Id. sec. 3a.]

**Art. 6271. Soldier to have served honorably; evidence, how taken.**—Every Confederate soldier applying for a pension under this chapter shall have served honorably from the date of his enlistment until the close of the late civil war between the states, or until he was discharged or paroled in some military organization regularly mustered into the army or navy of the Confederate States until the surrender. It shall be the duty of the county judge to take down the evidence in writing of all witnesses examined by him, which shall be paid for by the applicant at the rate of five cents per hundred words; provided, that the applicant is authorized to have such evidence taken down by his attorney, or by such other person as he or she may employ under the contract of employment to secure his or her pension; and provided, that no greater fee than hereafter provided shall be charged by such attorney, or representative of such applicant; and the county judge shall certify to the written statement of the evidence when taken before him. The application, affidavit and certified statement of the evidence shall be forwarded to the commissioner of pensions of the state of Texas. [Id. sec. 4.]

**Art. 6272. What constitutes indigency.**—To constitute indigency, within the meaning of this Act, neither the applicant nor his wife, if the applicant be a married man, nor both together, nor the widow, if the applicant be a widow, shall own property, real or personal, exceeding in value one thousand dollars, exclusive of the homestead, and if its value

be not in excess of one thousand dollars, and exclusive of household goods and wearing apparel; and such applicant shall not be in the enjoyment of an income, annuity, the emoluments of an office or wages for his or her services in excess of three hundred dollars per year, nor in receipt of aid or of a pension from any state of the United States, or from any other public source, nor an inmate of the Confederate Home or other public institution at the expense of the state. Persons who are not indigent under the foregoing definition shall not be entitled to a pension under this chapter. [Art. 6272, Rev. St. 1911, repealed. Acts 1913, p. 282, sec. 3.]

**Art. 6273. Payments to be made when.**—The payments of such pensions shall begin on the first day of March and September of each year, payable at the end of each quarter; and on and after the first of each quarter the pensioner shall make his or her affidavit, stating the county of his or her residence and postoffice address, and that he or she is the identical person to whom a pension has been granted under this law, and that the conditions which existed at the time of making his or her application and on which the pension was originally granted still exist; which affidavit shall be supported by the affidavit of some other credible person to the same fact, and which affidavit may be made before any one authorized to administer oaths, which affidavit shall be filed with the commissioner of pensions for examination; and, if approved by him, the comptroller of public accounts shall draw his warrant to the amount of such pension on the treasurer; and upon presentation the treasurer shall pay the same out of any money in the treasury which may be appropriated to this purpose. [Acts 1909, p. 231, sec. 7.]

**Art. 6274. Pensions denied to whom.**—No application shall be allowed, nor shall any aid be given or pension paid in any case, to any soldier or sailor, or the widow of any soldier or sailor under the provisions of this chapter, where it shall appear that any such soldier or sailor deserted his command, or voluntarily abandoned his post of duty, or the said service during the said war, nor shall any application be allowed, nor any aid given, nor any pension paid, to any widow of any soldier or sailor who has been divorced from any such soldier or sailor, being her husband, nor to any widow who voluntarily abandoned and without cause any such soldier or sailor, being her husband, and continued to live separately from him up to the time of his death, nor to any such soldier or sailor who served as a substitute for another, nor to the widow of said substitute. [Id. sec. 8.]

**Art. 6275. Grand jury to be charged.**—It shall be the duty of the district judges of this state to specially charge the grand jury at every session to investigate violations of this law. [Id. sec. 10.]

**Art. 6276. Fees limited.**—No person shall receive a greater fee than five dollars to secure a pension for another, and any contract for a larger sum shall be unlawful and shall not be enforced by the courts. [Id. sec. 11.]

**Art. 6277. Fees of county judge.**—A county judge shall be allowed a fee of two dollars for hearing an application and taking proof therein, said fee to be paid by the applicant, and before hearing of application is had thereon; provided, that all fees received by such county judge shall be reported as other fees of office and be otherwise controlled by the law as it now exists, regulating the fee of the county judges; and provided, further, that said fee of two dollars shall be the only fee allowed to the county judge for all the work performed by him in securing a pension. [Id. sec. 12.]

**Art. 6278. Certain persons not entitled to.**—No person shall, while an inmate of the Texas Confederate home, nor shall any person while confined in any of the asylums of this state, at the expense of the state,

or confined in the state penitentiary to satisfy a judgment of conviction, receive a pension under this chapter; and any person having been granted a pension under the provisions of this chapter, and afterwards become an inmate of said home, asylum or penitentiary, shall, while such inmate, forfeit his pension, it being intended that no person shall at the same time receive benefits from both sources, and no pensioner who leaves this state for a period of over six months shall draw a pension while so absent. [Id. sec. 14.]

**Art. 6279. Appropriation, how allotted to pensioners.**—On the first day of September, and on the first day of March each year, the commissioner of pensions shall first allot to each blind, maimed and totally disabled soldier and sailor, or the blind and totally disabled widow of such soldier or sailor, the sum of eight and one-third dollars per month for each year; and the remainder of said appropriation shall be equally pro rated among the pensioners who are in indigent circumstances only, and whose claims to pensions have been established and filed with the commissioner of pensions, as provided by law; and the comptroller shall issue his warfants for the amount due said pensioners in the manner provided by law, and all pensioners to be paid at the end of each quarter and all such pensions shall begin on the first day of September and March after the filing and establishment of such application; provided, however, that the commissioner of pensions is authorized to fill, after the apportionment is made, any vacancies created by death or other causes, at any time between the first day of March and the first day of September in each year. [Art. 6279, Rev. St. 1911, repealed. Acts 1913, p. 282, sec. 5.]

#### PERPETUATION OF EVIDENCE

**Art. 6280. Certain persons may make statement under oath.**—Any Confederate veteran, soldier, or sailor, who may be entitled to a pension under and by virtue of the pension laws of Texas, who may be desirous of establishing such right by the evidence of any person who may be cognizant of such facts as would prove and establish his such right, may cause such person or persons to go before the county judge, or any notary public, of the county of the residence of such person, and make a statement in writing of all facts within his knowledge concerning and relating to the service as a soldier or sailor in the army or navy of the Southern Confederacy during the civil war, such statement in writing when made to be duly subscribed and sworn to by the person making the same. [Acts 1909, p. 215, sec. 1.]

**Art. 6281. Statement to be filed with secretary of state.**—Any such statement as provided for in the preceding article, made and reduced to writing duly authenticated, shall be filed with the secretary of state, and by him recorded in a book to be kept for such purpose, a properly certified copy of which shall be admitted and used in evidence, at any future time, to prove and establish the right of the soldier or sailor in whose behalf, or at whose instance, the same may have been made to such pension as may be provided by law. [Id. sec. 2.]

**Art. 6282. Widow may establish identity in same way.**—The widow of any soldier or sailor who may be entitled to a pension as such, under the laws of this state, shall be entitled to establish her identity and right to such pension in the same way and manner as is herein provided for soldiers and sailors. [Id. sec. 3.]

#### COMMISSIONER OF PENSIONS

**Art. 6283. Salary and general duties of.**—There shall be a commissioner of pensions, whose term of office shall be two years, with a salary of two thousand dollars per annum, who shall be appointed by the gov-



error. It shall be the duty of said commissioner of pensions to examine and pass on all pension claims under the existing law, to keep a correct record of all approved claims, with the name, disability, service, county and amount paid, to furnish the county judges with suitable blanks for use of claimants. The said commissioner of pensions shall, on the first day of September of each year, make to the governor a written report, showing the whole number of pensioners, the number of claims allowed for the past year and the amounts paid, together with such information pertaining to his office as the governor may ask. All records, books, claims or other matters connected with the office of said commissioner of pensions shall be kept open to inspection, and under the charge and direction of the governor, and all rulings made by said commissioner shall be subject to revision and change by the governor. This office shall continue for ten years only, unless continued by further legislation. The said commissioner of pensions shall not exercise the power of attorney to draw any pension. [Acts 1909, p. 231, sec. 5.]

**Art. 6284. Shall strike certain persons from roll.**—It shall be the duty of the commissioner of pensions, when it shall come to his knowledge that any person has been granted a pension through fraud or perjury, or that any one on the pension roll has, by reason of acquiring property or annuity, emolument or other income that would have prevented the granting of a pension had such conditions existed at the date of said application, to strike the name of such persons from the pension roll. [Id. sec. 9.]

**Art. 6285. Copies of certain instruments evidence before grand jury.**—It shall be the duty of the commissioner of pensions, on the application of the grand jury, to forward to the district clerk of the county in which the grand jury is convened, copies of any and all original papers on file in his office connected with an application for a pension, which said grand jury may desire to investigate; and such copies, with their correctness attested by the commissioner of pensions, shall have the same force and value in law that the original papers could have had. [Id. sec. 13.]

## TITLE 106

## PHARMACY

Art.	Art.
6286. Governor to appoint board.	6292. Fees of board.
6287. Organization of board; secretary's salary and bond; compensation of board.	6293. Pharmacists to be licensed.
6288. Oath.	6294. Certain persons entitled to be registered without examination.
6289. Duty of; shall make report of money, etc.	6295. Qualifications of applicant.
6290. Shall hold meetings for examination, when.	6296. Board to issue license, when.
6291. May issue temporary certificates.	6297. Applicants legally registered in foreign countries to be granted license, when.
	6298. License to be posted; renewals, etc.

[In addition to the notes under the particular articles, see also note on the subject in general, at end of title.]

**Article 6286. Governor to appoint board.**—The governor shall, on or before September 1, after his inauguration, appoint five persons, licensed as pharmacists, who are actively engaged in the practice of pharmacy within this state at the time of their appointment, and shall have been so engaged for the past five years or more immediately preceding their appointment. The Texas state pharmaceutical association may recommend to the governor, on or before August 1, after his inauguration, a list of names of persons who are licensed pharmacists of this state, of twice the number to be appointed, and the appointments may be made by the governor from this list. The five persons so appointed shall constitute a board to be styled, "The Texas Board of Pharmacy," who shall hold their office for two years, and until their successors shall have been appointed and qualified; provided, however, that no person who is connected with any school or college of pharmacy in any way shall be appointed as a member of the Texas state board of pharmacy; and any member of the board may be removed by the governor for good cause shown him. Provided, further, that no two members of the board shall reside in the same county. In case of a vacancy from death or other cause, the governor shall appoint a successor to fill out the unexpired term, with qualifications as above set forth. [Acts 1907, p. 394, sec. 7.]

**Art. 6287. Organization of board; secretary, his salary and bond; compensation of board.**—The persons so appointed and constituting the Texas state board of pharmacy shall, within thirty days after their appointment, and annually thereafter, meet and organize by the election of a president, secretary and treasurer, who shall hold their office for the term of one year from the date of their election. The president and the treasurer shall be elected from the members of the board, and the secretary need not be a member of the board. The secretary shall receive such salary as may be prescribed by the board of pharmacy, and his necessary expense while engaged in the performance of his official duties. The board may adopt such by-laws and regulations as they shall deem necessary to carry into execution the provisions of this chapter, but which shall not be inconsistent with this chapter. The treasurer and secretary shall give bond in such sum as the board may determine, which at no time shall be for less amount than the sum handled by them annually. The expense of making such bonds shall be paid by the board. The secretary shall collect all money due the board from all sources, and shall pay the same over to the treasurer within ten days after the taking his receipt therefor. The bonds of the treasurer and secretary of the board shall be payable to the governor of the state of Texas, and shall be conditioned for the faithful performance of all duties imposed by law, or by order of the board of pharmacy. The

board shall prescribe the pay of the members thereof, but at no time shall the amount exceed five dollars per day for each member, and this amount to be paid to them for such days during which they are actually engaged in the discharge of their official duties; and they are to receive such additional amounts as they may actually incur for expenses in the discharge of their duties for mileage, hotel bills, stamps and stationery; provided, no bill either for services of a member of such board or any expense of such member shall be paid until an itemized statement of such service and each item of expense has been made out and sworn to by such member of such board, before some officer authorized under the law to administer oaths, and such account shall have been filed with and approved by said board; provided, that the state shall never be liable for the salary and expense of any members of this board. [Id. sec. 8.]

**Art. 6288. Oath.**—The persons so appointed and constituting the Texas state board of pharmacy, before entering upon the duties of said office, shall take the oath prescribed by the constitution of the state of Texas for state officers, and shall file the same in the office of the secretary of state, who shall thereupon issue to each of said members a certificate of appointment. [Id. sec. 9.]

**Art. 6289. Duty of; shall make report of money, etc.**—It shall be the duty of the board to examine all applications for registration of such persons as may be entitled to the same under the provisions of this chapter, and to make an annual report to the governor, a copy of which shall be furnished to the Texas state pharmaceutical association, upon the condition of pharmacy in Texas; which report shall embrace all the proceedings of the board, and give an itemized account of all money received and disbursed by said board; and said itemized account of money paid out by said board shall show to whom paid and specifically for what purpose it was paid, and also the names of all pharmacists duly registered under this chapter. And it shall be the further duty of the board to deliver all money on hand at the end of the term of each board, after all outstanding debts have been paid, over to their successors in office. [Id. sec. 10.]

**Art. 6290. Shall hold meetings for examination, when.**—The Texas state board of pharmacy shall hold meetings for the examination of applicants for registration, and for the transaction of such other business as may legally come before it, at least once in four months, and such additional meetings as may be necessary; provided, that said regular meetings shall be held on the third Tuesday of January, May and September of each year, in such cities or places as the said board may select, or such cities or places as shall be deemed most convenient for applicants. Due notice of such meetings shall be given by publication in such papers as may be selected by the board thirty days in advance of said meetings. Three members shall constitute a quorum for the transaction of any and all business. The president and secretary shall have the power to administer oaths in all matters pertaining to the examination and registration of pharmacist and assistant pharmacist. The board shall keep a record of its proceedings and a register of all persons to whom certificates or license as pharmacist or assistant pharmacist and permits have been issued, and all renewals thereof; and the books and register of the board, or a copy of any part thereof certified by the secretary, shall be accepted as competent evidence in all the courts. [Id. sec. 11.]

**Art. 6291. May issue temporary certificates.**—Any member of the board of pharmacy may issue a temporary certificate upon satisfactory proof that the applicant is competent; said temporary certificate shall be null and void after the first meeting of the board of pharmacy next after the granting said temporary certificate; provided, that not more

than one temporary certificate shall ever be granted to any one person. [Id. sec. 12.]

**Art. 6292. Fees of board.**—The board of pharmacy shall be entitled to charge and collect the following fees: For the examination of an applicant for license as a pharmacist, five dollars; for the examination of an applicant for license as an assistant pharmacist, two dollars and fifty cents; for renewing the license as a pharmacist, one dollar; for renewing the license as assistant pharmacist, one dollar; for issuing license to any proprietor or employé to conduct a drug store in towns of not more than one thousand inhabitants, one dollar. All fees shall be paid before any applicant may be admitted to examination, or his name placed upon the register of pharmacists or assistant pharmacists, or before any license or permit or any renewal thereof may be issued by the board. [Id. sec. 13.]

**Art. 6293. Pharmacists to be licensed.**—It shall be unlawful for any person not licensed as a pharmacist, within the meaning of this chapter, to conduct or manage any pharmacy, drug or chemical store, apothecary shop, or other place of business, for the retailing, compounding or dispensing of any drug, chemical or poison, or for the compounding of physician's prescriptions, or to keep exposed for sale at retail any drug, chemicals or poisons, except as hereinafter provided, or for any person not licensed as a pharmacist or assistant pharmacist, within the meaning of this chapter, to compound, dispense or sell at retail any drug, chemical, poison, or pharmaceutical preparation upon the prescription of a physician or otherwise, or to compound physician's prescriptions, except as an aid to or under the supervision of a person licensed as a pharmacist under this chapter. And it shall be unlawful for any owner or manager of a pharmacy or drug store, or other place of business, to cause or permit any other than a person licensed as a pharmacist or assistant pharmacist to compound, dispense, or sell at retail any medicine or poison, except as an aid to or under the supervision of a person licensed as a pharmacist; provided, however, that nothing in this article shall be construed to prevent any person from engaging in the business herein described as proprietor and owner thereof, provided such proprietor or owner shall have employed in his business to conduct same some one qualified under this chapter, nor to interfere with any legally registered practitioner of medicine or dentistry in the compounding of his prescriptions, or to prevent him from supplying his patients such medicine as he may deem proper, nor with exclusively wholesale business of any dealer who shall be licensed as a pharmacist, or who shall keep in his employ at least one person who is licensed as a pharmacist, nor with the selling at retail of non-poisonous domestic remedies, nor with the sale of patent or proprietary preparations, when sold in unbroken packages, nor with the sale of poisonous substances which are sold exclusively for use in the arts, or for use as insecticides, when such substances are sold in unbroken packages bearing a label having plainly printed upon it the name of the contents, the word poison and the names of at least two readily obtainable antidotes. [Id. sec. 1.]

**Art. 6294. Certain persons entitled to be registered without examination.**—All persons registered by district boards of pharmaceutical examiners prior to the nineteenth day of July, 1907, upon presenting proof of such registration in accordance with the law relating to the practice of pharmacy then in force, and the payment of one dollar, shall be entitled to a certificate of registration as a licensed pharmacist under the meaning of this chapter from the said board of pharmacy, without examination; provided, the application for such certificate shall have been made to the said board of pharmacy within ninety days after the first meeting of said board after its creation. Proprietors, and employés of such proprietors, who were on the nineteenth day of July, 1907, actively

engaged in the preparation of physician's prescriptions and compounding and vending of medicines in towns of less than one thousand inhabitants in the state of Texas, and also proprietors, and employes of such proprietors, who may become so engaged in such towns during the five years next succeeding the date aforesaid, shall be exempt from examination; provided, he or she shall have registered as required by this chapter, and upon paying said board of pharmacy one dollar, shall receive a certificate of registration, which shall entitle such person to practice pharmacy in towns of one thousand inhabitants or under; and provided, further, that, should such persons have failed to apply for registration within ninety days from and after the first meeting of said board after its creation, said person shall be required to pay the same fees as for original registration. Every person, except in the cases named, who desires to be licensed as a pharmacist, shall file with the secretary of the board of pharmacy an application upon blanks furnished by the board of pharmacy for that purpose, duly verified under oath, setting forth the name and age of the applicant, the place or places at which and the time spent in the study of the science and art of pharmacy, the experience in compounding physician's prescriptions which the applicant has had under the direction of a legally licensed pharmacist, and shall appear at a time and place designated by the board of pharmacy, and submit to an examination as to his or her qualifications for registration as a licensed pharmacist or assistant pharmacist; provided, however, if any applicant should fail to pass a satisfactory examination, he or she may at any subsequent meeting of the board of pharmacy, within six months, be permitted to be re-examined without cost. [Id. sec. 2.]

*In general.*—The statute regulating the practice of pharmacy, and applicable only to druggists or pharmacists in towns of 1,000 inhabitants or more, held not unconstitutional as a special statute. *Green v. State*, 49 Cr. R. 380, 92 S. W. 847.

**Art. 6295. Qualifications of applicants.**—In order to be licensed as a pharmacist, within the meaning of this chapter, an applicant shall be not less than twenty-one years of age, and shall have been licensed as an assistant pharmacist for not less than two years prior to his application for license as a pharmacist, or he shall present to the board satisfactory evidence that he is a graduate of a reputable school or college of pharmacy, or that he has had four years practical experience in pharmacy under the instruction of a pharmacist; and he shall also pass a satisfactory examination by or under the direction of a board of pharmacy. In order to be licensed as an assistant pharmacist, within the meaning of this chapter, an applicant shall not be less than eighteen years of age, and shall have a sufficient preliminary general education, and shall have had not less than two years experience in pharmacy, and shall pass a satisfactory examination by or under the direction of the board of pharmacy; provided, however, that in the case of persons who have attended a reputable school or college of pharmacy, the actual time of attendance at school or college of pharmacy may be deducted from the time of experience required of pharmacist and assistant pharmacist, but in no case shall less than two years experience be required for registration as a licensed pharmacist. [Id. sec. 3.]

**Art. 6296. Board to issue license, when.**—If the applicant for license as a pharmacist or assistant pharmacist has complied with all the requirements of the two preceding articles, the board of pharmacy shall enroll his name upon the register of pharmacists or assistant pharmacists, and issue to him a license which shall entitle him to practice as pharmacist or assistant pharmacist for a period of two years from the date of said license. The board of pharmacy may refuse to grant a license to any person guilty of felony or gross immorality, or who is addicted to the use of alcoholic liquors or narcotic drugs to such an extent as to render him unfit to practice, and the board of pharmacy, after due

notice, may revoke a license for like cause, or any license which has been procured by fraud. [Id. sec. 4.]

**Art. 6297. Applicants legally registered in foreign countries to be granted license, when.**—The board of pharmacy may issue license to practice as pharmacist or assistant pharmacist in this state, without examination, to such persons as have been legally registered or licensed as pharmacists or assistant pharmacists in other states, or foreign countries; provided, that the applicant for such license shall present satisfactory evidence of qualifications equal to those required from licentiates in this state, and that he was registered or licensed by examination in such other state, or foreign country, and that the standard of competency required in such other state, or foreign country, accords similar recognition to the licentiates of this state. Applicants for license under this article shall, with their application, forward to the secretary of the board of pharmacy the same fees as are required of other candidates for license. [Id. sec. 5.]

**Art. 6298. License to be posted; renewals, etc.**—Every certificate of license to practice as pharmacist or assistant pharmacist, and every license to any proprietor or employé to conduct a drug store in towns of not more than one thousand inhabitants as above provided and every renewal of such license shall be conspicuously exposed in the pharmacy or drug store or place of business of which the pharmacist or assistant pharmacist or other person to whom it is issued is the owner or manager, or in which he is employed. Every licensed pharmacist or assistant pharmacist who desires to continue in the practice of his profession shall, within thirty days next preceding the expiration of his license or permit, file with the board an application for the renewal thereof, which application shall be accompanied by the fee hereinafter prescribed. If the board shall find that the applicant has been legally licensed in this state and is entitled to renewal of license, or to a renewal of such permit, it shall issue to him a certificate attesting the fact. If any pharmacist or assistant pharmacist shall fail, for a period of sixty days after the expiration of his license, to make application to the board for its renewal, his name shall be erased from the register of licensed pharmacist or assistant pharmacist; and such person, in order to become registered as a licensed pharmacist or assistant pharmacist, shall be required to pay the same fee as in the case of original registration. The name of the responsible manager of every pharmacy, drug store, or apothecary shop, shall be conspicuously displayed outside of such place of business. [Id. sec. 6.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Property right in prescription.**—A druggist held to have a right of property in prescriptions, entitling his transferee to sue for their value in conversion. *R. C. Stuart Drug Co. v. Hirsch* (Civ. App.) 50 S. W. 533.

## TITLE 107

## PILOTS

Chap.

1. Commissioners of Pilots.

Chap.

2. Branch Pilots and Pilots for the Mouth of Brazos River and Matagorda and Lavaca Bays.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of title.]

## CHAPTER ONE

## COMMISSIONERS OF PILOTS

Art.

6299. Governor to appoint.

6300. Duties of commissioners.

6301. Terms of residence and of probation for pilots.

Art.

6302. Further powers and duties.

6303. Same subject.

6304. County judge to appoint committee, etc., to act in place of board.

**Article 6299. [3790] Governor to appoint.**—The governor shall appoint, with the consent of the senate, for each port whose population and circumstances will warrant it, and also for Matagorda and Lavaca bays from Pass Cavallo to Indianola and Lavaca, a board of five persons of respectable standing, under the denomination of “commissioners of pilots” for such port and bays, three of whom shall be practical seamen and the other two merchants, who shall be commissioned by the governor for the term of two years; and the governor shall, during the recess of the legislature, be authorized to suspend, until the next session of the same, any of said commissioners, and to fill, until the same period, any vacancies in the board caused by death, resignation or otherwise; provided, however, that no member of the board of commissioners shall be directly or indirectly pecuniarily interested in any pilot boat or branch pilot in the business of their trust. [Act April 17, 1846, p. 79, sec. 2. Act Feb. 9, 1861, p. 19. P. D. 4762, 4775.]

**Wrecks.**—See Title 137.

**Art. 6300. [3791] Duties of commissioners.**—Said board of commissioners shall be authorized, if they deem it advisable, to examine and decide on the qualifications of any branch or deputy pilot whom they find already appointed at the time of their organization; and it shall be their duty to examine each new applicant for the office of branch or deputy pilot, and to decide on his qualifications, recommending to the governor, where new appointments are proper, such as are meritorious; and it shall also be their duty to examine into any case of alleged or supposed misconduct or inefficiency in branch or deputy pilots; and they shall be authorized, after a due hearing of accusation, testimony and defense, to suspend such pilot if sufficient cause appear, and during such suspension he shall not be allowed to exercise the functions of his office; the governor shall, however, have power at his will and pleasure to remove any branch pilot, or to reinstate any one of the same who has been suspended by the commissioners. [Act April 17, 1846, p. 79, sec. 3. P. D. 4763.]

**In general.**—It seems to be intended by this article that the government shall have both the appointing power and discretion as to the needs of the port, the board in this latter respect being advisory. *Petterson v. Boards of Com'rs*, 24 C. A. 33, 57 S. W. 1005.

If the clause requiring a term of service as branch pilot be directory (and it seems to be so) the governor or board could ignore it in case of abuse and any person might be appointed whom the board might find upon examination to be possessed of the other required qualities. *Id.*

**Art. 6301. [3792] Term of residence and probation for pilots.**—The board of commissioners of pilots of each port shall require a certain term of residence in the state of Texas, not less than two years, to authorize any person to exercise the functions of branch pilot for their port or said bays; as also to establish a term of probation not exceeding one year, as a deputy pilot, before any person can exercise the functions of branch pilot. [Id. sec. 4. P. D. 4764.]

*In general.*—While the latter clause of this article is of faulty construction it is not void for uncertainty, and there are strong reasons for holding the provision of the article to be directory. *Petterson v. Board of Com'rs*, 24 C. A. 33, 57 S. W. 1004, 1005.

**Art. 6302. [3793] Further powers and duties.**—The board of commissioners of pilots shall have authority, within the limits provided in this title, to fix rates of pilotage, and to establish regulations respecting the stations whereat and the times wherein pilots shall be on duty, with provisions for leave of absence; as also respecting the class, condition, number and use of pilot boats, and such other minor regulations, compatible with the provisions of this title, as may be needed for the government of pilots and for the order and good effect of the proceedings of the board, of which proceedings a record shall be kept; provided, no regulation shall be adopted repugnant to the constitution. [Id. sec. 7. P. D. 4766.]

**Art. 6303. [3794] Same subject.**—The board of commissioners of pilots shall be authorized and required to hear and determine all disputes that may arise respecting pilots and pilotage; to award to pilots extra compensation for extra services to vessels in distress; as also compensation for injurious loss of time incurred by pilots in waiting on vessels or by being carried off to sea on vessels by default of the master or owner when such pilots might have been landed; provided, always, that no more than three dollars for each day shall be awarded for mere loss of time; and it shall be the duty of said board to superintend and generally attend to all matters appertaining to pilots and pilotage; but from any decision of said board an appeal may be taken to the court having cognizance of the case. [Id. sec. 7. P. D. 4767.]

**Art. 6304. [3795] County judge to appoint committee, etc., to act in place of board.**—At any port whose population and circumstances do not warrant the appointment of a board of commissioners of pilots in the manner before provided, the governor may authorize the county judge of the county to appoint a provisional committee of from three to five persons of good character and maritime experience, who shall be authorized under this chapter to establish the rates of pilotage and the rules for governing pilots; to examine the qualifications of pilots and applicants for the office; to investigate the case of any pilot charged with misconduct or inefficiency, and to suspend him if sufficient cause appear. [Id. sec. 13. P. D. 4773.]

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## CHAPTER TWO

### BRANCH PILOTS AND PILOTS FOR MOUTH OF BRAZOS RIVER AND MATAGORDA AND LAVACA BAYS

Art. 6305.	Appointment, term and vacancies.	Art. 6313.	Pilots for mouth of Brazos.
6306.	Bond and oath.	6314.	Their bond, by whom approved.
6307.	May appoint deputies.	6315.	Pilots for Matagorda and Lavaca bays.
6308.	Malfeasance and punishment.	6316.	To keep channels staked out.
6309.	Pilotage.	6317.	Pilotage for said bays.
6310.	Exemptions from extra pilotage.	6318.	Rules for branch pilots applicable.
6311.	Consignee responsible for pilotage.	6319.	Penalty for unlicensed pilot.
6312.	Unauthorized pilot to forfeit fifty dollars.		



**Article 6305. [3796] Appointment, term and vacancies.**—The governor is authorized and required to appoint at each of the ports such number of branch pilots as may from time to time be necessary, each of whom shall hold his office for the term of two years. In case of a vacancy in said office, the appointment shall be for the unexpired term. [Act April 17, 1846, p. 79, sec. 1. P. D. 4761.]

**Art. 6306. [3797] Bond and oath.**—Before entering upon the duties of his office, each branch pilot shall enter into bond, with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the governor and his successors in office, and conditioned for the faithful performance of the duties of his office. Such bond shall be approved by the board of commissioners of pilots for the port, or if there be no such board, by the county judge of the county in which the port is situated, and forwarded to the governor, to be by him deposited in the office of the secretary of state. Each pilot shall also take and subscribe the oath of office prescribed in the constitution, which shall be indorsed on said bond, and together with the bond shall be recorded in the office of the clerk of the county court of the county in which such port is situated before being forwarded to the governor; and certified copies of said bonds, under the hand and seal of the county clerk, may be used as evidence in all the courts with like effect as the originals. [Id. sec. 5. Act Feb. 9, 1861, p. 19, sec. 1. P. D. 4765, 4775.]

**Art. 6307. [3798] May appoint deputies.**—Each branch pilot may appoint, subject to examination and approval by the board of commissioners, two deputies, for whose acts the branch pilot so appointed shall be responsible; and any branch pilot who shall appoint a deputy without the approval of said board shall forfeit his own appointment; and the said board shall have authority to restrict all deputy pilots from piloting over the bar vessels of over a certain draught of water. [Id. sec. 8. P. D. 4768.]

**Art. 6308. [3799] Malfeasance and punishment.**—Any branch or deputy pilot who shall be guilty of taking charge of a vessel in a state of inebriety shall, upon proof of the same, for the first offense be suspended for one month, and for the second offense be dismissed and be rendered incapable of again serving in either capacity; and if any branch or deputy pilot shall wilfully or by neglect cause the wreck of a vessel, he shall be dismissed and be rendered incapable of again serving in either capacity, and shall be subject to such punishment as is prescribed by law. [Id. sec. 10. P. D. 4770.]

**Art. 6309. [3800] Pilotage.**—The rate of pilotage on any class of vessels shall not, in any port of this state, exceed four dollars for each foot of water which the vessel at the time of piloting draws, and whenever a vessel, except of the classes below excepted, shall decline the services of a pilot, offered outside the bar, and shall enter the port without the aid of one, she shall be liable to the first pilot, whose services she so declined, for the payment of half pilotage; and any vessel which, after being brought in by a pilot, shall go out without employing one, shall be liable to the payment of half pilotage to the pilot who brought her in, or, if she has come in without the aid of a pilot, though offered outside, she shall, on so going out, be liable for the payment of half pilotage to the pilot who had first offered his services before she came in, but if she has come in without the aid of a pilot, or the offer of one outside, she shall not, in case of going out without a pilot, be liable to half pilotage. At any port where vessels shall receive or discharge their cargoes at an anchorage outside of the bar, such vessel shall be liable to pilotage at the above rate to such anchorage, but shall not be liable for or compelled to pay pilotage from such anchorage to the open sea; and if any vessel bound from the open sea to such anchorage, while under way, shall decline the services of a pilot, and shall

afterward receive or discharge any portion of her cargo at such anchorage, on the lighters or otherwise, she shall be liable for the payment of half pilotage, at the above rate, to such anchorage to the first pilot whose services shall have been tendered to and declined by her, but not liable for any pilotage from such anchorage to the open sea; and when a pilot takes charge of a vessel twenty miles outside of the bar, and brings her to it, he shall be entitled to one-fourth pilotage for such off-shore service, in addition to what he is entitled to recover for bringing her in, but if such off-shore service be declined, no portion of said compensation shall be recovered. [Act Sept. 26, 1866, pp. 14, 15, P. D. 7201. Acts 1879, ch. 89, p. 99.]

**Art. 6310. [3801] Exemptions from extra pilotage.**—The following classes of vessels shall be free from any charge for pilotage, unless for actual service, to-wit: All vessels of twenty tons and under, all vessels of whatsoever burthen owned in the state of Texas and registered and licensed in the district of Texas, when arriving from or departing to any port of the state of Texas; all vessels of seventy-five tons and under owned and licensed for the coasting trade in any part of the United States, when arriving from or departing to any port in the state of Texas; all vessels of seventy-five tons or under owned in the state of Texas and licensed for the coasting trade in the district of Texas, when arriving from or departing to any port in the United States. [Id. p. 15. P. D. 7201.]

*Validity of provisions.*—The provisions of the statute relating to coast wise vessels as distinguished from foreign, are in conflict with the laws of the United States and are void, but these provisions are separable from other provisions of the statute and these latter are not void. *Olsen v. Smith* (Civ. App.) 68 S. W. 321.

**Art. 6311. [3802] Consignee responsible for pilotage.**—The consignee of any vessel shall be held responsible for the pilotage of said vessel. [Act April 17, 1846, p. 79, sec. 12. P. D. 4772.]

**Art. 6312. [3803] Unauthorized pilot to forfeit \$50.**—If any person not appointed a branch or deputy pilot shall pilot any ship or vessel out of or into any port when a branch or deputy pilot has offered such service, the person so piloting shall forfeit and pay to such branch or deputy pilot the sum of fifty dollars, to be recovered before any court having cognizance of the case. [Id. sec. 11. P. D. 4771.]

*In general.*—This article contemplates that under certain circumstances an unlicensed pilot may act. *Olsen v. Smith* (Civ. App.) 68 S. W. 323.

**Art. 6313. [3804] Pilots for mouth of Brazos.**—The governor shall also appoint a sufficient number of competent pilots for the mouth of the Brazos river, whose terms of office, mode of qualification and pilotage shall be the same as prescribed in the preceding articles for branch pilots; and they shall be entitled to all the privileges, and shall exercise all the powers, and discharge all the duties prescribed for branch pilots, and be subject to like penalties. [Act March 18, 1848, p. 144. P. D. 4776, 4782.]

**Art. 6314. [3805] Bond, by whom approved.**—The bonds of pilots for the mouth of the Brazos river shall be approved by the county judge of Brazoria county. [Id.]

**Art. 6315. [3806] Pilots for Matagorda and Lavaca bays.**—The governor shall also appoint not less than two nor more than four competent pilots for Matagorda and Lavaca bays, from Pass Cavallo to Indianola and Lavaca, who shall hold their offices for the same term as branch pilots, and whose mode of qualification, powers and privileges, in so far as the same are applicable, shall be the same; the bonds of such pilots shall be approved by the county judge of Calhoun county. [Act Feb. 9, 1861, p. 19. P. D. 4775.]

**Art. 6316. [3807] To keep channels staked out.**—It shall be the duty of pilots appointed under the preceding article to keep the channels

of said bays properly staked and marked out, and in default thereof they shall be subject to removal or suspension. [Id.]

**Art. 6317. [3808] Pilotage for said bays.**—The rate of pilotage for said bays shall be two dollars and fifty cents for each foot of water the vessel may draw at the time of piloting; and all vessels that may draw five feet or more shall be subject to pay any licensed pilot for said bays, whose services are tendered and declined, one-half the pilotage herein prescribed. [Id.]

**Art. 6318. [3809] Rules for branch pilots applicable.**—All the provisions of this chapter relating to branch pilots at ports, in so far as the same are applicable and not expressly qualified, shall apply to and govern pilots appointed for the mouth of the Brazos river and for Matagorda and Lavaca bays. [Id.]

**Art. 6319. [3810] Penalty for unlicensed pilot.**—If any person not a licensed pilot or deputy shall pilot any vessel into or out of the mouth of said river, or through the channel of said bays, up or down, he shall forfeit and pay to any pilot licensed or commissioned for the mouth of said river, or for said bays, full pilotage for such vessel, to be recovered by suit in any court of competent jurisdiction. [Id.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Enjoining unlicensed pilot.**—In a suit by commissioned branch pilots to restrain an unlicensed pilot from acting as a branch pilot, a contention that, the federal government having deepened the Galveston bar and extended the harbor, plaintiffs were without authority to demand half pilotage, held without merit. *Olsen v. Smith* (Civ. App.) 68 S. W. 320.

In a suit by branch pilots to restrain one not created a branch pilot from acting as such, a contention that plaintiff's statutory remedy was exclusive held of no merit. *Peterson v. Smith*, 30 C. A. 139, 69 S. W. 542.

## TITLE 107A

## POOL HALLS

Art.  
 6319a. Local option elections.  
 6319b. Order for election; where held, etc.  
 6319c. Clerk to post order; election, how conducted.  
 6319d. Ballots, etc.  
 6319e. Laws applicable; report of election; duty of commissioners' court; order prohibiting; evidence.  
 6319f. Order to be published or posted.  
 6319g. Order when vote against prohibition.  
 6319h. Second election after two years, etc.

Art.  
 6319i. Order setting aside previous order prohibiting.  
 6319j. Failure to carry prohibition not to prevent other election, when and where.  
 6319k. Election may be contested, when and how, etc.  
 6319l. Pool hall defined.  
 6319m. Authority of county and district attorneys; injunction.  
 6319n. Evidence; judicial notice, etc.

**Article 6319a. Local option elections.**—The commissioners court of each county in this state may, when they deem it expedient, and shall when petitioned by ten per cent of the qualified voters of a county or a number of the qualified voters, equal to twenty per cent of the qualified voters of any political subdivision hereinafter mentioned, order an election to be held by the qualified voters of said county or of said political subdivision, to determine whether or not pool rooms, as herein defined, shall be prohibited in such county or such subdivision of the county, as the case may be; and in case an election is asked or order for a subdivision of said county composed of two or more complete commissioners or justices precincts or school districts, such petition shall describe such subdivisions by number only, and it shall never be necessary in a petition to more than refer to such precincts and districts by number, which said petition shall be recorded in the minutes of the commissioners court, and the notice of such election shall refer to the same by number only; provided, however, that no city or town shall be divided in holding a local option election, nor shall a school district be divided, but that the same, as an entirety, shall be included in such subdivision when the election is held. [Acts 1913, p. 136, sec. 1.]

**Art. 6319b. Order for election; where held, etc.**—It shall be the duty of said commissioners court, when an election is ordered, to direct that the same be held at the regular voting places within the proposed limits where the election is held, not less than fifteen nor more than thirty days from the date of said order, where it is practicable so to do, and the order made shall express the object of such election and shall be prima facie evidence that everything has been done to give it validity and to clothe the court with jurisdiction to make it; provided, that if there is no regular voting place within the proposed limits the commissioners court shall designate some suitable place within said subdivision where the election shall be held, and said place shall be named in the notices of election, and said court will appoint such officers to hold such election as are now required to hold the same under the general election laws. [Id. sec. 2.]

**Art. 6319c. Clerk to post order; election, how conducted.**—The clerk of said court shall post, or cause to be posted, at least five copies of said order at different places within the proposed limits for at least ten days prior to the day of election, which election shall be held and the returns thereof made in conformity with the provisions of the general laws of the state and by the officers of election appointed and qualified under such laws. [Id. sec. 3.]

**Art. 6319d. Ballots, etc.**—At such election the vote shall be by official ballot, which shall have printed or written at the top thereof in plain letters "Official Ballot," and shall also have written or printed thereon

the words "For the prohibition of Pool Halls," and the words "Against the prohibition of Pool Halls," and the clerk of the county court shall furnish the presiding officer of each voting box within the proposed limits not less than twice the number of ballots as there may be qualified voters at said voting box. The presiding officer of each voting box shall write his name on the back of each ballot before delivering the same to the voter, and the person offering to vote at such election shall at the time he offers to vote be furnished by such presiding officer with one such ballot, and no voter shall be permitted to depart from the room or place where the election is being held with such ballot, and shall not be assisted in voting by any person except by such presiding officer or by some officer assisting in holding such election under the direction of the presiding officer when requested by such voter so to do. Those who favor the prohibition of pool halls within the proposed limits shall erase the words "Against the prohibition of pool halls" by making a pencil or pen mark through the same, and those who oppose it shall erase the words "For the prohibition of pool halls" in a similar way; no ballot shall be received or counted by the officers of such election that is not an official ballot and that has not the name of the presiding officer of such election written thereon in the handwriting of such presiding officer, unless it shall appear that his signature or the words "Official Ballot" were omitted from said ballot by mistake, accident, inadvertence or some cause not involving an intention to commit fraud in regard to said election. [Id. sec. 4.]

**Art. 6319e. Laws applicable; report of election; duty of commissioners' court; order prohibiting; evidence.**—The officers holding said election shall in all respects not herein specified conform to the general election laws in force regulating elections, and after the polls are closed shall proceed to count the votes, and within ten days thereafter make due report of said election to the commissioners court, which court shall hold a special session on the 11th day after the election or so soon thereafter as practicable, for the purpose of opening and counting the votes, and if a majority of the votes are for the prohibition said court shall immediately make an order declaring the result and prohibiting the operation and maintenance of pool halls as defined in this Act, within the prescribed limits until such time as the qualified voters therein may at a legal election held for that purpose, by a majority vote, decide otherwise, and the order thus made shall be held as prima facie evidence that all of the provisions of the law have been complied with in petitioning for the election, ordering the election, giving notices thereof, holding the election, in counting and returning the votes and in declaring the results thereof, and the same shall be absolutely conclusive evidence that said election is valid and legal after the expiration of the time limited herein for a contest. [Id. sec. 5.]

**Art. 6319f. Order to be published or posted.**—The order of the court declaring the result of such election and prohibiting the operation and maintenance of pool halls shall be published for two successive weeks in some newspaper published in the county where such election was held, which paper shall be selected by the county judge for that purpose. If there be no newspaper published in the county the judge shall cause three copies of said order to be posted at three different public places within the prescribed limits for the aforesaid length of time, and the fact of the publication shall be entered by the county judge on the minutes of the commissioners court, but a failure so to do on his part shall in no sense prevent the full operation of said law within the prescribed limits. [Id. sec. 6.]

**Art. 6319g. Order when vote against prohibition.**—If a majority voting at such elections vote against the prohibition the court shall make

an order declaring the results and have the same entered of record in its minutes. [Id. sec. 7.]

**Art. 6319h. Second election after two years, etc.**—No election under the provisions of this Act shall be held within the same prescribed limits in less than two years after an election under this title has been held. Such time shall date from the expiration of the time provided for publication; provided that if no notice is required to be published then such time shall date from the time such result is declared; but at the expiration of the said two years the commissioners court when they deem it expedient and shall when petitioned in the manner as provided for hereinbefore, order another election to be held by the qualified voters of said county or any subdivisions such as are provided for herein, which said election shall be ordered, held, notice thereof given, votes counted and returned and results declared and published in all respects as provided for the first election and the order granting such election, and declaring the results, shall, if the prohibition carried, have the same force and effect and the same conclusiveness as are given to them in the case of a first election by the provisions of this Act. [Id. sec. 8.]

**Art. 6319i. Order setting aside previous order prohibiting.**—When such election results against the prohibition the court shall enter an order setting aside the previous order enforcing the prohibition, and shall officially announce and publish the same as provided where the election resulted in favor of the prohibition. [Id. sec. 9.]

**Art. 6319j. Failure to carry prohibition not to prevent other election, when and where.**—The failure to carry the election in favor of the prohibition of pool halls in any county shall not prevent an election therefor from being immediately held in a justice's precinct, a commissioner's precinct, school district or a territory composed of two or more of such subdivisions, or in a city, town or village of such county as may be designated by the court, or as may be indicated in any petition presented; nor shall the failure to carry prohibition in a town or city or village prevent an election from being immediately thereafter held for the entire county, justice precinct, commissioners precinct, school district or a territory composed of two or more subdivisions in which said town, city or village is situated; nor shall the failure to carry prohibition in any subdivision of a county prevent the holding of an election immediately thereafter in the county or in any subdivision of the county, or in a territory composed of two or more subdivisions of the county of which said justice precinct is a part; but where prohibition has been carried for the entire county no election on the question of prohibition shall be thereafter ordered in any subdivision or a part of said county until after the same has been defeated at a subsequent election ordered and held for the entire county; nor in any case where prohibition has carried in any subdivision or territory of a county designated shall an election on the question be ordered thereafter in any part of said subdivision or territory until after the same has been defeated at a subsequent election ordered and held for the larger precinct, subdivision, or territory. [Id. sec. 10.]

**Art. 6319k. Election may be contested, when and how, etc.**—At any time within thirty days after the result of an election has been declared by the commissioner court any qualified voter within the limits of the territory for which the election is held may contest the same in the district court of the county, which court shall have original and exclusive jurisdiction of all suits to contest the election. The proceedings thereof shall be conducted in the manner as has been or may hereafter be prescribed for contests, and said court shall have jurisdiction to try and determine all matters connected with said election; shall have authority, if necessary, to have ballot boxes opened, ballots recounted and exam-

ned, and shall determine whether because of the action or want of action on the part of the officers to whom were entrusted the contest of such election such a number of legal voters were denied the privilege of voting as had they been allowed to vote might have materially changed the result, and if it shall appear from the evidence that such irregularities existed as to render the true result impossible to be ascertained, or very doubtful, the court shall adjudge said election void and shall order the proper officers to order another election, and shall cause a certified copy of the judgment to be delivered to proper officers upon whom is devolved the duty of ordering such election; that all such cases shall have precedence in the courts of the State, and the result of such contest shall finally settle all questions relating to the validity of said election, and it shall not be legal to again call the legality of any such election in question in any suit or proceeding; provided further that if no contest of said election is filed and prosecuted in the manner and within the time provided above it shall be conclusively presumed that said election as held and the result as declared are in all respects valid and binding upon all courts; and provided that pending such a contest, if prohibition has carried, the enforcement of the prohibition against pool halls in such territory shall not be suspended; and provided further, that on said contest, if it shall appear that there has been a substantial compliance with the provisions of this Act in regard to the petitioning for said election, the ordering of said election, the posting of notices thereof, the holding of the same, and the counting and making returns and opening and canvassing the results and declaring and making publication of the result, the said election shall be held legal unless it is made affirmatively to appear by the contestant that but for the illegalities or irregularities complained of the result of the election would in all reasonable probability have been different. [Id. sec. 11.]

**Art. 6319l. Pool hall defined.**—The term “pool hall” as used herein shall mean and include the following: Any room, hall or building in which are exhibited any pool or billiard table or tables for the purpose of permitting games played thereon for hire, revenue, prize, fees, or gain of any kind. [Id. sec. 12.]

**Note.**—Section 13 makes it a criminal offense to operate a pool hall after an election resulting in favor of prohibition.

**Art. 6319m. Authority of county and district attorneys; injunction.**—After any such county or such subdivision thereof has by vote as prescribed in this Act prohibited the running of pool rooms or pool halls in such county or subdivision thereof, the county attorney of such county or subdivision or the district attorney of the district in which such county is situated, either in term time or vacation, may apply to the district judge of such district for an injunction to prohibit the running of any pool room or pool hall in such territory in which the running of same has been prohibited and if upon hearing the court should determine that pool rooms or pool halls are running in violation of the provisions of this Act he shall issue an injunction permanently prohibiting the running thereof, while the law is in effect prohibiting same. [Id. sec. 14.]

**Art. 6319n. Evidence; judicial notice, etc.**—In any prosecution that may arise under this Act it shall not be necessary for the state to introduce in evidence, any records, order of court, or any copy thereof, in regard to the adoption of said law, but all courts of the county and all appellate courts reviewing any such prosecution shall take judicial knowledge of the existence and validity of said law, and shall give the same in charge to the juries the same as if a part of the penal code of this state. [Id. sec. 15.]

## TITLE 108

## PRAIRIE DOGS—PROVIDING FOR THE EXTERMINATION OF

Art. 6320.	Organized counties to hold elections.	Art. 6325.	Form of ballot and returns.
6321.	Thirty days' notice of election.	6326.	Twelve months allowed to exterminate dogs after publication.
6322.	Order for election.	6327.	Who liable, and measure of damages for failure to comply.
6323.	Election, where held; managers and their pay.	6328.	Venue of suits.
6324.	Qualifications of electors.		

**Article 6320. Organized counties to hold elections.**—In all organized counties in Texas, upon the written petition of fifty freeholders of any such county, the commissioners' court of such county shall order an election to be held on some day named in the order, for the purpose of enabling the freeholders to determine whether or not the prairie dogs shall be exterminated in said county. [Acts 1903, p. 70, sec. 1.]

**Art. 6321. Thirty days' notice of election.**—Upon filing such petition, the commissioners' court, at its next regular term, shall order an election to be held in such county on a day to be designated in the order, not less than thirty days from the date of such order, the election to be held and conducted and the returns thereof made in accordance with the laws regulating general elections in so far as the same are applicable. [Id. sec. 2.]

**Art. 6322. Order for election.**—Immediately after the passage of an order for an election by the commissioners' court, the county judge shall issue an order for such election, giving thirty days' legal notice, said notice reciting the petition and the action of the commissioners' court, and naming the date for said election. [Id. sec. 3.]

**Art. 6323. Election, where held; managers and their pay.**—The election shall be held at the regular election boxes in said county by the regularly appointed managers of elections; and for holding said election, those holding the same shall be paid the legal fees as provided by law for such services. [Id. sec. 4.]

**Art. 6324. Qualifications of electors.**—No person shall vote at any election under the provisions of this title unless he be a freeholder in the county, and is also a qualified voter under the constitution and laws of this state. [Id. sec. 5.]

**Art. 6325. Form of ballot, and returns.**—The ballots to be voted in any such election shall either have written or printed on them, "For extermination of prairie dogs," or, "Against extermination of prairie dogs," and those holding the election shall make within ten days time legal returns showing number of votes cast for and against the same to the county judge of the county, who shall tabulate and count the vote in the presence of the commissioners' court and ascertain the result of said election. [Id. sec. 6.]

**Art. 6326. Twelve months allowed to exterminate dogs.**—If a majority of the votes cast at such election shall be, "For extermination of the prairie dogs," the county judge immediately after counting the votes shall issue his proclamation declaring the result of the election, which proclamation shall be posted at the court house door, and, after the expiration of twelve months from its issuance, it shall be unlawful for any land owner or lessee of land in said county to allow to run at large any prairie dog on any lands owned or leased by him, and it shall be his duty



to kill the same within twelve months from issuance of proclamation by the county judge. [Id. sec. 7.]

**Art. 6327. Who liable, and measure of damages for non-compliance.**—After the issuance of proclamation by the county judge in any county, declaring that the election has been held and that the result was, “For extermination of prairie dogs,” at the expiration of twelve months any land owner, or lessee owning land in said county who shall wilfully fail or refuse to kill the prairie dogs inhabiting his land shall be liable for damages to the owners of contiguous land who have complied with the law; and the measure of damages is hereby fixed at two dollars and fifty cents per month for each and every month that he permits the prairie dogs running on his land to run at large. Any land owner owning adjoining lands, who has in good faith complied with the law and removes the dogs from his lands, should his lands be invaded by prairie dogs from the adjoining land, he may bring a suit for damages against such land owner, the amount of damages being hereby fixed at two dollars and fifty cents per month, and such suits are to be filed in the courts having competent jurisdiction; provided, further, that any party desiring to bring suit must notify the party from whom he claims damages, in writing, ninety days prior to the filing of said suit, and no damages shall accrue until after the expiration of said ninety days; provided, however, that in all cases where lands infested with prairie dogs owned by nonresidents, and such land or lands are being used by some other person, or inclosed under the fence of another who is paying the owner thereof no compensation for the use thereof, then in all such cases the duty herein imposed as to the extermination of such prairie dogs shall devolve upon the person so using such land or lands or having the same inclosed under his fence. [Id. sec. 8.]

**Art. 6328. Venue of suits.**—The venue of all suits for damages under this title shall be in the county or precinct where the lands of the plaintiff are situated. [Id. sec. 8a.]

## TITLE 109

## PRINCIPAL AND SURETY

[See Article 3732.]

Art. 6329.	Surety may require suit to be brought.	Art. 6334.	One surety may have execution against co-surety, when.
6330.	Discharged by failure to sue.	6335.	Sheriff, etc., has same right as surety, when.
6331.	May have question of suretyship tried, when.	6336.	Surety not to be sued alone, unless, etc.
6332.	Execution levied first on property of principal.	6337.	Who is surety within this title.
6333.	Rights of surety who makes payment on judgment.		

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of title.]

**Article 6329. [3811] Surety may require suit to be brought.**—Any person bound as surety upon any contract for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute suit upon such contract. [Act Feb. 5, 1858. P. D. 4783.]

**Who is surety within meaning of act.**—Where one not a payee by indorsing notes, does not intend to assume the obligation of an original promisor, but that of an indorser or surety, he is a surety, within the meaning of this article and Arts. 6330, 6337. *Williams v. Ogg*, 42 C. A. 558, 94 S. W. 422.

**Agreement that no suit should be brought.**—Under this article, an agreement by the holder for a valuable consideration that no suit should be brought on the note for a year, made without the knowledge or consent of the sureties, released them from their obligation. *McKaughan v. Baldwin* (Civ. App.) 153 S. W. 660.

**Notice by surety to creditor to proceed against principal.**—A surety may protect himself by requiring the creditor to sue. It is not the duty of the creditor to give the surety notice that he intends to indulge the principal debtor. Mere forbearance to sue will not discharge the surety if there is no valid contract extending the time. *Behrns v. Rogers* (Civ. App.) 40 S. W. 419.

The payee of a note held not bound to resort to attachment to collect a note from the maker as against sureties thereon. *Robertson v. Angle* (Civ. App.) 76 S. W. 317.

A payee of a note, on notice by sureties to sue the maker, where such suit was within the jurisdiction of either the district or county court, held entitled to bring the suit in either court. *Id.*

Where the maker of a note was insolvent when sureties notified the payee to sue thereon, the payee's failure to sue held no defense to the sureties. *Id.*

The sureties on a builder's bond must, to obtain a discharge, notify the obligee forthwith to institute suit on the contract on the principal abandoning or breaching it. *Dallas Homestead & Loan Ass'n v. Thomas*, 36 C. A. 268, 81 S. W. 1043.

A surety is not discharged because the creditor, after notice to do so, fails to present his claim for payment to the guardian of an insane principal and sue thereon if payment is refused, since, in the absence of statutory authority, a surety cannot require the creditor to proceed against the principal, and this article does not authorize notice to proceed against the estate of an insane principal; and hence an answer alleging such failure was insufficient, especially where it merely alleged the giving of notice and did not allege non-compliance therewith. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

In view of this article, a mere postponement or failure to sue does not discharge a surety, in the absence of agreement to do so. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

**Form and sufficiency of notice.**—A written notice sent by surety on a note to payee held a notice to sue maker. *Sullivan v. Dwyer* (Civ. App.) 42 S. W. 355.

A verbal notice by the surety to the creditor to bring suit against the principal does not release the surety, the notice must be in writing. *Leazar v. Menefee* (Civ. App.) 61 S. W. 438.

Under this article a notice reading: "You will please file claim with the probate court for payment. The estate \* \* \* is now being represented \* \* \* by E. as administratrix, and there is plenty of property or funds there to pay you. Please kindly see to this matter at once, and oblige"—is insufficient, even assuming that this article authorizes a surety to require the creditor to present his claim to the probate court, since such a notice must be a full, explicit, and peremptory demand that suit be brought forthwith, with the further statement that the surety will not be bound any further if that is not done. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

**Art. 6330. [3812] Discharged by failure to sue, when.**—If the creditor or obligee, not being under legal disability, shall fail to bring his suit to the first term of court thereafter, or to the second term, showing good cause why he did not bring it to the first term and pros-

ecute the same to judgment and execution, the surety giving such notice shall be discharged from all liability thereon. [P. D. 4784.]

**Failure of creditor to proceed against principal.**—As to the liability of the surety, when creditor has been negligent in pursuing remedy against principal, see *Parks v. State National Bank* (Civ. App.) 34 S. W. 1044.

A surety on a note after notice to payee to sue the principal is discharged if suit is not brought within the statutory time. *Sullivan v. Dwyer* (Civ. App.) 42 S. W. 355.

The fact that the payee of a note does not sue thereon at the first term of court after maturity does not release the surety. *Rice v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 42 S. W. 1023.

If the payee fails to bring suit after notice in writing by the surety to do so, at the first term, or at the second, and showing good cause for not bringing it at first, the surety will be released. *Leazar v. Menefee* (Civ. App.) 61 S. W. 438.

Facts held to show sufficient diligence on the part of the payee of a note in suing the maker on notice to do so by sureties. *Robertson v. Angle* (Civ. App.) 76 S. W. 317.

Since, on death of a principal, a creditor may look to the surety, and cannot be compelled to first resort to the probate court to collect the debt, a failure to do so after notice did not release the surety. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

A surety is not released by a failure to sue at the first or second term, unless he has given notice in writing to the creditor forthwith to institute suit; consequently an agreement extending the time of payment of the debt of a pledgor does not affect the liability of makers of notes pledged. *Daugherty v. Wiles* (Civ. App.) 156 S. W. 1089.

**Art. 6331. [3813] May have question of suretyship tried, when.**—When any suit is brought against two or more defendants upon any contract, any one or more of the defendants being surety for the others, the surety may, upon a written statement of the matter being set out in his answer, cause the question of suretyship to be tried and determined upon the issue made for the parties defendant at the trial of the cause, or at any time before or after the trial, or at a subsequent term; but such proceedings shall not delay the suit of the plaintiff. [P. D. 4785.]

**Action by creditors—Parties.**—See Art. 6336.

Under this article and Arts. 2000, 3732, 6332, 6333, an estate which was surety on notes secured by a vendor's lien should be made a party defendant in an action against the principal debtor on the notes and to foreclose the lien, in order to enable the executrix of the estate to protect the equitable rights of the estate; and hence the principal could not be proceeded against alone in the district court for a personal judgment, and the claim afterwards prosecuted against the estate in the probate court. *Hume v. Perry* (Civ. App.) 136 S. W. 594.

**Venue.**—Where defendants residing in different counties are sued as joint sureties, and one files a cross-pleading against another alleging that the latter assumed the entire burden of the joint suretyship, and was really the surety or indemnitor of the other sureties, the plea of privilege of the defendant in the cross-action to be sued in the county of his residence was properly overruled. *Hall v. Taylor et al.* (Civ. App.) 95 S. W. 756.

**Art. 6332. [3814] Execution, levied first on property of principal.**—If the finding of such issue be in favor of the surety, the court shall make an order directing the sheriff to levy the execution first upon the property of the principal subject to execution, and situate in the county in which the judgment was rendered, before a levy shall be made upon the property of the surety, if so much property of the principal can be found as will in the opinion of the sheriff be sufficient to make the amount of the execution; otherwise the levy to be made on so much property of the principal as may be found, if any, and upon so much of the property of the surety as may be necessary to make the amount of the execution; and the clerk shall make a memorandum of such order on the execution. [P. D. 4786.]

See *Hume v. Perry* (Civ. App.) 136 S. W. 594.

**In general.**—An appeal having been taken from a joint and several judgment against a principal, supersedeas was sued out by the principal and sureties, except T., who did not join in the writ of error. Pending such appeal the judgment could not be enforced by execution against T. *Wren v. Peel*, 64 T. 375.

This statute cannot be enforced when the principal debtor is dead, with the preservation of the creditor of his right to proceed against the surety since the principal debtor must be proceeded against in the probate court. *Planters' & Mechanics' Nat. Bank v. Robertson* (Civ. App.) 86 S. W. 645.

**Judgment for creditor—Form of.**—It is error to render judgment against a principal and in favor of a surety with direction that execution shall issue in a suit against both, when the surety has not paid the debt and when his right to an execution is not made dependent on his future payment. *Labbe v. Corbett*, 69 T. 503, 6 S. W. 808.

Judgment should be rendered so that execution should be first levied upon the property of the principal. *Montrose v. Fannin County Bank*, 23 S. W. 709.

In an action against the maker and indorser of a note, a judgment which failed to direct that execution should first be levied upon the property of the maker is improper under this article. *Abney v. Citizens' Nat. Bank of Hillsboro* (Civ. App.) 152 S. W. 734.

— Effect of.—When a joint and several judgment is rendered against the principal and sureties, it does not change their relations as to each other as principal and sureties. *Wren v. Peel*, 64 T. 375.

Judgment against sureties of tenant.—See Art. 5484.

Execution against property of surety.—See notes under Art. 3732.

Deposit in court—Effect of.—See Title 37, Chapter 21.

**Art. 6333. [3815] Rights of surety who makes payment on a judgment.**—When any person, being surety in any undertaking whatever, shall be compelled to pay any judgment, or any part thereof, or shall make any payment which is applied upon such judgment by reason of such suretyship, the said judgment shall not be discharged by such payment, but shall remain in force for the use of such surety, and shall be considered as assigned to such surety, together with all the rights of the creditor thereunder, to the extent of the payment thereof made by such surety, and interest thereon; and such surety shall be entitled to have execution thereon in the name of the creditor for the use of such surety against the principal debtor for the full amount of such payment and interest thereon and all costs, which execution shall be issued upon the application of such surety to the clerk, or court, as the case may be, and shall be levied, collected and returned as in other cases. [P. D. 4787.]

See, also, notes at end of title.

In general.—In order for a surety to obtain the benefit of this article and Art. 6331, he should plead the question of the suretyship and have the same adjudicated on the trial of the case. *Tarilton v. Orr*, 40 C. A. 410, 90 S. W. 536.

Rights of surety against creditor.—A surety upon an error bond sued out by one of several joint defendants paying the debt after the judgment had been affirmed is subrogated to the rights of the plaintiff as against all the defendants. *Taul v. Epperson*, 38 T. 492.

Where the original principal in a debt prosecuted a writ of error, and the original surety or indorser of the note afterwards paid the debt, he is entitled to have the judgment against the original defendant and sureties on the supersedeas bond assigned to him, upon the general principle that a surety is entitled to assignment of all collaterals, and that the second surety might have put him in a worse position. *Mitchell v. De Witt*, 25 T. Sup. 180, 78 Am. Dec. 561.

Grantee of surety on injunction bond held, on paying judgment enjoined, entitled to subrogation. *Darrow v. Summerhill*, 93 T. 92, 53 S. W. 680, 77 Am. St. Rep. 833.

Where interveners had paid a judgment existing against property devised to them, by reason of their testator's liability as surety for the payment of another judgment, it was not necessary for them to sue on the original judgment, but they were entitled to pursue an action to subject the land, for the purchase price of which that judgment was obtained, to the payment of their claim. *Darrow v. Summerhill*, 24 C. A. 208, 58 S. W. 158.

The sureties on the bond of a defaulting county treasurer may bring in a bank who has misappropriated the funds as a surety and be subrogated to the rights of the county against the bank in the same action. *Skipwith v. Hurt*, 94 T. 322, 60 S. W. 423.

Where a judgment against a principal and surety was paid by the surety without satisfying the same of record, the surety was subrogated to the lien of the judgment, and he or his assignee could foreclose the same. *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Civ. App.) 78 S. W. 239.

Right to contribution in general.—See, also, notes at end of title.

A surety paying a judgment is entitled to have execution thereon in the name of the creditor, against the principal debtor; also against the cosurety for half the amount. *Ernst v. Brewing Ass'n* (Civ. App.) 26 S. W. 457.

Under this article and Art. 6331, a surety who has paid a judgment is not precluded from thereafter seeking contribution against a cosurety of his proportionate part in an action of implied assumpsit. *Eubanks v. Sites* (Civ. App.) 146 S. W. 952.

Jurisdiction.—When suit is brought in the county court on a note secured by the vendor's lien, a surety on the note cannot defeat the jurisdiction of the county court by pleading such lien. The most that the new surety could claim would be the right of subrogation in case he should pay the judgment. *Crozier v. Stephens*, 2 App. C. C. § 801.

Judgment.—A judgment against the maker and surety on a note should conform to Art. 6333. *Dignowity v. Staacke* (Civ. App.) 25 S. W. 824.

It is proper for the court to render judgment over in favor of the guarantor against his principal even without pleading of the guarantor in a case where judgment was rendered against the guarantor. *Slaughter v. Moore*, 17 C. A. 233, 42 S. W. 372.

An entry providing for execution in favor of indorser in case of payment by him is but a formal declaration of a right plainly given him by this article and Art. 6337. No pleading on the part of the indorser is necessary as a basis for such judgment. *Kyle v. Richardson* (Civ. App.) 71 S. W. 400.

Under this article and Arts. 6331, 6332, 6337 indorsers of a purchaser's note, secured by a vendor's lien, who are parties to the holder's suit thereon and for foreclosure, and who by cross-bill ask judgment over against the purchaser, are entitled to the judgment prayer in the same amount as plaintiff's judgment against them, and to have execution for any sums that may be paid out by them by reason of the judgment. *Blake v. Vesey* (Civ. App.) 143 S. W. 221.

P., S., T., and N. subscribed to corporate stock, each to take in severally a fourth part of the stock subscribed, and gave their joint note for the subscription price. In an action on the note, N. answered by general denial; T. answered by setting up the transaction out of which the note arose, and alleged that each of the defendants was primarily liable for a fourth of the note, and liable as surety for each of the others in a like amount. P. and S. answered that they signed the note as sureties for T. and N. The judgment found against the four defendants jointly for the full amount of the note, and recited that, if either of the defendants should pay to the plaintiff more than one-fourth of the judgment, he should, as to the excess so paid, become subrogated to the rights of the plaintiff against the other defendants. Held, that the recitals in the judgment as to the right of contribution and subrogation were in response to T.'s answer, and not to that of P. and S., and the judgment was one imposing a joint liability with a several right of contribution and subrogation; and hence, where T. paid the entire judgment, he was entitled to have execution issued in his favor against the other defendants to enforce contribution to the extent of three-fourths of the amount thereof, as authorized by this article and Arts. 6331, 6634; the rule that, where a judgment is rendered against several persons jointly, without provisions therein for the right of contribution or subrogation, the judgment is extinguished by a payment by one of the judgment debtors, so that his remedy for contribution is by a separate action, not applying. *Polk v. Seale* (Civ. App.) 144 S. W. 329.

Under this article and Art. 6337 a judgment against the maker and indorser of a note, which, after decreeing the amount due plaintiff, ordered that the indorser should recover from the maker the amount he might be compelled to pay on the judgment, is not improper as making no reference to the verdict, whereby the sum due the indorser might be ascertained, and entirely omitting the statement of that amount. *Abney v. Citizens' Nat. Bank of Hillsboro* (Civ. App.) 152 S. W. 734.

**Art. 6334. [3816] One surety may have execution against a co-surety, when.**—Should there be more than one surety, and one or more of them has failed to pay his proportionate part of the judgment, execution may issue, as provided in the preceding article, against the principal for the use of the surety who has paid more than his proportionate part for the whole amount paid by him and interest thereon, and also against his co-sureties for their proportionate part of the excess so paid by him, and interest thereon. [P. D. 4788.]

See *Polk v. Seale* (Civ. App.) 144 S. W. 329.

**Art. 6335. [3817] Sheriff, etc., has same rights as surety, when.**—If a sheriff or other officer shall be compelled to pay any judgment, or any part thereof, by reason of any default of such officer, except for failing to pay over any money collected, or for wasting property levied on, such sheriff or other officer shall be entitled to have execution therefor against the principal defendant in such judgment as provided in the case of a surety. [P. D. 4787.]

**Art. 6336. [3818] Surety not to be sued alone, unless, etc.**—No surety shall be sued, unless his principal is joined with him, or unless a judgment has previously been rendered against his principal, except in the cases provided for in article [1843].

See *Shropshire v. Smith* (Civ. App.) 37 S. W. 470.

**Foreclosure proceedings.**—The statute limiting right to sue sureties held inapplicable in proceeding to foreclose deed of trust out of court, through intervention of trustee. *Duncan v. Hand* (Civ. App.) 87 S. W. 233.

**Parties.**—See Arts. 1842-1844, 1897.

The plaintiff is not required to make the principal a party to the suit when not otherwise required so to do, or to exhaust the estate of the principal who is dead before enforcing the judgment against the surety. *Foster v. Champlin*, 29 T. 22; *Hooks v. Bramlette*, 1 App. C. C. § 866.

One of several joint promisors, not signing as a surety, cannot plead that he is a surety for the purpose of requiring the alleged principal to be jointly or simultaneously sued. *Hooks v. Bramlette*, 1 App. C. C. § 863; *McDonald v. Holt*, 1 App. C. C. § 1014, citing *Lewis v. Riggs*, 9 T. 164; *Ritter v. Hamilton*, 4 T. 325; *Ennis v. Crump*, 6 T. 85.

When it was recited in the judgment that the suit was dismissed as to a defendant principal because he is insolvent, the surety cannot complain on appeal when he has not put in issue the truth of the suggestion. *Hooks v. Bramlette*, 1 App. C. C. § 863, citing *Lewis v. Riggs*, 9 T. 164; *White v. Leavitt*, 20 T. 704.

Under this article and Arts. 6337 and 3452, a judgment could not be obtained against the estate of one who was a guarantor of the debt sued on so as to make the estate a surety, without joining the principal in the suit, or unless judgment had been previously rendered against the principal in an independent proceeding. *Hume v. Perry* (Civ. App.) 136 S. W. 594.

**Sureties joined as parties.**—See Arts. 1843, 1845.

**Art. 6337. [3819] Who is surety within this title.**—The remedy provided for sureties by this title extends to indorsers, guarantors, drawers of bills which have been accepted, and every other suretyship,

whether created by express contract, or by the operation of law. [P. D. 4789.]

See notes under Art. 6329.

Official bonds.—See Title 99.

Surety companies.—See Title 71, Chapter 13.

Guardian's bond—Citation against sureties.—See Title 64, Chapter 15.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

- I. **Creation and existence of relation.**
    1. Guaranty accompanying suretyship obligation.
    2. Validity of obligation of principal.
    3. Creation of relation in general.
    4. Implied contracts.
    5. Change from principal debtor to surety.
    6. Change from surety to principal debtor.
    7. Notice to creditor of relation.
    8. Execution of written instruments.
    9. — Conditional signature.
    10. Delivery of written instruments.
    11. — Acceptance and notice thereof.
    12. Consideration.
    13. Mistake.
    14. Fraud.
    15. Evidence of existence of relation.
    16. Estoppel or waiver as to defects or objections.
    17. Guaranty companies.
  - II. **Nature and extent of liability of surety.**
    18. General rules of construction.
    19. Scope and extent of liability in general.
    20. Commencement of liability.
    21. Conditions of liability.
    22. Duties of office or employment, and performance thereof by principal.
    23. Performance of contract by principal.
  - III. **Discharge of surety.**
    24. Provisions of contract of suretyship in general.
    25. Subsequent release or agreement.
    26. Operation of law in general.
    27. Death of principal.
    28. Death of surety.
    29. Change in obligation or duty of principal.
    30. Alteration of instrument.
    31. Change in parties to obligation secured.
    32. Extension of time for payment or other performance.
    33. — Requisites and validity of agreement in general.
    34. — Consideration.
    35. Taking additional or substituted security.
    36. Payment or other satisfaction by principal.
    37. Misapplication of funds or securities by creditor.
    38. Release or loss of other securities.
    39. Release of cosurety.
    40. Unauthorized payment to principal.
    41. Discharge of principal without payment or satisfaction.
  42. Negligence of creditor in general.
  43. Failure to terminate employment or contract after default.
  44. Neglect to give notice to surety of default.
  45. Neglect to act or proceed against principal.
  46. Reservation by creditor of rights against surety in transactions with principal.
  47. Consent by surety to transactions between creditor and principal.
  48. Waiver or estoppel of surety.
  49. Payment or other satisfaction by surety.
- IV. **Remedies of creditors.**
    50. Rights of action against surety.
    51. Defenses by surety.
    52. Conclusiveness of former adjudication in action against principal or surety.
    53. Recourse to indemnity to surety.
    54. Pleading.
    55. Evidence.
    56. Instructions and questions for jury.
    57. Execution.
  - V. **Rights and remedies of surety.**
    - (A) *As to creditor*
      58. Recourse to and exhaustion of remedy against principal.
      59. Recourse to and exhaustion of other securities.
      60. Recovery of payments to or money received by creditor.
    - (B) *As to principal*
      61. Right of recourse to principal, in general.
      62. Contracts and conveyances for indemnity.
      63. Rights of surety after payment or satisfaction by him of debt or liability.
      64. Actions against principal.
    - (C) *As to cosureties*
      65. Relation between cosureties.
      66. Obligations constituting parties cosureties.
      67. Recourse to indemnity to cosurety from principal.
      68. Right to contribution in general.
      69. Measure of contribution.
      70. Conclusiveness as between cosureties of adjudication against principal or surety.
      71. Actions between cosureties.

#### I. CREATION AND EXISTENCE OF RELATION

1. Guaranty accompanying suretyship obligation.—One signing a note as surety may by provisions thereof also guarantee payment for future purchases on open account by the principal debtor of the payee. *Bassham v. Robertson* (Civ. App.) 154 S. W. 1065.

2. Validity of obligation of principal.—A bond made to secure performance by a corporation of an ultra vires contract is binding on the sureties. *Mitchell v. Hydraulic Bldg. Stone Co.* (Civ. App.) 129 S. W. 148.

Sureties held liable for beer sold principal, notwithstanding indefiniteness of executory contract between principal and brewer. *Terry v. Texas Brewing Co.* (Civ. App.) 130 S. W. 184.

3. Creation of relation in general.—In an action on a note brought by a transferee a special answer alleged that at the time defendant B. executed the note he was a surety for a codefendant, that it was agreed that the cosurety's husband would sign as principal, that at maturity B. informed the payee in writing that he was only a surety and instructed the payee to sue thereon, and that the cosurety had property which could have been

made liable. Held, that B. was not entitled to protection as surety, but was in legal effect a principal, it not appearing that the payee was a party to the agreement of the husband to sign as principal. *Wright v. Hulme* (Civ. App.) 147 S. W. 340.

4. **Implied contracts.**—An accommodation acceptor who has been obliged to pay the bill, though primarily liable to the payee as between himself and drawer, is entitled to be regarded in the light of a surety for the drawer. *Sublett v. McKinney*, 19 T. 438.

Circumstances under which a loan was made held to show prima facie that one of the makers of the note for the loan was only a surety. *Devine v. United States Mortg. Co. of Scotland* (Civ. App.) 48 S. W. 585.

Where a mortgagor executed another mortgage to his grantee, on other property, as security for his agreement to discharge the mortgage on the premises granted, held, that the grantee was a surety to the extent of the interest conveyed by the later mortgage. *Magill v. Brown*, 20 C. A. 662, 50 S. W. 143, 642.

An agreement held not to make land, on which was a mortgage, only a surety for the mortgage debt. *Heard v. Thrasher* (Civ. App.) 71 S. W. 803.

Where a mortgage is given to secure the notes of a third party, the mortgagors, though not parties to the notes, become sureties thereon to the extent of their interests in the land, which is treated as surety or guarantor. *Planters' & Mechanics' Nat. Bank v. Robertson* (Civ. App.) 86 S. W. 643.

Assumption of payment of notes held to create relation of principal and surety with maker. *Long v. Patton*, 43 C. A. 11, 93 S. W. 519.

Where one assumes payment of a note as consideration for a transfer, the relation of principal and surety is created between the original and new debtor. *Hawkins v. Western Nat. Bank of Hereford* (Civ. App.) 145 S. W. 722.

An agreement between defendant and plaintiff, from whom defendant purchased lumber which plaintiff had purchased, and for which he gave purchase-money notes to a bank, secured by lien, by which defendant agreed to assume plaintiff's purchase-money notes, would not make defendant liable merely as surety as to the bank. *Continental State Bank of Beckville v. Trabue* (Civ. App.) 150 S. W. 209.

5. **Change from principal debtor to surety.**—The maker of a note secured by mortgage does not become a mere surety as to the note because, when he afterwards conveys the mortgaged property to R., he informs the payee thereof, and tells it that it must look to R. as the principal obligor, and to himself as surety only; the payee not consenting or agreeing thereto. *Witt v. Amarillo Nat. Bank* (Civ. App.) 135 S. W. 1108.

6. **Change from surety to principal debtor.**—When the money of a ward is loaned by the guardian to a firm composed of the guardian and one of the sureties on his bond, such surety becomes a principal debtor as between himself and his co-surety, from whom the co-surety, after payment of the debt, would be entitled to recover all he paid. *Robertson v. Tonn*, 76 T. 535, 13 S. W. 385.

7. **Notice to creditor of relation.**—In a suit by an executor on a note given to testator, testator's knowledge that certain defendants were sureties held not proved by evidence that another defendant, whose sureties they were, paid the interest. *Coffin v. Loomis* (Civ. App.) 41 S. W. 511.

8. **Execution of written instruments.**—One employed as agent to make a contract for another, but who signs as an obligor, is liable thereon as surety. *Tabet v. Powell*, 39 C. A. 465, 88 S. W. 273.

A building contractor's bond executed by the sureties held binding on them, though the contractor did not sign it. *Wright v. Jones*, 55 C. A. 616, 120 S. W. 1139.

A bond signed by the sureties is not void merely because it is not signed by the principal. *Mitchell v. Hydraulic Bldg. Stone Co.* (Civ. App.) 129 S. W. 148.

A bond signed by sureties held valid as to them, though not signed by the principal. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

9. — **Conditional signature.**—One who signs a joint obligation upon an agreement between all the parties thereto that he is but a surety, and shall not be bound unless the name of another party is procured, is not bound by a subsequent verbal promise to pay. *Loving v. Dixon*, 56 T. 75.

Where the obligee on an official bond had notice, before it was filed with and approved by him, of a stipulation between the principal and his surety that said surety should not be bound unless additional signatures were secured, held, surety not liable where the stipulation is not fulfilled. *McFarlane v. Howell*, 16 C. A. 246, 43 S. W. 315.

Violation of a surety's oral agreement with principal maker, of which payee had notice, to obtain another solvent surety before delivery of a note, held a good defense to payee's action against the surety. *Large v. Parker* (Civ. App.) 56 S. W. 587.

Where a surety signed a convict bond on a condition precedent to his liability, and the payee, on accepting the bond, knew of such condition, which never was fulfilled, the surety was not liable on the bond. *Gatling v. San Augustine County*, 25 C. A. 283, 61 S. W. 432.

A surety held not relieved from liability by an agreement with the principal. *Forrest v. White Sewing Mach. Co.* (Civ. App.) 67 S. W. 340.

A surety, though signing on condition that another sign as surety, which was not done, is liable; the bond having been delivered without the obligee knowing of the condition. *Seaton v. McReynolds* (Civ. App.) 72 S. W. 874.

Bond signed by sureties on condition, expressed by one of them only, that third person would sign, held of no validity against either, if not signed by third person. *Norris v. Cetti*, 35 C. A. 28, 79 S. W. 641.

Failure to obtain an agreed number of sureties on the bond held to discharge the sureties obtained. *French, Finch & Co. v. Hicks*, 52 C. A. 427, 114 S. W. 691.

Where a party signs as surety on condition that another should sign, he will not be afforded relief if the other does not sign, unless the obligee is notified of the condition. *First Nat. Bank v. Burns* (Civ. App.) 126 S. W. 34.

An agreement between sureties on a note held not binding on the payee, unless he had notice thereof, and that it had been violated before he took the note. *Hess v. Schaffner* (Civ. App.) 139 S. W. 1024.

The defense that a bond was not to be used by the principal unless he procured other sureties is insufficient, where the bond provided that no agreement that other persons

should sign it should be a defense. *White Sewing Mach. Co. v. Wingo* (Civ. App.) 152 S. W. 187.

One signing an obligation as surety, on condition that another shall also sign it, is not bound when the other does not sign it, if the obligee has notice of the condition, but, where the obligee has no knowledge of the condition, the surety is liable. *Wharton v. Fidelity Mut. Life Ins. Co. of Philadelphia* (Civ. App.) 156 S. W. 539.

10. **Delivery of written instruments.**—A note payable to a named person or bearer, and delivered by the maker to a third person, is void as to the sureties. *Battle v. Cushman* (Civ. App.) 33 S. W. 1037.

11. — **Acceptance and notice thereof.**—Sureties in a bond conditioned on the principal therein performing certain acts enumerated are not entitled to notice of the acceptance of the bond by the obligee therein. *Haupt v. James Cravens & Co.*, 56 C. A. 253, 120 S. W. 541.

12. **Consideration.**—A surety to a note without consideration is not bound thereby. One who signs a note as surety after it is executed, no other consideration intervening, is not liable. *Simmang v. Farnsworth* (Civ. App.) 24 S. W. 541.

A creditor's acceptance of notes for a debt due held a valid consideration to support the obligation of accommodation sureties. *Hannay v. Moody*, 31 C. A. 88, 71 S. W. 325.

The release of a cosurety from liability and the dismissal of an action on the debt secured is a sufficient consideration for a note and the collateral agreement to become liable instead of such cosurety. *Wash v. D. Sullivan & Co.* (Civ. App.) 84 S. W. 368.

A promise as guarantor or surety to pay an executed contract of indebtedness of a third person, without additional consideration, is not binding. *Bluff Springs Mercantile Co. v. White* (Civ. App.) 90 S. W. 710.

13. **Mistake.**—Where an insurance agent had been appointed district manager before the execution of his bond, his sureties cannot claim freedom from liability for his acts as such, on the ground that they supposed they were executing a bond for a soliciting agent only. *Foster v. Franklin Life Ins. Co.* (Civ. App.) 72 S. W. 91.

14. **Fraud.**—A surety on a building contractor's bond held put on notice so as to make it his duty to make inquiry in the absence of which mere silence of the obligee was not fraud precluding a recovery on the bond. *United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works* (Civ. App.) 132 S. W. 536.

In an action by a surety, who had paid a judgment, to compel contribution of a cosurety, a defense charging fraud in obtaining defendant's signature and a forged indorsement, but failing to implicate the plaintiff, held insufficient. *Eubanks v. Sites* (Civ. App.) 146 S. W. 952.

15. **Evidence of existence of relation.**—See notes under Art. 3687, Rule 20.

16. **Estoppel or waiver as to defects or objections.**—One who has signed a note as surety for another to be used for a particular purpose, on being informed that it could not be so used, should promptly notify the payee that he was no longer bound by his signature; otherwise he may be held on the note if afterwards used for the purpose originally intended. *Early v. Chamberlain*, 1 App. C. C. § 921.

Sureties, who, after signing, delivered the bond to the principal, held estopped to deny liability, though the principal failed to sign it. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

17. **Guaranty companies.**—See notes under Title 71, Chapter 13.

## II. NATURE AND EXTENT OF LIABILITY OF SURETY

18. **General rules of construction.**—If the bond of a surety company insuring the performance of a building contract is susceptible of two constructions, one favorable and the other unfavorable to the surety company, the latter, if consistent with the object for which the contract was made, must be adopted. *American Surety Co. of New York v. San Antonio Loan & Trust Co.* (Civ. App.) 98 S. W. 387.

Suretyship contracts are to be strictly construed, and uncertainties and ambiguities resolved in favor of the surety. *American Surety Co. of New York v. Koen*, 49 C. A. 98, 107 S. W. 938.

The liability of sureties cannot be extended by construction. *McClary v. Trezevant & Cochran* (Civ. App.) 112 S. W. 954.

A bond must be strictly construed according to its terms, and cannot be extended by implication, so as to make sureties liable beyond its stipulations. *Campbell-Root Lumber Co. v. Smith* (Civ. App.) 148 S. W. 1195.

A surety can be held only upon the very terms of his contract. *Bomar v. Gahagan* (Civ. App.) 152 S. W. 689.

19. **Scope and extent of liability in general.**—Any person capable of contracting may create a lien on his property to secure the debt of another without subjecting himself to any further obligation than the lien contract imposes. *Hodges v. Roberts*, 74 T. 517, 12 S. W. 222.

Sureties on a county judge's bond held not liable for the judge's misappropriation of the proceeds of school lands sold by him under an appointment of the commissioners' court. *Henderson County v. Richardson*, 15 C. A. 699, 40 S. W. 38.

Though a principal separately bound himself to pay in a particular place, the sureties are not bound by his contract, but by their bond. *Chamberlain v. Fox* (Civ. App.) 54 S. W. 297.

An owner suing a contractor and the surety on his bond, conditioned to secure faithful performance of the contract, held entitled to recover the amount it would cost above the contract price to remedy the defects and complete the work according to the contract. *American Surety Co. v. Lyons*, 44 C. A. 150, 97 S. W. 1080.

Where promissory notes are secured by a deed of trust of property, which deed fixes the compensation of the trustee in case of sale, sureties on the notes are bound thereby, and cannot claim that the trustee was entitled to a reasonable sum only. *Bolton v. G. C. Gifford & Co.*, 45 C. A. 140, 100 S. W. 210; *Sorrel v. Same* (Civ. App.) 100 S. W. 212; *Seeligson v. Same*, Id.



Under a certain bond referring to the employment of the principal, the sureties held bound only for cash advancements, and not for other obligations of the principal covered by the contract of employment. *Turner v. National Cotton Oil Co.*, 50 C. A. 468, 109 S. W. 1112.

A surety in a bond of an insurance agent held not liable for the failure of the agent to pay a premium note procured from an insured, and indorsed and delivered to the general agent of insurer. *McClary v. Trezevant & Cochran* (Civ. App.) 112 S. W. 954.

In the absence of fraud or collusion, when a principal is concluded, the sureties are also concluded. *Wiseman v. Swain* (Civ. App.) 114 S. W. 145.

The obligation of the surety cannot be extended beyond the terms of his bond, nor to those not parties thereto. *United States Fidelity & Guaranty Co. v. Jasper*, 56 C. A. 236, 120 S. W. 1145.

The liability of an accommodation surety cannot be extended beyond the strict letter of the contract. *May v. Chicago Crayon Co.* (Civ. App.) 147 S. W. 733.

**20. Commencement of liability.**—Sureties are not liable for defaults taking place before the execution of the bond, unless made so by its terms. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

**21. Conditions of liability.**—Agreement by a seller with the buyer's surety that other notes should not mature before the one on which the surety was liable held supported by sufficient consideration. *Reeves & Co. v. Jowell* (Civ. App.) 140 S. W. 364.

**22. Duties of office or employment, and performance thereof by principal.**—For liability on particular statutory bonds, see notes under the particular statutory provisions.

The sureties on a mail contractor's bond to the United States are responsible only to the government on a breach of the bond; their obligation as sureties is strictissimi juris, and they are not responsible to the citizen as sureties on such bond for a failure of their principal to deliver mail packages, whereby damages result. *McRea v. Williams*, 58 T. 328.

The sureties on the bond of the treasurer of a corporation are liable for the subsequent misappropriation of funds in his hands at the time the bond was executed. *Barry v. Screwman's Ass'n*, 67 T. 250, 3 S. W. 261.

The sureties on a bond conditioned for the faithful performance of the duties of agent of an insurance company are bound for advances made to the principal by the obligees under whom he worked. *Chamberlain & Gillette v. Hodgetts* (Civ. App.) 99 S. W. 161.

A bond given by an insurance agent held breached, rendering the sureties liable thereon. *Haupt v. James Cravens & Co.*, 56 C. A. 253, 120 S. W. 541.

Where a contract between a crayon company and an agent, appointing the agent as district manager, only required him to solicit orders for frames and the enlargement of portraits and collect money for the portraits and frames, making him responsible for an accounting of his subagents for money collected and money advanced to them in carrying on the business, the agent was not bound to account for money collected for the sale of wire for use on the portrait frames, so that the surety was not liable for the agent's default in accounting for such money. *May v. Chicago Crayon Co.* (Civ. App.) 147 S. W. 733.

**23. Performance of contract by principal.**—A statement appended to a contract held to render the signers responsible for performance of the agreement. *Clark v. Turk* (Civ. App.) 50 S. W. 1070.

In an action for breach by a contractor against his assignees and their sureties on a bond given for the completion of a building in accordance with the contract, facts held to entitle the contractor, as against the sureties, to a credit for damage for delay in completing the building. *American Surety Co. v. Lucas* (Civ. App.) 57 S. W. 969.

A contractor who transferred his contract, taking a bond for completion of the building, as against the sureties of his assignees in an action on the bond for breach of contract, held liable to account for the excess over \$5,000 allowed in his settlement with the builder on an order directing the latter to pay to a bank \$5,000, or so much as might be advanced by it out of the next estimate. *Id.*

Contractor's surety on a building contract held entitled under the terms of the contract to a return of collateral deposited by him, if the owner paid no more than the contract price for the completion of the building, though the contractor abandoned the work. *Essex v. Murray*, 29 C. A. 368, 68 S. W. 736.

Sureties on the bond of a building contractor held bound by determination of architect as to what items were necessary to complete the contract on its abandonment by the contractor. *Dallas Homestead & Loan Ass'n v. Thomas*, 36 C. A. 268, 81 S. W. 1041.

Sureties upon a contractor's bond held bound by the agreement to arbitrate. *Bell v. Campbell* (Civ. App.) 143 S. W. 953.

### III. DISCHARGE OF SURETY

**24. Provisions of contract of suretyship in general.**—Generally a surety is discharged by disregard of conditions imposed as security to himself. *Reeves & Co. v. Jowell* (Civ. App.) 140 S. W. 364.

**25. Subsequent release or agreement.**—Creditor held not estopped to proceed against surety by creditor's attorney's representation that principal's administratrix would pay claim, where surety was not prejudiced thereby. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

**26. Operation of law in general.**—The grounds of release of an indorser are not available to a surety. *Kellogg v. Bank* (Civ. App.) 26 S. W. 856.

Sureties on a lessee's bond conditioned to put certain machinery into the building held not released by the facts that the property put in was subject to a lien, that some of it was released, and some rent paid, unless the quantity of property put in complied with contract. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

An indorser of commercial paper will ordinarily be released by the same acts that will release a surety. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

A surety on a contract to indemnify a subsequent purchaser for the nonpayment of a vendor's lien note was not discharged as indemnitor by his principal's fraud in procuring the release of the lien note, or by an indorsee's failure to obtain a written transfer of the note; he not having been induced to sign the note by the vendee's acceptance of the release or indorsee's failure to record such transfer. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

A requested instruction to the effect that acts of the principal debtor committed after the making of the guaranty are not binding on the guarantor, where not ratified by him, held improperly refused. *Ball-Carden Co. v. Humphrey* (Civ. App.) 154 S. W. 595.

27. **Death of principal.**—On death of the principal the creditor may look to the surety. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

28. **Death of surety.**—At common law, when the surety on a joint obligation dies, there is no remedy at law on the obligation against his estate. By the act of February 5, 1840 (4th Cong., p. 73), the estate of those jointly bound with another was liable after the death of the former, the same as if the obligors had been bound severally as well as jointly. *Bergstroem v. State*, 53 T. 95; *Mays v. Cockrum*, 57 T. 353; *Glasscock v. Hamilton*, 62 T. 143. This act was repealed by Revised Statutes 1895 (Final Title, § 4), but its provisions were re-enacted by the act of March 10, 1887 (20th Leg., p. 17, ante, Art. 3438). See *Boyd v. Bell*, 69 T. 735, 7 S. W. 657.

The intention of the indorsers being to make themselves severally as well as jointly bound with the principal, the death of one indorser did not relieve his estate from liability. *Latham v. Flour Mills*, 68 T. 127, 3 S. W. 462.

29. **Change in obligation or duty of principal.**—A surety is discharged by a valid agreement, made without his consent, varying the original contract in any material particular, whether to his benefit or prejudice. *Lane v. Scott*, 57 T. 367; *Ryan v. Morton*, 65 T. 258. Where the principal debtor and creditor, without consent of the surety, enter into a valid agreement by which the original contract is altered, with intent to change its effect, and with knowledge on the part of the creditor of the relation of principal and surety, the latter is discharged. *Clark v. Cummings*, 84 T. 610, 19 S. W. 798.

Liability of sureties on official bond cannot be varied by private agreement with their principal. *Coe v. Nash* (Civ. App.) 40 S. W. 235.

A surety on a contractor's bond for the erection of a building held discharged by an alteration of the contract. *House v. American Surety Co.*, 21 C. A. 590, 54 S. W. 303.

An insurance agent's bond held to contemplate a recovery after agreements changing his duties, and hence the fact that defalcations occurred while filling the position of district manager was no defense to the liability of the sureties. *Foster v. Franklin Life Ins. Co.* (Civ. App.) 72 S. W. 91.

Where a contract of employment was materially changed without the consent of the employer's accommodation sureties, they were discharged from liability on his bond. *Cudahy Packing Co. v. Shepard*, 37 C. A. 1, 82 S. W. 786.

A deed of trust held not to authorize one of the grantors to change the debt secured from an open account to a note, imposing an increased liability, as against one of the signers of the deed, who was a mere surety. *Casey-Swasey Co. v. Anderson*, 37 C. A. 223, 83 S. W. 840.

Sureties in a bond conditioned on the principal therein constructing a building according to certain plans are released where without their consent the plans are subsequently materially changed. *Thompson v. Chaffee*, 39 C. A. 567, 89 S. W. 235.

The sureties on a note given by a shipper of cotton to a factor for advances held not released by a transaction in accordance with the general custom of the market of which they had notice. *Kempner v. Patrick*, 43 C. A. 216, 95 S. W. 51.

Where in a building contract the right of the owner to make changes in the plans is reserved, a surety on the contractor's bond is not discharged by the exercise of the right by the owner. *American Surety Co. of New York v. San Antonio Loan & Trust Co.* (Civ. App.) 98 S. W. 387.

The owner in a building contract may waive compliance with a provision that no alteration or extra work is to be done except on the price and additional time necessary to complete the same being agreed upon and indorsed on the contract, without discharging the surety on the contractor's bond. *Id.*

Generally any material change in a contract for the performance of which a bond is given, without the surety's consent, will release the surety, whether the change is for his benefit or not. *Loneragan v. San Antonio Loan & Trust Co.*, 101 T. 63, 104 S. W. 1061, 106 S. W. 876, 129 Am. St. Rep. 803.

A compensated surety on a bond to perform a contract held discharged from liability by material changes in the contract without his consent. *Id.*

Failure to comply with a provision of a building contract held not subject to waiver so as not to discharge the contractor's surety on it being disregarded. *Id.*

A surety in a building contractor's bond held released from his obligations by reason of changes made in the building. *Luling Oil & Mfg. Co. v. Gohmert*, 50 C. A. 606, 110 S. W. 772.

Under the terms of a building contractor's bond, the sureties held not discharged by a subsequent agreement that the president of the contracting company should pay it the first installment of the price, and receive a credit therefor in satisfaction of his personal debt to the owner. *Zang v. Hubbard Building & Realty Co.* (Civ. App.) 125 S. W. 85.

A surety is discharged by a valid agreement made without his consent, varying the original contract in any material particular, whether the change be to his benefit or prejudice. *Id.*

The surety on one of several notes given for the price of machinery held entitled to discharge for breach of a condition imposed by him. *Reeves & Co. v. Jowell* (Civ. App.) 140 S. W. 364.

Where a subcontract provided for payments to the subcontractor of 85 per cent. of estimates, but the contractor agreed to make advancements for necessary materials and labor, which exceeded the contract price, there was a material change in the contract which relieved the subcontractor's sureties from liability. *McKnight v. Lange Mfg. Co.* (Civ. App.) 155 S. W. 977.

Where, by a material change in a subcontractor's contract, excessive payments were made which discharged his sureties, it was immaterial that they were necessary to enable the subcontractor to complete the job. *Id.*

A surety on a bond which binds him to all changes or modifications made in the contract between the obligor and obligee is not discharged from liability because of material modifications. *Wharton v. Fidelity Mut. Life Ins. Co. of Philadelphia (Civ. App.) 156 S. W. 539.*

As respects a surety on a building contractor's bond, a provision of a contract for the construction of a schoolhouse that a supervising architect be employed was not altered by a member of the school board, who was a practical contractor, though not a professional architect, agreeing with the other members to act as such supervisor. *General Bonding & Casualty Ins. Co. v. Beckville Independent School Dist. (Civ. App.) 156 S. W. 1161.*

Where, in a building contract, there is nothing making it binding on the owner to employ a certain person named by inference as the supervising architect, a verbal agreement that such person is not to be so employed, made without the consent of the surety on the contractor's bond does not release the surety. *Id.*

Where the terms of a contract, the performance of which is guaranteed by a surety, are materially altered after its execution, the surety is released unless he consents to the change. *Id.*

**30. Alteration of Instrument.**—A. signed a promissory note, writing the word "security" after his signature. After the execution and delivery of the note, and without his knowledge or consent, the word "security" was erased. Held, that A. was thereby discharged. *Rogers v. Tapp, 1 App. C. C. § 1308.*

The alteration of an official bond by the commissioners' court, by erasing therefrom the name of one of the sureties, without the consent of the remaining sureties, will discharge all of the sureties; but the principal, who afterwards performed official duties, is estopped from denying the validity of the bond. *Wilbarger County v. Bean, 3 App. C. C. §§ 17, 18.*

Sureties on note held released by erasure, before delivery, without their knowledge, of the name of a signer. *Connor v. Thornton (Civ. App.) 51 S. W. 354.*

A change of the date in a surety bond held not a material one and did not affect its validity. *San Antonio Brewing Ass'n v. J. M. Abbott Oil Co. (Civ. App.) 129 S. W. 373.*

In an action on a note from which the name of one of the sureties had been erased, the effect of such erasure on the liability of former and subsequent signers stated. *Hess v. Schaffner (Civ. App.) 139 S. W. 1024.*

Where, when a note was delivered, it bore the names of four sureties, but the name of one had been erased, the payee, in the absence of notice to the contrary, could presume that the erasure was with the consent of the other sureties. *Id.*

Where the payee of a negotiable instrument had indorsed it to a third person, and, on the maker's default, had taken up the note, the erasure of the indorsement was not such alteration as to deprive the payee of his remedy on the note. *Gray v. Altman (Civ. App.) 149 S. W. 760.*

A surety on a contractor's bond for the construction of a schoolhouse held not released by an alteration of the contract where a member of the board knew of the alteration, and the member was employed by the surety company to procure the bond. *General Bonding & Casualty Ins. Co. v. Beckville Independent School Dist. (Civ. App.) 156 S. W. 1161.*

**31. Change in parties to obligation secured.**—The transfer of mortgaged property and the assumption by the assignee of payments of notes secured by the property held not to release the surety from liability on the notes. *Trotti v. Gaar, Scott & Co. (Civ. App.) 126 S. W. 670.*

The liability of the sureties on a note held not extinguished by any new obligation. *First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.) 136 S. W. 89.*

**32. Extension of time for payment or other performance.**—If a creditor, without the knowledge and consent of the surety, gives time to the principal by a valid and binding agreement enlarging the credit beyond the period stipulated in the contract, the surety will be discharged both in law and equity. *Morris v. Booth, 4 App. C. C. § 285, 18 S. W. 639; Mann v. Brown, 71 T. 241, 9 S. W. 111; Gardner v. Watson, 76 T. 25, 13 S. W. 39; Clark v. Cummings, 84 T. 610, 19 S. W. 798; Beasley v. Boothe, 22 S. W. 255, 3 C. A. 98; Marshall Nat. Bank v. Smith, 33 C. A. 555; 77 S. W. 237; Wright v. Deaver, 52 C. A. 130, 114 S. W. 165; First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.) 136 S. W. 89.*

An extension of note secured by a mortgage on land without the consent of a subsequent owner held not to release the land from the lien. *Montague County v. Meadows, 21 C. A. 256, 51 S. W. 556.*

Where the holder of a note, after having received information that one of the signers thereof was only a surety, extends the time of payment without the surety's consent, such surety is released. *Zapalac v. Zapp, 22 C. A. 375, 54 S. W. 938.*

Where there was evidence that the holder of a note had extended the time of payment without the consent of the surety, an instruction to find for the plaintiff was erroneous, since whether there was an extension was a question for the jury. *Robson v. Brown (Civ. App.) 57 S. W. 83.*

The sureties on an appeal bond are not discharged from liability by an agreement of the obligees, without their knowledge, permitting the filing of the transcript in the appellate court after the time for its filing has expired. *McAuley v. McKinney, 23 C. A. 500, 57 S. W. 309.*

Extension of time before maturity of note, and acceptance of new note from which one of sureties was omitted, held to have released a trust deed, indemnifying the sureties. *Westbrook v. Belton Nat. Bank, 97 T. 246, 77 S. W. 942.*

In an action on mortgage notes, evidence that a part of the consideration was a contemporaneous parole agreement for an extension without the knowledge of the sureties held admissible to affect the liability of the surety. *Moroney v. Coombes (Civ. App.) 88 S. W. 430.*

Proving claim on note against maker in bankruptcy proceedings and delay in bringing suit on the note held not an extension of time so as to discharge surety. *Dreeben v. First Nat. Bank* (Civ. App.) 93 S. W. 510.

Indorser agreeing conditionally to extension of time of payment held released by extension without compliance with condition. *Long v. Patton*, 43 C. A. 11, 93 S. W. 519.

The sureties on the official bond of a justice held discharged from their liability for costs collected by the justice due to the county attorney by an agreement extending time of payment. *Wright v. Deaver*, 52 C. A. 130, 114 S. W. 165.

An agreement between the payee of notes secured by chattel mortgage and the transferee of the mortgaged property, extending the time of payment on the notes, held not to release the surety from liability thereon. *Trotti v. Gaar, Scott & Co.* (Civ. App.) 126 S. W. 670.

A surety on a note held discharged by agreement between the creditor and principal debtor. *Dearing v. Jordan* (Civ. App.) 130 S. W. 876.

An agreement extending the time of payment of a debt of the pledgor does not affect the liability of makers of notes pledged by him. *Daugherty v. Wiles* (Civ. App.) 156 S. W. 1089.

**33. — Requisites and validity of agreement in general.**—If the creditor, without the knowledge and consent of the surety, expressly or tacitly yielded, gave time to the principal by a valid and binding agreement, enlarging the credit beyond the period mentioned in the contract, the surety will be discharged; but the mere giving of time without a binding agreement to that effect will not discharge the surety. *Burke v. Cruger*, 8 T. 66, 58 Am. Dec. 102; *Cruger v. Burke*, 11 T. 694; *Payne v. Powell*, 14 T. 600; *Wybrants v. Lutch*, 24 T. 309; *Pilgrim v. Dykes*, 24 T. 383; *Hunter v. Clark*, 28 T. 159; *Roberts v. Bane*, 32 T. 385; *Claiborne v. Birge*, 42 T. 98; *Yeary v. Smith*, 45 T. 56; *Hoerr v. Coffin*, 1 App. C. C. § 185; *Farmers' & Merchants' Bank v. Bayless*, 1 App. C. C. § 1245.

A guaranty that "the undersigned agrees to guaranty and become responsible on the within note to the extent of \$300" is an absolute promise to pay, and is not discharged by mere indulgence to the principal not predicated upon an agreement. On a guaranty of collection the holder is charged with diligence, and if by his negligence or laches a loss occurs it must fall upon him. *Tobin Canning Co. v. Fraser*, 81 T. 407, 17 S. W. 25.

Extension of time of payment in favor of one who has assumed a note, but who has not been accepted as debtor, does not discharge a surety, though he did not consent. *Behrns v. Rogers* (Civ. App.) 40 S. W. 419.

An extension of a note for an indefinite period held not valid so as to discharge a surety thereon. *Webb v. Pahde* (Civ. App.) 43 S. W. 19.

Surety on note held not discharged by payment of interest in advance by maker without surety's knowledge. *Guerguin v. Boone*, 33 C. A. 622, 77 S. W. 630.

That the holder of a note indulges the maker in not enforcing collection held not to release the sureties where there is no binding contract to extend the note. *Titterington v. Murrell* (Civ. App.) 90 S. W. 510.

A contract between a holder and maker of a note, and a deed from the latter to the former, held to extend the time for the payment of the note, releasing the sureties thereon. *Carter-Battle Grocer Co. v. Clarke* (Civ. App.) 91 S. W. 880.

A surety is released by an agreement extending time of payment, though the creditor was induced to make the agreement by fraud of the principal. *Red River Nat. Bank v. Bray* (Civ. App.) 132 S. W. 968.

The extension of a mortgage by the payee of a note held not to discharge the sureties on the note; the mortgage not being security therefor. *First Nat. Bank v. Rusk Pure Ice Co.* (Civ. App.) 136 S. W. 89.

A surety held released by a binding agreement for an extension of the maturity of the debt without his consent, but not by an agreement voidable by the creditor for fraud. *Red River Nat. Bank v. Bray*, 105 T. 312, 148 S. W. 290.

**34. — Consideration.**—Part payment by a principal of a note, secured by trust deed, on a verbal promise to extend time of payment on the amount remaining, without other consideration, does not operate as a release of the sureties on the note. *Andrews v. Hagadon*, 54 T. 571.

Sureties not affected by an agreement by the principal to pay a higher rate of interest than that specified in the note. *Brown v. Fountain*, 22 S. W. 129, 3 C. A. 227.

A surety is not released by a promise without consideration to extend time. *Benson v. Phipps* (Civ. App.) 28 S. W. 359.

Release of sureties by payment of an increased rate of interest in consideration of an extension. *Shropshire v. Smith* (Civ. App.) 37 S. W. 174.

An agreement to extend the payment in consideration of the payment of interest in advance releases a surety who did not consent thereto. *State Nat. Bank v. Stratton-White Co.* (Civ. App.) 50 S. W. 631.

Where a new agreement between a debtor and creditor is that the debtor shall pay, at the end of a period agreed on for an extension, precisely the same sum due at the time the agreement was entered into, the surety is nevertheless released. *De Barrera v. Frost*, 39 C. A. 544, 88 S. W. 476.

An agreement between a holder and maker of a note extending the time for its payment held supported by a consideration. *Carter-Battle Grocer Co. v. Clarke* (Civ. App.) 91 S. W. 880.

An extension of time for payment of a note, on consideration that the maker would pay interest accruing, held to release the surety. *Fambro v. Keith*, 57 C. A. 302, 122 S. W. 40.

An agreement by a debtor held a valid consideration for the creditor's promise not to enforce payment in monthly installments. *Dearing v. Jordan* (Civ. App.) 130 S. W. 876.

**35. Taking additional or substituted security.**—An agent made with sureties a bond to his principal guarantying payment of all moneys "which may come into his hands by virtue of his employment under the present or any future contract." He thereafter was required to give a new bond as an additional security. After this he made default, and it was held that the sureties on both bonds were liable. *Singer Manuf. Co. v. Ponder*, 82 T. 663, 18 S. W. 152.

Execution of a note for the balance of an account providing for attorney's fees and a higher rate of interest held to discharge the property of a surety mortgaged to secure the account. *Casey-Swasey Co. v. Anderson*, 37 C. A. 223, 83 S. W. 840.

Where an action was based on a note for the balance of an account secured by a deed of trust, plaintiff held not entitled to recover as on the account, as against a surety who had been discharged by the taking of the note. *Id.*

**36. Payment or other satisfaction by principal.**—The guarantor of the payment of a note is discharged by the existence of any matter growing out of the contract which entitles the maker of the note to recover from the payee a sum equal to the balance which would otherwise be due on the note. *Aultman v. Hefner*, 67 T. 54, 2 S. W. 861; *Mann v. Brown*, 71 T. 241, 9 S. W. 111; *Wylie v. Hightower*, 74 T. 306, 11 S. W. 1118; *Gardner v. Watson*, 76 T. 25, 13 S. W. 39.

Where notes given for price of personalty are secured by personal sureties, and also by mortgage on property, return of property to seller will not of itself discharge sureties. *Burns v. Staacke* (Civ. App.) 53 S. W. 354.

Sums collected by the agent of the payee of a note from collaterals deposited by the maker held a proper credit on the note in favor of the sureties. *Robertson v. Angle* (Civ. App.) 76 S. W. 317.

Preferential payment of a note by a bankrupt held not to extinguish the note either as to the bankrupt's indorser or sureties. *Hooker v. Blount*, 44 C. A. 162, 97 S. W. 1083.

Surrender of certain vendor's lien notes on payment by one of the makers with simple interest, and a release of the lien, held to discharge the other maker's interest in the land from further liability for payment of compound interest under a deed of trust, and therefore to discharge and release complainant's land covered by the deed as surety. *Irion v. Yell* (Civ. App.) 132 S. W. 69.

Assignment of certain accounts to a bank, the proceeds to pay a note on which R. was surety, having been set aside in bankruptcy against the maker, held not to constitute payment of the note as against R. *Rider v. First Nat. Bank* (Civ. App.) 133 S. W. 905.

**37. Misapplication of funds or securities by creditor.**—Failure of a bank to apply the proceeds of real estate to a secured debt, as directed by sureties, held to discharge such sureties from liability, though the sureties' obligation had not matured. *Western Bank & Trust Co. v. Gibbs* (Civ. App.) 96 S. W. 947.

A contractor to erect a building, who let the contract to a third person, who executed a bond, held not required to see to it that payments made by him to the third person on account of the building were actually so applied by the third person. *Caldwell v. Concho Building & Loan Ass'n* (Civ. App.) 131 S. W. 625.

A surety on a note payable to a bank is not discharged because the bank fails to exercise its privilege of appropriating to the payment of the note a deposit to the credit of the principal in its possession. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

**38. Release or loss of other securities.**—A. executed his note payable to B. After the maturity of the note B. by his indorsement assigned the note to C. C., being about to sue out an attachment against the maker of the note, who was about to move out of the county, D., who was not a party to the contract, deposited with C. certain property to prevent him from suing out the attachment. Afterwards, in consideration of the release of the property, D. executed to C. an obligation guaranteeing the payment of the note. Suit was afterwards brought against the maker, the indorser and guarantor. Held, that the liability of the indorser having been fixed by suit, he was not released by the contract of guaranty, and the pledge of the property and guaranty did not inure to his benefit. *Tooke v. Taylor*, 31 T. 1.

A surrender by a creditor of any security held by him discharges the surety. *Murrell v. Scott*, 51 T. 520; *Machine Works v. Templeton*, 82 T. 443, 18 S. W. 601; *Kiam v. Cummings*, 13 C. A. 198, 36 S. W. 770.

Where the holder of a note transferred to another a mortgage taken as collateral security, the surety was thereby discharged. *Embree v. Strickland*, 1 App. C. C. § 1299.

The owner of several promissory notes, executed by four persons, who signed each of them as principals, and which were secured by lien on land, afterwards agreed with one of the debtors that, in consideration of \$100 then paid, and in further consideration that if another note, then made by the debtor, for \$115, was paid, to release the one debtor from liability on the lien notes, and if the \$115 more was paid, to release one hundred acres of the land from the lien. The note for \$115 was not paid when it matured, and an extension of time was refused. Held, the payment made of \$100, and the making of the note for \$115, which matured before the lien notes became due, constituted a sufficient consideration to support the promise for the release of the lien. The liability of the other principals in the note continued after the release of the one who thus contracted for his discharge. *Kirchoff v. Voss*, 67 T. 320, 3 S. W. 548.

Where a principal creditor has the means of satisfaction within his grasp, he must retain them for the benefit of the surety. This rule does not apply to bank deposits. *Houston v. Braden* (Civ. App.) 37 S. W. 467.

In an action on a note against sureties an instruction that, if the deposit of collateral was a part of the agreement on the faith of which sureties signed, and the payee did not take collateral, the sureties were relieved, held error. *Robertson v. Angle* (Civ. App.) 76 S. W. 317.

It was not essential to a surety's defense on the ground that the creditors had permitted the principal to escape with certain of the mortgaged property, that such act was collusive and with an intent to deprive the surety of part of his security under a subsequent mortgage. *Scott v. Llano County Bank*, 99 T. 221, 89 S. W. 749.

On a sale of certain mortgaged cattle to the mortgagee's assignee for application on a mortgage debt, such assignee held bound to the mortgagor's surety, secured by another mortgage on the same cattle, not only to ascertain the cattle subject to the mortgages, but to use due diligence to obtain possession and apply them to the debts. *Id.*

Surety on note held discharged by failure of payee to record chattel mortgage, resulting in loss of security. *Bennett v. Taylor*, 43 C. A. 30, 93 S. W. 704.

A transaction between a shipper of cotton and a factor who had made advances to

him held not to have released the shipper's sureties. *Kempner v. Patrick*, 43 C. A. 216, 95 S. W. 51.

Where a nonresident indorsee of a note, after learning of fraud in the acceptance and negotiation of the note, had in its hands funds of the nonresident payee sufficient to pay the note, the maker is not liable to the indorsee. *Union Nat. Bank v. Menefee* (Civ. App.) 134 S. W. 822.

The holder of a note signed by a surety and also secured by a chattel mortgage by permitting the principal to remove the mortgaged property from the state held to have discharged the surety. *Means v. Worthington* (Civ. App.) 147 S. W. 345.

A surety will be discharged to the extent he is injured by a loss of effects, pledged to secure a debt, in the lands of the creditor through the creditor's negligence. *First Nat. Bank v. Powell* (Civ. App.) 149 S. W. 1096.

The payee of a note given for certain cattle, having transferred the same to a bank with the mortgage securing it, held not discharged by the removal of the cattle to another state, nor by bank's passive negligence in failing to see that the proceeds of the cattle were applied to the note. *Id.*

Failure of a bank to apply the funds of a depositor on deposit to the payment of a note held by it will not discharge the surety thereon. *Id.*

Where mortgaged property is not in the hands of the mortgagee, his mere indulgence or even negligence in delaying foreclosure, though resulting in loss of the security, does not relieve sureties on the debt, though it is otherwise if the mortgaged property is in the mortgagee's possession and control. *Dillard v. Chandler* (Civ. App.) 157 S. W. 303.

Sureties on a debt secured by a mortgage held not released by reason of the creditor's consent to the removal of a small portion of the property; the sureties' right in any event being limited to the value of the property so removed. *Id.*

**39. Release of cosurety.**—When the obligation of the sureties is joint and several, the discharge of one of them does not ordinarily release the others from payment of their proper proportion of the claim. *Glasscock v. Hamilton*, 62 T. 143.

As between joint promisors who are principals, a release of one is a release of all; but as between promisors who sustain as between themselves the relation of principal and surety, the liability of the principal is made neither more nor less by the release of a surety, and the latter may stipulate for his own discharge and leave the creditor to pursue his remedy against the principal for the full amount of the original debt. *McIlhenny v. Blum*, 68 T. 197, 4 S. W. 367.

By agreement, one joint surety may be released without releasing the others. *Richardson v. Overleese*, 17 C. A. 376, 44 S. W. 308.

A discharge of one of several sureties from a joint or several obligation with an express reservation as to the other obligors does not release the other sureties or principal. *Lane v. Moon*, 46 C. A. 625, 103 S. W. 211.

In an action on a joint and several bond signed by defendants as sureties for a liquor dealer, when the signing by defendant corporation was not necessarily ultra vires, the other surety held not released if the corporation should be relieved of liability on a plea personal to itself. *Munoz v. Brassel* (Civ. App.) 108 S. W. 417.

Where a person sued two sureties, his dismissal as against the heirs of one of them, substituted upon the surety's death pending suit, would not release the remaining surety. *Carlton v. Krueger*, 54 C. A. 48, 115 S. W. 619, 1178.

**40. Unauthorized payment to principal.**—Material alterations in contract by principals held to discharge the sureties. *Sanders v. Hambrick*, 16 C. A. 459, 41 S. W. 883.

Where a building contract allowed the owner to retain 25 per cent. of the contract price, his payment of the entire amount did not release the contractor's sureties. *Meyers v. Wood*, 26 C. A. 591, 65 S. W. 671.

Surety on a building contractor's bond held not discharged by the obligee unconsciously failing to retain a part of the contract price. *McKenzie v. Barrett*, 43 C. A. 451, 98 S. W. 229.

**41. Discharge of principal without payment or satisfaction.**—The release of a joint debtor discharges all the others. *Bridges v. Phillips*, 17 T. 128; *McIlhenny v. Blum*, 68 T. 197, 4 S. W. 367; *Wills Point Bank v. Bates*, 76 T. 329, 13 S. W. 309.

Whenever a principal on a note is discharged, his sureties will be also, but to this rule there are certain exceptions, among which are sureties of married women, infants and lunatics. *Lee v. Yandell*, 69 T. 34, 6 S. W. 665.

Where the money of a ward is loaned by the guardian to a firm composed of the guardian and one of the sureties on his bond, such surety becomes a principal debtor as between himself and cosurety, and the discharge of such surety operates as a discharge of the cosurety. *Roberson v. Tonn*, 76 T. 535, 13 S. W. 385.

A judgment of the United States circuit court, absolving the United States marshal and the attaching creditor from liability, held a bar to a subsequent action for such levy against the sureties on the attachment bond. *Sonnenheil v. Texas Guarantee & Trust Co.*, 23 C. A. 436, 56 S. W. 143.

Sureties on justice's appeal bond held released by plaintiff's release of part of the defendants. *Crook v. Lipscomb*, 30 C. A. 567, 70 S. W. 993.

Release of one who had assumed payment of notes held to release maker. *Long v. Patton*, 43 C. A. 11, 93 S. W. 519.

Release of maker of note also releases indorser. *Id.*

**42. Negligence of creditor in general.**—The sureties on the bond of an officer of an incorporated company for the faithful performance of his duties as such are not relieved from liability on account of the fact that the officer was already a defaulter when the bond was given, provided the officers of the corporation had no knowledge of the defalcation. Mere negligence of the officers in failing to detect the fraud will not relieve the securities. *Bennett v. S. A. R. E. B. & L. Ass'n*, 57 T. 72.

**43. Failure to terminate employment or contract after default.**—A surety on a building contractor's bond held not discharged from liability merely because the obligee acquiesced in the continuance of the work by the contractor after the time fixed for the completion of the work. *United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works* (Civ. App.) 132 S. W. 536.

44. **Neglect to give notice to surety of default.**—A surety is generally bound with his principal in one and the same instrument. The contract of a guarantor is a separate undertaking in which the principal does not join. A surety becomes liable upon the delivery of the obligation. A guarantor is only liable upon default and is entitled to notice. *Garrett v. Mobile Life Ins. Co.*, 1 App. C. C. § 937.

When security is required for the discharge of a trust requiring strict integrity, and the obligee knows that the person from whom he requires bond with security for its performance is dishonest, it is his duty to inform the surety. The fact that the treasurer of the association from whom bond with security is required may, as such treasurer, during a former term, have mingled the funds of the association with his own, and thus used the identical trust fund for individual purposes, and in this way may have been guilty of a technical conversion, and this with the knowledge of the association, who failed through its proper officers to inform the sureties of the fact, will not relieve such sureties from liability on the treasurer's bond for a subsequent defalcation. *Screwmen's Ass'n v. Smith*, 70 T. 168, 7 S. W. 793.

The obligee in a builder's bond does not have to give the sureties on the bond notice that their principal has abandoned or breached the contract to entitle him to sue on the bond. *Dallas Homestead & Loan Ass'n v. Thomas*, 36 C. A. 268, 81 S. W. 1043.

The failure of the county attorney to notify the sureties on the official bond of a justice that the justice has collected and neglected to pay over costs due to the county attorney does not release the sureties. *Wright v. Deaver*, 52 C. A. 130, 114 S. W. 165.

The obligee in a building contractor's bond held not required to notify the surety of a defect in the work. *United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works (Civ. App.)* 132 S. W. 536.

45. **Neglect to act or proceed against principal.**—Notice by surety, see notes under Arts. 6329, 6330.

When the issuance of an execution creates no lien on the debtor's property, the mere fact that the execution is held up by the creditor, unless it be so done in pursuance of a valid and binding agreement with the principal debtor, will not release the surety. *Brown v. Chambers*, 63 T. 131. See *Jenkins v. McNeese*, 34 T. 189; *Parker v. Nations*, 33 T. 210; *Johnston v. Mills*, 25 T. 704.

Ordinarily the surety is not released if the creditor fails to have execution issued on his judgment, or, having one issued, fails to have it levied. But if a lien on property is created by a levy of an execution, such property becomes a fund to be applied to the judgment, and the creditor is chargeable with diligence and is responsible for his own negligence. The same rule applies when there is a judgment of foreclosure on property. *Machine Works v. Templeton*, 82 T. 443, 18 S. W. 601.

Sureties on a replevin bond held not released by plaintiff's delay in levying execution. *Koch v. Cornwell (Civ. App.)* 40 S. W. 144.

Sureties on county treasurer's bond are not released by connivance of county commissioners at the treasurer's defalcation. *Coe v. Nash (Civ. App.)* 40 S. W. 235.

The payee of a bankrupt's note owes no duty to a surety thereon to prove such debt as a claim against the bankrupt estate. *Levy v. Wagner*, 29 C. A. 93, 69 S. W. 112.

As a rule, the payee need not exercise active diligence to preserve his rights against the surety on a note. *First Nat. Bank v. Rusk Pure Ice Co. (Civ. App.)* 136 S. W. 89.

Mere passivity or inaction by a creditor will not discharge a surety, even though the debt could have been collected if the creditor had acted promptly, where the creditor acts in good faith and takes no affirmative action detrimental to the surety's rights. *National Bank of Commerce v. Gilvin (Civ. App.)* 152 S. W. 652.

46. **Reservation by creditor of rights against surety in transactions with principal.**—An order allowing a compromise with sureties on an administrator's bond held to show intent that a release to one surety on receipt of proportionate payment should not operate to release the others. *Ulrich v. Hoefling*, 23 C. A. 289, 56 S. W. 199.

Provision in agreement by maker and holder of a note, on extension thereof, that surety should not be released, held not binding on surety. *Robson v. Brown (Civ. App.)* 57 S. W. 686.

Certain agreement between assigning debtor and accepting creditor, that sureties on indemnity bond shall not be released, held not fraudulent. *Weddington v. Jones*, 41 C. A. 463, 91 S. W. 818.

Where the holder of certain vendor's lien notes, by surrendering them to one of the makers, discharged the signers of a deed of trust from liability thereon, he could not avoid such result by notifying them that he did not intend to release them from the obligations of the deed. *Irion v. Yell (Civ. App.)* 132 S. W. 69.

47. **Consent by surety to transactions between creditor and principal.**—Sureties liable for the performance of a contract are not released by a change in the contract, caused by an agreement made by them. *Janes v. Ferd Heim Brewing Co. (Civ. App.)* 44 S. W. 896.

When a surety requests an extension of time, he cannot claim immunity, or be held to say it operated to his detriment. *Henderson v. Brooks (Civ. App.)* 54 S. W. 305.

Act of owner in violating building contract as to manner of payment to contractor, and in furnishing additional money above the contract price, held not to release the sureties. *Brown Iron Co. v. Templeman*, 30 C. A. 50, 69 S. W. 249.

Surety on contract for delivery of cattle held to have acquiesced in, and ratified, forbearance as to time of delivery extended to his principals. *Stanley v. Evans*, 33 C. A. 535, 77 S. W. 17.

Extension by payee of time for payment of notes to one who had assumed payment thereof without knowledge or consent of maker held to release maker. *Long v. Patton*, 43 C. A. 11, 93 S. W. 519.

Surety on a corporation's note, having participated in an arrangement by which the corporation was released, is not himself discharged from liability as surety, where he knew that the holder still looked to him for full payment. *Peugh v. Moody (Civ. App.)* 145 S. W. 296.

48. **Waiver or estoppel of surety.**—A surety on a bond liable for goods sent to the principal, making arrangement for the sending of more goods after he knew a cosurety

was released, held to ratify his liability. *Janes v. Ferd Heim Brewing Co.* (Civ. App.) 44 S. W. 396.

A surety on a building contractor's bond held not entitled to escape liability on the ground of an extension of time for the completion of the work agreed on prior to the execution of the bond. *United States Fidelity & Guaranty Co. v. Means & Fulton Iron Works* (Civ. App.) 132 S. W. 536.

**49. Payment or other satisfaction by surety.**—A surety on a promissory note may buy his discharge and leave in full force the original debt against his principal. *McIlhenney v. Blum*, 68 T. 197, 4 S. W. 367.

Payment of notes and interest by surety in consideration of sale of cattle to surety by principal held a payment by principal. *Lasater v. First Nat. Bank* (Civ. App.) 72 S. W. 1054.

#### IV. REMEDIES OF CREDITORS

**50. Rights of action against surety.**—Creditor held not estopped to proceed against surety by looking to the principal's estate for payment for several years, where this was done at the surety's request and he was kept informed as to the status of the claim. *National Bank of Commerce v. Gilvin* (Civ. App.) 152 S. W. 652.

**51. Defenses by surety.**—The sureties on a bond are not bound on the principal therein establishing a defense in bar. *Thompson v. Chaffee*, 39 C. A. 567, 89 S. W. 285.

A surety on a note given for the price of corporate stock held not required to tender back the stock to avail himself of the defense that he was released from liability because of the extension of the note without his consent. *Wisegarver v. Yinger* (Civ. App.) 122 S. W. 925.

A surety on an indemnity bond given by a building contractor held entitled to assert that the property was the homestead of the obligee in the bond. *Republic Guaranty & Surety Co. v. Wm. Cameron & Co.* (Civ. App.) 143 S. W. 317.

**52. Conclusiveness of former adjudication in action against principal or surety.**—A finding by a probate court that a certain sum was due from a discharged guardian is admissible in an action on the guardian's bond. *Hornung v. Schramm*, 22 C. A. 327, 54 S. W. 615.

A judgment adjudicating the nonliability of the only solvent principal on a bond is an adjudication that the sureties are not liable. *Grayson County Nat. Bank v. Wandelohr* (Civ. App.) 131 S. W. 1168.

In an action on a judgment against a guardian and the sureties on his bond, the judgment held admissible. *Minchew v. Case* (Civ. App.) 143 S. W. 366.

**53. Recourse to indemnity to surety.**—A creditor's right to enforce security given by the principal debtor to a surety held not affected by an agreement between the principal and surety made after the creditor had commenced suit. *Magill v. Brown*, 20 C. A. 662, 50 S. W. 143, 642.

A mortgagee may avail himself of a fund furnished by the mortgagor to a surety for payment of the debt, though the mortgagor is solvent and the land is sufficient to pay the mortgage. *Id.*

A mortgagee may avail himself of a later mortgage made by his mortgagor on other land, in favor of a purchaser of the land covered by the earlier mortgage, to secure the payment of the earlier mortgage. *Id.*

**54. Pleading.**—See, also, notes under Art. 1827, § 133.

Petition in a suit on a note against T. and N., alleging that it was understood that N. was to sign the same as surety, and that plaintiff believed he had signed it, etc., held to state no cause of action against N. *Vogelsang v. Taylor* (Civ. App.) 80 S. W. 637.

**55. Evidence.**—See, also, notes under Art. 3687.

Evidence held insufficient to show that one of the makers of a note secured by mortgage on the other's land had the benefit of the loan, thereby making him a principal. *Devine v. United States Mortg. Co. of Scotland* (Civ. App.) 48 S. W. 585.

Amount of liability of sureties of commission merchants on bond to indemnify shippers determined. *Lasater v. Purcell Mill & Elevator Co.*, 22 C. A. 33, 54 S. W. 425.

In an action on a building contractor's bond, evidence held to warrant an inference that the president of the contractor actually applied out of his individual funds \$600 to the expense of the construction of the building received by him as a credit on indebtedness owing by him personally to the owner. *Zang v. Hubbard Building & Realty Co.* (Civ. App.) 125 S. W. 85.

**56. Instructions and questions for jury.**—See notes under Art. 1971, § 152.

**57. Execution.**—See notes under Art. 3732.

#### V. RIGHTS AND REMEDIES OF SURETY

##### (A) As to Creditor

**58. Recourse to and exhaustion of remedy against principal.**—Where a judgment has been rendered against principal and sureties, and the principal dies, having undertaken to appeal, the judgment creditor need not see that the appeal is prosecuted to effect before proceeding against sureties. *Willis v. Chowning*, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

Payee of an obligation, after death of principal debtor, may treat the sureties as primarily liable, without proceeding against deceased principal's estate. *Id.*

**59. Recourse to and exhaustion of other securities.**—Upon the payment of the debt of the principal, the surety is entitled to the full benefit of all collateral security, both of an equitable and legal nature, which the creditor has taken as an additional pledge for his debt, and he is entitled to be substituted as to the very debt itself to the creditor, and have it assigned to him. *Sublett v. McKinney*, 19 T. 438; *Jordan v. Hudson*, 11 T. 82; *Fievel v. Zuber*, 67 T. 275, 3 S. W. 273.

A surety who pays the debt is entitled to the benefit of any security held by the creditor. *Murrell v. Scott*, 51 T. 520; *Machine Works v. Templeton*, 82 T. 443, 18 S. W. 601; *Klam v. Cummings*, 13 C. A. 198, 36 S. W. 770.



The payment of an accommodation draft by the acceptor entitles him to be regarded in the light of a surety, and he is entitled to an assignment of all the independent securities in the hands of the creditor, with all the remedies which he had to enforce them against the principal. *Hoffman v. Bignall*, 1 App. C. C. § 705, citing *Jordan v. Hudson*, 11 T. 82; *Sublett v. McKinney*, 19 T. 438.

A surety paying without suit a note providing for attorney's fees in case of suit is subrogated to the payee's rights under such provision, and may recover such attorney's fees in a suit against the maker. *Beville v. Boyd*, 16 C. A. 491, 41 S. W. 670, 42 S. W. 318.

Right of indorser of note secured by trust deed to compel holder to enforce the security determined. *Williams v. Planters' & Mechanics' Nat. Bank* (Civ. App.) 44 S. W. 617.

When assignee of note is not named as beneficiary in deed of trust, and did not accept its terms, indorser is not released from liability by failure of assignee to enforce such deed. *Tarver v. Evansville Furniture Co.*, 20 C. A. 66, 48 S. W. 199.

Where an indorsed note is given as a part of the purchase price of land, the vendor also retaining a lien therefor, he is not required to exhaust such lien before collecting of the indorser. *Levy v. Wagner*, 29 C. A. 98, 69 S. W. 112.

In an action on a bond of an insurance agent for misappropriation, it was no defense that the company's general agent was also liable to it for such misappropriation. *Foster v. Franklin Life Ins. Co.* (Civ. App.) 72 S. W. 91.

An ex-guardian surety, having been subrogated to the rights of the succeeding guardian in an action against his principal and several defendants primarily liable for such ex-guardian's misappropriations, held entitled to continue such action against the defendants primarily liable. *Brown v. Fidelity & Deposit Co. of Maryland* (Civ. App.) 76 S. W. 944.

The holder of a note may sue an indorser, without first resorting to his remedy under a mortgage securing the same. *Williams Bros. v. Rosenbaum* (Civ. App.) 79 S. W. 594.

Sureties of guardian, who settled for her default, held subrogated to rights of wards against debtors, whose claims guardian compromised without authority. *Browne v. Fidelity & Deposit Co.*, 98 T. 55, 80 S. W. 593.

A surety on a note who paid the note held subrogated to the proceeds of a note given to the payee by a third person for the benefit of a co-surety, so that on the payee collecting the note of the third person the proceeds were held for the benefit of an assignee of the surety. *Vernor v. D. Sullivan & Co.* (Civ. App.) 126 S. W. 641.

The surety on the bond of a guardian, though a company engaged in giving bonds for compensation, held, on paying a judgment on the bond, subrogated to the right of the ward against one who had received from the guardian funds misappropriated by him. *United States Fidelity & Guaranty Co. v. Adoue & Lobit*, 104 T. 379, 137 S. W. 648, 138 S. W. 383, 37 L. R. A. (N. S.) 409.

Where a tax collector wrongfully commingled money belonging to the state and to a county, embezzled part of it, and paid the balance to the county, which appropriated it to its own benefit without any act to its prejudice, its want of notice was no defense to an action by the sureties on the collector's bond to the state, brought after payment of such bond and subrogation to the rights of the state. *Boaz v. Ferrell* (Civ. App.) 152 S. W. 200.

The undertaking of a surety on a note is independent and additional to any security furnished by the maker, and a holder of the note may sue on the unqualified promise of the surety without reference to any collateral security available from other sources. *Erwin v. E. I. Du Pont De Nemours Powder Co.* (Civ. App.) 156 S. W. 1097.

Where a debt is secured by mortgage on personal property, the creditor was not bound to enforce the mortgage before proceeding to enforce the liability of sureties. *Dillard v. Chandler* (Civ. App.) 157 S. W. 303.

**60. Recovery of payments to or money received by creditor.**—Where a creditor who has sufficient security of the debtors to pay the debt diverts such security and exhausts security belonging to a surety, such surety may recover for his property so used. *Bruce v. Laing* (Civ. App.) 64 S. W. 1019.

In an action for the wrongful conversion of collaterals of a surety, evidence that, after the creditor had accepted an assignment for its benefit, it without consideration promised to look solely to the assigned fund for its pay, is immaterial. *Id.*

The fact that the creditor obtains payment from a cosurety of his share of the debt by false representations that no part of debt is paid held not to entitle such cosurety to recover back his payment. *Wash v. D. Sullivan & Co.* (Civ. App.) 84 S. W. 368.

#### (B) As to Principal

**61. Right of recourse to principal, in general, in general.**—A principal is bound to reimburse his sureties, whether he signed the bond or not. *Marsh v. Phillips* (Civ. App.) 144 S. W. 1160.

**62. Contracts and conveyances for indemnity.**—An officer may indemnify his surety, and such indemnity is superior to claim of unsecured creditors. *Butler v. Sanger*, 23 S. W. 487, 4 C. A. 411.

A surety may protect himself by procuring additional security. *Sonnentheil v. Trust Co.* (Civ. App.) 30 S. W. 945; *Sanger v. Henderson*, 1 C. A. 412, 21 S. W. 114; *Schmick v. Bateman*, 77 T. 326, 14 S. W. 22; *McLaughlin v. Carter* (Civ. App.) 37 S. W. 666. See *Traders' Nat. Bank v. Fry*, 14 C. A. 403, 37 S. W. 672.

A contract indemnifying a surety against a loss, accompanied by delivery of property to be applied to the debt, is treated as a pledge or trust which the creditor may follow. *Bank v. Wheeler*, 12 C. A. 489, 33 S. W. 1093.

Where a deposit is alleged to have been made with sureties to indemnify them on an appeal bond, they cannot escape liability because the deposit was with a third person and by a receiver of the principal, where it was held by such third person subject to their control, and the receiver had authority to use the money for such purpose. *McAuley v. McKinney*, 23 C. A. 500, 57 S. W. 309.

Where the wife of the maker of a note executed a trust deed to indemnify a surety, such deed held not to continue as to a renewal note. *Westbrook v. Belton Nat. Bank* (Civ. App.) 75 S. W. 842.

A surety held entitled to recover the amount of a note given him by his principal as indemnity, together with the stipulated interest and attorney's fee. *Worthington v. Whitefield* (Civ. App.) 142 S. W. 34.

Sureties on a renewal note paid by the maker are not entitled to sue on notes held by them as security against their liability as sureties. *Morgan v. Hays* (Civ. App.) 147 S. W. 315.

63. **Rights of surety after payment or satisfaction by him of debt or liability.**—Subrogation on payment of judgment, see notes under Art. 6333.

When the surety upon a promissory note is sued, the principal is liable to him for the costs he may have to pay by reason of such suit. *Bennett v. Dowling*, 22 T. 660.

Surety paying note held subrogated to provision therein for attorneys' fees in case of suit. *Beville v. Boyd*, 16 C. A. 491, 41 S. W. 670, 42 S. W. 318.

A surety of two other sureties on a note held not liable to them, they having paid the note. *Mulkey v. Templeton* (Civ. App.) 60 S. W. 439.

A conveyance held in satisfaction of the obligation of a surety incurred by paying the debt. *Tarlton v. Orr*, 40 C. A. 410, 90 S. W. 534.

The discharge of either the principal or a surety in a bond does not deprive another surety, who subsequently pays, of his remedy against the principal for indemnity, or the co-surety for contribution. *Lane v. Moon*, 46 C. A. 625, 103 S. W. 211.

A surety who pays a note for his principal discharges it, and can recover only on the implied contract of reimbursement. *Hays v. Housewright* (Civ. App.) 133 S. W. 922.

A surety having paid the debt, his claim for reimbursement is on the implied promise arising out of the relation of the parties. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

64. **Actions against principal.**—A finding held not to show that a conveyance was not in satisfaction of the obligation of a surety incurred by paying the debt. *Tarlton v. Orr*, 40 C. A. 410, 90 S. W. 534.

Under a contract between principal and surety, principal held not liable for compensation of attorney employed by surety. *American Surety Co. of New York v. Lehr* (Civ. App.) 93 S. W. 681.

Evidence held insufficient to show the making of an express contract by a principal to reimburse his surety after the principal's implied promise was barred by limitations. *Yndo v. Rivas* (Civ. App.) 142 S. W. 920.

#### (C) As to Cosureties

65. **Relation between cosureties.**—One surety may be held a principal as to another surety, where it is shown that such was the understanding between them. *Dullnig v. Weekes*, 16 C. A. 1, 40 S. W. 178.

66. **Obligations constituting parties cosureties.**—Sureties on different bonds to secure the performance of the same guardian's duty held liable to contribution. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

67. **Recourse to indemnity to cosurety from principal.**—Sureties for several debts held entitled to share pro rata in proceeds of indemnity mortgage. *Wheeler v. First Nat. Bank* (Civ. App.) 41 S. W. 376.

A co-surety who is surety for the same principal on a different liability, and takes security therefor, held not liable to contribute to the other surety. *Urbahn v. Martin*, 19 C. A. 93, 46 S. W. 291.

One of two sureties on a treasurer's bond, on taking security prior to payment of the amount due, held liable to contribution. *Id.*

After co-sureties have paid the amount due on their bond, one of them, obtaining security from the principal, is not liable for contribution to the other. *Id.*

68. **Right to contribution in general.**—A surety on an official bond who secures in advance from the principal indemnity and the means of discharging the obligation holds it for the benefit of his cosureties; but the fact that such indemnity and means of payment was secured constitutes no defense to a cosurety against paying the debt to the creditor, and if he be compelled to pay the debt it constitutes no defense to his demand for contribution against a non-paying cosurety. *Glasscock v. Hamilton*, 62 T. 143.

As soon as a debt becomes due, any one of several cosureties may without suit at once pay the debt and recover contribution from his cosureties. But if the principal be solvent, no contribution can be enforced in favor of a cosurety who voluntarily discharges a debt or judgment that could have been collected from the principal. *Id.*

Ordinarily there is no liability for contribution to a cosurety who voluntarily pays the debt after it is barred by limitations; yet, if he pays it after judgment on a suit begun before limitation has run, such payment after the period when the bar of the statute would have been complete if the suit had not been brought will render his cosurety liable for contribution. *Id.*

In a suit between cosureties for contribution the plaintiff cannot recover unless he shows that he has paid a greater portion than the defendant is liable to pay. *Id.*

When one party has paid a certain sum on a compromise agreement by which he was personally discharged, but the cosurety was excluded from the benefit of the compromise, he cannot compel such cosurety to contribute. *Id.*

One of several cosureties who voluntarily pays a note, the principal debtor being insolvent, is entitled in a suit to enforce contribution against his cosureties to recover from each his aliquot proportion of the original debt, according to the number of the original sureties who are solvent; he also must sustain his proportion of the loss resulting from insolvency. *Acers v. Curtis*, 68 T. 423, 4 S. W. 551.

A surety cannot compel a contribution by a cosurety, unless it appears that the principal is insolvent, or that due diligence has been used unsuccessfully to obtain from him the amount claimed. *Tabor v. Cockrell*, 4 App. C. C. § 126, 16 S. W. 786.

One of several principals paying an entire debt is entitled to recover from each his proportion obtained out of the consideration. Where one surety pays off the debt of an insolvent principal, he can recover from each surety his proportionate part. *Graves v. Smith*, 23 S. W. 603, 4 C. A. 537.

Contribution may be enforced between wrong-doers, when. *City of Ft. Worth v. Allen*, 10 C. A. 463, 31 S. W. 235.

One of several joint obligors seeking contribution from the others must show that he has paid a greater sum than the defendant remains liable to pay in order to maintain his action. *Bank v. McAnulty* (Civ. App.) 32 S. W. 376.

Where sureties were bound on several obligations of the same principal, held that there was no equity requiring one of them, who received a fund from the principal, to prorate it between all the obligations. *Sanders v. Wettermark*, 20 C. A. 175, 49 S. W. 900.

The fact that one surety pays the entire obligation does not relieve the co-surety from liability for contribution. *Wash v. D. Sullivan & Co.* (Civ. App.) 84 S. W. 368.

Sureties residing beyond the jurisdiction of the court are not considered in determining what cosureties shall be held to contribution. *Gaddy v. Witt*, 142 S. W. 926.

**69. Measure of contribution.**—Each surety, as to the creditor, is liable for the whole debt; as between himself and his cosureties he is liable to contribution, as to those paying the debt, to no more than his equal portion, ratably distributed between those who are solvent. *Merchants' Nat. Bank v. McAnulty* (Sup.) 33 S. W. 963. See *Page v. White Sewing Mach. Co.*, 12 C. A. 327, 34 S. W. 988.

In action by sureties who had paid a note against a cosurety, he is liable only for his pro rata part of the amount paid. *Mulkey v. Templeton* (Civ. App.) 60 S. W. 439.

Where claimant paid an entire indebtedness for which claimant and deceased were sureties, claimant was only entitled to contribution against decedent's estate to the extent of one-half of the amount so paid. *Smart v. Panther*, 42 C. A. 262, 95 S. W. 679.

Cosureties' bonds for the same thing, but in different amounts, are liable to contribute in the proportion of the amounts of the obligations signed by them respectively. *Moore v. Hanscom* (Civ. App.) 103 S. W. 665.

**70. Conclusiveness as between cosureties of adjudication against principal or surety.**—A surety on a note, who failed to defend an action thereon before a justice, cannot attack the judgment in an action by a cosurety for contribution. *Eubanks v. Sites* (Civ. App.) 146 S. W. 952.

**71. Actions between cosureties.**—The sureties on a joint obligation must be jointly sued in an action by one surety for contribution. *Rush v. Bishop*, 60 T. 177.

A suit may be brought against several cosureties for contribution in any county in which either of them reside. *Id.*

The remedy of a joint obligor paying a joint judgment held on an implied assumpsit. *Tarleton v. Orr*, 40 C. A. 410, 90 S. W. 534.

Evidence held to sustain finding that surety agreed with cosureties to pay note in case of failure of principal to pay it. *Hall v. Taylor* (Civ. App.) 95 S. W. 755.

## TITLE 110

## PRINTING—PUBLIC

<b>Art.</b>		<b>Art.</b>	
6338.	Board of public printing.	6356.	Awarding of contracts.
6339.	Record of proceedings.	6357.	Successful bidder to be notified.
6340.	Board shall contract for public printing.	6358.	Requisites of contract.
6341.	Expert may be employed.	6359.	Suits on contractors' bonds.
6342.	Printing classified, etc.	6360.	Secretary of senate and clerk to furnish journals of.
	First class.	6361.	Secretary of state to furnish laws.
	Second class.	6362.	To compare copies and to certify, etc.
	Third class.	6363.	Work to be delivered to whom.
	Fourth class.	6364.	When to be delivered.
6343.	Proclamations, etc., how published.	6365.	Account, how audited and paid.
6344.	When published in more than one paper, etc.	6566.	Accounts for current printing of legislature.
6345.	Stationery, maximum prices of.	6367.	Rates may be altered.
6346.	Other printing and stationery.	6368.	Contracts may be abrogated.
6347.	Current printing of legislature to be done at Austin.	6369.	May be re-let, etc.
6348.	Number of copies of laws.	6370.	Supplies to reporters.
6349.	Governor's message.	6370a.	Reports of appellate courts; award of contract, etc.
6350.	Of other public documents.	6370b.	Terms of contract; duty of clerks of courts.
6351.	Advertisements for proposals.	6370c.	Price of reports; number of volumes; plates; copyright.
6352.	To include what.	6370d.	Laws repealed.
6353.	Bid to be accompanied by, etc.		
6354.	No officer to be interested.		
6355.	Proposals, to whom addressed.		

**Article 6338. [4219] Board of public printing provided for.**—The attorney general, the state treasurer, and the secretary of state shall constitute a board of public printing, and a majority of the board shall constitute a quorum for the transaction of business. [Act June 27, 1876, p. 31, secs. 1, 16.]

**Art. 6339. [4220] Record of the proceedings of the board, etc.**—The secretary of state shall keep a record of the proceedings of the board and of all acts done by him in connection with the public printing, under the provisions of this title. [Id. sec. 16.]

**Art. 6340. [4221] Board shall contract for public printing, etc.**—The board of public printing is authorized and required to contract, as hereinafter prescribed, with some suitable person or persons, who shall be a resident of this state, to print and bind the laws and the journals of the senate and house of representatives, and to do such other printing and binding, and to furnish such stationery as may be required by law, or may be needed by any department of the state government, or by either house of the legislature, not to include such work as may be done at the deaf and dumb asylum, nor such stationery, printing and binding as may be needed by the judicial department. They are authorized to make a separate contract when printing is to be done in any other language than the English; and in such case the printing board shall employ a competent person, at a price not to exceed thirty cents per hundred words, to translate the matter required into such other language. [Id. sec. 1.]

**Art. 6341. [4222] An expert may be employed, etc.**—The board of public printing shall be authorized to employ a competent practical printer at a salary not to exceed seventy-five dollars per month, who shall be ex officio instructor in the art of printing at the deaf and dumb asylum, and whose further duty it shall be to advise with and assist the board in advertising for proposals for printing and stationery, and in making contracts therefor; and to examine the work done and stationery furnished under such contracts, and to certify to the board whether

the same are correct and in accordance with law and with the contracts of the contractors. [Id. sec. 15. Act March 13, 1875, p. 91, sec. 1.]

**Art. 6342. [4223] Printing classified; prices to be paid.**—The public printing shall be divided into four classes, as follows:

**First. First class.**—The first class shall include the printing and binding of the laws, journals, department reports, governor's messages and like documents which shall be printed on white calendered book paper of uniform color, twenty-five by thirty-eight inches in size, and weighing not less than forty-five pounds to the ream, from long primer type (except tabular work which may be from such type smaller than long primer as the nature of the work and good taste may require); the pages of the laws, department reports, governor's messages and like documents to be twenty-six ems pica wide and forty-six ems pica long, including head and foot lines, and to contain not less than one thousand eight hundred and twenty-four ems; and the journals shall be printed in octavo form, the pages to be twenty-six and one-half picas wide and forty-six ems pica long, including head and foot lines, from brevier type, two columns to the page, each column thirteen ems pica wide, and each page to contain not less than two thousand eight hundred ems. When printed, the laws and reports shall be neatly folded, stitched, covered and trimmed, and the journals and messages folded, stitched and trimmed. Cover paper shall not be less than thirty-five pounds to the ream. The index to the laws shall be printed from brevier type, and the index to the journals from nonpareil type. The maximum prices for the material and work of the first class shall be: For paper, white and cover, per pound, fifteen cents, and no allowance shall be made for waste; composition, seventy-five cents per thousand ems, printers' measurement; press work, sixteen pages to the form, unless the nature of the work requires a smaller number of pages, fifty cents a token of two hundred and forty impressions or less; binding, forty cents per hundred, for folding, stitching, covering and trimming first signature of sixteen pages, and twenty cents per hundred for each additional signature of sixteen pages or less; for folding, stitching and trimming without covering, thirty cents per hundred for first signature of sixteen pages, and fifteen cents per hundred for each additional signature of sixteen pages or less. No matter shall be leaded, except by the express direction of the printing board. The printing board shall, at the same time the contract is let for the printing of the journal of the two houses of the legislature, include in said contract the printing and delivery of each day's proceedings of the two houses while in session, the same to be printed in octavo form, as provided in this act for the printing of the regular journals of the two houses, five hundred copies for the use of the house of representatives and two hundred copies for the use of the senate, the same to be delivered by the hour of meeting of the day following that on which such proceedings were had.

**Second: Second class.**—Work of the second class shall consist of all blanks and printed stationery required by any department of the state government, except the judicial department, and shall be on first-class sized and calendered white wove unruled flat papers of such dimensions and weights as the nature of the work may require. The maximum prices for such work shall be as follows: For composition, fifty cents per one thousand ems, printers' measurement; for press work, on forms the size of flatcap sheet or less, forty cents per token; on forms larger than flatcap, fifty cents per token; and a token shall be two hundred and forty impressions or less when the number of copies of a job ordered shall require a less number of impressions. The maximum prices for paper required for work of the second class shall be twenty-five cents per pound. For ruling work of the second class, the maximum price shall be twenty cents per one hundred sheets for each actual and neces-

sary passage through the ruling machine. For numbering with a numbering or paging machine, per one hundred pages or more, one hundred numbers, ten cents. For binding work of the second class, the maximum price shall be, for pads of one hundred copies each of any printed job, quarter sheet cap, demy, post or medium, per pad, five cents; for pads of two hundred copies of any printed job, half sheet cap, demy, post or medium, per pad, ten cents; for quarter binding quarter sheet cap, demy, post or medium, per quire, ten cents; for quarter binding, half sheet cap, demy, post or medium, per quire, fifteen cents; for quarter binding whole sheet cap, demy, post or medium, per quire, twenty cents; for half binding quarter sheet cap, demy, post or medium, per quire, twenty-five cents; for half binding and half sheet cap, demy, post or medium, per quire, thirty-five cents; for half binding whole sheet cap, demy, post or medium, per quire, forty-five cents. A quire, within the meaning here intended for binding work of the second class, is not less than forty leaves.

Third: **Third class.**—Work of the third class shall consist of blank books, either ruled and printed, or ruled without printing. The paper shall be made of linen stock and of the quality known among paper dealers as "P" paper; and the maximum prices shall be as follows: Cap paper, eighteen pounds to the ream, plain ruled half bound sixty cents per quire; ditto printed heads, eighty-five cents per quire; ditto plain ruled, extra full bound, one dollar per quire; ditto printed heads, one dollar and twenty-five cents per quire. Demy paper, twenty-eight pounds to the ream, plain ruled, half bound, seventy-five cents per quire; ditto printed heads, one dollar per quire; ditto plain ruled, extra full bound, one dollar and thirty-five cents per quire; ditto printed heads one dollar and fifty cents per quire. Medium paper, forty pounds to the ream, extra full bound, Russia leather ends and bands, canvas cover with Russia leather corners, plain ruled, three dollars per quire; ditto, printed heads, four dollars per quire. Super royal paper, fifty-four pounds to the ream, extra full bound, Russia leather ends and bands, canvas cover with Russia leather corners, plain ruled, four dollars and fifty cents per quire; ditto, printed heads, five dollars per quire. A quire shall not be less than forty leaves in work of the third class. No extra charge to be allowed for vowelings, paging, labeling, lettering, or gilding. Where changes in the printed heads occur in any blank book ordered, the maximum price shall be fifty cents for each change in ruling and printing together.

Fourth: **Fourth class.**—Work of the fourth class shall consist of the printing of bills, resolutions, committee reports and such other like work as may be ordered by the legislature, or either house thereof, and shall be on first-class sized and calendered white wove, flat cap paper, of fourteen pounds to the ream, printed on pica type, lines numbered in the margin, with space between the lines of the size of pica, the printing to be thirty-two ems pica wide and sixty-five ems in length. The maximum price for work of the fourth class will be: For two hundred copies, or any number of copies less than two hundred, ordered by either house of the legislature, including composition, paper, press work and binding, two dollars per page for as many pages as are contained in one copy thereof, and when more than two hundred copies of work mentioned in this class are ordered by either house of the legislature, the printer shall be paid only for the paper, press work and binding of such additional copies at such rates as are contracted for, for work of the second class; provided, that the printing board, in having schedules prepared for the use of printers for the first and second class of printing, may fix on other and lower maximum prices than those designated in this article for work and material of the first and second class of printing; and that such schedules may call for bids by the ream on all papers required for the first and second classes, giving dimensions and weights, in no wise to exceed the basis of twenty-five cents per pound, or may

call for bids by the ton for all papers required for said class; and provided, that the printing board may in their discretion receive separate proposals and make separate contracts for furnishing in part or all the printing papers required under the provisions of this article for the printing of the first and second classes, under like conditions required by law for contracts to do the printing and furnish the paper; and in the event of such separate contracts the printing board shall cause the papers so furnished to the state to be delivered to the contractor, to do the printing and binding on written requisition of such contractor, and under proper guards and checks, at such times and in such quantities as the requisites of any job or jobs of printing may require. [Amended Act 1903, p. 12.]

**Art. 6343. [4223a] Proclamations, etc., how published.**—No contract with the public printer shall be made for the publication of executive proclamations, advertisements, and other like documents; but the maximum price for such work shall be one dollar per square of one hundred words for the first publication, and fifty cents per square for each subsequent publication that may be ordered, and fractional parts of a square at proportionate rates, and each square shall contain not less than one hundred words. [Amend. 1895, No. 73, Sen. Jour. p. 482.]

**Art. 6344. [4224] When published in more than one paper.**—When proclamations, advertisements and like publications are authorized or required by law to be published in more newspapers than one, they shall be published under like rules; provided, that proclamations and like documents shall not be published in more than two newspapers in each congressional district, and at different points, and shall not be inserted for a longer period than three months; and proposed amendments to the constitution shall be published once a week for four weeks, commencing at least three months before the time specified by the legislature for an election thereon, in one weekly newspaper in each county in which such newspaper may be published; and all claims presented for publishing advertisements shall be accompanied by a copy of the advertisement as printed, and shall state the dates when the same was published. [Acts 1876, p. 31, sec. 4.]

**Art. 6345. [4225] Stationery, maximum prices of.**—The maximum rates for stationery shall be as follows:

Legal cap paper—Eighteen pounds to the ream, seven dollars and twenty cents per ream; sixteen pounds to the ream, six dollars and forty cents per ream; fourteen pounds to the ream, five dollars and sixty cents per ream.

Foolscap paper—Sixteen pounds to the ream, six dollars and forty cents per ream; fourteen pounds to the ream, five dollars and sixty cents per ream.

Letter paper—Twelve pounds to the ream, four dollars and eighty cents per ream; ten pounds to the ream, four dollars per ream.

Note paper—Eight pounds to the ream, three dollars and twenty cents per ream; six pounds to the ream, two dollars and forty cents per ream; five pounds to the ream, two dollars per ream.

Engrossing paper—Twenty-eight pounds demy, one-quarter sheets, seven dollars and twenty cents per ream; eighteen pounds cap, one-half sheets, eight dollars per ream.

Envelopes—XX white or buff, number ten, plain, seven dollars and twenty cents per thousand; printed, eight dollars and eighty cents per thousand; XX white or buff, number six, plain, four dollars and eighty cents per thousand; printed, six dollars and forty cents per thousand; XX white or buff, number five, plain, four dollars per thousand.

Blotting paper—One hundred and twenty pounds to the ream, six dollars and forty cents per one hundred sheets; one hundred pounds to the ream, five dollars and twenty cents per one hundred sheets.

Pencils—The kind to be specified in bid, eight dollars per gross.

Red ink—The manufacturer to be named in bid, two dollars and forty cents per dozen.

Mucilage—Quarts, seven dollars and twenty cents per dozen; pints, four dollars and eighty cents per dozen.

Steel pens—Brand to be named, two dollars per box.

Penholders—Five dollars and sixty cents per gross.

Rubber bands—Best, all sizes, two dollars and forty cents per box.

Mammoth ink and pencil eraser—Four dollars per dozen.

Rubber rulers—Twelve inch, one dollar and twenty cents each.

Wood rulers—Fifteen inch, eighty cents each.

Erasing knives—Eighty cents each.

Recording ink—Maker to be named in bid; quarts, fourteen dollars and forty cents per dozen.

Copying ink—Maker to be named in bid; quarts, nineteen dollars and twenty cents per dozen.

Inkstands—C. H. number three, sixty cents each; glass, flat, eighty cents each.

Paper fasteners—Forty cents per box. [Id. sec. 5.]

**Art. 6346. [4226] Other printing and stationery.**—All printing and stationery not embraced within the provisions of the preceding articles of this title shall be furnished by the contractor at rates proportionate to those stipulated for in the contract for work and stationery of similar character, to be fixed by the board of public printing. [Id. sec. 6.]

**Art. 6347. [4227] Current printing of legislature to be done at Austin.**—The current printing of the legislature shall be done at the seat of government. [Id. sec. 12.]

**Art. 6348. [4228] Number of copies of laws, etc.**—There shall be printed not less than eight thousand copies of the laws of a general nature, and as many more as the printing board may require, not to exceed twelve thousand in all; and fifteen hundred copies of the special laws, including all acts for private relief, all acts incorporating towns and cities, all acts having local application, all of a personal nature, and all acts incorporating private associations of every description that may be passed at each session of the legislature; and one thousand copies of the journals of each house of the legislature. [Acts 1883, p. 5.]

**Art. 6349. [4229] Of the governor's messages, etc.**—There shall be printed such number of copies of the messages of the governor and other documents as the legislature, or either house thereof, may order. [Acts 1876, p. 31, sec. 7.]

**Art. 6350. [4230] Of other public documents.**—There shall be printed, under the supervision of the secretary of state, eleven hundred copies of the annual reports of the comptroller of public accounts, treasurer, commissioner of the general land office, superintendent of the penitentiary, superintendent of the lunatic asylum, of the asylums of the blind, deaf and dumb, and the reports of all other officers who are required to report to the governor, or the legislature; three hundred copies of which reports shall be delivered by the secretary of state to the two houses of the legislature for their use, at as early a day as practicable after they are printed; three hundred copies shall be delivered to the officer making the report for his use, and the remaining five hundred copies shall be kept by the secretary of state for public use; but the printing board may increase the number of copies of such reports required to be printed, not to exceed two thousand. [Id. sec. 8.]

300 copies for use as officer and not as private person.—The 300 copies are to be delivered to the officer making the report for his use as such officer and not for his use as a private person. Madden v. Hardy, 92 T. 613, 50 S. W. 926.

**Art. 6351. [4231] Advertisement for proposals to do public printing, etc.**—It shall be the duty of the secretary of state, on the first day of August next, and every two years thereafter, or as soon after the first



day of August as may be practicable, to advertise for sealed proposals to furnish said stationery and to do such public printing and binding as may be required by the several departments of the government under the provisions of this title. Such advertisement shall be published for thirty days in not less than two nor more than five newspapers published within the state and having the largest circulation therein. It shall invite separate proposals to furnish the stationery and to do the printing and binding, and shall state as nearly as practicable the probable amount of such printing, binding and stationery which will be required under the contract. It shall also state the time and place of opening the bids and of awarding the contract, which shall be at the office of the secretary of state, not exceeding forty days from the date of the first publication of such advertisement. [Id. sec. 9.]

**Art. 6352. [4232] Proposals to include what.**—Separate proposals shall be made for furnishing the stationery and for doing the printing and binding; and the proposals for printing and binding shall embrace all such work as is included under articles 6342 and 6345, except such as may be done at the deaf and dumb asylum, and the material therefor; and the proposals for stationery shall embrace all material specified in article 6345, and such other articles as are usually included under the term stationery. [Id. sec. 10.]

**Art. 6353. [4233] Bid to be accompanied by bond.**—Each bid shall be accompanied by the bond of the bidder, with two or more good and sufficient sureties, conditioned that, should the contract be awarded to him, he will, without delay, upon being notified of such award, enter into a written contract in accordance with law, and with his said proposal, and will give bond and security, as required by law, for the faithful performance of such contract. [Id. sec. 2.]

**Art. 6354. [4234] No officer to be interested in contract.**—No member or officer of any department of the government shall be in any way interested in such contract, except in contracts for the translation of any public document into some other language. [Id. sec. 17.]

**Art. 6355. [4235] Proposals, to whom addressed.**—Such proposals shall be sealed and addressed to the secretary of state at the seat of government, and shall be indorsed with a memorandum showing that they are proposals for the public printing and binding, or for stationery for the several departments, as the case may be; and upon their receipt they shall be filed by the secretary of state; and the seals thereof shall not be broken until the day named in the advertisement for awarding the contracts, when they shall be opened in the presence of the printing board and such bidders and others as may desire to be present. [Id. sec. 2.]

**Art. 6356. [4236] Awarding of contract.**—It shall be the duty of the printing board on the day fixed in such advertisement, or as soon thereafter as practicable, to make a careful examination and comparison of such bids, and to award the contracts to the lowest and best responsible bidder whose bid may be below the maximum rates as herein prescribed; provided, such bid shall be approved by the governor and comptroller of public accounts. [Id.]

**Art. 6357. [4237] Successful bidders to be notified.**—It shall be the duty of the secretary of state, upon the making of such awards, immediately to notify the successful bidders, respectively, of the acceptance of their said bids, and that they will be required without delay to execute and deliver to him their contracts with the state for the due performance of their said undertakings.

**Art. 6358. [4238] Requisites of the contract.**—Such contract shall be in writing and shall be signed by the bidder, with two or more good

and sufficient sureties, to be approved by the printing board in such sum as they shall prescribe, made payable to the state, and conditioned for his faithful compliance with his bid, and with the provisions of the law relating thereto, for the period of two years, and until a new contract shall have been made and approved; the contract shall also be signed on behalf of the state by the members of the printing board, and shall be approved by the governor and comptroller, and filed in the office of the secretary of state. [Id. sec. 12.]

**Art. 6359. [4239] Suits on contractor's bond.**—On breach by the contractor of the bond provided for in the preceding article, the same may be put in suit on the order of the governor; and such suit may be brought in the proper court of the county in which the seat of government may be; and such bond shall not become void on the first recovery, but suits may be maintained thereon until the whole amount thereof shall be recovered. [Id.]

**Art. 6360. [4240] Secretary of the senate and chief clerk of house to furnish journals, etc., to contractor.**—It shall be the duty of the secretary of the senate, and of the chief clerk of the house of representatives, to deliver to the contractor for the public printing the journals of their respective houses for the purpose of being printed, together with a comprehensive index to the same, to be printed at the end thereof; and it shall be the duty of the contractor to carefully use the same, and to return them without delay, uninjured, to such secretary and clerk respectively when the printing thereof is completed. [Id. sec. 9.]

**Art. 6361. [4241] Secretary of state to furnish laws, etc.**—It shall be the duty of the secretary of state to deliver to such contractor, as soon as practicable after their passage or approval, copies of all laws and resolutions adopted by the legislature, together with a comprehensive index to the same. [Id.]

**Art. 6362. [4242] Secretary of state to compare copies and certify, etc.**—It shall also be the duty of the secretary of state to read and revise the proofs of such laws and resolutions, and to superintend the printing of the same, and to compare the same with the originals in his office, and to certify that the laws and resolutions as published are true copies of such originals; which certificate, together with a statement of the date on which the legislature adjourned, shall be appended to and printed at the end of each volume of such laws and resolutions. But the provision requiring the secretary of state to read and revise the proofs shall not dispense with the duty of the contractor to see that such proofs are properly read and corrected. [Id. secs. 9, 11.]

**Art. 6363. [4243] Work to be delivered to whom.**—The whole number of laws and journals, reports of public officers, and other public documents authorized to be printed, shall be delivered to the secretary of state at his office, except such printing as may be ordered by the two houses of the legislature, or either of them, for their use, which shall be delivered to such persons at such times as such houses, or either of them, may direct. [Id. sec. 10.]

**Art. 6364. [4244] When to be delivered.**—The laws and journals shall be delivered within sixty days after the last copy shall have been furnished to the contractor. The reports of public officers shall be delivered to the governor by the respective officers making the same in sufficient time to be delivered to the contractor one month before the meeting of the legislature, and if so furnished to said contractor shall be delivered by him to the secretary of state within the first week of said session; and if furnished less than one month before the meeting of the legislature, or after, the same shall be delivered by the contractor to the secretary of state within one month after they are so furnished. [Id. sec. 11.]

**Art. 6365. [4245] Account, how audited and paid.**—All accounts for printing done or stationery furnished, under the provisions of this title, except that for the legislature when in session, shall be audited as follows: The account shall be verified by the affidavit of the contractor that said account is just and correct; that the amount of work charged for has actually been performed, or the actual amount of stationery delivered, and that the prices charged in said account are in accordance with the stipulations of the contract, and shall be accompanied with a sample of the work done and stationery furnished. After which it shall be examined by the practical printer and printing board, and, if found correct, approved by said board. Such claim, when thus examined and approved, shall be sufficient authority for the comptroller to issue his warrant, to be paid out of the appropriations for public printing or stationery. [Id. sec. 13.]

**Art. 6366. [4246] Accounts for current printing of legislature.**—All accounts for printing done or stationery used in either house of the legislature shall, in addition to the requirements contained in the preceding article, be approved by the chairman of the committee on public printing and the chairman of the committee on contingent expenses of the house ordering the work, before being presented to the printing board; for which account, when thus approved, the comptroller is authorized to draw his warrant, payable out of the contingent fund. [Id. sec. 14.]

**Art. 6367. [4247] Legislature may alter maximum rates, etc.**—It shall be competent for the legislature, at any time, to change by law the maximum rates hereinbefore prescribed for stationery or printing and binding, and, should the contractors decline to do such work, or to furnish such stationery, at the maximum rates so fixed, the printing board shall immediately proceed to re-let such contract. [Id. sec. 17.]

**Art. 6368. [4248] Contract may be abrogated, when, etc.**—The contracts for printing and stationery herein provided for may be abrogated by the legislature when in session, or by the printing board, with the consent of the governor and comptroller, when the legislature is not in session, if the contractor should fail to perform the work, or to furnish the supplies, in accordance with law and with his contract, and as promptly as the exigencies of the public service demand. [Id.]

**Art. 6369. [4249] Board may re-let contract, etc.**—Should there be no bid for the public printing or stationery within the maximum rates as fixed by law, or should the successful bidder fail to execute the bond with security as herein required, or should the contract be abrogated, it shall be the duty of the printing board, with or without advertisement, as the interest of the state and the exigencies of the public service may seem to require, to proceed to let out a new contract as hereinbefore provided; and they may, in their discretion, make such temporary arrangements to meet the emergency as is demanded by the public interest. [Id.]

**Art. 6370. [4250] Supplies to reporters.**—The reporters for the supreme court and court of criminal appeals shall be furnished by the state printing board with all stationery necessary for the performance of their duties. [Acts 1889, p. 7, sec. 2.]

**Art. 6370a. Reports of appellate courts; award of contract, etc.**—That the board of public printing is hereby authorized and it is made its duty, for the purpose of the publication of the reports of the appellate courts of the state of Texas, to cause to be printed and bound the decisions of the supreme court, court of criminal appeals, and the courts of civil appeals of the state of Texas, in the form, size and manner as now provided by law, and for this purpose to invite bids, not confined to residents of this state, upon proposals advertised by said board, for

such time and manner as may be fixed by said board, and to award the contract for such printing and binding to the lowest responsible bidder, and the said board shall have the right to reject any and all bids. [Acts 1913, p. 59, sec. 1.]

**Art. 6370b. Terms of contract; duty of clerks of courts.**—The said board is hereby given full power and discretion to fix all the conditions, provisions and details of such contract concerning the printing, binding, publication and sale of such reports, and to demand such security from the contractor as will secure the performance of such contract and the interest of the state of Texas, provided that such contract shall be for a term of six years. Said contract may also provide for the printing and binding of delayed manuscripts of said reports; and said board may also provide, from time to time, by separate contracts, under similar conditions, for the reprint of said reports, or former volumes of said reports; and to facilitate the prompt printing and binding of said reports in the future, the clerks of said courts shall provide the reporters of said courts with manifold copies of their opinions as the several courts rendering the same shall direct to be published, duly certified, together with the record of the cases, as soon as said opinions become final. [Id. sec. 2.]

**Art. 6370c. Price of reports; number of volumes; plates; copyright.**—The maximum price of said reports furnished by the contractor to the legal profession and the public of the state shall not exceed two dollars per volume, and the maximum price paid by the state for such volume shall not exceed four dollars per volume, and the number of volumes to be delivered to the state shall not exceed two hundred and fifty of each volume of said reports for the use of the state; and said contract shall also provide that the contractor shall keep on hand a sufficient number of volumes of said reports, or make such arrangements as to enable the legal profession and the public in this state to obtain from such contractor such report at the price fixed in such contract. Said board shall also determine whether electrotype or stereotype plates of said reports are to be made, and to regulate the use thereof, but the ownership of said plates together with the copyright of such reports shall remain in the state of Texas. [Id. sec. 3.]

**Art. 6370d. Laws repealed.**—That all laws and parts of laws in conflict with the provisions of this Act be and the same are hereby repealed. [Id. sec. 4.]

## TITLE 111

## PROPERTY—STOLEN

<p><b>Art.</b> 6371. Treble value of stolen property recoverable, when.</p>	<p><b>Art.</b> 6372. Criminal prosecution not affected by this title.</p>
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**Article 6371. [5044] Treble value of stolen property recoverable, when.**—If any person shall purchase, trade or barter for any personal property after nightfall, and the same shall afterward be proved to be stolen property, such persons so purchasing, trading or bartering for said property, shall be liable to the true owner thereof in three times the value of the same, to be recovered in any court having jurisdiction of the case. [Act June 22, 1876, p. 26.]

**Wrongful intermixture of goods.**—Wrongful intermixture of stolen goods with others, so that they could not be distinguished, held to amount to a refusal of owner's demand for their return. *Rabe v. Jourdan*, 46 C. A. 456, 102 S. W. 1167.

**Evidence.**—In an action by the owner of stolen goods against one who had purchased them from the thief, evidence examined, and held to support a verdict for the amount rendered for the plaintiff. *Rabe v. Jourdan*, 46 C. A. 456, 102 S. W. 1167.

**Art. 6372. [5045] Criminal prosecution not affected by this title.**—Nothing in this title shall be so construed as to relieve any person so offending from prosecution under the criminal laws.

## TITLE 112

## PROPERTY—STATE'S PERSONAL—PRESERVATION OF

<p>Art. 6373. Persons in control of state property to make inventory.</p> <p>6374. How made and to whom rendered.</p> <p>6375. When made.</p> <p>6376. Persons in control of property responsible for same.</p>	<p>Art. 6377. Incoming and outgoing officers to check inventory; receipt to be given.</p> <p>6378. Penalty for non-compliance.</p> <p>6379. Law cumulative.</p>
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**Article 6373. Persons in control of state property must make inventory.**—It shall be the duty of every official or other person who has in his possession, or under his control, or for which he is in anywise responsible, any personal property belonging to the state of Texas, or in which it has an interest, to make out in triplicate a correct and full list and inventory of all such personal property which is or was in his possession when he assumed charge of such office or position, or had under his control, or for which he is in any way responsible, and which inventory shall contain the name of the article or articles of such personal property, the cost thereof, a fair and reasonable estimate of the present value thereof, a statement of the present condition of the same, how long said property has been in use, and the extent of the probable service, use and benefit that such property will be to the state in future; and, if sold during his term of office, or while in his possession, or under his control, he shall state the selling price thereof, and the disposition of the proceeds. [Acts 1899, p. 307, sec. 1.]

**Art. 6374. How made and to whom rendered.**—A copy of said list and inventory, duly sworn to, shall be by such person charged with keeping said property, or who has the same under his control, management, or who is responsible for the same, transmitted by registered letter to the secretary of state at Austin, Texas, whose duty it shall be to enter such list and inventory on a book to be kept by him for the purpose, under its appropriate heading; and said secretary of state is hereby authorized to purchase such book or books as shall be necessary to record all such lists and inventories so made to him, and he shall be responsible for the correct entry of all said articles in such book or books, and shall be responsible for the safe keeping of the original sworn report, from each of the persons named in this chapter, including the governor of this state, comptroller of public accounts, treasurer, attorney general, adjutant general, commissioner of insurance and banking, superintendent of public buildings and grounds, the commissioner of the general land office, chief justice of the supreme court, court of criminal appeals, and the several courts of civil appeals, and the clerks thereof, the managers of each and every asylum in the state of Texas, superintendents and assistant superintendents of the penitentiaries and reformatories, superintendents and managers of all state farms, superintendents and managers of the university and the several branches thereof, normal schools, all the officers and employes of either branch of the legislature having personal property belonging to the state in their possession, and each and every other person holding any personal property in trust for the state of Texas, or having the same under his control, or in his possession, or for which he is in any wise responsible, all of whom are included in this chapter and subject to its provisions. A duplicate of said list and inventory, so sent to the secretary of state, shall be forwarded to the comptroller of public account, who shall carefully preserve the same in his office; and it is made the duty of the

person so making out the list to retain in his possession for his successor in office a true copy thereof, and whose duty it shall be to deliver same to such successor within three days after his qualification and assuming charge of such position, office or agency. [Id. sec. 2.]

**Art. 6375. When made.**—Upon qualification at the beginning of the terms of office of any of the persons named herein, after each succeeding general election, and within thirty days after taking charge of any personal property as herein named, it shall likewise be his duty to make said report as herein required of the officers now holding any of said positions, and to forward same to the officers herein named, who shall receive them and who shall continue to keep the registration of said reports, lists and inventories, as herein required of the secretary of state under the foregoing article hereof, and who shall, when said lists are received, make comparisons with former reports and note all articles of property not included in former lists, or which were included in former lists, but are not in the list last filed, and shall designate all such articles which are either dropped from or added to those of former lists and inventories. [Id. sec. 3.]

**Art. 6376. Persons in control of property responsible for same.**—Every person herein named or referred to, in charge of any public institution of Texas, or having under his control any personal property belonging to the state of Texas, is hereby made responsible for the same and the full value thereof; and all persons hereafter coming into any of the offices or positions herein enumerated shall at once become and shall remain responsible for the preservation and safe keeping of all personal property herein named or referred to, whether such persons be under official bonds or not; and all official bonds made by any of the persons herein named or referred to shall be intended as security to the state of Texas for the full value of all such personal property in any such institution or department, or otherwise belonging to the state over which such person is in control, or for which he is by this act made responsible. [Id. sec. 4.]

**Authority to change agency holding property.**—The legislature has ample authority to change at will a mere governmental agency holding public property for a governmental purpose. *Lander v. Victoria County* (Civ. App.) 131 S. W. 821.

**Art. 6377. Incoming and outgoing officers to check inventory.**—Hereafter, when any of the officers named in this chapter, or who are hereby referred to and required to take charge of any of the properties of the state, shall take charge of same, they shall require of their predecessors in such positions, whose duty it is hereby made to furnish same, to make out for them a full list and inventory as above mentioned, of all properties in their possession, or under their control and management, or for which they are in any wise responsible, belonging to the state of Texas; and such outgoing and incoming officers shall together check up said list and inventory and ascertain that the same and each article in said list named is then on hand or duly accounted for. Said incoming officer shall give his receipt to his said predecessor in office for all of such property before he shall be entitled to possession of the same, and said receipt shall be by him delivered to said secretary of state for registration in his office, and a copy of the same shall be likewise delivered to the comptroller of public accounts for preservation in his office. [Id. sec. 5.]

**Art. 6378. Penalty for non-compliance.**—Should any of the officers, persons, or employes named in this chapter fail to make out said list and inventory, or fail to perform any of the duties herein required of him, he shall become immediately responsible to the state of Texas for the value of any and all articles of furniture, implements, goods, wares, merchandise, live stock and all other personal property which have come into his hands, or for which he may be responsible, and be sub-

ject to suit in the name of the state of Texas for the value of the same, and, should he fail to do or perform any of the acts and things required of him by this chapter, he shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished as provided in the Penal Code. The jurisdiction for all suits under this chapter shall be either in the county court of Travis county, or in the county where such officer shall reside at the time of the institution of said suit or prosecution, or where such property may be situated. [Id. sec. 6.]

**Art. 6379. Law cumulative.**—This chapter is not intended to repeal any law now in force for the preservation and protection of any state property, but is cumulative thereof, and all said laws are hereby kept in full force and effect where the same do not specifically conflict with this chapter. [Id. sec. 7.]



## TITLE 113

## PUBLIC BUILDINGS, GROUNDS AND PARKS

Chap.

1. Public Buildings and Grounds.
2. State Inspector of Masonry, Public Buildings and Works.

Chap.

3. Contractors' Bonds to Secure Laborers and Materialmen.
4. San Jacinto State Park.
5. Gonzales State Park.

## CHAPTER ONE

## PUBLIC BUILDINGS AND GROUNDS

Art.

6380. Appointment and term of office of superintendent of public buildings.
6381. Bond and oath.
6382. Removal and liability on bond.
6383. Superintendent to have charge of public buildings.
6384. Duties as to state cemetery.
6385. Shall file inventory of property.
6386. Under whose control public rooms and buildings.

Art.

6387. Public property to be sold, when.
6388. Shall have charge of halls, rooms, etc., when.
6389. Not to be used for private purposes.
6390. Authority as policeman.
6391. Shall frequently inspect, etc.
6392. To make report.
6393. Sheriff to have charge of court house.
6394. The Alamo.

**Article 6380. [3820] Appointment and term of office of superintendent.**—The governor shall appoint a suitable person as superintendent of public buildings and grounds, who shall hold his office for a term of two years. In case of a vacancy in said office the appointment shall be for the unexpired term. [Act April 29, 1874, p. 165. P. D. 7234f.]

**Art. 6381. [3821] Bond and oath.**—Before entering upon the duties of his office, the superintendent of public buildings and grounds shall execute a bond in the sum of two thousand dollars, payable to the state, with two or more good and sufficient sureties, to be approved by the governor, and conditioned for the faithful discharge of the duties of said office. He shall also take and subscribe the oath of office prescribed by the constitution, which oath and bond shall be filed in the office of the secretary of state. [Id. sec. 2. P. D. 7234g.]

**Art. 6382. [3822] Removal and liability on bond.**—The superintendent of public buildings and grounds may be removed from office at any time by the governor for neglect of duty, incompetency, or other sufficient cause; and he and his sureties shall be liable on his official bond for all damages occasioned by the injury or loss of any public property under his care, or resulting from any neglect of duty on his part. [Id. sec. 4. P. D. 7234.]

**Art. 6383. [3823] Superintendent to have charge of public buildings.**—It shall be the duty of the superintendent to have and take charge and control of all public buildings, grounds and property of the state, which may not be used by the different officers of the state government, including the state cemetery, and to properly care for and protect the same from damage, intrusion or improper uses. [Acts 1884, p. 60.]

**Art. 6384. [3824] Duties pertaining to state cemetery.**—The superintendent shall also control, superintend and beautify the grounds of the state cemetery. He shall preserve such grounds and everything pertaining thereto from depredation and injury, and shall procure and erect at the head of each grave without a permanent monument an obelisk of marble, on which shall be engraved the name of the deceased therein buried. [Act April 14, 1871, p. 35. P. D. 5885.]

**Art. 6385. [3825] Shall file inventory of property.**—Upon his qualification, the superintendent shall file in the office of the secretary of

state a true and correct inventory of all public personal property committed to his custody, verified by his affidavit, and a like inventory for all additions to such property during his term of office; and on his retirement from office such property shall be delivered to his successor, who shall receipt for the same. [Act April 29, 1874, p. 165, sec. 2.]

**Art. 6386. [3826] Different public rooms and buildings, under whose control.**—The executive mansion, and grounds belonging to the same, and the executive offices in the state capitol, and the rooms therein occupied severally by the secretary of state, the comptroller, the treasurer, the attorney general, the adjutant general, the board of education, the commissioner of agriculture, and other officers shall be under the charge and control of each of said officers occupying or using the same; and the rooms on the third floor wherein are the supreme court library and the rooms used and occupied as the offices of the clerks of the supreme court, court of criminal appeals, and court of civil appeals, shall be under the control and in the charge of the clerks of said courts. [Acts 1884, p. 60.]

**Art. 6387. [3827] Public property to be sold, when.**—All property belonging to the state situated or being in the city of Austin, or to any department, board or office of the state, when the same shall become unfit for use or no longer needed, shall be turned over to the said superintendent, who shall sell the same at public auction, after advertising it for not less than five days; and the money arising therefrom, less the expense of advertising and selling, shall be deposited in the state treasury to the credit of the department, board or office from which it was obtained, to be expended by the said superintendent for improvements or repairs whenever needed by the said departments, boards or offices, or for the state cemetery. The said superintendent shall make his report in writing to the comptroller, stating articles received, articles sold, to whom and at what price, and also a report showing how said funds were expended. [Id.]

**Art. 6388. [3828] Shall have charge of halls, rooms, etc., when.**—Said superintendent, during the recess of the legislature, shall have the charge and control of the halls and committee rooms of said capitol, except as hereinbefore provided; and before the assembling of each session of the legislature he shall prepare the different rooms for the uses of the legislature. [Acts 1884, p. 60.]

**Art. 6389. [3829] Not to be used for private purposes.**—No room, apartment or office in said building shall at any time be used by any person as a bedroom or for any private purposes whatever; provided, that this article shall not apply to the rooms occupied by the judges of the supreme court and courts of civil and criminal appeals, on the third and fourth floors of the capitol. [Id.]

**Art. 6390. [3830] Authority as a policeman.**—The watchmen employed about and around the capitol and other buildings and grounds shall have all the powers and authority of a policeman of the city of Austin; and whenever, for the purpose of properly executing the provisions of this law, under the approval of the governor, by the said superintendent, there may arise a conflict with any ordinances or authority granted or given under or by virtue of the charter of the city of Austin, then and in that event so much of the said charter as authorizes the granting of such ordinances or the giving of such authority, be and the same is hereby repealed in so far as they prevent the said superintendent from efficiently performing his duties hereunder. [Id.]

**Art. 6391. [3831] Shall frequently inspect all state property.**—It shall be the duty of the said superintendent to frequently inspect all the public buildings and property of the state at the capital, and at such other places as the governor may direct; to act as adviser to all

state boards in the preparation of specifications and plans for improvements and repairs to public buildings or property of the state, and to superintend the construction of said work, where the same is not otherwise specially provided for by law. The said state boards and departments shall notify the said superintendent of improvements and repairs needed for their respective buildings and offices, and the same shall be made under his direction. He shall also be required to give his special attention to the effective maintenance of the state sewers and their connections, in use at the public buildings, and to keep the same in such sanitary condition at all times as to prevent the dissemination of disease therefrom, and to see that the gas and water pipes, with their connections and appliances, are maintained in working order, ready at any time for immediate use. He shall also be required to prepare and have in his office a copy of the plans of all public buildings and improvements thereto under his charge, showing the exact location of all water, gas and sewerage pipes, so that in case of needed repairs or inspection, their position can be determined without unnecessary expense. [Id.]

**Art. 6392. [3832] To make reports.**—It shall be the duty of said superintendent to make a report to the governor on the first day of December, biennially, showing the manner in which he has discharged his duties, the improvements and repairs that have been made under his superintendence, with an itemized account of his receipts and expenditures, and the condition of all property under his charge, including an estimate of needed improvements and repairs to same. [Id.]

**Art. 6393. [3835] Sheriffs to have charge of court houses.**—The sheriffs of the several counties shall have charge and control of the court houses of their respective counties, subject to such regulations as the commissioners' court may prescribe; and the official bonds of such sheriffs shall extend to and include the faithful performance of their duties under this article.

**Art. 6394. The Alamo.**—The part of the old Alamo Mission property purchased by the state, adjoining the building known as the Alamo church, together with the Alamo church, are delivered to the care and custody of the Daughters of the Republic of Texas, to be maintained by them in good order and repair, without charge to the state, as a sacred memorial to the heroes who immolated themselves upon that hallowed ground, and, by the Daughters of the Republic of Texas, to be maintained or remodeled upon plans adopted by them, and approved by the governor of Texas; provided, that no changes or alterations shall be made in the Alamo church proper, as it now stands, except such as are absolutely necessary for its preservation; all of said property being subject to future legislation by the legislature of the state of Texas. [Acts 1905, p. 7, sec. 3.]

**Constitutionality.**—A "monopoly," in the sense forbidden by Const. art. 1, § 26, consists in the ownership or control of so large a part of the market supply of a given commodity as to stifle competition, restrict the freedom of commerce, and give the monopolies control over prices; and hence this article did not violate the constitutional provision, since it was but the assumption of a burden which deprived no citizen of any privilege or right and brought no financial gain to the corporation. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

This article did not violate Const. art. 1, § 26, which declares that perpetuities are contrary to the genius of free government and shall never be allowed. *Id.*

The superintendency of public buildings is a legislative office, which may have its powers increased or restricted or be abolished by the legislature, and this article is constitutional. *Id.*

This act did not violate Const. art. 3, § 35, prohibiting any bill from containing more than one subject, which shall be expressed in its title. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

**Acts 32d Leg. (1st Called Sess.) c. 3, did not repeal this article.**—This article was not repealed by an item in the appropriation act of 1911 (Acts 32d Leg. [1st Called Sess.] c. 3), which provided "for the improvement of the Alamo property belonging to the state of Texas, \* \* \* to be expended under the direction of the superintendent of public buildings and grounds upon the approval of the Governor, \$5,000," the latter provision being in harmony with the existing law and merely supplementary thereto, so that before

the appropriation could be used the plans therefor ought to be made by the corporation and approved by the governor. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

The Appropriation Bill of 1911 (Acts 32d Leg. [1st Called Sess.] c. 3), making an appropriation for the improvement of the Alamo property belonging to the state to be expended under the direction of the superintendent of public buildings and grounds upon the Governor's approval, did not impliedly repeal this article. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

**"Care and custody."**—By the use of the words "care and custody" this article places the corporation in the exclusive and absolute control within the conditions prescribed by the act; the "care and custody" of persons or property carrying the idea of exclusive possession. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

**On acceptance became trustee.**—The Daughters of the Republic of Texas by accepting the terms of this article became the trustee of the property for the state. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

**May restrain trespass.**—State officers trespassing upon property given by legislative enactment to the exclusive custody and possession of a private corporation held liable as any other trespasser would be; a suit against them not being a suit against the state. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

A private corporation given the exclusive care, custody, and possession of the so-called "Alamo property," owned by the state, by legislative consent, charged with its repair and maintenance, had the right and duty to protect its possession from a trespasser by action to enjoin the trespass. *Id.*

**Suit to restrain entry by superintendent not action against state.** A suit by the Daughters of the Republic of Texas against the superintendent of public buildings and grounds of the state to enjoin defendant from entering upon the Alamo property on the ground that it was given to the custody of plaintiff corporation by this article is not an action against the state, so as to be prohibited, being merely an action against defendant charging him with violating a statute, and interfering with plaintiff's property. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

**Could not enjoin the entry of superintendent to make repairs.**—The entry upon the Alamo Mission property by the state superintendent of public buildings and grounds pursuant to the governor's direction to have repairs made as expressly authorized by the appropriation bill of 1911 (Acts 32d Leg. [1st Called Sess.] c. 3), appropriating \$5,000 for repairs to be made under the superintendent's direction, did not interfere with the possession of the Daughters of the Republic of Texas under this article, so that that corporation could not enjoin such entry by the superintendent. *Conley v. Daughters of the Republic* (Sup.) 156 S. W. 197.

**Condition precedent to action.**—It was not a condition precedent to an action to enjoin trespass to real property, owned by the state and given by it into the exclusive possession of a private corporation charged with its maintenance, that the corporation should allege or prove that it was executing the charge reposed in it. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

**Defenses to action.**—In an action by a private corporation vested by the legislature with exclusive possession and control of state property to enjoin a trespass, defendants cannot object that the corporation has not acted in good faith with the state. *Conley v. Daughters of the Republic of Texas* (Civ. App.) 151 S. W. 877.

## CHAPTER TWO

### STATE INSPECTOR OF MASONRY, PUBLIC BUILDINGS AND WORKS

Art.  
6394a. Office created; salary, expenses, etc.  
6394b. Duties of inspector.  
6394c. Powers and duties.

Art.  
6394d. Assistants; salary and expenses, etc.  
6394e. Qualifications of inspector.

**Article 6394a. Office created; salary, expenses, etc.**—That the office of state inspector of masonry, public buildings and works is hereby created, who shall be appointed by the governor, and shall hold his office for the term of two years, from the date of his appointment, and shall be paid an annual salary of \$2000.00, one-twelfth (1-12) thereof to be paid at the end of each months' service, and his actual and necessary traveling expenses while in the performance of his duties under this Act; provided, however, that such expenses shall not exceed \$1500.00 per annum, such expenses to be paid monthly at the end of each month, on itemized accounts signed and sworn to by the inspector of masonry, and filed with the comptroller of public accounts. [Acts 1911, p. 207, sec. 1.]

**Art. 6394b. Duties of inspector.**—It shall be the duty of the said inspector of masonry to carefully examine and inspect the material and workmanship of all buildings, and other structures and additions thereto, that may be constructed by contract or otherwise for the state of Texas,

out of brick or stone, or substitutes therefor, and to see that such buildings are constructed in accordance with the contract, the plans and specifications therefor, and such buildings, structures or additions shall be constructed under the supervision of the state inspector of masonry, and the work, workmanship and material thereof shall be subject to his approval. [Id. sec. 2.]

**Art. 6394c. Powers and duties.**—The state inspector of masonry, public buildings and works, is hereby authorized and it is made his duty to inspect all plans and specifications for public buildings and structures and additions thereto, that are to be constructed by contract or otherwise for the state of Texas, prior to the time such plans and specifications are adopted, and he may, with the consent of the governor, reject any and all such plans and specifications, and he shall aid the committee, board or person having such matters in charge in preparing such plans and specifications, as is intended and desired, and he shall have full and final superintendence on all buildings, structures, or additions thereto that may be constructed by contract or otherwise for the state of Texas, according to the term of contract. [Acts 1911, p. 207. Amended Acts 1913, p. 25, sec. 1 (2a).]

**Art. 6394d. Assistants; salary and expenses, etc.**—The state inspector of masonry, public buildings and works, shall with the consent of the governor, when the work in his department requires it, appoint such assistants as he may need, not to exceed two, who shall have the same qualifications as is provided by law for the state inspector of masonry, public buildings and works, and who shall during their period of service receive an annual salary of eighteen hundred (\$1800) dollars per year payable in equal monthly installments, and also their actual and necessary traveling expenses while in the performance of their duties under this Act; provided, however, that such expenses do not exceed twelve hundred (\$1200) dollars per annum, such expenses to be paid on itemized accounts, signed and sworn to by such assistants, and approved by the state inspector of masonry, public buildings and works, provided, however, that the state inspector may discontinue the service of any such assistants, at any time his service is no longer needed, such assistants, when so appointed, shall assist the state inspector of masonry, public buildings and works, in the performance of his duties under the direction of said officer. [Id. (2b).]

**Art. 6394e. Qualifications of inspector.**—No person shall be appointed to said office except a skilled mechanic, who has had at least ten years' practical experience next prior to his appointment, in brick and masonry work and the substitutes therefor. [Acts 1911, p. 207, sec. 3.]

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## CHAPTER THREE

### CONTRACTORS' BONDS TO SECURE LABORERS AND MATERIALMEN

Art.  
6394f. Contractors with state, municipalities,  
etc., to give bond; actions on bond,  
etc.  
6394g. Laborers and materialmen to have  
right of action, when.

Art.  
6394h. Action to be commenced, when; parties.  
6394i. Judgment; sureties may pay into  
court.  
6394j. Notice of lis pendens.

**Article 6394f. Contractors with state, municipalities, etc., to give bond; actions on bond, etc.**—That any person or persons, firm or corporation entering into a formal contract with this state or its counties or school district or other subdivisions thereof or any municipality therein

for the construction of any public building, or the prosecution and completion of any public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the state or any municipality on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claims and judgment of the state or municipality. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the state or municipality, the remainder shall be distributed pro rata among said interveners. The bond provided for may be made by a surety company authorized to do business in Texas. [Acts 1913, p. 185, sec. 1.]

**Art. 6394g. Laborers and materialmen to have right of action, when.**—If no suit should be brought by the state or municipality within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the state or municipality that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action for his or their use and benefit, against said contractor and his surety, and to prosecute the same to final judgment and execution. [Id. sec. 2.]

**Art. 6394h. Action to be commenced, when; parties.**—When suit is instituted by any of such creditors on the bond of the contractor, it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later; provided that if the contractor quits or abandons the contract before its consummation, suit may be instituted by any of such creditors on the bond of the contractor, and shall be commenced within one year after abandonment of said contract, and not later.

Where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contractor, and not later. [Id. sec. 3.]

**Art. 6394i. Judgment; sureties may pay into court.**—If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery; subject to the provisions in section 1 [Art. 6394f] of this Act, giving to the state or municipality the right of priority in the proceeds of such judgment. The sureties on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to-wit: the penalty named in the bond, less any amount which said surety may have had to pay to the state or municipality by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability. [Id. sec. 4.]

**Art. 6394j. Notice of lis pendens.**—In all suits instituted under the provisions of this Act, notice of the pendency of such suits shall be made by publication in some newspaper of general circulation, published in the

county or town where the contract is being performed, for at least three successive weeks, the last publication to be at least one week before the trial of such case. [Id. sec. 5.]

## CHAPTER FOUR

### SAN JACINTO STATE PARK

Art. 6395. Establishing state park on battlefield. Art. 6397. Duties of commissioners.  
6396. Commissioners.

**Article 6395. Establishing state park on battlefield.**—The lands owned and acquired by the state, commonly called the San Jacinto battlefield, shall be known and styled, “The San Jacinto State Park,” and, with the exceptions, reservations and limitations herein mentioned, the said San Jacinto state park shall be under the care and direction of the state superintendent of public buildings and grounds. Said superintendent and the commissioners shall jointly endeavor to improve, preserve and protect the lands and property within and connected with said San Jacinto state park. [Acts 1907, p. 104, sec. 9.]

**Art. 6396. Commissioners.**—The governor shall, every two years, appoint three resident citizens of the state, who shall be known as “San Jacinto State Park Commissioners,” and whose duties shall be to advise with and assist the superintendent of public buildings and grounds in the improvement, care and preservation of the lands now owned and hereafter acquired by the state, known as the San Jacinto battlefield; provided, that one or more of said commissioners may, in the discretion of the governor, be selected from the patriotic organization known as San Jacinto Chapter, Daughters of the Republic of Texas, or from any kindred organization; provided, further, that said commissioners shall serve without compensation. [Id. sec. 6.]

**Art. 6397. Duties of commissioners.**—It shall be the duty of said commissioners, acting with the advice and consent of the superintendent of public buildings and grounds, to cause to be erected upon a site by them selected a keeper’s cottage and other necessary buildings; to arrange for or employ a keeper who shall reside upon the grounds and who shall be clothed with all the powers and authority of a peace officer of the county for the purposes of caring for and protecting the property of the state; to provide the necessary teams, implements and other utensils for the use of such keeper and other employés in the work of beautifying, improving and protecting said grounds; to cause to be erected around, about and upon said grounds such fence and fences as shall, in the judgment of the commissioners and superintendent of public buildings and grounds, serve the best interests of the state in the care and protection of its property; to provide for and outline a plan, diagram and design of the work to be done from time to time, copies of which shall be kept in the office of the superintendent for reference, and to do any and all things necessary to be done, with the intent and purpose of beautifying, improving and protecting the state’s interest therein. [Id. sec. 7.]

For the acts of the legislature providing for the purchase of the land upon which this park is situated, see twenty-fifth legislature, p. 144; twenty-sixth legislature, p. 6 and p. 238, and thirtieth legislature, p. 104.

## CHAPTER FIVE

### GONZALES STATE PARK

Art.  
6397a. Establishing state park.  
6397b. Commissioners.  
6397c. Duties of commissioners.  
6397d. Expenses.

Art.  
6397e. Name; duties of state superintendent of buildings and grounds, etc.  
6397f. Appropriation.

**Article 6397a. Establishing state park.**—That, whereas, it has been the policy of the state of Texas to acquire title to, beautify and preserve certain historic spots in the State of Texas where the most memorable events occurred which resulted in Texas independence; and, whereas, along this line the state has already acquired title to the Alamo property in San Antonio, the San Jacinto battle ground in Harris county, the site of the Fannin massacre in Goliad county, with a view of making state parks, beautifying and preserving them, and, by erecting monuments with suitable inscriptions thereon, perpetuating the memory of the characters who made them historic spots; and, whereas, one of the most notable of such places is the municipality of Gonzales, where the first armed resistance was made; where the first army assembled and which was organized for the capture of San Antonio; where the only company was organized and equipped for the relief of Col. Travis after the Alamo was invested; and where General Houston assembled and organized the army of Texas which eventually destroyed Santa Anna's army and brought about Texas independence; and whereas, in the original plan of the municipal town of Gonzales a broad avenue 170 varas wide and three miles long runs east from the town of Gonzales to the limits of the four leagues of land originally granted to said municipality, along which avenue General Houston's army, after having been organized, retreated in the direction of San Jacinto, and which avenue, designated on the map of said municipality as East avenue, is now owned by the city of Gonzales, and contains about 150 acres of land, now unimproved; and, whereas, the city of Gonzales, through its municipal officers, have offered to convey unto the state of Texas, without charge, said avenue beginning in the city limits where Tinsley's creek crosses said east avenue and extending eastward to the limits of said avenue, which is the eastern boundary line of said four league grant from the state of Coahuila and Texas to said municipality, reserving and excepting, however, a street 60 feet wide on each side of said avenue for public passage, provided the state of Texas will dedicate the same for a public state park and will agree to beautify and protect the same.

Therefore, Be it enacted by the Legislature of the State of Texas: That the State of Texas accepts title to said ground tendered by the City of Gonzales, and dedicates it as a public State park in commemoration of the historic events that have occurred at Gonzales, and agrees to beautify and protect the same; which said ground shall be under the care and direction of the State Superintendent of Public Buildings and Grounds. [Acts 1913, p. 242, sec. 1.]

**Art. 6397b. Commissioners.**—The governor shall, as soon as practicable after the taking effect of this Act, and every two years thereafter, appoint three resident citizens of the state, who shall be known as "Gonzales State Park Commissioners," and whose duties shall be to advise with and assist the superintendent of public buildings and grounds in the improvement, care and preservation of the said land; provided, that one or more of said commissioners may, in the discretion of the governor, be selected from the patriotic organization known as Gonzales Chapter, Daughters of the Republic of Texas, or from any kindred organization; provided, further, that said commissioner shall serve without compensation. [Id. sec. 2.]



**Art. 6397c. Duties of commissioners.**—It shall be the duty of said commissioner, acting with the advice and consent of the superintendent of public buildings and grounds, to cause to be erected upon a site by them selected, a keeper's cottage and other necessary buildings; to arrange for or employ a keeper who shall reside upon the grounds and who shall be clothed with all the powers and authority of a peace officer of the county for the purpose of caring for and protecting the property of the state; to provide the necessary teams, implements and other utensils for the use of such keeper and other employés in the work of beautifying, improving and protecting said grounds; to cause to be erected around, about and upon said grounds such fences as shall, in the judgment of the commissioners and superintendent of public buildings and grounds, serve the best interests of the state in the care and protection of its property; to provide for and outline a plan, diagram and design of the work to be done from time to time, copies of which shall be kept in the office of the superintendent for reference, and to do any and all things necessary to be done, with the intent and purpose of beautifying, improving and protecting the state's interest therein. [Id. sec. 3.]

**Art. 6397d. Expenses.**—Such reasonable and necessary personal expense as may be incurred by said three commissioners in the performance of their duties in this behalf, and in the employment of landscape gardeners, surveyors, foresters, mechanics, employés, materials, or upon contracts, which may be or become necessary in carrying out the provisions of this Act, shall be presented in writing and under oath to the governor and, when approved by him as reasonable and correct, shall be audited as other claims and accounts for state purposes and shall be paid out of the appropriation herein made. [Id. sec. 4.]

**Art. 6397e. Name; duties of state superintendent of buildings and grounds, etc.**—The said land and grounds shall hereafter be known and styled "Gonzales State Park" and, with the exceptions, reservations, and limitations herein mentioned, the said Gonzales state park shall be under the care and direction of the state superintendent of buildings and grounds. Said superintendent and the commissioners shall jointly endeavor to improve, preserve and protect the lands and property within said Gonzales state park. [Id. sec. 5.]

**Art. 6397f. Appropriation.**—That, for the several purposes mentioned in this Act, the sum of seven thousand five hundred dollars (\$7,500.00), or so much thereof as shall be necessary, is hereby apportioned [appropriated] out of any money in the state treasury not otherwise appropriated. [Id. sec. 6.]

## TITLE 114

## QUO WARRANTO

[See Corporations, Trusts and Officers—Removal of.]

Art.  
6398. Petition for, when presented.  
6399. Joinder of parties, when.  
6400. Citations to issue, etc.  
6401. Proceedings as in civil cases.

Art.  
6402. Judgment of court.  
6403. Law cumulative.  
6404. Venue of suit for state office.

**Article 6398. [4343] Quo warranto, when.**—In case any person shall usurp, intrude into or unlawfully hold or execute, or is now intruded into, or now unlawfully holds or executes any office or franchise, or any office or any corporation created by the authority of this state, or any public officer shall have done or suffered any act which by the provisions of law works a forfeiture of his office, or any association of numbers of persons shall act within this state as a corporation without being legally incorporated, or any incorporation does or omits any act which amounts to a surrender or a forfeiture of its rights and privileges as a corporation, or exercises power not conferred by law, or if any railroad company doing business in this state shall charge an extortionate rate for the transportation of any freight and passengers, or refuse to draw or carry the cars of any other railroad company over its line as required by the laws of this state, the attorney general, or district or county attorney of the proper county or district, either of his own accord, or at the instance of any individual relator, may present a petition to the district court of the proper county, or any judge thereof, in vacation, for leave to file an information in the nature of a quo warranto in the name of the state of Texas; and, if such court or judge shall be satisfied that there is probable ground for the proceeding, the court or judge may grant the petition and order the information to be filed and process to issue. [Acts 1879, S. S., p. 43.]

**Historical.**—This article, as originally published, read as follows: "Or any office in any corporation \* \* \* or any association or number of persons \* \* \* or if any railroad company doing business in this state shall charge an extortionate rate for the transportation of freight or passengers." It was so printed in the Revised Statutes of 1879. See Acts 1879, S. S., p. 43; R. S. 1879, App. p. 45.

**In general.**—The right of an officer to exercise certain functions as a part of the duties of his office will not be determined on a proceeding by quo warranto. *State v. Smith*, 55 T. 447.

In adopting the statute of 9 Anne, on quo warranto, the legislature is presumed to have intended the language to receive the construction which the courts had uniformly given it. *State v. Smith*, 55 T. 447. This is a general rule of construction (*Morgan v. Davenport*, 60 T. 230; *Brothers v. Mundell*, 60 T. 240), and applies where a former law is substantially re-enacted (*Moffett v. Moffett*, 67 T. 642, 4 S. W. 70).

When the power to determine the question of the eligibility of a candidate for a municipal office is conferred by the legislature on a city council, its decision will not be revised in a proceeding by quo warranto. *Seay v. Hunt*, 55 T. 545.

**Nature of remedy.**—A suit by information is a civil proceeding in form analogous to a criminal prosecution. *State v. De Gress*, 53 T. 387.

A proceeding by quo warranto by the state is for the purpose of reclaiming a privilege granted by it and forfeited by noncompliance with the conditions of the grant. It cannot be used for the purpose of enforcing the performance of a condition or stipulation in the grant. *Morris v. Leona*, 67 T. 303, 3 S. W. 281.

**Exercise of franchise or privilege.**—A proceeding by quo warranto may be maintained against the enjoyment of a franchise claimed, whether under state legislation or municipal act, when there was absence of power to grant it. *Morris v. State*, 62 T. 728.

**Exercise of public office.**—The usual method of ascertaining whether an individual is holding an office contrary to law is by an information in the nature of the common-law writ of quo warranto. *Ex parte De Bland*, Dallam, 406; *Bradley v. McCrabb*, Dallam, 504; *Wright v. Allen*, 2 T. 158; *Banton v. Wilson*, 4 T. 400; *Grant v. Chambers*, 34 T. 573.

An information in the nature of a quo warranto filed in the district court by the proper officer at the instance of a private relator, where the value of the office is over \$500, is a proper proceeding, and may be used not only to oust the intruder, but also to adjudge to the relator the possession of the office. But this method of proceeding is not exclusive, and the right to an office may be determined as well by an ordinary civil suit. *McAllen v. Rhodes*, 65 T. 348, citing *State v. Owens*, 63 T. 261; *Williamson v.*

Lane, 52 T. 335. See *State v. De Gress*, 53 T. 387; *Fowler v. State*, 68 T. 30, 3 S. W. 255; *Brennan v. Bradshaw*, 53 T. 330, 37 Am. Rep. 758; *State v. De Gress*, 72 T. 242, 11 S. W. 1029; *City of East Dallas v. State*, 73 T. 371, 11 S. W. 1030; *Morris v. State*, 62 T. 728; *State v. Goowin*, 69 T. 55, 5 S. W. 678; *Ewing v. State*, 81 T. 172, 16 S. W. 872. See *State v. I. & G. N. R. Co.*, 89 T. 562, 35 S. W. 1067.

A proceeding in the name of the state, and in the nature of quo warranto, upon the relation of one entitled to the office of district clerk, is a civil proceeding which may be maintained by him to oust an intruder who has obtained possession and assumes to exercise the functions of such office. *Williams v. State*, 69 T. 368, 6 S. W. 845. See *City of East Dallas v. State*, 73 T. 371, 11 S. W. 1030; *Dean v. State*, 30 S. W. 1047, 31 S. W. 185, 88 T. 290; *State v. De Gress*, 53 T. 387.

One who has been declared elected to an office, and who has entered upon the discharge of its duties, cannot, in a proceeding by quo warranto, be deprived thereof for bribery until he has been convicted of that offense. *State v. Humphries*, 74 T. 466, 12 S. W. 99, 5 L. R. A. 217.

Quo warranto is not the proper remedy to restrain a legal officer from exercising his office beyond the territorial limits of his jurisdiction. *State v. Rigsby*, 17 C. A. 171, 43 S. W. 271.

The state may try the title to an office by quo warranto on the relation of one claiming to be elected to it, notwithstanding he has the right to contest the election. *Gray v. State*, 19 C. A. 521, 49 S. W. 699.

The court has jurisdiction of quo warranto to try the title to an office, regardless of the salary attached to it. Id.

This statute provides for writs of quo warranto as against one who usurps, intrudes into or unlawfully holds or executes any office or franchise. This is in consonance with the general nature of the writ of quo warranto, that is, it furnishes a remedy or mode to try the right of an office or franchise. Notwithstanding this the matter of appointment of members of a board of commissioners of city of Galveston, can be inquired into collaterally in a habeas corpus proceeding, and the action of the governor in appointing said members in accordance with the charter of said city, can be declared null and void if found to be unconstitutional. *Ex parte Lewis*, 45 Cr. R. 1, 73 S. W. 811, 108 Am. St. Rep. 929.

The remedy under this article is a proceeding by quo warranto, to be used against one in possession of an office, and cannot be used by an incumbent to protect him from attempted usurpation of his office. *Callaghan v. Tobin*, 40 C. A. 441, 90 S. W. 334.

Evidence in quo warranto for fraud and irregularities in election held sufficient to sustain a judgment ousting defendant from office and awarding the same to relator. *Pease v. State* (Civ. App.) 155 S. W. 657.

**Exercise of corporate franchises and powers.**—Quo warranto is the proceeding by which to determine whether a corporation exists or not. If a corporation be acting under color of law and recognized by the state as such, the courts will not permit its corporate character to be questioned in a collateral proceeding. *Brennan v. Bradshaw*, 53 T. 330, 37 Am. Rep. 758.

A town duly incorporated for several years failed to elect officers, and an effort was made by the inhabitants to reorganize under the general law without a compliance with its provisions. Under this reorganization municipal officers were elected. It was held that the validity of such reorganization and the consequent authority of the elected officers could be determined by a quo warranto. *State v. Dunson*, 71 T. 65, 9 S. W. 103.

An inquiry may be made by quo warranto into the legality of a corporation, when the right of a person claiming to be an officer under the terms of its charter, to exercise such powers as the charter proposes to give, is called in question. *Ewing v. State*, 81 T. 172, 16 S. W. 872.

The legality of the corporate existence of a city and the election and incumbency of its officers, including respondent, restraining relator under a *capias*, may only be attacked in quo warranto under this article, and may not be inquired into by habeas corpus for the release of one from arrest under an ordinance of the city and commitment thereunder. *Ex parte Keeling*, 54 Cr. R. 118, 121 S. W. 605, 130 Am. St. Rep. 884.

Under this article the court could not properly render a judgment for the amount of franchise taxes due from the corporation, have a receiver appointed for the property of the corporation alleged to be defunct, and through such receivership sell the property and distribute the proceeds. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

**Pleading—Information.**—A proceeding by quo warranto should be sworn to, and may be filed by a district attorney pro tem., appointed during a term of court by the district judge on account of the nonattendance of the district attorney. *Fowler v. State*, 68 T. 30, 3 S. W. 255; *Hunnicut v. State*, 75 T. 233, 12 S. W. 106.

It would seem that the information and petition should be filed as separate papers, but the petition may set out all the facts and grounds of relief with prayer for process, etc., and may be filed by order of the judge. *City of East Dallas v. State*, 73 T. 371, 11 S. W. 1030.

It has been held that an unsworn information officially made by the district attorney is sufficient. *Hunnicut v. State*, 75 T. 233, 12 S. W. 106. See *Davis v. State*, 75 T. 420, 12 S. W. 957; *Little v. State*, 75 T. 616, 12 S. W. 965.

Informations should be sworn to. Where consent is given by the district judge to file the information, no further inquiry could be made as to the source of information. *Hunnicut v. State*, 75 T. 233, 12 S. W. 106.

**Complaint or petition.**—In a proceeding by quo warranto to recover an office to which the relator claims to have been elected, an allegation that he was a citizen of the county and entitled to the office is, on general demurrer, a sufficient averment of his qualification to hold the office. In such a proceeding a statement in the information that the relator received a majority of the ballots of the qualified voters of the county is sufficient. *Fowler v. State*, 68 T. 30, 3 S. W. 255.

A contention that the disqualification of the presiding officer of an independent school district election rendered the election void held insufficient to raise the validity of such officer's election as a trustee of the district. *State v. Buchanan*, 37 C. A. 325, 83 S. W. 723.

A quo warranto petition to invalidate the incorporation of an independent school district for conflict with an adjoining district held insufficient. *Id.*

A petition in quo warranto, alleging that the relator has been deprived of an office to which he had been elected, and which stated the number of votes he received and the number defendant received and that the relator has been fraudulently counted out, was sufficient on general demurrer. *Griffin v. State* (Civ. App.) 147 S. W. 328.

In quo warranto by the state to oust defendant from an office and place relator therein, where the pleading did not allege the invalidity of the election, the court had no authority to declare the election void. *State v. Pease* (Civ. App.) 147 S. W. 649.

A petition in quo warranto to contest an election held sufficient to admit evidence of the names of the voters whose ballots had been fraudulently marked. *Id.*

**Parties plaintiff or petitioners.**—A judgment of forfeiture in which the state is not a party is a nullity. *Pickett v. Abney*, 84 T. 645, 19 S. W. 859.

Where an information in quo warranto against a school trustee is presented by one having no interest, the court may refuse to permit it to be filed, and should refuse to remove the respondent. *Deaver v. State*, 27 C. A. 453, 66 S. W. 256.

The state alone can take advantage of the fact that a municipality has been illegally constituted by instituting a proceeding to test the validity of the charter thereof, and no collateral attack can be permitted. *City of Carthage v. Burton*, 51 C. A. 195, 111 S. W. 440.

Under this article a proceeding to forfeit a charter of a corporation can only be instituted by the attorney general of the state, and the attempt to confer such power upon the district or county attorney is in violation of Const. art. 4, § 22, providing that the attorney general shall represent the state in all suits and pleas in the supreme court, and shall specially inquire into the charter rights of all private corporations, and take action for the collection of taxes, etc. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

**Parties defendant.**—In an information questioning the legality of the incorporation of a town or city, and where the theory of an attack upon the right of city officials to exercise their office is that there is no such corporation, then it would seem that the pretended corporation should not be made a party. It is sufficient to proceed against the persons assuming to compose the governing body. *Ewing v. State*, 81 T. 172, 16 S. W. 872.

Where defendant was the only one of eleven candidates for four offices who was claimed to have been defeated by relator, three of the other candidates being admittedly elected, defendant was the only one of the candidates who was a proper party defendant to quo warranto by relator to obtain title to one of the offices. *Griffin v. State* (Civ. App.) 147 S. W. 328.

— **Amendments.**—If an information is not sufficiently supported by the official oath of the attorney-general, it is competent for the court to permit the defect to be cured by an amendment duly verified or by a separate affidavit. *Little v. State*, 75 T. 616, 12 S. W. 965.

**Railroad doing business within state.**—The courts of Texas have no power to forfeit the franchise of a railway company granted in another state whose line of railway has been extended into Texas; but they can withdraw the franchise granted in Texas whenever a violation of the laws of Texas justifies it, and can, by injunction, prohibit it from carrying on business in Texas in violation of Texas laws. They may also place the property of such corporation situate in Texas in the hands of a receiver to adjust the claims of creditors. *Railway Co. v. State*, 75 T. 434, 12 S. W. 690.

**Under control of state's officers.**—Quo warranto proceedings, once begun, are under the control of the state's officer, and the supporting affiants cannot control or dismiss the proceedings. *Mathews v. State*, 82 T. 577, 18 S. W. 711.

**"Franchise."**—The word "franchise," as used in this article, applies only to franchises of corporations; it does not relate to the duties appertaining to an office. *State v. Smith*, 55 T. 447; *Railway Co. v. State*, 75 T. 356, 12 S. W. 685.

**Review by appeal only.**—The district attorney brought a petition for leave to bring quo warranto, under this article and under the authority of the other laws and statutes in force, praying for judgment of ouster from corporate franchises, dissolution, for judgment for unpaid franchise taxes and penalties, and for a receiver to wind up the corporation. Acts 30th Leg. c. 23, providing for a proceeding against a corporation whose charter has been forfeited by the secretary of state for failure to pay its franchise tax, permits, under section 14, all the relief sought by the suit brought, while in the proceeding under the Revised Statutes the unpaid franchise tax could not be collected. Held, that the proceeding would be held to be under the act of 1907, and not under the Revised Statutes; and hence, as section 15 of the act of 1907 contemplates review of the judgment by writ of error, a motion to dismiss the writ to the judgment, because proceedings under the Revised Statutes were reviewable only by appeal, must be denied. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

Even if the proceeding be construed to be both under this article and under Acts 30th Leg. c. 23, the writ of error would stand as to everything in the judgment, except the naked item of ouster. *Id.*

**Art. 6399. [4344] Joinder of parties in one action, when.**—When it appears to the court or judge that the several rights of divers parties to the same office or franchise may properly be determined on one information, the court or judge may give leave to join all such persons in the same information in order to try their respective rights to such office or franchise. [*Id.* sec. 2.]

**Art. 6400. [4345] Citations to issue.**—When the information is filed, as hereinbefore provided, the clerk shall issue citations in like form as in civil suits, commanding the defendant to appear at the return term of said court to answer the relator in an information in the nature of a quo warranto. If the information is filed in vacation, the citation shall

be returnable on the first day of the next succeeding term; if in term time, it may be made returnable on any day of the same term, not less than five days after the date of the writ, as shall be directed by the court. [Id. sec. 3.]

**Sufficiency of citation.**—The fact that a citation in quo warranto did not state the nature of relator's demand was not ground for quashing the citation, where the certified copy of the petition accompanying the citation sufficiently stated the nature of the demand; there being a substantial compliance with the statute. *Griffin v. State* (Civ. App.) 147 S. W. 328.

**Art. 6401. [4346] Proceedings as in civil cases.**—Every person or corporation who shall be cited as hereinbefore provided shall be entitled to all the rights in the trial and investigation of the matters alleged against him, as in cases of trial of civil causes in this state; and, in cases of appeal to which either party shall be entitled, the said court shall give preference to such case and hear and determine the same at the earliest day practicable; and all such appeals shall be prosecuted to the term of the court in session, or the first term to be held, if not in session, after judgment has been rendered in the district court. [Id. sec. 4.]

See *State v. Broach* (Civ. App.) 35 S. W. 86; *Alamo Club v. State*, 147 S. W. 639.

**Time for appeal.**—If an appeal from a judgment rendered in a proceeding by quo warranto is not presented to the next term of the court, the appeal, when presented to some other term, must be dismissed for want of jurisdiction. The provision of the act which declares that the remedy and mode of procedure in some cases shall be construed as cumulative does not affect the question. *Fontaine v. State*, 69 T. 510, 6 S. W. 816; *Livingston v. State*, 70 T. 393, 11 S. W. 115.

A writ of error from a judgment in a quo warranto proceeding to dissolve an independent school district will be dismissed, it appearing that no appeal was prosecuted within the time required by the above article and that steps for the prosecution of the writ of error were commenced after the lapse of six months after the expiration of the second term of this court. *Kendall v. State* (Civ. App.) 51 S. W. 1102.

**Precedence over other cases on appeal.**—It is proper to give precedence to such cases, and a case may be called out of its order. *Hunnicut v. State*, 75 T. 233, 12 S. W. 106.

**Provisions as to appeal do not apply when.**—The provisions of this article as to appeal do not apply where matters not contemplated by the statute are included in the application. *Railway Co. v. State*, 75 T. 356, 12 S. W. 685.

**Evidence.**—Under allegations in quo warranto to oust defendant from his office for fraud in marking ballots of illiterates, held, that the ballots as contained in a ballot box of a certain precinct were admissible. *Pease v. State* (Civ. App.) 155 S. W. 657.

**Findings.**—The court in quo warranto to oust defendant from the office of mayor of a city and place relator therein held to fail to find on the material issues, necessitating a reversal of the judgment. *State v. Pease* (Civ. App.) 147 S. W. 649.

**Art. 6402. [4347] Judgment of court.**—In case any person or corporation against whom any such proceeding is filed shall be adjudged guilty, as charged in the information, the court shall give judgment of ouster against such person or corporation from the office or franchise, and may fine such person or corporation for usurping, intruding into or unlawfully holding and executing such office or franchise, and shall also give judgment in favor of the relator for costs of the prosecution. [Id. sec. 5.]

See *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

**Judgment.**—Upon the dissolution of a corporation there is an equitable lien on its property in favor of its creditors. *Panhandle Nat. Bank v. Emery*, 78 T. 498, 15 S. W. 23.

The court may enter any order necessary to give effect to the general judgment. *Texas T. Ry. Co. v. State*, 83 T. 1, 18 S. W. 199.

A judgment awarding an office, together with all its franchises, privileges and emoluments, is proper. *Gray v. State*, 19 C. A. 521, 49 S. W. 699.

Allegations and prayers in quo warranto to oust defendant from his office as mayor and install relator therein held to justify a decree that relator, on being awarded the office, was entitled, as against defendant, to demand the proportionate part of the fees and emoluments of the office. *Pease v. State* (Civ. App.) 155 S. W. 657.

**Costs.**—One who successfully prosecutes proceedings in quo warranto by private counsel, and without the aid of the district attorney, is entitled to recover costs. *Hussey v. Heim*, 17 C. A. 153, 42 S. W. 859.

**Art. 6403. [4348] Remedy cumulative.**—The remedy and mode of procedure hereby prescribed shall be construed to be cumulative of any now existing. [Id. sec. 6.]

**Art. 6404. [4349] Venue of suit for state office.**—Suits against persons illegally claiming or holding any state office or appointment, as contradistinguished to a county or district office, shall be brought in the district court of Travis county. [Id. sec. 7.]

## TITLE 115

## RAILROADS

Chap.	Chap.
1. Incorporation of Railroad Companies.	11. Collection of Debts from Railroad Corporations.
2. Amending or Changing Charter.	12. Forfeiture of Charter.
3. Public Offices and Books.	13. Ticket Agents—Authority and Duty.
4. Officers of Railroad Corporations.	14. Liability for Injuries to Employés.
5. By-laws.	15. Railroad Commission of Texas.
6. Stock and Stockholders.	16. Issuance of Stocks and Bonds Regulated.
7. Meetings of Directors and Stockholders.	17. Interurban Railroad Companies.
8. Right of Way.	18. Street Railways.
9. Other Rights of Railroad Companies.	18a. State Railroad.
10. Restrictions Upon, Duties and Liabilities of Railroad Corporations.	19. General Provisions.

## CHAPTER ONE

## INCORPORATION OF RAILROAD COMPANIES

Art.	Art.
6405. Not less than ten persons may form.	6411. Existence of corporations begins when.
6406. Who may build railroad.	6412. May proceed to act when.
6407. Amount of stock subscribed and to be paid.	6413. Shall not be for more than fifty years.
6408. Articles of incorporation must contain what.	6414. Manner of renewing corporation.
6409. Shall be submitted to attorney general.	6415. When authorized to be sold or conveyed under special law.
6410. And filed in office of secretary of state.	6416. Shall take, subject to special liens.

**Article 6405. [4350] Not less than ten persons may form company.**—Any number of persons, not less not ten, being subscribers to the stock of any contemplated railroad, may be formed into a corporation for the purpose of constructing, owning, maintaining and operating such railroad, by complying with the requirements of this chapter. [Act Aug. 15, 1876, p. 141, sec. 1.]

**Street railways.**—A corporation formed by three or more persons for purpose of constructing and operating street railways for transportation of freight and passengers is not such a company as is contemplated by this article. *Aycock v. San Antonio Brewing Ass'n et al.*, 26 C. A. 341, 63 S. W. 954.

**Art. 6406. Who may build railroads.**—No corporation, except one chartered under the laws of the state of Texas, shall be authorized or permitted to construct, build, operate, acquire, own or maintain any railway within this state. [Acts 1903, p. 90.]

**Art. 6407. [4351] Amount of stock which must be subscribed and paid.**—No railroad corporation shall be formed until stock to the amount of one thousand dollars for every mile of said road so intended to be built shall be in good faith subscribed, and five per cent of the amount subscribed paid in to the directors of such proposed company. [Acts 1876, p. 141.]

**Art. 6408. [4352] Articles of incorporation shall contain what.**—The persons proposing to form a railroad corporation shall adopt and sign articles of incorporation, which shall contain:

1. The name of the proposed corporation.
2. The places from and to which it is intended to construct the proposed railroad, and the intermediate counties through which it is proposed to construct the same; provided, however, that local suburban railways may be constructed for any distance less than ten miles from the corporate limits of any city or town, in addition to such mileage as they may have within the same; and in such case the general direction shall be given from the beginning point.

3. The place at which shall be established and maintained the principal business office of the proposed corporation.

4. The time of the commencement and the period of the continuation of the proposed corporation.

5. The amount of the capital stock of the corporation.

6. The names and places of residence of the several persons forming the association for incorporation.

7. The names of the members of the first board of directors, and in what officers or persons the government of the proposed corporation and the management of its affairs shall be vested.

8. The number and amount of shares in the capital stock of the proposed corporation. [Acts 1889, p. 17.]

**Powers limited by charter.**—The rule that a corporation has only power to do such acts as its charter, construed in relation to the general law, authorizes it to do, applies to every class of corporations. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156.

**Estoppel to deny corporate authority.**—Though a corporation may exceed its charter power in making a contract, yet, when the contract is executed and the company has received its benefits, it is estopped to deny the authority to make it. *Railway Co. v. Gentry*, 69 T. 625, 8 S. W. 98.

**Effect of ultra vires act.**—That the act of a railroad company in building a certain spur track was ultra vires does not justify an entry on such track by another railroad. *Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co.*, 28 C. A. 551, 67 S. W. 525.

**Impairment of contract.**—A provision in a railroad charter exempting the railroad company from liability for causing the death of train employes held not a "contract" within the constitutional provision prohibiting impairing the obligation of a contract. *Texas & N. O. R. Co. v. Gross* (Civ. App.) 128 S. W. 1173.

**Art. 6409. [4353] Articles shall be submitted to attorney general, etc.**—The articles of incorporation, when so prepared, adopted and signed, shall be submitted to the attorney general of the state, whose duty it shall be to carefully examine the same; and, if he finds them to be in accordance with the provisions of this chapter and not in conflict with the laws of the United States or of this state, he shall attach thereto a certificate to that effect. [Acts 1876, p. 141, sec. 2.]

**Art. 6410. [4354] Shall be filed in office of secretary of state.**—When said articles have been examined and certified as provided in the preceding article, the same shall be filed in the office of the secretary of state, accompanied by an affidavit in writing, signed and sworn to by at least three of the directors named in such articles, before some officer of the state authorized by law to administer oaths, which affidavit shall state that the amount of one thousand dollars for every mile of such proposed road has been in good faith subscribed, and that five per cent of the amount subscribed has been actually paid to the directors named in such articles; and the secretary of state shall cause such articles, together with said affidavit, to be recorded in his office, and shall attach a certificate of the fact of such record to said articles and return the same to such corporation. [Id. sec. 3.]

**Art. 6411. [4355] Existence of corporation begins when.**—The existence of such corporation shall date from the filing of the articles of incorporation in the office of the secretary of state; and the certificate of the secretary of state, under the seal of the state, shall be evidence of such filing. [Id. sec. 5.]

**Art. 6412. [4356] Corporators may proceed to act, when.**—When the articles of incorporation have been filed and recorded as herein provided, the persons named as corporators therein shall thereupon become and be deemed a body corporate, and be authorized to proceed to carry into effect the objects set forth in such articles, in accordance with the provisions of this title. [Id. sec. 4.]

**Citizenship of corporation.**—A corporation is conclusively presumed to be a citizen of the state which created it. *Railway Co. v. Harrison*, 73 T. 103, 11 S. W. 168.

**Validity of contract.**—One owning the property and franchises of a railway company contracted to sell them to another in consideration that the purchaser was to pay a designated sum in cash (which was paid), and to deliver to the vendor certain shares of stocks and bonds of a new company to be organized under the franchise. The agreement to deliver the stocks and bonds was the promise of the new company, and was a sufficiently valid consideration. *Railway Co. v. Gentry*, 69 T. 625, 8 S. W. 98.

**Art. 6413. [4357] Corporation shall not be for more than fifty years, etc.**—No railroad corporation shall be formed to continue more than fifty years in the first instance, but such corporation may be renewed from time to time for periods not longer than fifty years, in the manner provided in the succeeding articles. [Id. p. 144, sec. 8.]

**Art. 6414. [4358] Manner of renewing corporation.**—The manner of renewing a railroad corporation which has expired by lapse of time shall be as follows:

1. By a resolution in writing adopted by a majority of three-fourths of the stockholders of the company at a regular meeting of the stockholders, which resolution shall specify the period of time for which the corporation is renewed.

2. Those desiring a renewal of the corporation shall purchase the stock of those opposed thereto at its current value.

3. The resolution, when adopted, shall be certified to by the president of the company; and he shall state in his certificate thereto that it was adopted by a majority vote of three-fourths of all the stockholders of said company at a regular meeting of such stockholders, and that the stockholders desiring such renewal have purchased the stock of those who oppose such renewal, and such certificate shall be attested by the secretary of the company under the seal of the company.

4. The said resolution and certificate shall then be filed and recorded in the office of the secretary of state, and the renewal of said corporation shall date from said filing. [Id.]

**Resolution signed by officers.**—A resolution of a corporation signed by its officers is within the meaning of this article. *Railway Co. v. Gentry*, 69 T. 625, 8 S. W. 98.

**Art. 6415. [4359] When authorized to be sold or conveyed under special law.**—Whenever any line or lines of railway or railway properties within this state are by special law authorized to be sold and conveyed, the persons contemplating or engaging for the purchase thereof may be formed into a corporation for the purpose of acquiring, owning, maintaining and operating such line or lines of railway by complying, as far as is applicable, with the requirements of this chapter. In the formation of such corporation, the requirements of article 6407 and so much of article 6410 of the Revised Statutes as relates to the affidavit therein provided for may be dispensed with, and words applicable to the case of a purchase may be used and substituted when necessary or proper, in the articles of incorporation or elsewhere, for or in lieu of words applicable to the building or construction of a railway. And when such corporation has been formed it shall have the power to purchase, acquire, own, maintain and operate such line or lines of railway and properties pertaining thereto, and all rights, powers and privileges given by the laws of this state to railway companies, including the right to complete and extend such line or lines of railway, and to construct branch lines thereto; and any proposed extension or branch lines may be provided for and included in the original articles of incorporation, or the same may, by amendment thereto at any time thereafter, be projected and provided for by such company. [Acts 1891, p. 128.]

**Power to purchase.**—A company cannot purchase the railway of another in the absence of legislative permission. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156. See *Railway Co. v. Fryer*, 56 T. 609; *Railway Co. v. Rushing*, 69 T. 306, 6 S. W. 834; *Railway Co. v. Newell*, 73 T. 334, 11 S. W. 342, 15 Am. St. Rep. 788; *Railway Co. v. State*, 75 T. 434, 12 S. W. 690.

**Rights transferred.**—A railroad company, after transfer of its rights to certain lands in 1862, could not, in 1870, pass any rights in such lands to another company acquiring by act of legislature all its franchises and property. *Walker v. Peterson* (Civ. App.) 42 S. W. 1045.

**Liabilities of successor.**—See, also, Arts. 6416, 6624, 6625.

The fact that one railway company succeeds another does not necessarily imply that the former becomes responsible for the obligations of the vendor. *Railway Co. v. Maddox* (Civ. App.) 31 S. W. 702; *Eddy v. Hinnant*, 82 T. 356, 18 S. W. 562; *Railway Co. v. Shirley*, 54 T. 137; *Railway Co. v. Newell*, 73 T. 334, 11 S. W. 342, 15 Am. St. Rep. 788; *Railway Co. v. Lyons* (Civ. App.) 34 S. W. 362.



**Lease of railway.**—See, also, Arts. 6604, 6697 et seq.

The lease of a railway transfers to the lessee the rights and liabilities in its management. *Railway Co. v. Watts*, 63 T. 549. See *Railway Co. v. Scheidementel* (Civ. App.) 24 S. W. 328; *Howe v. Gibson*, 3 C. A. 263, 22 S. W. 826; *Railway Co. v. Davis*, 4 C. A. 468, 23 S. W. 301; *Railway Co. v. Arispe*, 5 C. A. 611, 23 S. W. 928, 24 S. W. 33.

**Art. 6416. [4360] Shall take property subject to liens, etc.**—Every railroad company organized under the preceding article shall take the property so purchased subject to all incumbrances, judgments, claims, suits, claims for damages and for right of way against the old company and subject to all debts and claims for damages accruing against any receiver who may have been appointed for the old company to the same extent that such property would have been liable in the hands of the railroad company from which it was purchased; and such new company may be made a party to every suit pending against the company from which it purchased, or which may be pending against any receiver of such company, to enforce any right against such new company; and the new company may be sued to enforce any such rights, without joining the old company, or the receiver; and, in case any judgment has been rendered against the company from which the purchase is made, or against a receiver for such last named company, and for which the property is liable, execution may be issued on such judgment against such property in the possession of the new company without any suit therefor. When any corporation shall be formed under the provisions of article 6415, service of process may be had upon any agent of such corporation in any county where suit may be pending. Such service shall bind each and every railroad operated or owned under such charter, in the same manner as if it were one railroad. [Id. sec. 2.]

## CHAPTER TWO

### AMENDING OR CHANGING CHARTER

**Art.**

6417. May amend articles, when.  
6418. How amendment, etc., shall be made.  
6419. Shall take effect, when.  
6420. Shall not amend, when.

**Art.**

6421. May project, etc., branch line, etc., by amendment, etc.  
6422. Branch line shall complete ten miles first year, etc.

**Article 6417. [4361] Corporation may amend articles, etc.**—Any railroad corporation may amend or change its articles or act of incorporation in the manner provided in the following articles of this chapter. [Act Aug. 15, 1876, p. 142, sec. 5.]

**Power to purchase railway.**—A railway chartered under general laws cannot purchase the railway of another company, and it follows that the power cannot be obtained through an amended charter, in the absence of legislative permission. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156.

**Removal of offices and shops.**—A railroad which has for a valuable consideration contracted to locate its general offices, machine shops and roundhouses in a certain city cannot acquire the right to remove them by amending its charter. *City of Tyler v. St. Louis S. W. Ry. Co.*, 99 T. 491, 91 S. W. 4.

**Forfeiture of charter.**—See Arts. 6633–6635.

**Art. 6418. [4362] How amendment, etc., shall be made.**—Said amendment or change shall be made in the manner following:

1. It shall be in writing and signed by the president and board of directors of the corporation and attested by the secretary under the seal of the corporation.

2. It shall be submitted to the attorney general as in the case of original articles of incorporation, and examined and certified by him in the same manner.

3. It shall then be filed and recorded in the office of the secretary of state.

4. In the case of a corporation created by a special act of the legislature, the said amendment or change, together with the original charter

and such amendments and changes as have been made by special act of the legislature, shall be filed and recorded in the office of the secretary of state. [Id. sec. 5.]

**Art. 6419. [4363] Shall take effect, when.**—Such amendment or change shall be in force from the date of the filing of the same in the office of the secretary of state in accordance with the provisions of this chapter. [Id.]

**Art. 6420. [4364] Shall not amend, when.**—Where, by the special act or articles of incorporating any railroad company, any privileges, rights or benefits are conferred upon said corporation, such as it could not claim, exercise or receive under this title, or the general laws, then the said corporation shall not be permitted so to amend or change its charter or articles of incorporation as to relieve it from any of the requirements of such special act or acts conferring said privileges, rights or benefits. [Id.]

**Art. 6421. [4365] May project, etc., a branch line by amendment.**—Any railroad company may, by its original articles of incorporation, or by its amendments to its charter, project and provide for the locating, constructing, owning and operating of branch lines from any points on its main line, or from any points on its branch line, constructed or projected, to any other points making an angle of at least twenty-five degrees in the general course from the main line, if the branch commence from the same, or from the branch line, if it commence at a point on the same; provided, that the same may commence at the terminus of a branch line and continue in its general course; and may, by amendment to its charter, provide for the continuation in its general course of the main line; that any and all amendments of charters, acts or articles of incorporation approved by the attorney general of the state, or his lawful representative, by which any branch railroad or railroads has or have been constructed in accordance with the provisions of this article as herein provided are authorized, validated, sanctioned and confirmed to the same extent as though this article had always read as now amended. [Id. p. 143, sec. 7. Amended Acts 1901, p. 258.]

**Art. 6422. [4366] Branch line shall complete 10 miles first year, etc.**—Any such corporation making such amendment to its charter, as is authorized by the preceding article, shall complete and put in good running order at least ten miles of its said branch line in said amendment proposed within one year from the filing of such amendment, and an additional extent of at least twenty miles each and every succeeding year until the entire extent of the projected branch line is completed. [Id.]

## CHAPTER THREE

### PUBLIC OFFICES AND BOOKS

<b>Art.</b>	<b>Art.</b>
6423. Shall keep offices in this state.	6429. Where books to be kept and what they must contain.
6424. What officers to keep offices in this state, etc.	6430. President must report, etc.
6425. Forfeiture for violation hereof.	6431. Books to be subject to inspection.
6426. Required to do repair work in Texas.	6432. Legislature may examine.
6427. Rolling stock, etc., not to be removed for repair.	6433. Penalty, etc.
6428. Not to apply in cases of strikes, fires, etc.	6434. Duty of attorney general.
	6435. May change public office.
	6436. Notice to be given, etc.
	6437. Domicile of corporation.

**Article 6423. [4367] Shall keep offices in this state.**—Every railroad company chartered by this state, or owning or operating any line of railway within this state, shall keep and maintain permanently its general offices within the state of Texas at the place named in its char-

ter for the locating of its general offices; and, if no certain place is named in its charter where its general offices shall be located and maintained, then said railroad company shall keep and maintain its general offices at such place within this state where it shall have contracted or agreed, or shall hereafter contract or agree, to locate its general office for a valuable consideration; and, if said railroad company has not contracted or agreed for a valuable consideration to maintain its general office at any certain place within this state, then such general offices shall be located and maintained at such place on its line in this state as said railroad companies may designate to be on its line of railway. And such railroads shall keep and maintain their machine shops and round houses, or either, at such place or places as they may have contracted to keep them for a valuable consideration received; and, if said general offices and shops and round houses, or either, are located on the line of a railroad in a county which has aided said railroad by an issue of bonds in consideration of such location being made, then said location shall not be changed; and this shall apply as well to a railroad that may have been consolidated with another as to those which have maintained their original organization. [Acts 1889, p. 130, sec. 1.]

Cited, *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

**Location of general offices.**—According to the provisions of this article the offices of a railroad must at all events be kept within the state and at a point on its line. They must be located at the place named in the charter, but if it names no place any contract entered into for a valuable consideration determines their location. *City of Tyler v. St. Louis Southwestern Ry. Co.* (Civ. App.) 87 S. W. 238.

**Contracts for location of shops and offices—Meaning of terms.**—The words "contract" and "contracted," in this article, are used according to the common acceptance of the terms, and include all methods of contracting, whether express or implied, and whether written or oral. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater* (Civ. App.) 131 S. W. 251.

— **Execution of contract.**—See, also, notes under Art. 6446.

Use of city streets by a railroad company pursuant to a city ordinance held not a ratification of an alleged contract between the city and the railroad's vice president for the maintenance of the railroad's offices and shops in the city, made to induce the passage of the ordinance, but not referred to therein. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

— **Validity.**—There is a clear recognition in this article on the part of the legislature of the validity of contracts for the location and maintenance of railway shops and offices. It does not create the right to make but recognizes an existing right. If no place is named in the charter, any contract then or thereafter entered into for valuable consideration determines their location. A contract to perpetually maintain a railroad's shops and offices in a certain city is not void as against public policy. *City of Tyler v. St. L. S. W. Ry. Co.* (Civ. App.) 87 S. W. 245.

Under this article a contract between a city and a railroad, whereby the latter, in consideration of a right of way through streets for its road, agreed to locate its shops and general offices in the city, is valid and binds the railroad occupying the streets for its tracks to maintain its general offices and shops in the city, and the enforcement of the contract is not against public policy. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater* (Civ. App.) 131 S. W. 251, reversed on another point in (Sup.) 137 S. W. 1117.

Under Arts. 6485, 6497, a railroad company had no right to construct its line on the streets of a city without the city's consent which the city had an unqualified right to refuse, and the city was authorized to contract with the railroad company for the use of its streets in consideration of the railroad company's locating its offices, machine shops, and roundhouses within the city limits. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

Paschal's Dig. art. 4888, authorizing railroad corporations to establish a principal office at some point on the line of its road and to change the same at pleasure, giving public notice thereof, recognizes the right of a railroad corporation to change the location of its general offices to suit its convenience, but it does not limit the right of a railroad corporation to make a contract for the permanent location of its machine shops, roundhouses, and general offices of its superintendent of motive power and machinery. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

— **Consideration.**—The granting by a city to a railroad of a right of way through streets for its road is a sufficient consideration for an agreement by the railroad to establish and keep its general offices and shops in the city. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater* (Civ. App.) 131 S. W. 251, reversed on another point in (Sup.) 137 S. W. 1117.

— **Bind successors.**—Under this article the contractual obligation of a railroad company to maintain its roundhouses, machine shops, and general offices in a city, supported by a valuable consideration, is not a mere personal obligation of the company, but is an obligation imposed by law, and the obligation rests on a company purchasing the property and franchises at foreclosure sale. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

Under this article and Art. 6425, where a railroad company, in consideration of certain railroad aid bonds issued by a county, contracted to maintain its general offices roundhouses, shops, etc., in a certain city in the county, the observance of such contract

was not a mere covenant but a continuing condition of the company's right to corporate existence and was enforceable against a purchaser of the railroad company's property at a judicial sale, since such a purchaser takes the property and franchises freed only from the mere personal obligations of the former company. *International & G. N. Ry. Co. v. Anderson County* (Sup.) 156 S. W. 499.

**Counties aiding by issuance of bonds.**—Where railroad shops and offices are located on its line in a county which has aided it by the issuance of bonds, their removal is expressly prohibited by this article, notwithstanding consolidations with other roads. *City of Tyler v. St. Louis S. W. Ry. Co.* (Civ. App.) 87 S. W. 245.

**Remedies for breach of contract—Recovery of consideration.**—On repudiation by defendant railroad of contracts to perpetually maintain its offices and shops in plaintiff city, plaintiffs held entitled to recover considerations passed. *City of Tyler v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 87 S. W. 238.

— **Injunction to prevent removal.**—See Title 69 and notes.

— **Forfeiture of charter.**—See Art. 6425.

**Receiver to deposit railroad funds in state.**—See Art. 2145.

**Art. 6424. [4368] What officers are to keep offices in this state.**—

It shall be the duty of said railroad company to keep and maintain at the place within this state where its said general offices are located the office of its president, or vice-president, also the office of its secretary, treasurer, local treasurer, auditor, general freight agent, traffic manager, general manager, general superintendent, general passenger and ticket agent, chief engineer, superintendent of motive power and machinery, master mechanic, master of transportation, fuel agent, general claim agent; and each and every one of its general offices shall be so kept and maintained, by whatsoever name it is known, and the persons who perform the duties of said general offices, by whatever name known, shall keep and maintain their offices at the place where the said general offices are required to be located and maintained; and the persons holding said general offices of a railroad shall reside at the place and keep and maintain their offices at the place where the general offices of said railroad are required by law to be kept and maintained; and, if the duties of any of the above named offices are performed by any person, but his position is called by a different name, it is hereby made the duty of the said railroad company to have and maintain said offices at the place where its general Texas offices are kept and maintained, as required by this chapter; provided, that if the judgment of the court shall be to forfeit the charter, then it shall allow the railroad company six months from the date of the judgment within which to comply with the requirements of this chapter, and if said railroad company shall comply with the said time no forfeiture shall occur; but if the railroad company shall not comply then the judgment shall be final; the object and meaning of this statute being to require every railroad company owning or operating a line of railway within this state to keep and maintain its general offices within this state at such place as required herein; and the name of the general offices shall not be understood to allow the railroad company to have any of the offices usually known as general offices at any other place than the one it is required to keep its general offices at; and each and every railroad is hereby required to have and maintain its general offices at the place named herein; provided, further, that where the principal shops of any company are situated on its line in the state, at a place other than the place where its general offices are located, the superintendent of motive power and machinery, master mechanic, either or both, may have his office and residence at such place where such principal shops are located; and provided, further, that the railroad commission of Texas, where it is made to appear that any officer, other than the general officers of any company, can more conveniently perform his duties by residing at some place on the line in Texas other than the place where the general offices are situated, may, by an order entered on its record, authorize any such officer to so reside and keep his office at such place. [Acts 1889, p. 130, sec. 2. Amended Acts 1899, p. 117.]

**Art. 6425. [4369] Forfeiture for violation of, etc.**—Each and every railroad company chartered by this state, or owning, operating or

controlling any line of railroad within this state, which shall violate any of the provisions of this chapter shall forfeit the charter by which it operates its railroad in this state to the state of Texas; and it is hereby made the duty of the attorney general of this state, upon the application of any interested party, or on his own motion, to proceed at once against every railroad company owning, operating or controlling any line of railway within this state by quo warranto to forfeit the charter of the railroad company so offending, or violating any of the provisions of this law; [and every such railroad company] shall in addition to forfeiting the charter to that part of the railroad situated within this state be subject to a penalty of five thousand dollars for each and every day it violates any of the provisions of this chapter; said penalty to be recovered in the name of the state of Texas by a suit which shall be filed by the attorney general in any court in this state having jurisdiction; and on the trial the court shall, if it finds that the railroad company has violated any of the provisions of this chapter, render judgment in the name of the state of Texas at the rate of the sum of five thousand dollars for each and every day said court shall find that said railroad company violated any of the provisions of this chapter. And any money recovered from any railroad company under the provisions of this law shall be paid over into the state treasury and become a part of the available public free school fund. [Id. sec. 3.]

See *International & G. N. Ry. Co. v. Anderson County* (Sup.) 156 S. W. 499.

**Art. 6426. Required to do repair work in Texas.**—All railroad corporations operating in the state of Texas, and having their repair shops within the state, shall and are hereby required to repair, renovate, or rebuild in the state of Texas any and all defective or broken cars, coaches, locomotives or other equipment owned or leased by said corporations in the state of Texas, when such rolling stock is within the state of Texas; provided, that such railway shall have, or be under obligation to have, proper facilities in the state to do such work; and provided, this and the two succeeding articles shall not be so construed as to require any railway corporation to violate the safety appliance law of the Congress of the United States; and provided, further, that no railway shall be required to haul such disabled equipment a greater distance for repairs at a point within the state of Texas than would be necessary to reach their repair shops in another state; and provided, further, that no such railway company shall haul, or be permitted to haul for purposes of repair, any disabled equipment by or past any shop owned or operated by any such company where said disabled equipment can be repaired, in order to reach some other repair shop at a greater distance for purposes of repairing said disabled equipment; provided, that the provisions of this and the two succeeding articles shall not apply to companies having less than sixty continuous miles of railroad in operation in this state. [Acts 1909, p. 73, sec. 1.]

**Art. 6427. Rolling stock, etc., not to be removed for repair.**—All such railroad corporations, having their repair shops within the state, shall be prohibited from sending or removing any of their cars, coaches, locomotives or other equipment out of the state of Texas to be repaired, renovated or rebuilt, when the same is in a defective or broken condition and within the state. [Id. sec. 2.]

**Art. 6428. Not to apply in cases of strikes, fires, etc.**—The provisions of the two preceding articles shall not apply in cases of strikes, fires, or other unforeseen casualties and emergencies. [Id. sec. 3.]

**Art. 6429. [4370] What books shall contain; open to inspection, etc.**—At the public or general offices of the said railroad companies, established as provided for in this chapter, the principal business of said corporation shall be conducted, and stock transferred and claims for damages settled and adjusted by duly authorized officers and agents

of said corporations, and where there shall be kept for the inspection of stockholders of such corporation books, in which shall be recorded:

1. The amount of capital stock subscribed.
2. The names of the owners of the stock and the amounts owned by them respectively.
3. The amount of stock paid and by whom.
4. The transfer of stock with the date of the transfer.
5. The amount of its assets and liabilities.
6. The names and places of residence of each of its officers.

Provided, that railroad corporations shall be required to keep such office at some place on the line of its road in this state, as heretofore provided. [Acts 1885, p. 67.]

**Art. 6430. [4371] President shall report, etc.**—The president or superintendent of every railroad company doing business in this state shall report annually under oath to the comptroller, or governor, the true status of said railroad, and such other matters and things as may be inquired about by said comptroller, or governor. [Const., art. 10, sec. 3.]

**Action for penalty.**—The fact that the state has shown no special damage resulting from the failure of the company to make its report affords no defense to an action for the penalty prescribed by Rev. St. 1895, art. 4534. *Houston & T. C. R. R. Co. v. State*, 61 T. 342.

**Forfeiture of charter.**—See Art. 6636.

**Art. 6431. [4372] Books to be kept where.**—The books of such corporation kept at its public office shall at all reasonable business hours be open to the inspection of each stockholder, and to any officer or agent of the state whose duty it may be to inspect such books. [Id. sec. 4.]

**Art. 6432. [4373] Legislature may examine.**—The legislature may, by committee or otherwise, examine the books of any railroad corporation at such times and as often as may by said legislature be deemed necessary. [Id. sec. 5.]

**Art. 6433. [4374] Penalty for failure, etc.**—It shall be unlawful for any railroad or other corporation to fail or refuse to comply with any of the provisions of this chapter; and, if said railroad or other corporation shall fail or refuse to comply with any part thereof, it shall be liable to pay to the state of Texas the sum of one thousand dollars for each and every month that said railroad or other corporation shall fail or refuse to comply therewith, said sum to be recovered by the state in any court in this state of competent jurisdiction; provided, that an honest mistake in the entries in its books shall not subject a railroad company to the penalties of this article, if the office of said company shall be kept in this state, as herein provided. [Id. sec. 6.]

**Art. 6434. [4375] Duties of attorney general.**—It shall be the duty of the attorney general of this state to bring suit against said corporations, and prosecute them to judgment for any violation of the provisions of this chapter. [Id. sec. 7.]

**Art. 6435. [4376] May change public office.**—Every railroad corporation may change at pleasure its public office by publishing a notice of such change in some newspaper published on the line of its road, if any there be, and, if not, then in some newspaper in the state and having a general circulation in the state, for four successive weeks prior to such a change; provided, however, that the right to make such change shall be subject to the limitations and restrictions herein contained. [Act Feb. 7, 1854. P. D. 4888.]

**Art. 6436. [4377] Notice of establishment of public office, in first instance, shall be given.**—Every railroad corporation shall also, as soon as it has in the first instance established its public office, give notice of

such establishment by a like publication as required in the preceding article.

**Art. 6437. [4378] Public office the domicile of the corporation.**—The public office of a railroad corporation shall be considered the domicile of such corporation. [Act Aug. 15, 1876, p. 150, sec. 32.]

**Domicile equivalent to residence.**—"Domicile" as used in this article denotes residence and is synonymous with the word residence as used in section 4 of article 1830, and in the case of a railroad company means the place where its public office is located. *St. Louis S. W. Ry. Co. v. McKnight*, 99 T. 289, 89 S. W. 758. See, also, *Texas & P. Ry. Co. v. Edmisson* (Civ. App.) 52 S. W. 635.

**Citizenship of corporation.**—See note under Art. 6412.

## CHAPTER FOUR

### OFFICERS OF RAILROAD CORPORATIONS

<b>Art.</b>	<b>Art.</b>
6438. Board of directors.	6444. Failure to hold election, etc.
6439. Qualifications.	6445. Corporate powers vested, etc.
6440. Shall be elected by majority of, etc.	6446. President and other officers.
6441. Same, etc.	6447. Majority of directors required to elect officers.
6442. By-laws in regard to, not to be changed.	6448. Directors liable when.
6443. Manner of voting for.	6449. All officers liable when.

**Article 6438. [4379] Board of directors.**—Every railroad corporation shall have a board of directors of not less than seven nor more than nine persons. [Act Aug. 15, 1876, p. 144, sec. 11.]

**Art. 6439. [4380] Qualifications of directors.**—Each director shall be a stockholder in said corporation; and a majority of said directors shall be resident citizens of this state, and shall so remain resident citizens during their continuance as such directors. [Id. p. 145, sec. 14.]

**Art. 6440. [4381] Directors shall be elected by stockholders.**—The board of directors shall be elected by the stockholders of the corporation at their regular annual meeting in each year, in such manner as may be prescribed by the by-laws of such corporation, and by this title, and the directors shall hold their offices until their successors are elected. [Id. p. 144, sec. 11.]

**Art. 6441. [4382] Majority of stock required to elect a director.**—It shall require a majority in value of the stock of such corporation to elect any member of such board of directors. [Id. p. 145, sec. 14.]

**Art. 6442. [4383] By-laws in regard to election of directors shall not be changed, except, etc.**—The by-laws of the corporation shall prescribe the manner and time of electing directors, and the mode of filling a vacancy in the office of director; and such provisions in such by-laws shall not be changed, except at a regular annual meeting of the stockholders, and by a majority in value of the stockholders of such corporation. [Id. p. 144, sec. 11.]

**Art. 6443. [4384] Manner of voting for directors.**—In all elections for directors of such corporation, every stockholder shall have the right to vote in person or by proxy for the number of shares of stock owned by him for as many persons as there are directors to be elected, or to cumulate said shares and give one candidate as many votes as the number of directors to be elected multiplied by the number of his shares of stock shall equal, or to distribute them on the same principle among as many candidates as he may see fit; and such directors shall not be elected in any other manner. [Id. p. 149, sec. 29.]

**Art. 6444. [4385] Failure to hold election for directors.**—In case it shall happen at any time that an election of directors shall not be made on the day designated by the by-laws of the corporation for that pur-

pose, the stockholders shall meet and hold an election for directors in such manner as shall be provided by the by-laws of the corporation. [Id. p. 145, sec. 14.]

**Art. 6445. [4386] Corporate powers vested in directors.**—All the corporate powers of every railroad corporation shall be vested in and be exercised by its legally constituted board of directors. [Id. p. 144, sec. 11].

See *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117; *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

**Power of directors.**—Under Arts. 1159, 1160, giving directors general management of corporate affairs, and requiring them to keep a record of their business transactions, and this article, no corporate power may be exercised by any one except the board of directors, or by an agent specially empowered by the board to act for them. *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

**Art. 6446. [4387] President and other officers.**—There shall be a president of the corporation, who shall be chosen from and by the board of directors, and such other subordinate officers as the corporation by its by-laws may designate, who may be elected or appointed, and shall perform such duties and be required to give such security for the faithful performance thereof as the corporation, by its by-laws, shall require. [Id. p. 145, sec. 15.]

**Authority of officers and agents—Vice president.**—Under Art. 6445 and this article, where the by-laws of a railroad company contained nothing authorizing the company's vice president to contract to maintain its general offices, shops, etc., at a certain city in consideration of the right to operate the road over its streets, such officer had neither express nor implied power to make such contract. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

— **Superintendent.**—The superintendent of a railroad has authority to bind the company by contracts for services rendered an employé of the road injured in its employment. *Texas & St. L. R. R. Co. v. Myers*, 1 App. C. C. § 392; *Missouri Pac. R. R. Co. v. Turner*, 2 App. C. C. § 815.

— **Physician or surgeon.**—Where plaintiff was employed to perform a surgical operation by the local physician of a railroad company on a person injured by a train, and the physician had no authority to bind the railroad company, it never having ratified the same, was not liable for plaintiff's services. *Galveston, H. & S. A. Ry. Co. v. Allen*, 42 C. A. 576, 94 S. W. 417.

A railroad company is not liable for the negligence of its surgeon in charge of its hospital in failing to comply with his promise to notify a third person of the condition of an inmate. *Carroll v. St. Louis Southwestern Ry. Co. of Texas*, 56 C. A. 449, 120 S. W. 1079.

— **Agent accustomed to make contracts.**—The railway company is bound by contracts made by an agent who has been accustomed to make similar contracts with its knowledge and approbation. *Texas & P. R. R. Co. v. Nicholson*, 61 T. 491.

— **Ticket agents.**—See Chapter 13 of this title.

**Ratification of unauthorized acts.**—The vice president of a railroad company could not as a member of the corporation's executive committee ratify his own unauthorized acts, so as to bind the corporation. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

Where a city ordinance granting the city's consent to the use of certain streets by a railroad company did not express the consideration that the company should locate its offices and shops at that place, the railroad's use of the streets was not a ratification of the vice president's unauthorized agreement that the railroad company would maintain its offices, shops, etc., within the city in consideration of the passage of the ordinance. *Id.*

**Art. 6447. [4388] Majority of directors required to elect or appoint officers.**—In all cases, it shall require a majority of the directors to elect or appoint any officer of the corporation. [Id.]

**Art. 6448. [4389] Directors liable when false and fraudulent dividend is declared.**—If the directors of any railroad company shall declare and pay any dividend when the company is insolvent, or any dividend the payment of which would render it insolvent, they shall be jointly and severally liable for all debts of the company then existing, and for all that shall be thereafter contracted so long as they shall respectively continue in office; provided, that, if any of the directors shall be absent at the time of making the dividend, or shall object thereto, and shall within thirty days thereafter, or after their return, if absent, file a certificate of their absence or objection in writing with the clerk of the company and with the clerk of the county in which the principal office of said company is located, they shall be exempt from said liability. [P. D. 4886.]



**Art. 6449. [4390] All the officers liable when false representations are made.**—If any certificate or report made, or public notice given, by the officers of any such company, in pursuance of the provisions of this title, shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the company contracted while they are officers or stockholders thereof. [P. D. 4887.]

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## CHAPTER FIVE

### BY-LAWS

<p><b>Art.</b> 6450. Power to enact by-laws. 6451. Each share entitled to a vote.</p>	<p><b>Art.</b> 6452. When and by what vote by-laws shall be enacted.</p>
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**Article 6450. [4391] Power to enact by-laws.**—Every railroad corporation shall have the power to make such by-laws as it may think proper for the government of such company, the same not being inconsistent with the charter of such company or the laws. [Act Dec. 19, 1857, p. 95. P. D. 4911.]

**Art. 6451. [4392] Each share entitled to vote, etc.**—In the enactment of a by-law, the stockholders of the corporation shall be entitled to one vote for each share of stock held by them, and a stockholder may vote in person or by written proxy. [Id.]

**Art. 6452. [4393] When and by what vote shall be enacted, etc.**—No by-laws shall be enacted, altered, amended, added to, repealed or suspended, except at a regular annual meeting of the stockholders and by a majority vote of two-thirds in value of all the stock of the corporation. [Id.]

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## CHAPTER SIX

### STOCK AND STOCKHOLDERS

<p><b>Art.</b> 6453. Railroad stock is personal estate and transferable. 6454. Directors may require payment of stock, etc. 6455. Sale of stock when owner neglects to pay. 6456. Stockholders shall have access to books, etc., of corporation. 6457. Funds of corporation shall be used only for legitimate purposes. 6458. Extent of stockholder's liability for debts of corporation. 6459. Persons holding stock who are not liable. 6460. Capital stock may be increased. 6461. Notice of meeting for such increase. 6462. Notice shall state what.</p>	<p><b>Art.</b> 6463. Increase may be not exceeding amount named in notice. 6464. Order or resolution increasing shall be recorded. 6465. President and directors shall furnish statement to stockholders at regular meeting. 6466. May be required to furnish statement at special meeting. 6467. Stockholders may fix amount of loans and interest thereon. 6468. Stockholders may remove officers and elect others. 6469. No stock shall be issued, except, etc. 6470. Fictitious dividends, etc., void. 6471. Penalty for violating two preceding articles.</p>
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**Article 6453. [4394] Railroad stock is personal estate and transferable.**—The stock of a railroad corporation shall be deemed personal estate, and shall be transferable in the manner prescribed by the by-laws of the corporation; but no such transfer shall be valid until the same shall have been made on the stock and transfer books of the company; nor shall any share be transferable until all previous calls thereon have been paid. [Act Aug. 15, 1876, p. 145, sec. 17; p. 144, sec. 10.]

**Art. 6454. [4395] Directors may require payment of stock, etc.**—The directors of such corporation may require the subscribers to the cap-

ital stock of the corporation to pay the amount by them respectively subscribed, in such manner and in such installments as the directors may deem proper. [Id. p. 145, sec. 16.]

**Art. 6455. [4396] Sale of stock when owner neglects to pay.**—If any stockholder shall neglect to pay any installment as required by a resolution or order of the board of directors, the said board shall be authorized to advertise said stock for sale by publication once a week for thirty days in some newspaper published on the line of said road, if there be one, and, if not, in some newspaper published in the state having a general circulation in the state; which notice shall name the stock to be sold and the time and place of such sale; and all stock so sold shall be sold at the public office or place of business of such company, and between the hours of ten o'clock a. m. and four o'clock p. m., and to the highest bidder for cash, the proceeds of such sale to be credited to the delinquent stockholder. [Id. p. 145, sec. 16.]

**Art. 6456. [4397] Stockholders shall have access to books, etc., of corporation.**—All stockholders shall at all reasonable hours have access to and may examine all books, records and papers of such corporation. [Id. p. 145, sec. 13.]

**Art. 6457. [4398] Funds of corporation shall be used only for legitimate purposes.**—It shall not be lawful for any railroad corporation to use any of the funds thereof in the purchase of its own stock, or that of any other corporation, or to loan any of its funds to any director or other officer thereof, or to permit them, or any of them, to use the same for other than the legitimate purposes of the corporation. [Id. sec. 17.]

**Art. 6458. [4399] Extent of stockholder's liability for debts of corporation.**—Each stockholder of any railroad corporation shall be held individually liable to the creditors of such corporation to an amount not exceeding the amount unpaid on the stock held by him, for any and all debts and liabilities of such corporation until the whole amount of the capital stock of such corporation so held by him shall have been paid. [Id. p. 146, sec. 20.]

**Art. 6459. [4400] Persons holding stock who are not liable.**—No person holding stock in any railroad corporation as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as a stockholder of such corporation; but the estate or person owning such stock shall be considered as holding the same and liable as a stockholder accordingly. [Id. sec. 19.]

**Art. 6460. [4401] Capital stock may be increased.**—In case the capital stock of any railroad corporation shall be found insufficient for constructing and operating its road, such corporation may, with the concurrence of two-thirds in value of all its stock, increase its capital stock from time to time to any amount required for the purposes aforesaid. [Id. sec. 18.]

**Art. 6461. [4402] Notice of meeting for such increase, etc.**—Such increase shall be sanctioned by a vote in person or by written proxy of two-thirds in amount of all the stock of such corporation, at a meeting of such stockholders called by the directors of the corporation for such purpose, by giving notice in writing to each stockholder, to be served personally, or by depositing the same in a postoffice directed to the postoffice addresses of each of said stockholders severally, postage prepaid, at least sixty days prior to the day appointed for such meeting, and also by advertising the time, place and purpose of such meeting in some newspaper published in each county through or into which the said road shall run, or be intended to run, if any newspaper shall be published therein, at least sixty days next preceding the day appointed for such meeting. [Id.]

**Art. 6462. [4403] Notice shall state what.**—Such notice shall state the time and place of the meeting, the object thereof, and the amount to which it is proposed to increase such capital stock. [Id.]

**Art. 6463. [4404] Increase may be not exceeding amount named in notice.**—At such meeting, the capital stock of the corporation may be so increased by a vote of two-thirds in amount of the capital stock of the corporation to an amount not exceeding the amount mentioned in the notice so given. [Id.]

**Art. 6464. [4405] Order or resolution increasing shall be recorded.**—Every order or resolution increasing the capital stock of any such corporation shall be recorded in the office of the secretary of state; and such increase shall not take effect until such order or resolution has been so recorded. [Id.]

**Art. 6465. [4406] President and directors shall furnish statement to stockholders at regular meeting.**—At the regular annual meeting of the stockholders, it shall be the duty of the president and directors to exhibit a full, distinct and accurate statement of the affairs of the corporation to the stockholders. [Id. p. 145, sec. 13.]

**Art. 6466. [4407] May be required to furnish statement at special meeting.**—The stockholders may, at any special meeting of stockholders, require statements similar to the one required by the preceding article from the president and directors, and when so required it shall be the duty of such president and directors to furnish the same. [Id.]

**Art. 6467. [4408] Stockholders may fix amount of loans and interest thereon.**—At a regular annual meeting of stockholders, or at a special meeting called for the purpose, the stockholders may, by a majority in value of all the stock of such corporation, determine the amount of loans which may be negotiated by such company for the construction of its railway and its equipment, and fix the rate of interest which may be paid, and provide for the security of such loans. [Id.]

**Art. 6468. [4409] Stockholders may remove officers and elect others.**—The stockholders may, by a two-thirds vote in value of all the stock, at any regular or special meeting of stockholders, remove the president or any director or other officer of such corporation, and elect others instead of those so removed, in accordance with the by-laws of such corporation, and this title. [Id.]

**Art. 6469. [4410] No stock shall be issued, except, etc.**—No railroad corporation shall issue any stock or bonds, except for money, labor or property actually received and applied to the purpose for which such corporation was organized; nor shall it issue any shares of stock in said company, except at its par value and to actual subscribers who pay or become liable to pay the par value thereof. [Id. p. 148, sec. 25. P. D. 4921.]

**Art. 6470. [4411] Fictitious dividends, etc., void.**—All fictitious dividends and other fictitious increase of the capital stock or indebtedness of any such corporation shall be void. [Id.]

**Art. 6471. [4412] Penalty for violation of two preceding articles.**—Every officer or director of a railroad company, who shall violate or consent to the violation of either of the two preceding articles, shall become personally liable to the stockholders and creditors of such company for the full par value of such illegal stock, or for the full amount of such fictitious dividends, increase of stock, or indebtedness, as the case may be. [P. D. 4921.]

## CHAPTER SEVEN

## MEETINGS OF DIRECTORS AND STOCKHOLDERS

Art. 6472.	Annual meeting of directors.	Art. 6477.	Notice of special meeting.
6473.	Annual meeting of stockholders.	6478.	If quorum of stockholders should not meet.
6474.	Directors and stockholders may meet at same time and place.	6479.	Proxy must be dated within what time.
6475.	Quorum of directors and stockholders.	6480.	What stock shall not vote.
6476.	Special meeting of stockholders.		

**Article 6472. [4413] Annual meeting of directors.**—The directors of every railroad company shall hold one meeting annually at their office in this state, public notice of which shall be given at least thirty days before said meeting, said notice to be published in some daily newspaper printed and published in this state. [Const., art. 10, sec. 3. Acts 1885, p. 67.]

**Art. 6473. [4414] Annual meeting of stockholders.**—The stockholders of every railroad corporation shall hold at least one meeting annually at the public office or place of business of such corporation in this state; and it shall be the duty of the board of directors to cause public notice to be given of the time and place of such meeting for thirty days previously thereto, as provided in the preceding article. [Act Aug. 15, 1876, p. 144, sec. 12.]

**Art. 6474. [4415] Directors and stockholders may meet at same time and place.**—The annual meetings of the board of directors and of the stockholders provided for in the two preceding articles may be called to meet and may be held at the same time and place, in which case one notice shall answer the purpose of both meetings; provided, it be so stated in such notice.

**Art. 6475. [4416] Quorum of directors and stockholders.**—A majority of the directors of any railroad corporation shall constitute a quorum to transact business, and a majority in value of two-thirds of all the stock owned by such corporation shall constitute a quorum of stockholders to transact business. [Id. sec. 12.]

**Art. 6476. [4417] Special meeting of stockholders.**—A special meeting of stockholders may be called at any time during the interval between the regular annual meetings of such stockholders by the directors, or by stockholders owning not less than one-fourth of all the stock of such company. [Id.]

**Art. 6477. [4418] Notice of special meeting.**—When any special meeting of stockholders is called, notice of the time and place of such meeting shall be given for at least thirty days prior to the time fixed for such meeting, in the same manner as is required in the case of a regular annual meeting; and such notice shall specify the purpose or purposes for which the said special meeting is called; and no other business shall be transacted at such special meeting, except that specified in such notice. [Id.]

**Art. 6478. [4419] If quorum of stockholders should not meet.**—If at any meeting of stockholders a majority in value of the stockholders equal to two-thirds of the stock of such corporation shall not be represented in person or by proxy, such meeting shall be adjourned from day to day, not exceeding three days without transaction of any business; and, if within said three days two-thirds in value of such stock shall not be represented at such meeting, then the meeting shall be adjourned and another meeting called, and notice thereof given as hereinbefore provided. [Id. p. 145, sec. 14.]

**Art. 6479. [4420] Proxy must be dated within what time.**—Every proxy from a stockholder shall be dated within six months previous to the meeting of the stockholders at which it is proposed to vote by virtue thereof, and if not dated within such time shall not be voted. [P. D. 4908.]

**Art. 6480. [4421] What stock shall not vote.**—Stock issued within thirty days before any stockholders' meeting shall not entitle the holder to vote thereat, except at the first stockholders' meeting under their articles or act of incorporation for organization; nor shall any stock be voted upon, except in proportion to the amount paid thereon, or secured to be paid by good security in addition to the subscription and stock. [P. D. 4928.]

## CHAPTER EIGHT

### RIGHT OF WAY

Art.	Art.
6481. Right to construct anywhere in the state, etc.	6507. Regular judge disqualified; special judge appointed.
6482. Right of way over public lands.	6508. County judge shall appoint.
6483. Lineal survey, etc.	6509. Commissioners shall be sworn.
6484. May lay out road two hundred feet wide.	6510. Shall set a day and place.
6485. Across streams of water, etc.	6511. To give written notice, etc.
6486. Opening through fences, etc.	6512. Manner of service, etc.
6487. Width of crossings, etc.	6513. Return of service, etc.
6488. Where may be made, etc.	6514. Property of minors, etc.
6489. Demand to be in writing, etc.	6515. Non-residents, or party secreting himself.
6490. Time for completion, etc.	6516. Proceedings, etc.
6491. Distance, etc.	6517. Powers of commissioners, etc.
6492. Failure, etc.	6518. Rules of damages, etc.
6493. Intersections of roads and streets.	6519. Same subject.
6494. Crossings of public roads, etc.	6520. Same subject.
6495. Culverts, etc.	6521. Injuries and benefits not to be estimated as to.
6496. Navigable waters, etc.	6522. Assessments to be in writing.
6497. Streets not to be taken without.	6523. Others may be appointed, when.
6498. Along highways, etc.	6524. Compensation of.
6499. Other railways, etc.	6525. Cost of service of notice.
6500. Intersected railways shall do what.	6526. Shall make out cost bill.
6501. When corporations can not agree.	6527. May remove cause, when.
6502. May enter upon adjacent land and take timber and material, etc.	6528. Decision made judgment, when.
6503. Damages, etc.	6529. How costs awarded.
6504. When owner and corporation can not agree.	6530. Damages to be paid, when.
6505. Shall not enter on land, except.	6531. Practice in case specified.
6506. Statement to be filed, etc.	6532. Right of way, how construed.
	6533. Right of way out of railroad lands.
	6534. Right of way vested how.

[In addition to the notes under the particular articles, see also notes on Injuries from Construction or Maintenance of Railroad, at end of chapter.]

**Article 6481. [4422] Right to construct, etc., road anywhere in the state.**—Any railroad corporation shall have the right to construct and operate a railroad between any points within this state and to connect at the state line with railroads of other states. [Const., art. 10, sec. 1.]

**Cited.**—Texas Channel & Dock Co. v. State (Civ. App.) 133 S. W. 318; Id., 104 T. 168, 135 S. W. 522; Rockport & P. A. R. Co. v. State (Civ. App.) 135 S. W. 263; Houston B. & T. Ry. Co. v. Hornberger, 143 S. W. 272, citing Chapters 8 and 9 of this title; Ft. Worth & D. C. Ry. Co. v. Mapes (Civ. App.) 156 S. W. 528.

**Railroad a public highway.**—A railroad is a public highway, conducted and operated for the public's benefit. Heilbron v. St. Louis Southwestern Ry. Co. of Texas, 52 C. A. 575, 113 S. W. 610, 979.

**Acquisition of right of way, etc.—By purchase.**—See Art. 6537 and notes.

— **Voluntary grants.**—See Art. 6538 and notes.

— **Dedication.**—The doctrine of dedication or estoppel in pais applies to the right of way for a railroad. Railway Co. v. Sutor, 56 T. 496.

— **Condemnation.**—See Art. 6504 and notes, and other articles of this chapter.

**Injuries from construction and operation of railroad.**—See notes at end of this chapter and of Chapter 10.

— **Injuries to animals on or near tracks.**—See Art. 6603 and notes.

— **Injuries to employes.**—See Chapter 14 of this title.

— **Injuries to passengers, baggage or freight.**—See Art. 707 et seq.

**Art. 6482. [4423] Right of way over public lands.**—Every such corporation shall have the right of way for its line of road through and over any lands belonging to this state, and to use any earth, timber, stone or other material upon any such land necessary to the construction and operation of its road through or over said land.

Cited, *Texas Channel & Dock Co. v. State* (Civ. App.) 133 S. W. 318; *Id.*, 104 T. 168, 135 S. W. 522.

**To what lands applicable.**—This article applies to lands surveyed for and appropriated to the public school fund. *Texas C. Ry. Co. v. Bowman*, 97 T. 417, 79 S. W. 296.

Under Const. art. 10, § 1, authorizing railroads to construct lines between any points within the state and this article, a domestic company can construct its road over tide water lands and islands of the state without specific legislative authority, but not through lands specially set apart for a quarantine station, regardless of whether the whole tract is actually used for that purpose. *Rockport & P. A. R. Co. v. State* (Civ. App.) 135 S. W. 263.

Under Const. art. 10, § 1, and Arts. 6481, 6484, and this article land belonging to the state, situated on an island within the state, is subject to appropriation by a railway company for its use as a right of way. *Texas Channel & Dock Co. v. State*, 104 T. 168, 135 S. W. 522.

**Validity of special grant.**—The grant of land to the Ft. Worth & Denver City Railway Company, by its special charter in 1873 (Sp. Laws 1873, c. 208), providing "the right of way, to be held to the extent of 200 feet in width, is hereby granted to said railway company through the public lands of Texas," sufficiently designated the right of way granted, and was not void for uncertainty, in view of this article and Art. 6484. *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 151 S. W. 850.

**Art. 6483. [4424] Lineal survey.**—Every railroad corporation shall have the right to cause such examination and survey for its proposed railway to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damage that may be occasioned thereby. [Act Aug. 15, 1876, p. 147, sec. 23.]

**Examination to secure evidence.**—Under Art. 5004, which provides that any corporation organized for irrigation purposes may obtain sites and rights of way over private lands, the damages to be assessed and paid for as in railroad cases, and this article, the court, in condemnation proceedings by an irrigation company, has no right to permit an inspection of the land sought to be condemned for the purpose of qualifying its own witnesses as to the value of the property, or for any purpose. *Byrd Irr. Co. v. Smythe* (Civ. App.) 146 S. W. 1064.

**Selection of site for shops.**—A railroad is empowered absolutely to select such right of way as it should deem "most advantageous" to its enterprise. But it has not the same right as to selection of location for its machine shops. *Rainey v. Red River T. & S. Ry. Co.*, 99 T. 276, 89 S. W. 771, 90 S. W. 1096, 3 L. R. A. (N. S.) 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580.

**Art. 6484. [4425] May lay out road two hundred feet wide, etc.**—Such corporation shall have the right to lay out its road not exceeding two hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments to take as much more land as may be necessary for the proper construction and security of its railway, and to cut down any standing trees that may be in danger of falling upon or obstructing the railway, making compensation in the manner provided by law. [Id.]

See *Ft. Worth & D. C. Ry. Co. v. Southern Kansas Ry. Co. of Texas* (Civ. App.) 151 S. W. 850.

**Land for depot and yard facilities.**—While a railroad in laying out its road is restricted to a right of way 200 feet in width, such restriction does not apply to land sought to be condemned for depot facilities, switches, spur tracks and freight yards necessary for the operation of its road. *Hengy v. M., K. & T. Ry. Co.* (Civ. App.) 109 S. W. 403.

**Condemnation of crossing over railroad—For bridges.**—See Art. 655.

— **For streets in towns and villages.**—See Art. 1066.

— **For levees, etc.**—See Art. 5575.

**Art. 6485. [4426] Right to construct across streams of water, etc.**—Such corporation shall have the right to construct its road across, along, or upon any stream of water, water course, street, highway, plank road, turnpike, or canal which the route of said railway shall intersect or touch; but such corporation shall restore the stream, water course, street, highway, plank road, turnpike, or canal thus intersected or touched to its former state, or to such state as not to unnecessarily impair its usefulness, and shall keep such crossing in repair.

See *Galveston & W. Ry. Co. v. City of Galveston*, 90 T. 398, 39 S. W. 96, 36 L. R. A. 83; *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

**What is highway.**—A public highway may be defined as a public easement, by virtue whereof every one may pass and re-pass over a particular strip of land. Looked at from another point of view, a highway is a road or street maintained by the public for the general convenience. *Railway Co. v. Montgomery*, 85 T. 64, 19 S. W. 1015.

Testimony to the effect that a road had been traveled by the public for twenty years is not sufficient to show a dedication, in a country where any one feels himself at liberty to pass at will over all uninclosed lands. Such crossing the railway company was not bound to maintain. *Id.*

**Consent of authorities.**—See Art. 6498.

— **City.**—See Art. 6497.

**Duty to restore and repair.**—A railway company crossing a public street must restore it to such state as does not unnecessarily impair its usefulness. *Railway Co. v. Speed*, 3 C. A. 454, 22 S. W. 527; *Railway Co. v. Able*, 72 T. 150, 9 S. W. 871.

The right granted is coupled with an imposed duty to the public and the responsibility for the discharge of this duty cannot be shifted or evaded by committing the construction to an independent contractor. *Railroad Co. v. Johnson*, 20 C. A. 572, 50 S. W. 1044.

Railroad must restore the crossing of a highway, disturbed by the construction of its line. *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, 38 C. A. 322, 85 S. W. 476.

Railway companies must obey the requisites of this article in maintaining public crossings. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 181.

Even if a railroad takes a part of a highway for its right of way by condemnation, it must comply with this article in regard to restoring such highway to its former condition, or to such condition as not to unnecessarily impair its usefulness. *Hall v. Houston & T. C. R. Co.*, 52 C. A. 90, 114 S. W. 891.

A railroad company must keep its highway crossings in a reasonably safe condition for the use of the traveling public, and is negligent in not doing so. *Missouri, K. & T. Ry. Co. of Texas v. Gillenwater (Civ. App.)* 146 S. W. 589.

— **Degree of care required.**—The railroad company is chargeable with no higher duty than exercise of ordinary care in undertaking with reasonable dispatch to repair its road across a street crossing and conducting the work with ordinary care looking to the safety of those who use the crossing as such. *San Antonio & T. P. Ry. Co. v. Belt*, 24 C. A. 281, 59 S. W. 610.

A charge that a railway company must maintain its track along a public street in a reasonably safe condition for persons using the same, substantially embraces the requirements of the law, and if the duty is statutory, it is no defense if the railway company has exercised ordinary care to maintain its tracks along the street in a proper condition. *International & G. N. Ry. Co. v. Haddox*, 36 C. A. 385, 81 S. W. 1037.

A railroad company, in maintaining a crossing, is required to use only reasonable care. *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, 38 C. A. 322, 85 S. W. 476.

Ordinary care in maintaining public crossings is not sufficient. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 181.

In cases against a railway company for damages caused by its negligence in not restoring highway crossed by it to its former state, the true issue is, not what changes and alterations a prudent person would have made under the circumstances, but was the usefulness of the street unnecessarily impaired? The one is not the legal equivalent of the other. *Missouri, K. & T. Ry. Co. v. Davis*, 53 C. A. 547, 116 S. W. 427.

— **Extent of crossing.**—See, also, note under Art. 6493.

A company is not responsible for the overturning of a buggy, caused by its failure to fill in between the rails beyond the street, even though it was negligent in not filling at the intersection of the track with the street. *San Antonio & A. P. Ry. Co. v. Belt (Civ. App.)* 46 S. W. 374.

A railroad company held not to have assumed to keep in repair a footpath across the right of way at a crossing. *San Antonio & A. P. Ry. Co. v. Montgomery*, 31 C. A. 491, 72 S. W. 616.

The crossing within the meaning of the statute is not confined to that portion of a railway company's roadbed upon which the cross-ties and iron rails are laid, but extends to and includes the approaches of public roads thereto on its right of way. *St. L. S. W. Ry. Co. v. Smith*, 49 C. A. 1, 107 S. W. 640.

— **Conformity to street grade.**—Under the police power, held, that railroads may be compelled to conform the grade of their tracks, where they cross streets, to the street grade. *Houston & T. C. R. Co. v. City of Dallas (Civ. App.)* 78 S. W. 525.

— **Agreement to construct new road.**—If a railroad agreed to open up a new road to take the place of a part of a public highway taken by it for a right of way, the county authorities could not release it from its obligation to construct the new road in the manner public roads are required to be constructed by statute, by accepting the new road as completed by the company. *Hall v. Houston & T. C. R. Co.*, 52 C. A. 90, 114 S. W. 891.

— **Right to repair tracks.**—A railroad company has the right to disturb the surface of the street for the purpose of repairing its tracks, and it is not liable for injury caused by a reasonable user of such right. *San Antonio & A. P. Ry. Co. v. Belt*, 24 C. A. 281, 59 S. W. 607.

**Power of city to regulate laying of tracks.**—See Art. 863.

**Damage to abutting property from railroad in street.**—See notes at end of this chapter.

**Rights of railroad and public at crossings.**—The rights of a traveler on a highway crossing railroad tracks and of the company to operate trains are reciprocal. *International & G. N. R. Co. v. Glover (Civ. App.)* 88 S. W. 515.

The use of a street is for the ordinary travel over it; and the right of a railroad to operate its trains across it is subordinate to the use. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds (Civ. App.)* 136 S. W. 279.

**Damages for failure to restore and repair.**—In general.—See also, "Duty to restore and repair," ante, and Arts. 6493, 6494.

The owner of premises abutting on a street has no right of action for lessened facilities of ingress, etc., until the company has a reasonable time to complete its work and restore the street. *Railway Co. v. Speed*, 22 S. W. 527, 3 C. A. 454.

Where both the railroad company and the city along whose street a track has been laid have been guilty of negligence in constructing and allowing an embankment to remain without a fence or railing, a judgment can be properly rendered against each, because each was bound not only to make the crossing and the approaches thereto safe in the first instance but were each equally bound by law to keep them so. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 29 C. A. 356, 69 S. W. 463.

If the railroad fails to restore the highway as required by this article, the public is entitled to recover damages resulting from such failure. *St. Louis, S. F. & T. Ry. Co. v. Grayson County*, 31 C. A. 611, 73 S. W. 65.

The failure to perform the statutory duty imposed (to restore and keep in repair the crossing) is negligence per se, and if one in the exercise of ordinary care is injured and if the injury is proximately caused by such negligence, the railroad company is responsible. *International & G. N. Ry. Co. v. Butcher* (Civ. App.) 81 S. W. 820.

— **Contributory negligence.**—That a railway company failed to perform its statutory duty as to a proper overhead crossing held not to prevent the defense of contributory negligence of a traveler injured while using the highway. *Marshall & E. T. Ry. Co. v. Petty* (Civ. App.) 134 S. W. 406.

**Accidents at crossings from operation of trains.**—See notes at end of Chapter 10 of this title.

**Interference with stream.**—See, also, Art. 6495.

This article seems to have no reference to the flow of the water in a stream but rather to the extent to which its use may be affected. *Gulf, C. & S. F. Ry. Co. v. Steele*, 29 C. A. 328, 69 S. W. 173. The cases arising under this article usually involve the unnecessary impairment of the use of some public street or highway. *Id.*

By this article and Art. 6495 the damming of a natural water course and obstructing the natural flow of water therein is wrongful and unlawful per se, and one injured thereby is not required to show that the work was negligently done in order to recover his damages therefrom. *International & G. N. Ry. Co. v. Walker* (Civ. App.) 97 S. W. 1082.

**Manner of constructing bridges.**—See, also, Art. 6496.

Bridges must be constructed so as to allow the safe passage of cars of other roads which are in common use in the country at large. *Railway Co. v. Moore*, 27 S. W. 962, 8 C. A. 289.

**Contracts for use of county bridges.**—See Art. 650.

**Art. 6486. [4427] Opening through fences, etc.**—All railway corporations in this state, which have or which may hereafter fence their right of way, may be required to make openings or crossings through their fence and over their roadbed along their right of way every one and one-half miles thereof; provided, that, if such fence shall divide any inclosure, that at least one opening shall be made in said fence within such inclosure. [Acts 1887, p. 39.]

See *Houston E. & W. T. Ry. Co. v. Lee* (Civ. App.) 135 S. W. 694.

**Constitutionality.**—The right of the legislature to require railway companies to construct crossings, etc., is clearly within the scope of the police power impliedly reserved in granting the corporate franchise. But it cannot compel a railway which has fenced its track in obedience to previous laws to construct crossings within inclosures for the benefit and convenience of the owners of such inclosures. *Railway Co. v. Rowland*, 70 T. 298, 7 S. W. 718; *Railway Co. v. Ellis*, 70 T. 307, 7 S. W. 722.

This article in so far as it requires railroad companies to make crossings over their right of way at their own expense is unconstitutional so far as it applies to a right of way acquired before the passage of the act. *Hemphill v. T. & P. Ry. Co.* (Civ. App.) 46 S. W. 874.

This statute has no application where the right of way was acquired and fenced by the railroad company prior to the enactment of the statute. In such cases the railroad company cannot be required to construct and maintain such crossing at its own expense. *Owazarsak v. Gulf, C. & S. F. Ry. Co.*, 31 C. A. 229, 71 S. W. 794.

Act March 23, 1887 (Arts. 6486 to 6492), which requires the construction of private crossings every 1½ miles along the line of a railroad, to be made at such times and places as may be demanded by any two or more citizens who either live or own land within five miles of the place where the crossing is demanded, and imposes a penalty of \$500 for each month's failure to comply with the demand, is invalid as attempting to deprive the railroad of its property without due process of law. *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Inclosed land divided by right of way.**—The owner of inclosed land who has granted the right of way to a railway company by deed is entitled to such crossings over the railroad track as are reasonably necessary for the use of the premises inclosed. *Railway Co. v. Rowland*, 70 T. 298, 7 S. W. 718.

A railroad company has no right to divide the inclosed lands of any person without, at its own expense, making and leaving good and adequate passage-ways through its fences and over its road-bed and right of way for the owner's use in passing from one part of his farm to the other. Such openings are not required to be clear of gates. *Burgess v. M., K. & T. Ry. Co.* (Civ. App.) 41 S. W. 703.

Right of person through whose farm a railroad company inclosed a right of way to a farm crossing determined. *Texas & P. Ry. Co. v. Ford* (Civ. App.) 42 S. W. 589.

It is made the duty unconditionally of railroads to make openings in the fences inclosing right of way, where the fences divide any inclosure. *Railroad Co. v. Greer*, 20 C. A. 138, 49 S. W. 148.

The chief purpose of the statute is to secure openings through fences and crossings over roads of the character defined, to residents or owners of land through which the road passes, and the proviso was introduced merely to recognize and secure to owners of in-



closures their right of access to, and passage through their lands thus divided. *M., K. & T. Ry. Co. v. Hanacek*, 93 T. 446, 55 S. W. 1118.

— **Previously acquired right of way.**—See, also, "Constitutionality," ante.

The statutes requiring construction of farm crossings held not to apply where the right of way was acquired before the law was enacted. *San Antonio & A. P. Ry. Co. v. Grier* (Civ. App.) 42 S. W. 1022.

— **Manner of constructing crossing.**—See notes under Art. 6487.

— **Validity of contract for open crossing.**—A railroad's contract to maintain open farm crossings is not void, as against public policy, in the absence of a statute requiring the company to fence its tracks. *Gulf, C. & S. F. Ry. Co. v. Schawe*, 22 C. A. 599, 55 S. W. 357.

A contract providing that a private crossing over a railroad shall be left open is not against public policy. *Gulf, C. & S. F. Ry. Co. v. Clay*, 28 C. A. 176, 66 S. W. 1115.

— **Common-law way of necessity.**—There has been no statutory modification of the common-law rule entitling the owner of land over which a railway is constructed to a way of necessity over the railroad. *Gulf, C. & S. F. Ry. Co. v. Clay*, 28 C. A. 176, 66 S. W. 1115.

— **Duty to keep gates closed.**—See, also, notes under Art. 6603.

The duty to keep the gates closed rests upon the owner of the land. *Railroad Co. v. Glenn*, 30 S. W. 845, 8 C. A. 301. See *Railway Co. v. Meithvein* (Civ. App.) 33 S. W. 1093.

Under this article, where a railway company constructed a crossing outside an inclosure divided by their track and erected gates when they were not then required to do so, it was their duty to keep them closed; and they are liable for injuries to animals escaping onto the track through these gates, although the owner of the land and the animals had, after the placing of the gates, erected a lane leading up to the gates, so that the railway company, at the time of the injury, was required under the statute to put in the crossing and gates, since the track then divided an inclosure. *Chicago, R. I. & G. Ry. Co. v. Wilson* (Civ. App.) 124 S. W. 132.

— **Damages for failure to construct crossing—In general.**—Where a railroad was negligent in failing to put in a farm crossing to enable the landowner to haul wood to market, the latter held entitled to recover profits lost by reason of his inability to haul and sell the wood. *Kendall v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 95 S. W. 757.

Under this article, failure of a railroad company to construct a crossing between the pieces of the same inclosure of land severed by its road resulting in the direct and proximate loss of the crop grown on the land gives the landowner a cause of action. *Chicago, R. I. & G. Ry. Co. v. Nicholson* (Civ. App.) 135 S. W. 235.

— **Exemplary damages.**—Failing to make an opening in a railroad fence, after demand by the owner, where openings were made for his neighbors, held gross negligence sufficient to warrant exemplary damages. *San Antonio & A. P. Ry. Co. v. Grier*, 20 C. A. 138, 49 S. W. 148.

— **Evidence.**—See, also, note under Art. 3687.

In an action for animals drowned because of failure of defendant to leave openings in its right of way fence, that the flood was unprecedented held not to affect the question of defendant's negligence. *Gulf, C. & S. F. Ry. Co. v. Clay*, 28 C. A. 176, 66 S. W. 1115.

Plaintiff held not negligent in using his pasture after knowledge of the construction of the fence. *Id.*

Evidence held to support a finding for plaintiff. *Id.*

Evidence held not to show contributory negligence. *Id.*

— **Injuries to animals on or near tracks.**—See Art. 6603 and notes.

— **Accidents at crossings.**—See notes at end of Chapter 10 of this title.

**Art. 6487. [4428] Width of crossings.**—Such crossings shall not be less than thirty feet in width, and shall be made and kept in such condition as to admit of the free and easy passage of horses, cattle, sheep, hogs and all other domesticated animals, wagons and other vehicles.

— **To what crossings applicable.**—This article refers only to crossings. The use in this article of the same word "crossings" in describing the character of the thing required as that employed in subsequent provisions relating alone to those crossings required to be made outside inclosures indicates that all the provisions of the statute except the proviso of Art. 6486 and the exception made to the provisions of Art. 6490 were made with reference to them alone. *M., K. & T. Ry. Co. v. Hanacek*, 93 T. 446, 55 S. W. 1118.

— **Manner of constructing crossings.**—It is not necessary for the railroad to put in cattle guards at a private crossing. *S. A. & A. P. Ry. Co. v. Robinson*, 17 C. A. 400, 43 S. W. 76.

Where a railroad company construed a contract with abutting owners to maintain crossings to require open crossings, which it maintained for 18 years, a finding that the company was required to maintain open crossings was proper. *Gulf, C. & S. F. Ry. Co. v. Schawe*, 22 C. A. 599, 55 S. W. 357.

The character of the openings was doubtless intended to be such as would be appropriate to the situation and needs of the owner. *M., K. & T. Ry. Co. v. Hanacek*, 93 T. 446, 55 S. W. 1118.

The owner of inclosure is not entitled to open crossing. *M. K. & T. Ry. Co. of Texas v. Chenault*, 24 C. A. 481, 60 S. W. 59; *Burgess v. M., K. & T. Ry. Co.* (Civ. App.) 41 S. W. 703.

An instruction only requiring a railroad company to furnish such a railroad crossing to a landowner "as made it possible" for him to obtain ingress and egress to his land, held erroneous. *Kendall v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 95 S. W. 757.

If a railroad company fences its right of way inside of an inclosure and thus divides it, the owner has the right by statute to an opening through the fences, but the statute does not prescribe what the opening shall consist of or how constructed. The company cannot be compelled to construct and maintain an opening and crossing with wing fences

and cattle guards, and free from gates. *Bean v. Jasper & E. Ry. Co.* (Civ. App.) 101 S. W. 874.

**Repair and maintenance.**—See, also, Arts. 6485, 6493, 6494.

Railway company must use ordinary care to keep crossings of its track in good order although not adopted as public roads. *Railway Co. v. Neill* (Civ. App.) 30 S. W. 369.

Owner of land not adjoining a railroad, held not entitled to recover for killing of animals cause by the negligent maintenance of a private crossing connecting land owned by another. *Houston & T. C. Ry. Co. v. Hollingsworth*, 29 C. A. 306, 68 S. W. 724.

**Art. 6488. [4429] Where may be made.**—Such crossings shall be made at such times and places as may be demanded by any two or more citizens of the state who either live or own land within five miles of the place where such crossings may be demanded. [Id. sec. 3.]

**To what crossings applicable.**—See, also, note under Art. 6487.

The demand by the owner that the railroad company construct a crossing inside of his inclosure is not authorized by this article. And for a failure to comply with a demand to make a crossing inside of an inclosure the penalty cannot be recovered. *Railroad Co. v. Chenault*, 92 T. 501, 49 S. W. 1035.

**Art. 6489. [4430] Demand to be in writing.**—Such demand shall be made in writing, of the nearest local agent of such railway company to the place where such crossing or crossings are demanded, and shall state when and where such crossing is desired. [Id. sec. 4.]

**Art. 6490. [4431] Thirty days' time for completion.**—No railway company shall be required to complete such crossing as may be demanded under this chapter in a shorter time than thirty days from the day on which such demand is first made, nor shall they be required to make any crossings where they have already left such crossings in each one and one-half miles of their road, except inside of inclosures, as provided in article 6486. [Id. sec. 5.]

**Art. 6491. [4432] Distance from place.**—Any railway company, upon such demand, shall be deemed to have complied therewith upon making such crossings within four hundred yards of the place where they are demanded, within the time herein allowed. [Id. sec. 6.]

**Art. 6492. [4433] Failure, etc.**—Whenever any railway company shall fail or refuse to comply with the requirements of this chapter, after demand is made in accordance herewith, such railway company shall pay to the persons who made such demand each the sum of five hundred dollars for each and every month they shall so fail or refuse to comply with such demand, the same to be recovered by suit in any court of this state having jurisdiction of the amount. [Id. sec. 7.]

**To what crossings applicable.**—See, also, note under Art. 6487.

The penalty applies only to failure to make crossings on demand of two or more citizens, and not to a failure to make an opening in a fence dividing an inclosure. *Railroad v. Chenault*, 92 T. 501, 49 S. W. 1035.

It has been held by the supreme court that this article does not apply to crossings within inclosures. *M., K. & T. of Tex. v. Chenault*, 24 C. A. 481, 60 S. W. 56.

**Actions for negligence in maintenance of crossings—Liability in general.**—See, also, Arts. 6485 and 6494.

Where a traveler's foot was caught by a defect in the planking of a railroad crossing, which the railroad company could have discovered by ordinary care, it was liable for injuries resulting therefrom. *Houston & T. C. R. Co. v. Weaver* (Civ. App.) 41 S. W. 846.

Where a railroad company recognized the right of the public to cross its tracks on a street laid out after the building of the railroad, it was bound to keep the same in repair, though the portion of the street on the right of way had not been condemned, and therefore it was liable for injuries caused by defects therein. *San Antonio & A. P. Ry. Co. v. Belt*, 24 C. A. 231, 59 S. W. 607.

In an action for injuries to plaintiff through stepping into a hole in a bridge built by defendant over a ditch on its right of way at a highway crossing, evidence examined, and held sufficient to show defendant's negligence and plaintiff's freedom from contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Smith*, 49 C. A. 1, 107 S. W. 638.

Liability of a railroad company for failing to maintain a safe railroad crossing defined. *Quanah, A. & P. Ry. Co. v. McWhorter* (Civ. App.) 136 S. W. 1162.

**Private road.**—See, also, notes under Art. 6487.

A railroad, having directed its contractors to put in a crossing over a private road, and justified the public in using it as a public crossing, is liable for injuries caused by its defective construction. *Dublin v. Taylor, B. & H. Ry. Co.*, 92 T. 535, 50 S. W. 120.

**Extent of crossing.**—In an action against a railway company for injuries sustained by a traveler on a public street, due to a defective bridge, an instruction to the effect that, if the bridge was a necessary part of defendant's crossing, plaintiff could recover if the bridge was permitted to become and remain out of repair, was not erroneous. *Denison & P. S. Ry. Co. v. Foster*, 28 C. A. 578, 68 S. W. 299.

— **Cause of accident.**—Though plaintiff might have passed over a defective crossing without injury by being jarred from his buggy, if his mule had not been running away, if the accident would not have occurred notwithstanding the mule's speed had the crossing been in repair, the defective crossing was a concurring cause of the accident, so as to make the railway company liable in the absence of contributory negligence. *Missouri K. & T. Ry. Co. of Texas v. Gillenwater* (Civ. App.) 146 S. W. 589.

— **Contributory negligence.**—Use by a person of a defective crossing on a railroad not conclusive evidence of negligence. *Railway Co. v. Robertson* (Civ. App.) 27 S. W. 564.

In an action for injury caused by a defective culvert, plaintiff's testimony held sufficient to show his knowledge of the defect which caused the accident. *International & G. N. R. Co. v. Lewis* (Civ. App.) 64 S. W. 1011.

One using bridge over railroad crossing which he knew to be defective held guilty of contributory negligence. *Houston & T. C. R. Co. v. Evans* (Civ. App.) 92 S. W. 1077.

The mere attempt of plaintiff to cross a bridge over a ditch on the side of defendant railroad company's right of way at a highway crossing, with knowledge that there was a hole in the bridge, held not conclusive evidence of negligence on plaintiff's part. *St. Louis Southwestern Ry. Co. of Texas v. Smith*, 49 C. A. 1, 107 S. W. 638.

Evidence, in an action against a railroad company for personal injuries by being jolted from a wagon on a railroad highway crossing, held to sustain a finding that plaintiff was not guilty of contributory negligence. *Southwestern Ry. Co. v. Bradford* (Civ. App.) 139 S. W. 1046.

The mere fact that plaintiff's mule was going fast when crossing a railroad crossing when plaintiff was thrown out does not of itself constitute contributory negligence relieving the company of liability for the defective condition of the crossing. *Missouri, K. & T. Ry. Co. of Texas v. Gillenwater* (Civ. App.) 146 S. W. 589.

Since any contributory negligence of one injured by being thrown from a buggy at a railroad crossing by its alleged bad repair in rapidly driving the buggy over the crossing would necessarily involve his knowledge of the condition of the crossing, it was not error to charge that plaintiff must have known of the defective condition of the crossing in order to bar a recovery. *Id.*

— **Obstruction of crossing.**—Damages caused by interrupting a right of way is the additional expense in using a more circuitous route. *Railway Co. v. Newton* (Civ. App.) 30 S. W. 475.

**Accidents at crossings from operation of trains.**—See notes at end of Chapter 10 of this title.

**Art. 6493. [4434] Intersections of roads and streets.**—Nothing in this chapter shall be so construed as to affect the law requiring railroad companies to provide proper crossings at intersection of all roads and streets. [*Id.* sec. 8.]

**Art. 6494. [4435] Crossings of public roads.**—It shall be the duty of every railroad company in this state to place and keep that portion of its roadbed and right of way over or across which any public county road may run, in proper condition for the use of the traveling public; and, in case of its failure to do so for thirty days after written notice given to the section boss of the section where such work or repairs are needed by the overseer of such public road, it shall be liable to a penalty of ten dollars for each and every week such railroad company may fail or neglect to comply with the requirements of this article, recoverable in any court having jurisdiction of the amount involved in a suit in the name of the county in which the cause of action accrued. [Acts 1885, p. 45.]

See *Gulf, C. & S. F. Ry. Co. v. Milam County*, 90 T. 355, 38 S. W. 747.

**To what crossings applicable.**—If the railroad has let a contract for constructing its road to independent contractors, who, without direction of the company, build a crossing over a road which has not been opened by the proper authorities, nor dedicated to the public by the owner of the land, the company is not liable for an injury resulting from negligent construction of the crossing, while the work is still in the hands of the contractors. *Dublin v. Railroad Co.* (Civ. App.) 49 S. W. 667.

**Construction and repair of crossings.**—Where a county, on refusal of a railroad company to construct a crossing, does the work itself, it is entitled to recover the cost. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

The duty imposed upon the railroad to keep its roadbed and right of way across a public county road in proper condition is practically the same as that imposed by Art. 6485. *St. L. S. W. Ry. Co. v. Smith*, 49 C. A. 1, 107 S. W. 641.

**Actions for negligence in maintenance of crossings.**—See notes under Arts. 6485 and 6493.

**Accidents at crossings from operation of trains.**—See notes at end of Chapter 10 of this title.

**Duty of district and county attorneys to sue for penalties.**—See Art. 367.

**Art. 6495. [4436] Shall first construct necessary culverts, or sluiceways.**—In no case shall any railroad company construct a roadbed without

first constructing the necessary culverts or sluices, as the natural lay of the land requires, for the necessary drainage thereof. [Acts 1876, p. 147.]

Cited, Uvalde Electric Light Co. v. Parsons (Civ. App.) 138 S. W. 163.

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|-----------------------------------------------------------------------|--------------------------------------------------------|
| 1. Duty to construct culverts or sluices<br>—In general.              | 15. — Injuries to land not adjacent.                   |
| 2. — Accumulation of water on right<br>of way.                        | 16. — Percolation or seepage of water.                 |
| 3. — Sufficiency of drains.                                           | 17. — Measure of damages in general.                   |
| 4. — Floods or overflows.                                             | 18. — Deposit of sediment.                             |
| 5. — Maintenance of culverts.                                         | 19. — Johnson grass.                                   |
| 6. — Special contract.                                                | 20. — Aggravation or mitigation of<br>damages.         |
| 7. — Interference with stream.                                        | 21. — Duty of owner to prevent or re-<br>duce damages. |
| 8. — Delegation of duty.                                              | 22. — Successive actions.                              |
| 9. — Receiver of road.                                                | 23. — Limitation of actions.                           |
| 10. Actions for damages for breach of du-<br>ty—Liability in general. | 24. — Effect of release.                               |
| 11. — Parties entitled to recover.                                    | 25. — Pleading.                                        |
| 12. — Cause of injury.                                                | 26. — Evidence.                                        |
| 13. — Negligence.                                                     | 27. — Instructions.                                    |
| 14. — Interference with stream.                                       | 28. Injunction.                                        |

1. **Duty to construct culverts or sluices—In general.**—The requirement in this statute must be complied with, and if damages result from failure to do so the company is liable, although it may have exercised proper care in order to comply with this provision of the law. S. A. & A. P. Ry. Co. v. Gurley, 37 C. A. 283, 83 S. W. 843.

A railroad company in constructing culverts for drainage held bound to take into consideration, not only existing conditions, but such future changes as it could have foreseen. St. Louis Southwestern Ry. Co. of Texas v. Rollins (Civ. App.) 89 S. W. 1099.

Under the statute it is the duty of railway company to provide all waterways made necessary by the construction of its switch tracks, to prevent an overflow of surface water on a party's land. Houston & T. C. Ry. Co. v. Barr, 44 C. A. 571, 99 S. W. 438.

This article makes absolute the duty of the railway company to erect such culverts or sluices as the natural lay of the land requires for the necessary drainage thereof. Missouri, K. & T. Ry. Co. v. Arey (Civ. App.) 100 S. W. 966.

See Art. 6485.

The duty of the railroad to provide and maintain necessary culverts and sluices to carry off surface waters is absolute, and the exercise of ordinary care in the premises is not sufficient. Ft. Worth & D. C. Ry. Co. v. Suter (Civ. App.) 118 S. W. 216.

A railroad held required to drain all surface waters. International & G. N. R. Co. v. Holzer (Civ. App.) 127 S. W. 1062.

2. — **Accumulation of water on right of way.**—This statute does not impose upon the company the duty of preventing the accumulation of water upon its right of way. The object was to prevent the company from unnecessarily interfering with the natural drainage of the land on either side of its right of way. Dobbins v. M., K. & T. Ry. Co., 91 T. 60, 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856.

3. — **Sufficiency of drains.**—Where a railroad having constructed a ditch along its roadbed increased the flow of water by raising the grade, it was its duty to so change the ditch. Galveston, H. & S. A. Ry. Co. v. Riggs (Civ. App.) 107 S. W. 589.

This article was intended to compel railway companies to permit the flow of surface waters as it aforesaid had naturally done; and culverts and sluices which do not permit this, are not the necessary culverts and sluices contemplated by law. M., K. & T. Ry. Co. v. Macon (Civ. App.) 115 S. W. 849.

4. — **Floods or overflows.**—In the construction of its road the railway company must take into account the probabilities of overflows, and in estimating these it must be considered what effect the size and length of the river near which it is building may have in producing them, as well as the number and the frequency of former freshets. It may not be required to provide for an unprecedented rise in the river, but that cannot be called unprecedented which has for more than a quarter of a century occurred every three, four or five years, nor can that be called extraordinary which is but the natural result of the length and size of the river taken in connection with the fall of water liable to occur at intervals, though separated from each other by several years. G., C. & S. F. R. R. Co. v. Holliday, 65 T. 512; Railway Co. v. Pool, 70 T. 713, 8 S. W. 535; Railway Co. v. Wood, 69 T. 679, 7 S. W. 372.

The true test in determining when a railway company is liable for damages, whose embankment is so constructed in crossing a stream that injury results to neighboring property from an overflow, is, considering all the circumstances, and especially the history of the stream, would a prudent man have anticipated such a flood as caused the damage. The statute must be construed to mean that provision need not be made for such extraordinary floods as could not have been reasonably foreseen; but that such as may have been reasonably anticipated must be guarded against, without reference to the frequency of their recurrence. When it is known that extraordinary inundations caused by a stream have occurred within the memory of man, their recurrence should be anticipated, and the construction work of a road should be so done as to make provision for the danger likely to result from such work should such inundation again occur. Railroad Co. v. Pomeroy, 67 T. 498, 3 S. W. 722.

Where an overflow occurred on the line of a railroad built a few years afterwards, followed by two other overflows within nine months of each other, these facts tended strongly to support the conclusion that such overflows might reasonably have been expected when the railroad was built. Railroad Co. v. Hadnot, 67 T. 503, 4 S. W. 138.

If a structure placed over a stream does not obstruct the natural flow of water, except

in an extraordinary flood which could not be anticipated by any ordinary prudence, no damage can be recovered for an injury from an overflow. *Railway Co. v. Broussard*, 69 T. 617, 7 S. W. 374.

Water resulting from an overflow in districts where large bodies of land are thereby covered will be treated as surface water and the rights of persons affected thereby will be determined accordingly. *Gulf, C. & S. F. Ry. Co. v. Steele*, 29 C. A. 328, 69 S. W. 173.

The railroad must construct its roadbed so as not to interfere with flood water in an ordinary rise of a stream along or across which it may run. It should anticipate the accumulation of flood water from the overflow and build its roadbed with sufficient openings to carry off with expedition the water from all but unprecedented floods. *Gulf, C. & S. F. Ry. Co. v. Pearce*, 43 C. A. 387, 95 S. W. 1134.

5. — **Maintenance of culverts.**—This article imposes the duty of maintenance of the culverts also. *International & G. N. R. Co. v. Glover* (Civ. App.) 84 S. W. 604.

6. — **Special contract.**—A contract contained in a deed conveying a tract for a railroad right of way, held not to release the company from its duty to construct ditches, under this article. *Missouri, K. & T. Ry. Co. of Texas v. Riverhead Farm*, 53 C. A. 643, 117 S. W. 1049.

A consideration was necessary to sustain a contract by a landowner upon conveying a tract for a railroad right of way, releasing his right to recover damages for failure to discharge the statutory duty to construct necessary ditches. *Id.*

7. — **Interference with stream.**—See notes under "Damages for breach of duty," post, and under Art. 6485; and see Art. 6496.

8. — **Delegation of duty.**—A railroad company cannot delegate its duty to construct culverts through its embankment, so as to absolve it from liability for injuries due to a failure to properly construct the same. *Denison, B. & N. O. R. Co. v. Barry* (Civ. App.) 80 S. W. 634.

9. — **Receiver of road.**—A receiver using a railway embankment without the culverts required by this article is liable for an overflow caused by the defect; the company's duty being imposed on him by the act of congress of March 3, 1887, c. 373, § 2, 24 Stat. 554 (U. S. Comp. St. 1901, p. 582). *Freeman v. Field* (Civ. App.) 135 S. W. 1073.

10. **Actions for damages for breach of duty—Liability in general.**—If a railway company fails to construct the proper culverts, sluices or ditches necessary to pass off the surface water by the way it flowed before the railway was built, it is responsible for the damage incurred from such neglect. *G., C. & S. F. R. R. Co. v. Helsley*, 62 T. 593; *G., C. & S. F. R. R. Co. v. Holliday*, 65 T. 512; *G., C. & S. F. R. R. Co. v. Donahoo*, 59 T. 128; *G., H. & S. A. R. Co. v. Tait*, 63 T. 223; *G., C. & S. F. R. R. Co. v. Jones*, 3 App. C. C. § 22; *Railroad Co. v. Scott*, 2 App. C. C. § 140.

When an overflow of land, without the intervention of other agencies, directly and proximately causes the drowning of cattle, their owner is entitled to recover their value, whether they were drowned on his land or not. *S. & E. T. R. R. Co. v. Johnson*, 65 T. 389. A mere license to graze one's cattle on the lands of another confers no such right in the lands as to entitle the owner of cattle to recover damages on account of the destruction of the grass by an overflow. *S. & E. T. R. R. Co. v. Johnson*, 65 T. 389.

When there are no channels through which water is usually passed off, damages occasioned by an obstruction cannot be recovered. *Ft. Worth & D. C. R. R. Co. v. Scott*, 2 App. C. C. § 140; *T. T. R. R. Co. v. Elam*, 1 App. C. C. § 445.

Action may be maintained for damages resulting from destruction of crops caused by an overflow of water. *Railway Co. v. Anderson*, 85 T. 88, 19 S. W. 1025; *Railway Co. v. Borsky*, 21 S. W. 1012, 2 C. A. 545.

One directing a dam by which water is collected, and which may escape by overflow or percolation on the premises of another, is liable for damages caused thereby. *Texas & P. Ry. Co. v. O'Mahoney* (Civ. App.) 50 S. W. 1049.

In cases involving damage from overflow caused by railway companies in constructing their lines across or along streams without providing sufficient outlets for such volumes of water they might reasonably foresee and provide against, this article has uniformly been applied. The clear intention of this article is to require railway companies in constructing their roads to put in such culverts or sluices as might be necessary to prevent interference with the natural flow of surface water and a failure of a railway company to perform this statutory duty renders it liable as a matter of law for the resulting damage. *Gulf, C. & S. F. Ry. Co. v. Ryon* (Civ. App.) 72 S. W. 73.

A railroad, which constructed a dump and failed to provide sufficient waterways, held liable for overflow of property, but not for sickness caused by fright from such overflow. *Denison, B. & N. O. R. Co. v. Barry*, 98 T. 248, 83 S. W. 5.

Under statute, railroad held liable for damage to crops and land caused by water overflowing ditches along roadbed. *St. Louis Southwestern Ry. Co. of Texas v. Baer*, 39 C. A. 16, 86 S. W. 653.

While this article is generally applied to cases of damages to land, it is not expressly limited to such cases, and it is applicable in a case where, through negligence in failure to construct culverts sufficient to carry off water, the water has backed against the embankment constituting the roadbed, loosening the dirt, thereby causing derailment of train and consequent death of employé. *G., C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 399.

Where a railroad company fails to comply with the statute requiring the construction of such culverts as the natural lay of the land requires for the necessary drainage thereof, it is liable for the damage resulting, regardless of the amount of care used in the roadbed's construction. *Baugh v. Gulf, C. & S. F. Ry. Co.*, 44 C. A. 443, 100 S. W. 958.

Though a railroad ditch as originally constructed was sufficient to carry off the water, if defendant increased the flow and negligently permitted the ditch to become stopped, which negligence was the proximate cause of the injury, defendant would be liable. *Galveston, H. & S. A. Ry. Co. v. Riggs* (Civ. App.) 107 S. W. 589.

A railroad company held liable for injuries to plaintiff's crops by the overflow of a water course owing to the railroad's negligence in failing to provide sufficient openings in its embankment. *Missouri, K. & T. Ry. Co. of Texas v. Cannon* (Civ. App.) 111 S. W. 661.

A railroad company held negligent in constructing ditches by the side of its track, resulting in overflow of adjoining land. *St. Louis Southwestern Ry. Co. of Texas v. Clayton*, 54 C. A. 512, 118 S. W. 248.

A railroad maintaining any part of an embankment is responsible for damages caused by overflows resulting therefrom. *Doke v. Trinity & B. V. Ry. Co. (Civ. App.)* 126 S. W. 1195.

A railway company's failure to leave proper openings for escape of water in constructing its road over a stream is negligence, making it liable for damages to land thereby overflowed. *Gulf, C. & S. F. Ry. Co. v. Felts (Civ. App.)* 135 S. W. 719.

11. — **Parties entitled to recover.**—The fact that the embankment which caused the injury was built before plaintiff owned the injured property was no defense. *Texas & P. Ry. Co. v. Maddox*, 26 C. A. 297, 63 S. W. 134.

That plaintiff acquired the land after the embankment was constructed held no defense. *Gulf, C. & S. F. Ry. Co. v. Moore (Civ. App.)* 81 S. W. 569.

The fact that plaintiff, seeking damages for overflowing his land resulting from the defective construction of a railroad embankment, purchased the land after the embankment was constructed with knowledge of its defective construction, would not preclude him from recovery. *San Antonio & A. P. Ry. Co. v. Gurley*, 37 C. A. 283, 83 S. W. 842.

That one had sold his land after it had been damaged by water because of a railroad embankment held not to preclude him from maintaining an action for the damages. *Gulf, C. & S. F. Ry. Co. v. Provo (Civ. App.)* 84 S. W. 275.

That a railroad embankment was constructed before plaintiff purchased his lands did not preclude him from damages thereafter caused to the land by water dammed up by the embankment. *Id.*

Person in possession of land when the same was injured by negligent construction of embankment, and not a subsequent purchaser, held the party entitled to damages. *Texas Cent. R. Co. v. Brown*, 38 C. A. 610, 86 S. W. 659.

A railroad which negligently subjected land to overflow, so that it could not be cultivated, was liable in damages to the owners of the land, who had rented the same out on shares. *Chicago, R. I. & G. Ry. Co. v. Seale (Civ. App.)* 89 S. W. 997.

12. — **Cause of injury.**—If by the obstruction water is rendered stagnant, so as to cause the decay of vegetable matter, whereby unwholesome gases are developed, the company is responsible for damages, even though natural causes combine with its act to produce the result. *Ft. W. & D. C. R. R. Co. v. Scott*, 2 App. C. C. § 142.

Railroad held not excused from liability for flooding plaintiff's property by reason of the fact that a street railway was equally liable. *Texas & P. Ry. Co. v. Maddox*, 26 C. A. 297, 63 S. W. 134.

A railroad company was liable only for proportionate damages to land from an overflow caused by waters deflected by it and by waters from a creek not obstructed by it. *Taylor v. San Antonio & A. P. R. Co.*, 36 C. A. 658, 83 S. W. 738.

One negligently constructing dam and embankment in and adjacent to stream held not excused from liability for additional damages caused thereby during an overflow which would have occurred in the absence of the obstructions. *Gulf, C. & S. F. Ry. Co. v. Harbison (Civ. App.)* 88 S. W. 452; *Same v. Wetherly*, *Id.* 456; *Same v. Oates*, *Id.* 457.

A railroad company held liable for damages from overflow of land caused by its negligence in constructing culverts, concurring with the acts of others or the act of God. *St. Louis Southwestern Ry. Co. of Texas v. Jenkins (Civ. App.)* 89 S. W. 1106.

Railroad company held not liable for flowage of plaintiff's land which would not have occurred but for digging a ditch by county. *Siewerssen v. Harris County*, 41 C. A. 115, 91 S. W. 333.

A railroad company held not liable for surface water naturally accumulating on its right of way and not held there by any works made by the railroad company. *McFadden v. Missouri, K. & T. Ry. Co. of Texas*, 41 C. A. 350, 92 S. W. 989.

Where plaintiff's house was damaged by water resulting from an unprecedented rainfall, and from the railroad's negligence concurring therewith, the railroad company was not relieved from liability because of the unprecedented rainfall. *Galveston, H. & S. A. Ry. Co. v. Riggs (Civ. App.)* 107 S. W. 589.

13. — **Negligence.**—A person constructing an artificial pond on his land is responsible for injury caused by his permitting water to seep or percolate therefrom, regardless of the question of negligence in the construction of the banks. *Texas & P. Ry. Co. v. O'Mahoney*, 24 C. A. 631, 60 S. W. 902.

Where railroad construction caused surface water to collect and stand on the railroad's right of way and become a nuisance to an adjoining property owner, the railroad was liable for the damage sustained, regardless of its negligence. *McFadden v. Missouri, K. & T. Ry. Co. of Texas*, 41 C. A. 350, 92 S. W. 989.

Where a railroad obstructed the flood waters of a stream by its embankment in violation of statute, it was liable for the resulting damage, regardless of the question of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Dubose (Civ. App.)* 95 S. W. 588.

Under the statute, a railroad held liable for causing water to overflow land adjacent to its track, whether negligent or not. *Missouri, K. & T. Ry. Co. of Texas v. Crow*, 43 C. A. 280, 95 S. W. 743.

In an action for injuries by the overflow of water from defendant railroad's right of way, a claim that defendant was negligent as a matter of law held not within the issue. *Galveston, H. & S. A. Ry. Co. v. Riggs (Civ. App.)* 107 S. W. 589.

One seeking to recover under the common law and the statutes governing the construction of railroads with reference to the natural drainage of land held required to allege and prove negligence. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.)* 134 S. W. 280.

14. — **Interference with stream.**—Where the construction of defendant's railroad embankment so changed the course of a stream as to overflow plaintiff's land and make it necessary for plaintiff to construct new bridges and roads, the expense of such construction may be recovered in an action against defendant. *San Antonio & A. P. Ry. Co. v. Gurley*, 37 C. A. 283, 83 S. W. 842.

A railway company, accepting and operating a track constructed for it by sub-contractors, is liable to an adjacent owner for damages due to the negligent construction of the track, so as to interfere with a stream. *Gulf, B. & G. N. Ry. Co. v. Roberts* (Civ. App.) 86 S. W. 1052.

In an action for damages to land by flowage resulting from defendant railroad's negligent construction of its roadbed over a stream, the fact that an embankment forming part of the roadbed afforded protection to the land prior to and at the time of plaintiff's purchase thereof held not to preclude recovery for damages subsequently occurring. *San Antonio & A. P. Ry. Co. v. Dickson*, 42 C. A. 163, 93 S. W. 481.

A railway company held liable for failing to leave proper openings in constructing its road over a stream. *Gulf, C. & S. F. Ry. Co. v. Felts* (Civ. App.) 135 S. W. 719.

An owner of land damaged by an overflow, caused by the failure of a railroad company to properly construct its roadway across the valley of a stream, held entitled to recover the damages caused by the overflow, whether such damages were permanent or temporary, and for the permanent injury by reason of anticipated overflow. *Stephenville, N. & S. T. Ry. Co. of Texas v. Yates* (Civ. App.) 148 S. W. 836.

15. — *Injuries to land not adjacent.*—In action against railroad company for negligently constructing embankment which washed away onto plaintiff's land, objection that break in embankment was not opposite plaintiff's land held untenable. *Missouri, K. & T. Ry. Co. of Texas v. McGregor* (Civ. App.) 68 S. W. 711.

16. — *Percolation or seepage of water.*—Where a railroad company constructed ditches and excavations creating reservoirs from which water reached and damaged plaintiff's land, the railroad company was liable, though the water escaped by percolation. *International & G. N. R. Co. v. Slusher*, 42 C. A. 631, 95 S. W. 717.

17. — *Measure of damages in general.*—Where a crop has been wrongfully destroyed, the proper measure of damages is the value of the crop at the time and place of its destruction. *Railway Co. v. Joachimi*, 58 T. 456; *Railway Co. v. Carter* (Civ. App.) 25 S. W. 1023; *Railway Co. v. Holliday*, 65 T. 512; *Railway Co. v. Parr*, 8 C. A. 280, 28 S. W. 264; *Railway Co. v. McGowan*, 73 T. 362, 11 S. W. 336; *Railway Co. v. Pape*, 73 T. 503, 11 S. W. 526; *Railway Co. v. Nicholson* (Civ. App.) 25 S. W. 54.

Damages for injury to land and the crops growing thereon, which are a part of the land, is the difference between the market value of the land immediately before the injury is done and its market value immediately after such injury. *I. & G. N. R. Co. v. Malone*, 1 App. C. C. § 232; *T. T. R. Co. v. Elam*, 1 App. C. C. § 445; *Mo. Pac. Ry. Co. v. Cox*, 2 App. C. C. § 288.

The measure of damages for permanent injury to land by an overflow of water is the difference in its value immediately before and after each overflow. *Railway Co. v. Davis* (Civ. App.) 29 S. W. 483.

Measure of damages to a landowner as a result of the building of a railroad embankment stated. *Texas Cent. R. Co. v. Wills* (Civ. App.) 41 S. W. 848.

The measure of damages by overflowing realty is its difference in value just prior to and just after the injury thereto. *San Antonio & A. P. Ry. Co. v. Horkan* (Civ. App.) 45 S. W. 391.

The measure of damages in an action for successive overflows of land stated. *Houston & T. C. R. Co. v. Lensing* (Civ. App.) 75 S. W. 826.

The consequences of the failure to comply with this statute are to be measured only by the extent of the injury done to the property of others. *T. & P. Ry. Co. v. Whitaker*, 36 C. A. 571, 82 S. W. 1051; *St. Louis S. W. Ry. Co. v. Jenkins* (Civ. App.) 89 S. W. 1108.

In an action against a railroad for the construction of a dump causing a permanent nuisance, the measure of damages was the difference in the value of the property before the injury and its value immediately thereafter. *Denison, B. & N. O. R. Co. v. Barry*, 98 T. 248, 83 S. W. 5.

Measure of damages for the construction of a permanent railway embankment, subjecting land to inundation, held the difference in the value of the land before and after the construction. *Texas Cent. R. Co. v. Brown*, 38 C. A. 610, 86 S. W. 659.

In an action for damages to land from an overflow by the construction of trestle, the measure of damages determined. *San Antonio & A. P. Ry. Co. v. Kiersey*, 98 T. 590, 86 S. W. 744.

A railroad which subjects land to overflow, and consequent temporary injury, is liable for the amount of money necessary to repair the injury. *Chicago, R. I. & G. Ry. Co. v. Seale* (Civ. App.) 89 S. W. 997.

Statement of elements of damages in injury to a growing cotton crop. *St. Louis Southwestern Ry. Co. of Texas v. Jenkins* (Civ. App.) 89 S. W. 1106.

In an action against a railroad for damages to plaintiff's farm from an overflow of water, resulting from negligence of a railroad in constructing bridges and embankments, the measure of damages determined. *Missouri, K. & T. Ry. Co. of Texas v. Bell* (Civ. App.) 93 S. W. 198.

Where 10 acres of plaintiff's land was overflowed by water of a stream, the course of which was alleged to have been negligently diverted, plaintiff was not entitled to abandon the balance of his land as against defendant, but could only recover for injury to the land overflowed. *Eastern Texas R. Co. v. Moore* (Civ. App.) 94 S. W. 394.

The measure of damages to a landowner resulting from defective culverts on the adjoining land, where such damages are permanent, is the depreciation in the value of the land because of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Green*, 44 C. A. 247, 99 S. W. 573.

Time at which damages for wrongful obstruction of surface waters by railroad should be computed, stated. *Texas & P. Ry. Co. v. Ford*, 54 C. A. 312, 117 S. W. 201.

In action for damages to land caused by construction by railroad company of drain box insufficient to drain the land as it had previously been drained, measure of damages, stated. *Id.*

The measure of damages to land by a railroad company held to be the difference between the market value just before and just after the injury. *St. Louis Southwestern Ry. Co. of Texas v. Clayton*, 54 C. A. 512, 118 S. W. 248.

In an action for damage to land by overflow caused by the negligent construction of

a railroad embankment, the measure of damages is the difference between the market value of the land immediately before and immediately after the injury. *Missouri, K. & T. Ry. Co. of Texas v. Chilton*, 52 C. A. 516, 118 S. W. 779.

That land, on account of the soil being washed away, would not produce a crop, can be considered in estimating the difference in the value of the land just before and after the overflow. *Gulf, C. & S. F. Ry. Co. v. Felts* (Civ. App.) 135 S. W. 719.

Measure of damages for overflowing land stated. *Gulf, C. & S. F. Ry. Co. v. Felts* (Civ. App.) 135 S. W. 719; *Stephenville, N. & S. T. Ry. Co. of Texas v. Yates*, 148 S. W. 836.

The measure of damages for rendering a well worthless by overflows caused by construction of a railroad dump is the difference in market value of the real estate immediately before and after the injury. *Wichita Falls & W. Ry. Co. v. Wyrick* (Civ. App.) 147 S. W. 694.

18. — **Deposit of sediment.**—In action against railroad for injury to crops and realty by overflow, fact that sediment would not tend to injure plaintiff's land held immaterial. *Gulf, C. & S. F. Ry. Co. v. Harbison* (Civ. App.) 88 S. W. 452; *Same v. Wetherly* (Civ. App.) 88 S. W. 456; *Same v. Oates* (Civ. App.) 88 S. W. 457.

In an action against a railroad for injury to crops and realty by overflows caused by insufficient drainage, the evidence held not to show a claim for damages based on the fact that deposit of sediment injured the soil. *Gulf, C. & S. F. Ry. Co. v. Harbison*, 99 T. 536, 90 S. W. 1097.

19. — **Johnson grass.**—See, also, Arts. 6601, 6602.

Railroad which negligently caused land to be overflowed and grow up in Johnson grass held not liable for expense of removing the Johnson grass, in the absence of evidence of its reasonableness. *Chicago, R. I. & G. Ry. Co. v. Seale* (Civ. App.) 89 S. W. 997.

Damages from overflow of land and depositing Johnson grass thereon held not too remote to be considered. *Gulf, C. & S. F. Ry. Co. v. Ondrej* (Civ. App.) 99 S. W. 176.

20. — **Aggravation or mitigation of damages.**—In an action against a railroad for injury to crops and realty by overflows caused by insufficient drainage, the damages sustained could not be reduced by showing that the land had been enhanced by a deposit of a sediment, unless the value of the benefits was shown. *Gulf, C. & S. F. Ry. Co. v. Harbison*, 99 T. 536, 90 S. W. 1097.

Where plaintiff alleged that injury to grass on pasture lands was caused by overflow, it was not error for him to show that the injury was caused or augmented by cattle tramping the grass when it was wet. *St. Louis, B. & M. Ry. Co. v. West* (Civ. App.) 131 S. W. 839.

21. — **Duty of owner to prevent or reduce damages.**—The doctrine is well established that where one is injured from another's breach of contract or tort, he is bound to use reasonable exertions—ordinary care—to render the injury as light as possible. Action by landowner for damages to his land and crop thereon from overflow of water, caused by the embankment erected and kept up by the defendant. It was shown in defense that at an outlay of \$35, which sum plaintiff was able to expend, the land could have been drained from the overflow and the injury avoided. Held, such facts were not a perfect defense, unless it had been shown further that he (plaintiff) had the right to make such drain without injury to neighboring lands. *A. & N. Ry. Co. v. Anderson*, 85 T. 88, 19 S. W. 1025.

Where plaintiff sued for injuries caused by the overflowing of his land by defendant railroad company, plaintiff's failure to raise the grade of his land, so as to prevent such overflow, was no defense. *Texas & P. Ry. Co. v. Maddox*, 26 C. A. 297, 63 S. W. 134.

22. — **Successive actions.**—The measure of damages for negligently deluging the land of another without permanently taking it is the value of the products destroyed, including fruit trees, and the injury done to the land; and an action for damages for successive overflows may be maintained when they occur. *S. & E. T. R. Co. v. Johnson*, 65 T. 389; *G., C. & S. F. R. Co. v. Helsley*, 62 T. 593; *Ft. W. & D. C. R. Co. v. Scott*, 2 App. C. C. § 143; *Railway Co. v. Brouard*, 69 T. 617, 7 S. W. 374; *Railway Co. v. Pool*, 70 T. 713, 8 S. W. 535. See *Bonner v. Wirth*, 24 S. W. 306, 5 C. A. 560; *Railway Co. v. Ware*, 67 T. 635, 4 S. W. 13.

In 1878 L. brought suit to recover damages for injury to his growing crop and to his land from an overflow caused by an embankment constructed by a railway company, and in 1879 recovered judgment therefor. In 1880 the land was again overflowed, and a second suit brought for the damages occasioned thereby. The defendant pleaded the judgment in the first action as a bar to the second suit. Held, that damages from the flood to land caused by a permanent structure will include the entire injury, and that a judgment will be a bar to actions for subsequent injury from the same cause. *T. & P. R. R. Co. v. Long*, 1 App. C. C. §§ 559-561; *T. C. R. R. Co. v. Clifton*, 2 App. C. C. § 489; *Railway Co. v. Hogsett*, 67 T. 685, 4 S. W. 365; *Owens v. Railway Co.*, 67 T. 679, 4 S. W. 593.

23. — **Limitation of actions.**—See, also, Title 87.

Limitation in character of cases to which this article applies does not commence to run until the occurrence of each overflow. *St. L. S. W. Ry. Co. v. Beck* (Civ. App.) 80 S. W. 538.

24. — **Effect of release.**—A release by a landowner of a railroad from damages for overflow of land held operative against a subsequent lessee of the land. *Gulf, C. & S. F. Ry. Co. v. Thornton* (Civ. App.) 109 S. W. 220.

25. — **Pleading.**—See notes under Art. 1827.

26. — **Evidence.**—See, also, notes under Art. 3687.

The testimony of scientific railway engineers that they had constructed a road-bed skillfully and in accordance with scientific rule will not prevail over other credible testimony to the effect that the roadbed did in fact cause the injury. *Railroad Co. v. Hadnot*, 67 T. 503, 4 S. W. 133.

In an action by a householder for injuries sustained from water turned back on his land by a railroad company's negligence in failing to provide sufficient culverts



through its embankment, evidence held to warrant a verdict in favor of plaintiff. *Denison, B. & N. O. R. Co. v. Barry* (Civ. App.) 80 S. W. 634.

In an action against a railroad company for injuries to crops caused by an overflow, evidence examined, and held to show that the injuries complained of were due to the negligence of defendant in constructing its road and a bridge over a river. *Houston & T. C. R. Co. v. Buchanan*, 48 C. A. 129, 107 S. W. 595.

Evidence in an action against a railroad company for injuries to plaintiff's land held insufficient to warrant a verdict in plaintiff's favor. *Suter v. Ft. Worth & D. C. Ry. Co.* (Civ. App.) 134 S. W. 785.

27. — **Instructions.**—See Chapter 13 of Title 37.

28. **Injunction.**—See Title 69 and notes.

**Art. 6496. [4437] Navigable waters shall not be obstructed.**—

Nothing in this chapter shall be so construed as to authorize the erection of any bridge, or any other obstruction across or over any stream or water navigable by steamboats or sail vessels at the place where any bridge, or other obstruction, may be proposed to be placed so as to prevent the navigation of such stream or water. [Id.]

Cited *Rockport & P. A. R. Co. v. State* (Civ. App.) 135 S. W. 263.

**Obstruction of navigable stream.**—See, also, note under Art. 6485.

A navigable stream is not subject to condemnation for the purpose of erecting a dam so as to furnish a reservoir of fresh water for the use of a railway company in operating its engines. The terms and meaning of the words "steamboats or sail vessels," used in the statute, are those in common acceptance. A navigable stream is defined by the statute, and the courts will not look to other sources for its definition. *G., C. & S. F. R. Co. v. Tacquard*, 3 App. C. C. § 142.

A railroad company is liable for damages caused by obstructing a navigable river in Texas while repairing a bridge across the stream so as to prevent a raft of logs from being propelled along the river to point of destination. *Gulf, C. & S. F. Ry. Co. v. Meadows*, 56 C. A. 131, 120 S. W. 522.

Where a stream had been generally used for a long time as a means of rafting logs, it was a navigable stream so as to make wrongful the construction of a railroad bridge which interfered with such rafting. *Burr's Ferry, B. & C. Ry. Co. v. Allen* (Civ. App.) 149 S. W. 358.

**Art. 6497. [4438] Streets, etc., of incorporated cities or towns shall not be taken without, etc.**—Nothing in this chapter shall be so construed as to authorize the construction of any railroad upon or across any street, alley, square, or highway of any incorporated city or town without the assent of the corporation of said city or town. [Id.]

See *G. & W. Ry. Co. v. City of Galveston*, 90 T. 398, 39 S. W. 96, 36 L. R. A. 33.

**Grant of right to use streets—Necessity.**—A railroad has no right to construct its line on the streets of a city without the city's consent. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

That by the erection of the sea wall in the city of Galveston, by the county of Galveston, a railroad company's track was cut in two, did not entitle the company to a new location across streets and alleys as a way of necessity, without the assent of the city, though the rule would be otherwise, had the wall been erected by the city; no such right being given by this article. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

— **Validity.**—A municipal franchise permitting a railroad company to construct its road on a street and an alley is not a deprivation of abutting property without due process of law within Const. U. S. Amend 14, and Const. Tex. art. 1, § 19. *McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co.* (Civ. App.) 131 S. W. 85.

Where a railroad right of way in a city was acquired by one company by purchase from another, and the city by ordinance confirmed and granted this right to the purchaser, the fact that the original purchase was illegal could not invalidate the grant. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

— **Conditional grants.**—When the assent of a city is required it has power to prescribe lawful and proper conditions. *City of Indianola v. Railway Co.*, 56 T. 594; *Mayor, etc., v. Railway Co.*, 84 T. 585, 19 S. W. 786; *Taylor v. Dunn*, 80 T. 666, 16 S. W. 732; *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 37 S. W. 27.

Under Art. 6485 and this article a railroad company had no right to construct its line on the streets of a city without the city's consent which the city had an unqualified right to refuse, and the city was authorized to contract with the railroad company for the use of its streets in consideration of the railroad company's locating its offices, machine shops, and roundhouses within the city limits. *Kansas City, M. & O. Ry. Co. of Texas v. City of Sweetwater*, 104 T. 329, 137 S. W. 1117.

Where the legislature grants railroad companies the right to occupy city streets upon condition that the consent of the city be first obtained, and a city grants a right, and attaches to it a condition subsequent not authorized by the statute, such condition is void. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

— **Acceptance of grant.**—A railroad company held to have accepted a city's grant of a right of way, though not all the portion granted was in actual use. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 96 T. 233, 72 S. W. 161, 201.

That a railroad company, after being given the right by ordinance to relocate its road between two points, constructed its tracks over streets in accordance with a right given by the same ordinance, rehabilitated its tracks, and generally began to put itself in position to carry out the purpose for which the relocation was desired, held to consti-

tute an acceptance of the grant. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

— **Construction and effect.**—Proviso to first section of a city ordinance, which confirmed a prior grant of a railroad right of way, held to apply only to such first section, where it appeared from the context of the entire ordinance that such was the intention. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

Under a city ordinance granting a railroad company a right to relocate its track between two points upon any degree of curvature, not less than 3 degrees, it could relocate its track upon a line which made a short curve of 13 degrees at one end and another short curve of 10 degrees at the other end, united by a straight line. *Id.*

An ordinance authorizing the relocation of a railroad track "at any time thereafter" held not to postpone the right to make such relocation until the happening of certain events, but to give a present right. *Id.*

A city ordinance authorizing the relocation of a railroad between two points carried with it the right to cross such streets and alleys not crossed by the old line as were necessary to such relocation. *Id.*

— **Transfer of right.**—The possession of a charter authorizing the building of a railroad on the streets of a city after obtaining the city's consent did not prevent a company, purchasing such right at a foreclosure sale of a former grantee, from claiming under the sale. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 96 T. 233, 72 S. W. 161.

A railroad purchasing the property of another company at foreclosure sale, held to have acquired the rights of its predecessor to the use of certain streets for its right of way. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 30 C. A. 474, 72 S. W. 201.

The charter of a railroad company purchasing the property of another at foreclosure sale held not to require the purchaser to surrender the right of way to a city street which it had acquired by the purchase, and to reacquire it by exercise of its charter powers. *Id.*

— **Abandonment or forfeiture.**—Facts stated in certified questions held not to show, as a matter of law, an abandonment by a railroad company of a right of way in a street. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 96 T. 233, 72 S. W. 161, 201.

A decision in an injunction case involving conflicting locations of railroad held to involve a conclusion that the railroad had not abandoned a right of way in a street. *Id.*

Forfeiture of a railway company's right to use a city street for a right of way held enforceable only by the state or city, and not by another railway company. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 30 C. A. 233, 72 S. W. 201.

A municipal franchise to maintain railway tracks in a street and in an alley held not to lapse because of breach of the condition as to time of completing work on which it was granted. *McCammon & Lang Lumber Co. v. Trinity & B. V. Ry. Co.* (Civ. App.) 131 S. W. 85.

That a railroad company continued to use its old location for about 21 years after being granted a right to relocate its track did not work a forfeiture of its rights under the grant, where there was ample excuse for the delay. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

Where a city had no right to attach as a condition subsequent to a grant of a railroad right of way a provision that the grant should be forfeited unless exercised within a reasonable time, such a condition could not be implied. *Id.*

**Power of city to regulate railroads.**—See Art. 863.

**Damages to abutting property.**—See ante, and notes at end of this chapter.

**Injuries from manner of construction or maintenance.**—See notes at end of this chapter.

**Injuries from operation of trains.**—See notes at end of Chapter 10 of this title.

**Art. 6498. [4439] In case of highways, plank roads, etc.**—In case of the construction of any railway along highways, plank roads, turnpikes, or canals, such railroad corporation shall either first obtain the consent of the lawful authorities having control or jurisdiction of the same or condemn the same under the provisions of law. [*Id.*]

**Action by county for damages.**—In an action by a county against a railroad for damages caused by defendant's appropriation of a highway, held error to refuse a certain charge. *St. Louis, S. F. & T. Ry. Co. v. Grayson County*, 31 C. A. 611, 73 S. W. 64.

Measure of damages to be recovered by a county, where a railroad constructed a new road parallel to an old road appropriated by it, defined. *Id.*

**Art. 6499. [4440] Shall have the right to cross, intersect, etc., other railways.**—Such corporation shall have the right to cross, intersect, join and unite its railway with any other railway before constructed at any point on its route and upon the grounds of such other railway corporation, with the necessary turnouts, sidings and switches, and other conveniences in furtherance of the objects of its connection. [*Id.*]

**Article construed.**—Construed with Art. 6504, confers jurisdiction upon the county court to appoint commissioners to assess damages. *Railway Co. v. Railway Co.*, 86 T. 537, 26 S. W. 54.

This article, in connection with Arts. 6500, 6591, 6608, 6615, construed. *Inman v. St. Louis S. W. R. Co.*, 14 C. A. 39, 37 S. W. 37.

**Enforcement of duties to public.**—Order of railroad commission directing railroads crossing each other to put in intersecting tracks held not shown to be an abuse of discretion. *International & G. N. R. Co. v. Railroad Commission of Texas* (Civ. App.) 86 S. W. 16.

The rights conferred and the duties imposed by this article, and Arts. 6500, 6608, 6609, and 6670, were not intended solely for the benefit of railroad companies. On the contrary, the primary purpose of these articles was to promote the public interest, and a

failure to comply with the duties so imposed constitutes such an abuse as Art. 6654 authorizes the railroad commission to correct. *Id.*

**Right to cross other railroads.**—One railroad has the right to condemn the right of way across another when necessary to make connection with another road. See Arts. 6501, 6504. *S. & E. T. Ry. Co. v. G. & I. Ry. Co.*, 92 T. 162, 46 S. W. 784.

**Manner of constructing crossing, control of railroad commission, expense and stopping at crossing.**—See Arts. 6701 et seq.

**Validity of special contract.**—The invalidity of a portion of a contract providing for crossing of street car tracks over a railroad's right of way held not to invalidate a provision for division of the cost of maintaining lights and safety appliances at the crossing. *Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.*, 103 T. 49, 123 S. W. 124.

A contract between a railroad company and a street car company for the division of expenses at a crossing of the street car tracks over the tracks of the railroad company held based on a sufficient consideration. *Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co. (Civ. App.)* 124 S. W. 987; *Id.*, 103 T. 49, 123 S. W. 124.

**Accidents at railroad crossings.**—See, also, notes at end of Chapter 10 of this Title.

Where railroads cross each other one road is not liable for injury caused by negligence of other, when it did not occur from a failure of duty imposed upon them jointly. *Missouri, K. & T. of Texas v. Jolly*, 31 C. A. 512, 72 S. W. 871.

**Art. 6500. [4441] Intersected railways shall do what.**—Every corporation whose railway is or shall be hereafter intersected by any new railway shall unite with the corporation owning such new railway in forming intersections and connections and grant to such new railway facilities therefor. [*Id.*]

See *Inman v. St. Louis S. W. R. Co.*, 14 C. A. 39, 37 S. W. 37.

**Enforcement of duties to public.**—See note under Art. 6499.

**Railroads crossing at different grades.**—The railroad commission has power to compel two railroads which cross each other, but not at grade, to put in tracks connecting each with the other, so that cars can be shifted from the tracks of one to the other. *International & G. N. Ry. Co. v. Railroad Commission*, 99 T. 332, 89 S. W. 963.

**Art. 6501. [4442] When the two corporations can not agree.**—If the two corporations can not agree upon the amount of compensation for any such crossing, intersection or connection, or the points and manner of the same, their differences shall be adjusted in the manner provided by law. [*Id.*]

See Arts. 6499, 6504, and *S. & E. T. Ry. Co. v. G. & I. Ry. Co.*, 92 T. 162, 46 S. W. 784.

**Art. 6502. [4443] May enter upon adjacent land and take material, etc.**—Any railroad corporation may enter upon and take from any land adjacent to its road earth, gravel, stone, or other materials, except fuel and wood, necessary for the construction of its railway, paying, if the owner of such land and the corporation can agree thereto, the value of such material taken and the amount of damage occasioned to any such land or appurtenances, and, if such owner and corporation can not agree, then the value of such material and the damage occasioned to such real estate may be ascertained, determined and paid in the manner provided in this chapter. [*Id. sec. 22.*]

Cited, *Cotulla v. La Salle Water Storage Co. (Civ. App.)* 153 S. W. 711.

**Art. 6503. [4444] Value of same and damages shall first be paid.**—The value of such material and the damage to such real estate shall in all cases be ascertained, determined and paid before such corporation can enter upon and take such material. [*Id.*]

**Art. 6504. [4445] In case corporation and owner can not agree, etc.**—If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate, or the material thereon, required for the purposes of its incorporation or the transaction of its business for its depots, station buildings, machine and repair shops, for the construction of reservoirs for the water supply, or for the right of way, or for new right of way for change or re-location of road bed to shorten the line, or any part thereof or to reduce its grades, or any of them, which is hereby authorized and permitted, or for any other lawful purpose connected with or necessary to the building, operating, or running its road, such corporation may acquire such property in the manner provided in this chapter; provided, that the limitation in width prescribed in article 6484, shall not apply to real estate, or any interest therein, required for the purposes herein mentioned, other than right

of way, and that real estate, or any interest therein, to be acquired for such other purposes or any of them need not adjoin or abut on the right of way; provided, further, that no change of the line through any city or town, or which will result in the abandonment of any station or depot, shall be made, except upon written order of the railroad commission of Texas, authorizing such change; and provided, further, that no railroad corporation shall have the right under this act to condemn any land for the purposes mentioned in this article situated more than two miles from the right of way of such railroad corporation. [Id. p. 146, sec. 21. Amended Acts 1901, p. 46.]

See *Railway Co. v. Railway Co.*, 86 T. 537, 26 S. W. 54; *Schlinke v. De Witt County* (Civ. App.) 145 S. W. 660; *Cotulla v. La Salle Water Storage Co.*, 153 S. W. 711; *Ft. Worth & D. C. Ry. Co. v. Mapes*, 156 S. W. 528.

**Compliance with statute.**—One claiming title under condemnation proceedings must show a strict compliance with the statute, and proceedings not in accordance therewith are insufficient, whether excepted to or not. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

**Who may exercise right.**—A foreign corporation, having secured permission to do business within the state, held entitled to exercise the right of eminent domain. *Texas Midland R. Co. v. Southwestern Telegraph & Telephone Co.* (Civ. App.) 57 S. W. 312.

Under these articles a domestic railroad corporation, legally incorporated, may condemn property for a right of way, and a proposed condemnation cannot be objected to on the ground that it is unlawful as authorizing the taking of property for a private use. *Chapman v. Trinity Valley & N. Ry. Co.* (Civ. App.) 138 S. W. 440.

A railroad corporation, organized under Arts. 6481-6534 to construct and operate a railroad, though organized primarily to haul lumber for a lumber manufacturing company controlling the railroad corporation, must perform the duties imposed on common carriers, and its road is, under Const. art. 10, § 2, a public highway, and it may condemn land for a right of way. Id.

The legislature could not give terminal railroad companies the right of eminent domain, unless their operation constitutes a public use. *Houston B. & T. Ry. Co. v. Hornberger* (Civ. App.) 143 S. W. 272.

**Land that may be taken.**—One railroad company has no right to condemn property of another, already dedicated to public use, where such taking will destroy the first use, unless the new use be of paramount importance, and cannot be otherwise accomplished. *Sabine & E. T. Ry. Co. v. Gulf & I. Ry. Co. of Texas*, 92 T. 162, 46 S. W. 784.

A railroad company does not lose its right to condemn lands of another railroad for lawful purposes, by having prior thereto obtained a crossing over such railroad company's tracks by condemnation. Id.

Property held by the state or by the United States for sale or settlement may be taken for railroad purposes, but not where the land has been devoted to a particular use of the government. *Rockport & P. A. R. Co. v. State* (Civ. App.) 135 S. W. 263.

**Amount that may be taken.**—While a railroad in laying out its road is restricted to a right of way 200 feet wide such restriction does not apply to land sought to be condemned for depot facilities, switches, spur tracks, and freight yards necessary for the operation of its road. *Hengy v. M., K. & T. Ry. Co.* (Civ. App.) 109 S. W. 403.

**Use of land condemned.**—Land may be condemned for a particular purpose, by which the damages may be measured. If used for other purposes compensation must be made. *Foster v. Railway Co.*, 10 C. A. 476, 31 S. W. 529.

This article and Art. 6542 seem to contemplate that a condemnation merely for right of way does not embrace or imply a use for machine or repair shops or yards, but that when such things are necessary property should be acquired or condemned for such purposes. When land is condemned for one purpose it cannot be applied to another purpose without compensation. *M., K. & T. Ry. Co. v. Anderson*, 36 C. A. 121, 81 S. W. 785.

**Authority of commission.**—An order of the state railroad commission, giving a railroad company a right to relocate its track upon any line "upon which it may legally acquire the right of way," did not give it a right to relocate its track without the assent of the city, since not only was the order not open to such construction, but this article gave the commission no authority to grant such a right. *Galveston & W. Ry. Co. v. City of Galveston* (Civ. App.) 155 S. W. 273.

**Waiver of prepayment of compensation.**—Under this article and Art. 5004 conferring the same rights of condemnation on irrigation companies, a married woman could not enjoin the maintenance of a dam by a corporation entitled to exercise the power of eminent domain, which would submerge the land of her husband, in which she had a homestead right, where the husband had waived prepayment of compensation before appropriation of the land, but was only entitled to recover compensation for her homestead. *Reitzer v. Medina Valley Irrigation Co.* (Civ. App.) 153 S. W. 380.

**Damages from construction or maintenance of railroad, shops, roundhouses, etc.**—See notes at end of this Chapter.

**Art. 6505. [4446]** Shall not enter upon land, etc., except for a lineal survey.—No railroad company shall enter upon, except for a lineal survey, any real estate whatever, the same being private property, for the purpose of taking and condemning the same, or any material thereon, for any purpose whatever, until the said company shall agree with and pay the owner thereof all damages that may be caused to the lands

and property of said owner by the condemnation of said real estate and property, and by the construction of such road. [P. D. 4922.]

**For what purposes land may be entered upon.**—See, also, Arts. 6483 and 6502.

**Remedies of owner for trespass—Damages in general.**—The owner of land may maintain an action for damages against a company which without his consent enters upon his land, which has not been condemned. *Railway Co. v. Benitos*, 59 T. 326; *Hays v. Railway Co.*, 62 T. 397. The consent of the owner may be given verbally. *Railway Co. v. Jarrell*, 60 T. 267.

In a suit for damages for injuries done to land by the construction of a railway roadbed, without first acquiring a right of way from the owner, evidence of such damage to the entire tract is admissible as would have been permitted had the proceedings been instituted to condemn the land pointed out by the statute. *H., E. & W. T. R. R. Co. v. Adams*, 63 T. 200.

The measure of damages against a railway company which is a naked trespasser upon inclosed land, and so uses its possession as to prevent the making of crops, is not the supposed value of the crops that might have been made, but the rental value of the land, as also the value of fence destroyed, or other specific injury directly inflicted. *Id.*

Where a railroad company appropriates a portion of the land of another in the construction of its road thereon, without referring to the statutory methods of ascertaining the damages, the measure of damages for the appropriation is the value of the land on the day it was taken, and that amount to be increased or diminished as the remainder of the tract has been injured or benefited by the appropriation of the part used in the construction of the road. Where work has already been done by the railway company upon the land in the construction of the roadbed, and ties, rails, etc., have been placed on it by the company, the value of these articles is not to be included as part of the compensation of the owner, although the owner may, in an action of trespass to try title, have previously recovered the land from the company. *T. & P. R. R. Co. v. Hays*, 3 App. C. C. §§ 56-59. See *H., E. & W. T. Ry. Co. v. Adams*, 63 T. 200.

A corporation owning land over which a traction company constructed its track held not entitled to oust the company, but limited to an action for damages. *Knowles v. Northern Texas Traction Co.* (Civ. App.) 121 S. W. 232.

**Damages for removing improvements.**—A railway company erected certain improvements on the land of another, which it afterwards removed. Held, that a naked trespasser, who erects on land fixtures which constitute a part of the realty, and who afterwards removes them without the consent of the landowner, is liable in damages for their value. *H., E. & W. T. R. R. Co. v. Adams*, 63 T. 200.

**Trespass to try title.**—One who permits a railway company to enter upon his land and clear a right of way for its roadbed, without objection, under verbal authority from him so to do, cannot afterwards repudiate the promise and maintain an action in trespass to try title to the strip so used for operating the road. *T. & St. L. R. R. Co. v. Jarrell*, 60 T. 267.

Where a railway company has acquired land for its use, without having acquired title thereto, or condemned the same for right of way, the land may be recovered by the owner in an action of trespass to try title. *T. & P. R. R. Co. v. Hays*, 3 App. C. C. § 56.

**Waiver of prepayment.**—See note under Art. 6504.

**Estoppel to claim compensation.**—An owner of land appropriated by a railroad company for a railroad right of way is not estopped to demand compensation, though he was present during construction of the road, for, until he has received compensation, the land belongs to him. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

Plaintiff, suing for damages for the value of a strip used by defendant as a railroad right of way and for damages to the remainder of the land, was not estopped by the fact that she and her deceased husband saw and knew that defendant was grading the road, expending money thereon, and operating its trains thereover, where defendant's entry was under a parol agreement by its agent for a consideration. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

**When right of way is acquired.**—See, also, Art. 6534.

A right of way is not acquired until it is paid for or payment is secured by a deposit of money. *Railway Co. v. Donahoo*, 59 T. 128. See *Railway Co. v. Benitos*, 59 T. 326.

The right of the state to take private property for public use becomes absolute when compensation has been agreed upon and paid, and no conveyance is necessary. *Getzen-daner v. Trinity & B. V. Ry. Co.*, 43 C. A. 66, 102 S. W. 161.

**Art. 6506. [4447] Statement to be filed with county judge.**—If such company and said owner can not agree upon the damages, it shall be the duty of said company to state in writing the real estate and property sought to be condemned, the object for which the same is sought to be condemned, the name of the owner thereof and his residence, if known, and file the same with the county judge of the county in which such property, or a part thereof, is situated; provided, if the owner resides in either county in which a portion of the land is situated, the same shall be filed in the county of his residence. [Acts 1885, p. 54.]

**Jurisdiction.**—The county court of a county in which is situated a part of the right of way of the railroad sought to be condemned for use of a telegraph company has jurisdiction to condemn other parts of such right of way in other counties for the use of the telegraph company. *H. & T. C. Ry. Co. v. Postal Telegraph Cable Co.*, 18 C. A. 502, 45 S. W. 179.

In a condemnation proceeding, neither the county judge, on filing of the statement provided for by this article, nor the commissioners, on the hearing as to damages, can inquire into the truth of the facts on which the jurisdiction is invoked; such inquiry being

proper only on hearing in the county court of the appeal from the commissioners' award. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

The court, on granting the motion of a railroad company, which has started to condemn land for its right of way, to dismiss the proceeding, retains jurisdiction to hear and determine the question of the damages sustained by the owner, occasioned by the company taking possession and proceeding to construct its railroad, irrespective of the amount of the damages. *Kansas City, M. & O. Ry. Co. v. Kirby* (Civ. App.) 150 S. W. 228.

The county court of a county, though deprived of civil jurisdiction, is the proper tribunal to appoint commissioners to assess damages in condemnation proceedings under this and the following articles, and the district court has no power to appoint commissioners. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

Commissioners appointed by the district court to assess damages in condemnation proceedings are not de facto commissioners and are without right to act. *Id.*

The taking of private property for a public use is a deprivation of property without due process of law, where the court appointing commissioners to assess damages has no authority so to do. *Id.*

Under this and the following articles the district court is without jurisdiction to appoint commissioners on the application of a railroad company seeking to condemn a right of way, the appointment is void, and the acts of the commissioners are subject to collateral attack. *Id.*

— **Right to object to jurisdiction.**—An owner of land sought to be taken by a railroad company for a right of way does not waive his rights or claim for damages nor admit the regularity of the proceedings by appearing before commissioners to assess damages appointed by a court having no authority to appoint, since the appointment is void. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

An owner of land sought to be taken by a railroad company for a right of way is not estopped from attacking the award of commissioners appointed by the district court instead of the county court, unless he knew of the illegality of the appointment and agreed to accept the decision and induced the company to apply to the wrong court. *Id.*

A railroad company, seeking to condemn land, applied to the district court for the appointment of commissioners to assess damages. The court appointed commissioners. The owner agreed in writing that the commissioners need not serve him with process, but could proceed to condemn his land. It was not shown that he agreed to submit the issues to the commissioners and abide their decision, and after their award he objected to their findings and attempted to appeal. Held, that he did not agree to a statutory or common-law arbitration, and he could collaterally attack the proceedings of the commissioners on the ground that the district court had no authority to appoint them. *Id.*

— **The statement.—In general.**—A party seeking for the condemnation of private property for public use must show a strict compliance with the statute. A statement not in substantial compliance with the statute is a nullity and will not confer jurisdiction. The designation of the property must be sufficiently certain to identify the particular portion of the land over which the right of way is sought. The title of the person named as owner is not in issue, and cannot be contested in this proceeding, the only question to be determined being that of damages. *G., H. & S. A. R. R. Co. v. Mud Creek I. A. & M. Co.*, 1 App. C. C. § 393; *Adams v. San Angelo Waterworks* (Civ. App.) 25 S. W. 165.

— **Description of land.**—See, also, note under Art. 6534.

The petition and judgment must describe the land sought to be condemned with sufficient certainty to fully identify it. *Ft. W. & D. C. R. R. Co. v. Hogsett*, 1 App. C. C. § 444. See, also, *G., H. & S. A. R. R. Co. v. Mud Creek I. A. & M. Co.*, 1 App. C. C. § 393; *Adams v. San Angelo Waterworks* (Civ. App.) 25 S. W. 165.

Such a description of the land sought to be condemned as would enable a person skilled in such matters to locate the land is sufficient. *H. & T. C. Ry. Co. v. Postal Telegraph Cable Co.*, 18 C. A. 502, 45 S. W. 179.

Neither party in his pleadings is required to define the limits or extent of the holding of the owner whose property is sought to be condemned. It is a matter wholly of proof. The owner is entitled to recover not only the market value of the property actually taken, but in addition thereto the damages sustained as to the remaining portion. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 282.

— **Purpose of condemnation.**—If the condemnation of property be desired for other purposes than the right of way, as for depot grounds and terminal facilities, the plaintiff must distinctly specify such objects. *Foster v. Railway Co.* (Civ. App.) 31 S. W. 529; *Barnes v. Chicago, R. I. & T. Ry. Co.* (Civ. App.) 33 S. W. 601.

— **Naming owners.**—All persons claiming an interest in land sought to be condemned by a railroad company may be made defendants in the condemnation proceedings. *Davidson v. Texas & N. O. R. Co.*, 29 C. A. 54, 67 S. W. 1093.

In condemnation proceedings, an allegation in the statement provided for by this article that specified defendants owned or claimed to own some interest in the lands, sufficiently named the owners. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

— **Averments as to disagreement.**—The petition need not state that the companies cannot agree, etc., when it does not appear there was any dispute in that respect. *Railway Co. v. Railway Co.*, 86 T. 537, 26 S. W. 54.

A county court acquired jurisdiction of a condemnation proceeding on an allegation in the statement, that the parties were unable to agree on damages; actual existence of the fact being unnecessary. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

— **Amendment.**—See note under Art. 6527.

**Art. 6507. Regular judge disqualified; special judge appointed.**—Where any petition or statement for condemnation is presented to a county judge, as provided in the preceding article, and such judge shall be disqualified to act by reason of any of the matters mentioned in article 1736, he shall indorse his certificate of such disqualification upon

such petition, or statement for condemnation, and file the same with the county clerk, who shall make a certified copy of such petition, or statement for condemnation, and of such indorsement thereon, and forward the same forthwith to the governor; whereupon the governor shall proceed to appoint some person learned in the law to act as special judge, who shall have and exercise all of the powers conferred upon the county judge by this chapter, and shall proceed to make the appointment of commissioners as provided by the succeeding article upon the said petition or statement for condemnation already filed, and in the event objections shall be filed by either party to the award of commissioners, the person so appointed by the governor shall preside at all trials of the cause in the county court until such time as the disqualification of the county judge may have ceased; provided, that any time before such disqualification is so certified to the governor, the parties by agreement may select such special judge. [Acts 1901, p. 20, sec. 1.]

**Art. 6508. [4448] County judge shall appoint commissioners.**—Upon the filing of such statement, the county judge shall forthwith, either in term time or in vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed on between said corporation and said owner. [Acts 1860, p. 60.]

**Jurisdiction and right to object to jurisdiction.**—See notes under Art. 6506.

**Duty to appoint commissioners.**—Where the parties fail to agree upon commissioners to assess damages it is the duty of the court as required by this article to appoint such commissioners. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 746.

**Art. 6509. [4449] Commissioners shall be sworn.**—The said commissioners shall be sworn by the county judge, or by any officer authorized by law to administer oaths, to assess said damages fairly and impartially and in accordance with law. [Id.]

**Parol evidence of oath.**—See notes under Art. 3687.

**Art. 6510. [4450] Commissioners shall select a day and place of hearing.**—Said commission shall, without delay, appoint a day and place for hearing said parties; and the day appointed shall be the earliest practicable day, and the place selected for such hearing shall be as near as practicable to the property in controversy, or at the county seat of the county in which the property is situated. [Id.]

**Art. 6511. [4451] Shall issue written notice to parties.**—The commissioners shall issue a notice in writing to each of the parties, notifying them of the time and place selected for the hearing. [Id.]

**Only notice required.**—The above article prescribes the only notice necessary to be given in a condemnation proceeding. *G., C. & S. F. Ry. Co. v. S. W. Telegraph & Telephone Co.*, 18 C. A. 500, 45 S. W. 151.

**Sufficiency of notice.**—Showing as to notice to defendants insufficient to support a judgment. *Railway Co. v. Day*, 22 S. W. 533, 3 C. A. 353.

**Description of land.**—See note under Art. 6534.

**Recital in judgment of service of notices.**—Recital in the judgment of condemnation of land that due notices have been given is conclusive, although the mode of service be not shown nor appears in the record. *Ackerman v. Huff*, 71 T. 317, 9 S. W. 236.

**Effect of waiver of notice.**—The mere fact that the owner agreed in writing that the commissioners need not serve him with process, but could proceed to condemn the right of way, did not show a common-law or statutory arbitration so as to prevent him from collaterally attacking the action of the commissioners for lack of jurisdiction of the court appointing them. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

**Art. 6512. [4452] Manner of serving notice.**—Said notice shall be served upon said parties at least five days before the day of hearing, exclusive of the day of service, and shall be served by delivering a copy of the same to the party, his agent or attorney, and may be served by any person competent to testify.

**Art. 6513. [4453] Return of notice.**—The person making such service shall return the original notice to said commissioners, or any one of them, on or before the day set for the hearing, with his return in writing thereon, stating how and when the same was served.

**Recital in judgment of service of notices.**—See notes under Art. 6511.

**Art. 6514. [4454] When the property belongs to estate or to a minor, notice shall be served on whom.**—When the property in controversy is the property of the estate of a deceased person, or of a minor, and such estate has a legal representative, or such minor has a guardian, the notice shall be served upon such legal representative, or guardian. [Id.]

Cited, *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

**Art. 6515. [4455] Property of non-resident, unknown owner, or one who secretes himself.**—When the property in controversy belongs to a non-resident of this state, or to an unknown person, or to a person whose residence is unknown, or who secretes himself so that the process of law can not be served upon him, such notice may be served upon such owner by publication in the same manner as is provided for service of citation in article 1874 of the Revised Civil Statutes. [Acts 1885, p. 54; Amend. 1895, Sen. Jour. No. 83, p. 482.]

Cited, *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

**Art. 6516. [4457] Proceedings of commissioners.**—When service of notice has been perfected, the commissioners shall, at the time and place appointed, or at any other time and place to which said hearing has been adjourned, proceed to fully hear said parties; but, if upon the day set for the hearing, the service of notice has not been perfected the said hearing shall be postponed from time to time until such service has been perfected.

**Opening and closing.**—In a proceeding to condemn the right of way, the party seeking the condemnation is entitled to the opening and conclusion. *Railway Co. v. Culver*, 4 App. C. C. § 5, 14 S. W. 1013; *Railway Co. v. Ross*, 4 App. C. C. § 87, 16 S. W. 536.

**Rules governing proceedings.**—A trial in proceedings by a railroad to condemn land is governed by the ordinary rules of law governing the trial of causes, though the tribunal having jurisdiction of such proceedings is special. *Davidson v. Texas & N. O. R. Co.*, 29 C. A. 54, 67 S. W. 1093.

**Effect of appearing before commissioners.**—An owner of land sought to be taken by a railroad company for a right of way does not waive his rights or claim for damages nor admit the regularity of the proceedings by appearing before commissioners to assess damages, when they were appointed by a court having no authority so to do. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

**Art. 6517. [4458] Power of commissioners.**—Said commissioners for the purpose mentioned in this chapter shall have power to compel the attendance of witnesses and the production of testimony, and to administer oaths and punish for contempt as fully as is provided by law for the district or county court.

**Art. 6518. [4459] Rule of damages.**—Said commissioners shall hear evidence as to the value of the property sought to be condemned, and as to the damages which will be sustained by the owner thereof by reason of such condemnation, and as to the benefits that will result to the remainder of such property belonging to such owner, if any, by the construction and operation of such railroad, and shall according to this rule assess the actual damage that will accrue to such owner by said condemnation.

**Stating damages claimed.**—In proceedings for condemnation a party cannot be required to state in writing before the trial the damages claimed by him. *Railway Co. v. Day*, 22 S. W. 538, 3 C. A. 353.

**Party entitled to damages.**—Prima facie the right to damages resulting from the opening of a road through lands which the owner has contracted to sell is in the purchaser. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**Measure of compensation—In general.**—The rule assessing damages for right of way for a railroad is the actual value of the land condemned for the use of the road, and such consequential damages as may result from the manner in which the road is constructed, or shape in which the land may be taken, against which consequential damages may be set off the increased value of the land remaining, by reason of the building of the road; and if the damage is greater than the benefit, the difference may be recovered by the owner, in addition to the value of the land. *Railway Co. v. Ferris*, 26 T. 603; *McDonald v. T. & P. R. R. Co.*, 1 U. C. 191; *Railway Co. v. Chenault*, 4 App. C. C. § 111, 16 S. W. 173; *Railway Co. v. Ferris*, 26 T. 588; *Railway Co. v. Mathews*, 60 T. 215; *Railway Co. v. Pape*, 62 T. 313; *Railway Co. v. Cave*, 80 T. 137, 15 S. W. 786.

The measure of damages in condemnation of land is its market value at time of condemnation, without regard to any fact that might have contributed to that value. *Allen v. Railway Co.* (Civ. App.) 25 S. W. 826.



The measure of damages for a permanent injury to land is the difference between its value before and after the injury. *Railway Co. v. Mohl* (Civ. App.) 37 S. W. 22.

The measure of damages is the value of the property taken and the damages to the remainder, to be determined by ascertaining the difference in value before the taking and at the time of trial. *Giersa v. Dennison & P. S. Ry. Co.* (Civ. App.) 45 S. W. 925.

Where, in trespass to try title against a railroad company, which had constructed a track across the land, the land having been taken from plaintiff and condemned, on a cross-bill of the railroad company, he was entitled to receive as compensation the value of the land taken, together with the damages thereby occasioned to the remainder of the tract. *Galveston & W. Ry. Co. v. Kinkead* (Civ. App.) 60 S. W. 468.

Measure of damages is the difference between the value of property just before and just after construction of railroad. *St. Louis Southwestern Ry. Co. of Texas v. Hughes* (Civ. App.) 73 S. W. 976.

The jury held required to estimate the damages which the land sustains by reason of the railroad running through it, less peculiar benefits. *Crystal City & U. R. Co. v. Boothe* (Civ. App.) 126 S. W. 700.

The fair cash market value of land condemned for a railroad right of way is not the market value of the strip taken when considered by itself, but its value as a part of the tract of which it forms a part. *Routh v. Texas Traction Co.* (Civ. App.) 148 S. W. 1152.

— **Matters to be considered.**—A witness, in giving his opinion as to the damage caused by the operation of a railroad across a tract of land, may state that a railroad runs across his land. *Railway Co. v. Day*, 22 S. W. 538, 3 C. A. 353.

In such proceedings a charge as to the method of computing the damages must be confined to the evidence. *Id.*

It is proper for the jury to consider existing business and development that may reasonably be expected. *Gulf, C. & S. F. Ry. Co. v. Burger* (Civ. App.) 45 S. W. 613.

The scope of an inquiry under this article is limited to the value of the property sought to be condemned and to damages which will be sustained by the owner thereof by reason of such condemnation. *Gregory v. Railroad Co.*, 21 C. A. 598, 54 S. W. 617.

The refusal of the court to instruct that in the appraisal of the land taken the jury could consider the present condition of the locality as to business and demand for property, and also any increase or development thereof that could be expected in the immediate future, was error. *Sullivan v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 429, 68 S. W. 745.

In proceedings to condemn a railroad right of way, it was error to instruct that the jury might consider in determining the injury or benefit done to the land not taken, the evidence as to the increased danger to live stock, buildings, fences, crops, or grass, without limiting such evidence to its effect upon the market value of the land. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 147 S. W. 730.

— **Time of valuation.**—See, also, notes under Art. 6530.

A railroad condemning land must pay the full value at the time of trial. *San Antonio & A. P. Ry. Co. v. Hunnicutt*, 18 C. A. 310, 44 S. W. 535.

Measure of damages for land taken for railroad right of way held its market value at date of trial, and not its less value at the time it was wrongfully taken. *Routh v. Texas Traction Co.* (Civ. App.) 148 S. W. 1152.

— **Valuation for taxation.**—In an issue as to the value of land in condemnation proceedings, evidence showing at what valuation the land was rendered for taxation is immaterial. *Railway Co. v. Kell*, 4 App. C. C. § 150, 16 S. W. 936.

The value of land, though fixed by the owner when assessed for taxation, forms no criterion of its value in a proceeding to condemn it. *Crystal City & U. R. Co. v. Isbell* (Civ. App.) 126 S. W. 47.

— **Town lots.**—A railroad condemning land suitable for town lots does not compensate the owner by paying its value for agriculture. *San Antonio & A. P. Ry. Co. v. Hunnicutt*, 18 C. A. 310, 44 S. W. 535.

On the trial of an issue as to the value of land condemned for a railroad, the exclusion of evidence that the owner rendered the land for taxation as acreage property held not ground for complaint, in the absence of evidence that the value was less as acres than as lots. *Calvert W. & B. V. Ry. Co. v. Smith* (Civ. App.) 68 S. W. 68.

— **Homestead.**—Property being used as a homestead, damages to its use as such by construction of a railroad is admissible. *Eastern Texas R. Co. v. Eddings*, 30 C. A. 170, 70 S. W. 98.

— **Improvements.**—In proceedings by a street railway to acquire property by condemnation, the property should be valued as a whole and the entire value thereof was properly shown, including the improvements thereon. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 C. A. 218, 108 S. W. 169, 110 S. W. 96.

— **Overflow or interference with drainage.**—In proceedings to condemn land for a railroad right of way, damages sustained by the landowner by an overflow caused by a defective construction of the railroad's embankment held not recoverable. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 281.

In a proceeding to condemn land for a railroad right of way, the petitioner's alleged negligence in so constructing its roadbed as to interfere with the drainage of defendant's farm held an improper issue. *Stephenville, N. & S. T. Ry. Co. v. Moore*, 51 C. A. 205, 111 S. W. 758.

— **Injuries and benefits to land not taken.**—See, also, Arts. 6520, 6521, and notes.

Damages to a tract of land adjoining that taken, fenced in a common inclosure, and used in connection therewith, may be recovered, since this article authorizes the recovery of damages to land not taken. *Concho, S. S. & L. V. Ry. Co. v. Sanders* (Civ. App.) 144 S. W. 693.

Where, in action by landowner for damages, the evidence showed that a railroad was constructed across the tract in question; that the railroad company fenced its right of way, separating the tillable land from the tract used for grazing purposes, relieving the landowner from the expense of erecting such fence, it warranted the charge given that the jury in estimating plaintiff's damages should, under Arts. 6518-6520, consider the

benefits as well as the injuries resulting to the remainder of the tract not taken. *Isenberg v. Gulf, T. & W. Ry. Co.* (Civ. App.) 152 S. W. 233.

— **Interest.**—Where a railroad company appropriates a strip of land for a right of way, interest on the amount awarded will be due from the time of the actual appropriation. *Panhandle & G. Ry. Co. v. Kirby* (Civ. App.) 108 S. W. 498.

Where land for a railroad right of way was assessed at its increased value at the time of the trial, the owners were not entitled to interest from a prior time at which the railroad company went into possession. *Routh v. Texas Traction Co.* (Civ. App.) 148 S. W. 1152.

— **Excessiveness of award.**—In condemnation proceedings by a street railway company to acquire property, evidence held not to show an award of \$55,000 to be excessive. *Foley v. Houston Belt & Terminal Ry. Co.*, 50 C. A. 218, 108 S. W. 169, 110 S. W. 96.

**Review of verdict on appeal.**—See note under Art. 6519.

**Damages to abutting property from railroad.**—See notes at end of this chapter.

**Art. 6519. [4406] Same subject.**—When the whole of a person's real estate is condemned, the damages to which he shall be entitled shall be the market value thereof in the market in which the same is located.

See *Isenberg v. Gulf, T. & W. Ry. Co.* (Civ. App.) 152 S. W. 233.

**Measure of compensation.**—See notes under Art. 6518.

**Review of verdict on appeal.**—A verdict finding the value of the land actually taken for a right of way and the damages sustained to the balance of the land, as authorized by Arts. 6519, 6520, rendered on conflicting evidence and supported by evidence will not be disturbed on appeal. *State v. Hutchinson* (Civ. App.) 133 S. W. 498.

**Art. 6520. [4461] Same subject.**—When only a portion of a person's real estate is condemned, the commissioners shall estimate the injuries sustained and the benefits received thereby by the owner as to the remaining portion of such real estate; whether such remaining portion is increased or diminished in value by such condemnation, and the extent of such increase or diminution, and shall assess the damages accordingly.

See *State v. Hutchinson* (Civ. App.) 133 S. W. 498; *Isenberg v. Gulf, T. & W. Ry. Co.*, 152 S. W. 233.

**Injuries and benefits to part not taken.**—See, also, Arts. 6518, 6521, and notes.

In estimating the damages for part of land taken by a railroad, its value in connection with the entire property, and also the depreciation of the remainder, should be considered. *Dallas Terminal Ry. & Union Depot Co. v. Mosher Mfg. Co.* (Civ. App.) 60 S. W. 893.

The owner is entitled to recover, not only the market value of the property actually taken, but in addition thereto the damages sustained as to the remaining portion. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 282.

In determining the injury or benefit to the land not taken in proceedings to condemn a railroad right of way, a witness whose property is similarly situated may testify as to the effect the construction of the railroad has had upon his own property. *Wichita Falls & W. Ry. Co. of Texas v. Wyrick* (Civ. App.) 147 S. W. 730.

In determining the injury or benefit done to land not taken in proceedings to condemn a railroad right of way, the inquiry as to the value of the land should be confined to its market value immediately before and after the taking, and evidence as to its market value at the time of the trial is not admissible. *Id.*

**Review of verdict on appeal.**—See note under Art. 6519.

**Damages to abutting property from railroad.**—See notes at end of this chapter.

**Art. 6521. [4462] Injuries and benefits which shall not be estimated.**—In estimating either the injuries or the benefits, as provided in the preceding article, those injuries or benefits which the owner of such real estate sustains or receives in common with the community generally, and which are not peculiar to him and connected with his ownership, use and enjoyment of the particular parcel of land, shall be altogether excluded from such estimate.

**Measure of compensation in general.**—See Arts. 6518, 6519, and notes.

**Injuries and benefits shared with community—in general.**—It is proper to ascertain how far the damages claimed, or any part thereof, are such as were shared by the community generally, and to have such excluded altogether from the estimate of the damages to be recovered. *C. & M. C. R. R. Co. v. Ritter*, 1 App. C. C. §§ 266, 267.

Under this article it was held that evidence of benefits derived from the construction of a telegraph line in common with the community in general cannot be excluded by the court, it being for the jury to determine what benefits were shared with the community. *Houston & T. C. R. Co. v. Postal Tel. Cable Co.*, 18 C. A. 502, 45 S. W. 179.

In the assessment of damages for property taken for the construction of a railway, resulting benefits to the owner cannot be considered. *McNamara v. Denison & P. S. Ry. Co.* (Civ. App.) 45 S. W. 334.

The submission of an issue as to the enhancement in value of lands in the community held error. *Panhandle & G. Ry. Co. v. Kirby*, 42 C. A. 340, 94 S. W. 173.

Where, in the prosecution of a public work, no damage is done to property except such as is suffered by the community, no recovery can be had, notwithstanding Const. art. 1, § 17. *Houston & T. C. R. Co. v. Powell* (Civ. App.) 125 S. W. 330.

Benefits which will lessen the damages must be special as to the particular land, and not general to the neighborhood. *Routh v. Texas Traction Co.* (Civ. App.) 148 S. W. 1152.

In a proceeding to condemn land for a levee, an instruction that the owner should be awarded the market value of the land taken and the damages caused to the remainder of the land not taken, deducting any benefits to the land not taken, was properly refused, since it authorized a deduction of the benefits accruing to the owner in common with the community generally, contrary to the express provisions of this article. *Ft. Worth Improvement Dist. No. 1, of Tarrant County v. Weatherred* (Civ. App.) 149 S. W. 550.

An instruction that the owner was entitled to the difference in the fair market value of the property before and after the construction of the levee was unduly favorable to the plaintiff, and hence could not be complained of by it, since it authorized a deduction of the benefits to the portion of the land not taken from the value of that taken, and also authorized a deduction for benefits shared by the owner in common with the community generally, in violation of this article. *Ft. Worth Improvement Dist. No. 1, of Tarrant County v. Weatherred* (Civ. App.) 149 S. W. 550.

— **Erection of depot close to land.**—The erection of a depot in the vicinity of the property cannot be regarded as having especially benefited it, where the benefit affected all property located in its neighborhood. *Pochila v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

Where the establishment of a railroad depot and switches near defendant's land was not a special benefit to him, it should not be considered in determining his damages in condemnation proceedings. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 281.

In a proceeding to condemn land near a projected union station for a park, the jury held entitled to consider the contemplated construction of the depot as bearing on the value of defendant's land. *City of El Paso v. Coffin*, 40 C. A. 54, 88 S. W. 502.

Enhancement of value of city property from the building of a railroad into the city and the construction of the main track, and erection of a depot near the property, held not a benefit to be set off against the damages to the property from the building of a spur track. *Eastern Texas R. Co. v. Eddings*, 51 C. A. 166, 111 S. W. 777.

**Art. 6522. [4463] Assessment shall be in writing, dated, signed, etc.**—When the said commissioners shall have assessed the damages, they shall reduce their decision to writing, stating therein the amount of damages due to the owner of such real estate, if any be found to be due, and shall date the same and sign it, and shall file the said assessment, together with all other papers connected with the case, with the county judge without delay.

Cited, *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

**Apportionment of damages.**—A condemnation of land by a railroad is not rendered invalid by a failure of the commissioners appointed by the county court to apportion the damages between claimants of the land, who are parties defendant, where the title to the land cannot be determined in the county court. *Davidson v. Texas & N. O. R. Co.*, 29 C. A. 54, 67 S. W. 1093.

**Description of land.**—See note under Art. 6534.

**Art. 6523. [4464] Other commissioners may be appointed, when.**—Should the said commissioners, or either of them, from any cause be unable or fail to act as such, the county judge may at any time appoint another commissioner or commissioners to supply the place or places of those who are unable or who fail to act.

**Art. 6524. [4465] Pay of commissioners.**—Commissioners appointed under this chapter shall be entitled to receive for their services three dollars each for every day they may be engaged in the performance of their duties as such commissioners, and they may withhold their decision until their said fees are paid to them.

**Art. 6525. [4466] Corporation shall pay expenses of serving notice.**—The railroad company seeking to condemn property shall defray all expenses of serving notice upon the owner of such property, but shall be entitled to recover said expenses from such owner in case it shall be decided that said owner shall pay the costs of the proceeding.

**Art. 6526. [4467] Commissioners shall make out cost bill, etc.**—The commissioners may adjudge the costs against either party, and shall make out a statement in writing of all the costs which have accrued before them, and shall state therein against which party the said costs have been adjudged, and shall sign the same and deliver it, with the other papers of the cause, to the county judge.

**Art. 6527. [4468] Either party, if dissatisfied with decision, may remove cause, etc.**—If either party be dissatisfied with the decision of such commissioners, he may, within ten days after the same has been filed with the county judge, file his opposition thereto in writing, setting forth the particular cause or causes of his objection; and thereupon the

adverse party shall be cited, and said cause shall be tried and determined as in other civil causes in said court. [P. D. 4922.]

**Proceedings after filing of opposition—Jurisdiction.**—See, also, notes under Art. 6506.

An owner, entitled to appeal from the judgment of commissioners assessing damages in proceedings to condemn land, may not appeal from the judgment of commissioners appointed by a court having no authority to appoint. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

— **Amendment of application.**—On the filing of opposition to the award of commissioners in condemnation proceedings, the plaintiff can after the suit is docketed for trial, amend his application and ask for a less quantity of land. *T. & N. O. R. Co. v. Postal Telegraph Cable Co.* (Civ. App.) 52 S. W. 108.

— **Scope of inquiry.**—In proceedings by a railroad corporation to condemn land for a right of way, the court will not inquire whether the corporation fraudulently procured its charter. *Chapman v. Trinity Valley & N. Ry. Co.* (Civ. App.) 138 S. W. 440.

— **Commissioners' award not to be considered.**—The jury, on appeal from the damages awarded by the board of commissioners in condemnation proceedings, should not consider for any purpose the amount awarded by the board. *Crystal City & U. R. Co. v. Boothe* (Civ. App.) 126 S. W. 700.

— **Answers to special issues.**—In proceedings to condemn land for a railroad right of way, answers to special issues submitted held not responsive, nor sufficient to sustain the judgment. *Kirby v. Panhandle & G. Ry. Co.*, 39 C. A. 252, 88 S. W. 281.

**Art. 6528. [4469] Decision shall be made the judgment of the court, when.**—If no objections are filed to such decision within the time prescribed in the preceding article, the county judge shall cause the said decision to be recorded in the minutes of his court, and shall make the same the judgment of said court, and may issue the necessary process to enforce the same.

**Judgment—Sufficiency, effect, etc.**—See Art. 6534 and notes.

**Art. 6529. [4470] How costs awarded.**—The costs of the proceedings before the commissioners and in the court shall be determined as follows, to-wit: If the said commissioners shall award greater damages than the said company offered to pay before the proceedings commenced, or if objections are filed to the decision in the county court under the provisions of this chapter, and the judgment of the court is for a greater sum than the amount awarded by the commissioners, then the said company shall pay all costs; but if the amount awarded by said commissioners as damages, or if the judgment of the county court shall be for the same or less amount of damages than the amount offered by the company before proceedings were commenced, then the costs shall be paid by the owner of the property. [Id.]

**Art. 6530. [4471] Damages must be paid before property is taken.**—In no case shall such corporation be entitled to enter upon and take the property condemned, without first having paid whatever amount of damages and costs may have been awarded or adjudged against it by such commissioners, or deposited money to cover the same in the court wherein such condemnation proceedings are pending. But if the plaintiff in the condemnation proceedings should desire to enter upon and take possession of the property sought to be condemned, pending litigation, it may do so at any time after the award of the commissioners, upon the following conditions, to-wit:

First. It shall pay to the defendant the amount of damages awarded or adjudged against it by the commissioners, or deposit the same in money in court, subject to the order of the defendant, and also pay the costs awarded against it.

Second. In addition thereto, it shall deposit in said court a further sum of money equal to the amount of the damages awarded by the commissioners, and which shall be held, together with the award itself, should it be deposited in court instead of being paid, exclusively to secure all damages that may be awarded or adjudged against the plaintiff; and it shall also execute a bond with two or more good and solvent sureties, to be approved by the judge of the court in which such condemnation proceedings are pending, conditioned for the payment of any further costs that may be adjudged against it, either in the court below or upon appeal.

Third. Should it be determined on final decision of the case that the right to condemn the property in question does not exist, the plaintiff shall surrender possession thereof, if he has taken possession pending litigation, and the court shall so adjudge and order a writ of possession for the property in favor of the defendant, and the court may also inquire what damages, if any, have been suffered by the defendant by reason of the temporary possession of the plaintiff, and order the same paid out of the award or other money deposited; provided, that in any case where the award paid the defendant or appropriated by him exceeds the value of the property as determined by the final judgment, the court shall adjudge the excess to be returned to the plaintiff.

If the cause should be appealed from the decision of the county court, the appeal shall be governed by the same law as in other cases; except the judgment of the county court shall not be suspended thereby. The rules hereinbefore laid down for governing railroad corporations shall likewise apply to all persons and corporations having the right of eminent domain. [Const., art. 1, sec. 17. Amended Acts 1899, p. 105.]

**Constitutional.**—This law allowing a railroad to take possession of land upon depositing the amount of the award of the commissioners is not in violation of section 17, art. 1, of the constitution. *Davidson v. Texas & N. O. Ry. Co.*, 29 C. A. 54, 67 S. W. 1096.

**Applies to pending proceedings.**—This law applies to condemnation proceedings pending at the time it went into effect and a telephone company is entitled to the benefits of the same that seeks to condemn a right of way. *Tex. Mid. Ry. Co. v. S. W. T. & T. Co.*, 24 C. A. 193, 58 S. W. 152.

**Payment of compensation.**—See, also, Art. 6505.

A right of way cannot be obtained by a railway company across land not belonging to it, until it has been paid for, or payment secured by a deposit of money. *G., C. & S. F. R. R. Co. v. Donahoo*, 59 T. 128.

— **Payment to clerk.**—Upon the entry of a decree of condemnation of land for a railway, it is proper that the money allowed for damages be paid to the county clerk. Such payment satisfies the constitutional requirement that compensation shall be first made or secured by a deposit in money. *Const.*, art. 1, sec. 17; *Ackerman v. Huff*, 71 T. 317, 9 S. W. 236.

Where a railroad company instituted proceedings in the district court to condemn land for a right of way, while under the statute they should have been in the county court, and the damages awarded by commissioners appointed by the district court were paid to the "clerk" of the county, there was no payment into court as required by statute. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

— **Time as of which damages are assessed.**—In proceedings for condemnation of the right of way, the damage is determined by the value of the land at the time of its appropriation by the company. If the railroad tenders or deposits the amount of damages fixed by the commissioners when their award is made, that act fixes the date and status of the taking, and no evidence of enhancement of value of the property subsequent to that date is admissible on appeal. When this is not done, the value at the time of the trial of the appeal is the true measure of damages. *G., C. & S. F. R. R. Co. v. Lyons*, 2 App. C. C. § 139.

Where a railroad company seeking to condemn land did not pay into court double the amount of the award of the commissioners, nor execute a bond, as required by this article, to entitle it to take possession, the value of the land sought to be taken must be fixed as of the date of the trial in the county court on appeal from the award of the commissioners. *Beaumont & G. N. R. R. v. Elliott* (Civ. App.) 148 S. W. 1125.

— **Interest.**—Where the condemning party, before taking possession, gives security for the payment of compensation in accordance with *Const.* art. 1, § 17, by depositing in court a sum equal to double the amount of the award with a cost bond, as required by this article, such deposit is equivalent to a tender of the amount awarded, and stops interest thereon, but, if the award is increased on appeal, the owner is entitled to interest on the increase from the date of possession. *Baldwin v. City of San Antonio* (Civ. App.) 125 S. W. 596.

**Possession pending appeal.**—A corporation in a condemnation proceeding cannot take possession of land by depositing the amount of the judgment with the clerk of the court that awards damages if the owner of the land has given a supersedeas bond. *Crary v. Port Arthur Channel & Dock Co.* (Civ. App.) 45 S. W. 342.

The fact that the compensation for land condemned by a railroad is deposited in court, and possession of the land is taken by the company before the right of claimants to the fund is determined, held not to render the condemnation invalid as being a taking without compensation. *Davidson v. Texas & N. O. Ry. Co.*, 29 C. A. 54, 67 S. W. 1093.

The judgment is not suspended by the giving of an appeal bond. Pending the appeal the railroad company has the right to take possession of the property upon compliance with the terms of the statute although no damages were awarded. *Texas & N. O. Ry. Co. v. Orange & N. W. Ry. Co.*, 29 C. A. 38, 68 S. W. 801.

This act does not authorize the owners of property who have accepted money paid into court on a judgment in the county court and executed a receipt for the same to appeal so as to suspend the judgment. The manner of appeal is not otherwise changed. The company had to pay the money into court before it could enter upon and take possession of the land. *Parks v. Dallas Terminal Ry. & Union Depot Co.*, 34 C. A. 341, 78 S. W. 534.

Where double the award for damages is deposited in the registry of the court, but no bond is given by the company seeking condemnation of the land, for the payment of any further costs that may be adjudged against it in the court below or upon appeal, the owner is entitled to injunction to restrain the company from taking possession of the land. *Hausmann v. Trinity & B. V. Ry. Co.* (Civ. App.) 82 S. W. 1053.

When one has complied with this article in taking possession of land sought to be condemned, an injunction will not lie pending appeal to prevent acting under the proceedings, because there is an adequate remedy at law. *Johnston v. O'Rourke* (Civ. App.) 85 S. W. 503.

The provision that the judgment of the county court shall not be suspended cannot be interpreted as meaning that an appeal by the condemning corporation will not have that effect, for the corporation is given the right to hold possession pending litigation until the final decision of the case. *Houston, B. & T. Ry. Co. v. Hornberger* (Civ. App.) 141 S. W. 311.

**Damages due to temporary possession.**—Where a railroad company, in proceedings to condemn land for a right of way, took possession of the land and proceeded to construct its road, and then moved to dismiss the proceeding, and the court ordered a dismissal, without prejudice to the owner's claim for damages as presented by a pleading filed pending the motion, the company had notice of the claim for damages, and was bound by a judgment therefor. *Kansas City, M. & O. Ry. Co. of Texas v. Kirby* (Civ. App.) 150 S. W. 238.

The court granting the motion of a railroad company, instituting a proceeding to condemn land for its right of way, to dismiss the proceeding retains jurisdiction to hear and determine the question of the damages sustained by the owner, occasioned by the company, pending the proceeding, taking possession of the land and proceeding to construct its railroad, irrespective of the amount of the damages. *Id.*

**The judgment—Sufficiency, effect, etc.**—See notes under Art. 6534.

**Damages to abutting property from railroad.**—See notes at end of this chapter.

**Art. 6531. [4472] Practice in case specified.**—When any railroad company is sued for any property occupied by it for railroad purposes, or for damages thereto, the court in which such suit is pending may determine all matters in dispute between the parties, including the condemnation of the property, upon petition or cross-bill asking such remedy by defendant, but the plea for condemnation shall be an admission of the plaintiff's title to such property. [Acts 1889, p. 18.]

Cited, *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

**Action for damages.**—See, also, notes under Art. 6505.

The owner of land invaded by a railway, which has left the fences open, does not have to either fence the right of way nor construct the necessary stops or cattle guards in order to maintain his action for the resulting damages. He can sue for these items in the proper court, and the right of way, if not previously condemned, can be awarded the railway and all matters settled in one proceeding. *Gregory v. Railroad Co.*, 21 C. A. 598, 54 S. W. 617.

The right of an owner to sue a railroad company to recover property occupied by it for railroad purposes is expressly recognized by our statutory law. *Galveston & W. Ry. Co. v. Kinkead* (Civ. App.) 60 S. W. 470.

A landowner, by waiving his right to recover land wrongfully taken for railroad right of way purposes, and suing for damages, thereby legalizes the possession and grants the easement as of the date of his election, so that upon the award of damages he is entitled to have them fixed as a lien upon the easement granted. *Texas & P. Ry. Co. v. El Paso & N. E. R. Co.* (Civ. App.) 156 S. W. 561.

**Trespass to try title.**—See, also, notes under Art. 6505.

In a suit brought in trespass to try title against a railway company, which had, without condemnation, constructed its road across the land for a period long enough to bar the claim of the plaintiff for damages, the district court has no jurisdiction on the application of defendant to change the suit to one condemning the right of way over the land. The defendant could only obtain a condemnation in the manner pointed out by the statute. *Railway Co. v. Poindexter*, 70 T. 98, 7 S. W. 316.

Under this article the district court could condemn land for a right of way and award damages as an incident to a suit in trespass to try title, but, since that would require condemnor to await final determination of the question of title, he could resort to independent condemnation proceedings instead. *Rabb v. La Feria Mut. Canal Co.* (Civ. App.) 130 S. W. 916.

**Pleading.**—Where as finally resolved the case is one for condemnation on appellant's cross-plea it seems that no particularity in pleading damages is required. *Choctaw O. & T. Ry. Co. v. True*, 35 C. A. 309, 80 S. W. 121.

**Collateral attack on condemnation proceedings.**—Objections to proceedings by a railroad company in condemning real estate held not properly raised by a collateral attack in a suit by the landowner to recover the property. *Davidson v. Texas & N. O. R. Co.*, 29 C. A. 54, 67 S. W. 1093.

**Measure of compensation.**—See Art. 6518 et seq.

**Damages to abutting property from railroad.**—See notes at end of this chapter.

**Waiver, estoppel or limitation of actions.**—The occupation of a right of way by consent of the owner for a long period of time will bar an action for its use. *Railway Co. v. Sutor*, 59 T. 29.

An owner does not waive his right to compensation by failing to object when a railroad is constructed on his land. *San Antonio & A. P. Ry. Co. v. Hunnicutt*, 18 C. A. 310, 44 S. W. 535.

The fact that agents for a nonresident landowner knew that a railroad company had constructed its track across the land, and took no steps to dispossess it, held not to es-

top the owner from recovering the land. *Galveston & W. Ry. Co. v. Kinhead* (Civ. App.) 60 S. W. 468.

A landowner may waive his right to recover land wrongfully held by a railway company for right of way purposes and sue for damages resulting from the taking. *Texas & P. Ry. Co. v. El Paso & N. E. R. Co.* (Civ. App.) 156 S. W. 561.

**Art. 6532. [4473] The right of way, how construed.**—The right of way secured or to be secured to any railway company in this state, in the manner provided by law, shall not be so construed as to include the fee simple estate in lands, either public or private, nor shall the same be lost by the forfeiture or expiration of the charter, but shall remain subject to an extension of the charter or the grant of a new charter over the same way without a new condemnation. [Act Feb. 7, 1861, p. 12.]

**Fee in land.**—The fee in land condemned for right of way remains in the original owner. *Lyon v. McDonald*, 78 T. 71, 14 S. W. 261, 9 L. R. A. 295.

A railroad using land for its right of way for the statutory period, under a verbal gift of a right of way, acquires only an easement, and not the fee. *Capps v. Texas & P. Ry. Co.*, 21 C. A. 84, 50 S. W. 643.

**Use by owners of fee.**—The right of way is subject to such uses by the owner as are consistent with the full exercise by the railway company of all its rights and the accomplishment of all its ends. *Lumber Co. v. Harris*, 77 T. 22, 13 S. W. 453; *Lyon v. McDonald*, 78 T. 71, 14 S. W. 261, 9 L. R. A. 295; *Muhle v. Railway Co.*, 86 T. 459, 25 S. W. 607; *Olive v. Railway Co.*, 11 C. A. 208, 33 S. W. 139.

The owners of the fee under a railroad right of way cannot bore there for oil. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

— **Adverse use.**—In the absence of proof of the adverse use of a right of way by abutting owners, the easement of the road will not be lost. *Scott v. Missouri, O. & G. Ry. Co.* (Civ. App.) 151 S. W. 578.

**Use by railroad.**—The land condemned for right of way can be used only for railroad purposes. *Calcasieu Lumber Co. v. Harris*, 77 T. 18, 13 S. W. 453.

Land condemned by a railway company for right of way purposes cannot be used for other purposes. *Croley v. St. Louis S. W. Ry. Co.* (Civ. App.) 56 S. W. 615.

The owners of the fee over which a railroad company had a right of way held not to have acquiesced in the company's boring for oil in the right of way. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

**Rights of public.**—The rights of the public in the property of a railroad company, stated. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1028.

**Abandonment.**—A right of way acquired by condemnation held subject to be abandoned by nonuser. *Chicago, R. I. & G. Ry. Co. v. Clark* (Civ. App.) 146 S. W. 989.

A failure to use land acquired by condemnation for depot purposes for seven years held to cast the burden on the railway to show the nonuser was not abandonment. *Id.*

**Forfeiture of charter.**—The forfeiture of its charter by a railroad for failure to construct its road within the time required by law did not cause the right of way to revert to the original owner, but such easement remained subject to an extension of the charter, or the grant of a new charter over the same way without a new consideration, and it makes no difference whether the right of way is acquired directly from the owner of the fee or by condemnation. *Scott v. Missouri, O. & G. Ry. Co.* (Civ. App.) 151 S. W. 578.

**Remedy of owner of fee.**—See, also, notes under Arts. 6505 and 6531.

Under this article trespass to try title is a proper remedy of one who claims the fee of land in which a railroad claims a right of way by condemnation, as a determination that the road was entitled to a right of way would not be inconsistent with the determination that the plaintiff was entitled to the fee. *Chicago, R. I. & G. Ry. Co. v. Clark* (Civ. App.) 146 S. W. 989.

**Art. 6533. [4474] Right of way reserved out of lands granted to railroad companies.**—The right of way is hereby reserved to any railroad companies incorporated by the laws of this state, or that may hereafter be so incorporated, to the extent of one hundred feet on each side of said road, or roads that cross over, or extend through any lands granted, or that may be hereafter granted, to any railroad company by the legislature, with the right to take from the lands so granted such stone, timber and earth as such road may need in the construction of its line of road. [P. D. 7389a.]

**Art. 6534. [4475] Right of way vested by judgment of the court.**—Whenever the right of way has been acquired, as hereinbefore provided, the judgment of the court shall vest such right in the company so acquiring the same.

**Compliance with statute.**—One claiming title under condemnation proceedings must show a strict compliance with the statute, and proceedings not in accordance therewith are insufficient. *Southern Kansas Ry. Co. of Texas v. Vance* (Civ. App.) 155 S. W. 696.

**The judgment in general.**—A verdict and judgment in condemnation proceedings should condemn the land actually taken in favor of petitioner. *Stephenville, N. & S. T. Ry. Co. v. Moore*, 51 C. A. 205, 111 S. W. 758.

**Description of land.**—The judgment must describe the land sought to be condemned with sufficient certainty to fully identify it. *Ft. W. & D. C. R. Co. v. Hoggsett*, 1 App. C. C. § 444.

The condemnation proceedings must describe the premises condemned with as much certainty as is required in deeds and other conveyances, and vest the right of way therein in the company. *Parker v. Railway Co.*, 84 T. 333, 19 S. W. 518; *Adams v. San Angelo Water Works Co.* (Civ. App.) 25 S. W. 165; *Railway Co. v. Lamphear*, 1 App. C. C. § 308; *Railway Co. v. Merkel*, 32 T. 723.

**Effect of judgment.**—A judgment for damages for right of way has the effect of a judgment for defendant for the right of way. *Railway Co. v. Knoepfli*, 82 T. 270, 17 S. W. 1052.

**Right to complain of judgment.**—A railroad company seeking to condemn land held not entitled to complain of a judgment establishing its right to condemn and for the owner for the damages found by the jury without finding in favor of the company for the lands sought to be taken. *Beaumont & G. N. R. R. v. Elliott* (Civ. App.) 148 S. W. 1125.

**Reformation of judgment.**—A railroad condemning land held to have the right to have the judgment reformed so as to include a tract of land omitted from the petition by mistake. *Getzender v. Trinity & B. V. Ry. Co.* (Civ. App.) 126 S. W. 328.

**INJURIES FROM CONSTRUCTION OR MAINTENANCE OF RAILROAD**

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|------------------------------------------------------------|---------------------------------------------------|
| 1. Injuries to abutting property—In general.               | 24. — Instructions.                               |
| 2. — Necessity of compensation.                            | 25. — Limitation of actions.                      |
| 3. — Jurisdiction.                                         | 26. Negligence in construction or maintenance.    |
| 4. — Party entitled to recover.                            | 27. — Injuries to children.                       |
| 5. — Persons or companies liable.                          | 28. — Measure of damages.                         |
| 6. — Cause of injury.                                      | 29. — Spread of disease.                          |
| 7. — Negligence.                                           | 30. — Excavations.                                |
| 8. — Measure of damages.                                   | 31. — Assumption of risk.                         |
| 9. — Matters to be considered in general.                  | 32. — Indemnifying city.                          |
| 10. — Trespass.                                            | 33. — Pleading.                                   |
| 11. — Ingress and egress.                                  | 34. Nuisances—In general.                         |
| 12. — Increased traffic.                                   | 35. — Cause of injury.                            |
| 13. — Switches or spur tracks.                             | 36. — Measure of damages.                         |
| 14. — Cuts or excavations.                                 | 37. — Annoyance, discomfort and inconvenience.    |
| 15. — Annoyance, discomfort and inconvenience.             | 38. — Noise, cinders, etc.                        |
| 16. — Noise, vibrations, smoke, noxious odors and cinders. | 39. — Evidence.                                   |
| 17. — Benefits.                                            | 40. — Defenses.                                   |
| 18. — Prospective damages.                                 | 41. Injuries from operation of trains.            |
| 19. — Lien for damages.                                    | 42. — Injuries to passengers, baggage or freight. |
| 20. — Injunction.                                          | 43. — Injuries to employes.                       |
| 21. — Defenses.                                            | 44. — Injuries to animals on or near tracks.      |
| 22. — Pleadings.                                           | 45. Notice of claim for damages.                  |
| 23. — Evidence.                                            |                                                   |

**1. Injuries to abutting property—In general.**—As to right of damages to property adjacent to a street along which a railroad is constructed, see *Railway Co. v. Odum*, 53 T. 353; *Railway Co. v. Eddins*, 60 T. 656; *Railway Co. v. Bock*, 63 T. 245; *Railway Co. v. Fuller*, 63 T. 467; *Rosenthal v. Railway Co.*, 79 T. 325, 15 S. W. 268; *Railway Co. v. Downie*, 82 T. 383, 17 S. W. 620; *McFadden v. Schill*, 84 T. 77, 19 S. W. 368; *Railway Co. v. Robson* (Civ. App.) 24 S. W. 37.

When a railway along a street inflicts such special injury on the abutting owner as practically to deprive him of the ordinary use and enjoyment of it, an action for damages will lie, and the right to such damages is not restricted to cases where the street has been exclusively appropriated by the road, or where the road has been unskillfully constructed. *G., C. & S. F. R. R. Co. v. Bock*, 63 T. 245. And see *H. & T. C. R. R. Co. v. Odum*, 53 T. 343; *G., C. & S. F. R. R. Co. v. Eddins*, 60 T. 656; *G., C. & S. F. R. R. Co. v. Fuller*, 63 T. 467.

A railroad is not liable for the spreading of grass, planted on its right of way, to adjoining land. *Gulf, C. & S. F. Ry. Co. v. Oakes*, 94 T. 155, 58 S. W. 999, 52 L. R. A. 293, 86 Am. St. Rep. 835.

The use of land by a railroad company for yard purposes held a private use for which a person injured thereby may sue for damages. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 36 C. A. 121, 81 S. W. 781.

Owner of land abutting on a street held not entitled to recover damages for use of street by a railroad. *Cane Belt R. Co. v. Ridgeway*, 38 C. A. 108, 85 S. W. 496.

Laying and maintenance of a commercial railroad track in city streets held to constitute an interference pro tanto from the beginning with the use of the street by the public. *Houston, O. L. & M. P. Ry. Co. v. Grossman* (Civ. App.) 89 S. W. 312.

Property owners on a street in which a railroad is built are entitled to damages for depreciation in value arising either from overflow of their lots, caused by construction of the road, or from operation of trains. *Schier v. Cane Belt Ry. Co.*, 45 C. A. 295, 100 S. W. 360.

Suit by an owner of property abutting on a street, for injuries caused by the construction and maintenance by a railroad of a tunnel and approaches in a street, held not a suit for damages to each lot described, considered separately. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

If a road located on a railroad's right of way was not a public highway, the railroad could destroy it for its own purposes, if it did so in a lawful manner, without being



liable to adjacent owners. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

A railroad obstructing a street held not liable for damages to an abutting owner. *Houston & T. C. R. Co. v. Powell* (Civ. App.) 125 S. W. 330.

In a suit by an abutting owner for damages from construction of an additional railroad track in a street, held, that there was no error in a special charge as to the right to an award. *Connor v. International & G. N. R. Co.* (Civ. App.) 129 S. W. 196.

A property owner damaged by the construction of a railroad in a street could sue for damages and was not bound to adjust her premises to the new conditions. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

2. — **Necessity of compensation.**—The rule that private property cannot be taken or damaged for public use without compensation has been extended to give the owner of land adjacent to a railroad damages incident to the proximity of the railroad to his premises, though they are not actually invaded. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

The occupation of a street by a railroad is not a "taking" of property of an abutting owner who does not own the fee in the street, within the provision of the constitution that, when property is taken for public use, compensation must be first made. *McCammon & Lang Lumber Co. et al. v. Trinity & B. V. Ry. Co.*, 104 T. 8, 133 S. W. 247, 36 L. R. A. (N. S.) 662, Ann. Cas. 1913E, 870.

In the constitutional provision as to compensation for property taken for public use, the term "property" includes the fee-simple title to the thing owned, whether it be burdened with an easement or not; and the term "taken" includes the appropriation of that thing or of some interest or estate in it, by actual, physical possession, such as exists when a railroad is constructed and operated on it. *Id.*

The dedication of land for a street, the fee being retained by the abutting owners, does not authorize the use of the street for purposes of commercial railroads without further compensation. *Id.*

Occupation of street by railroad held a taking of property of owner of fee in street, within constitutional provision that when property is taken compensation must be first made. *Id.*

3. — **Jurisdiction.**—Damages for injury to an abutting lot from the occupation of a street by a railroad can be recovered in the county court. *G., C. & S. F. R. R. Co. v. Graves*, 1 App. C. C. §§ 579, 580.

4. — **Party entitled to recover.**—Plaintiffs, in an action against a railroad for damages to abutting property, may recover for permanent injuries, though they had sold the property. *Dallas Terminal Ry. & Union Co. v. Ardrey* (Civ. App.) 146 S. W. 616.

5. — **Persons or companies liable.**—Railroad held liable for any damages done by a city under a contract with it, where it gave the city permission to do the acts causing the damage and required it to give an indemnifying bond. *Couch v. Texas & P. Ry. Co.*, 99 T. 464, 90 S. W. 860.

Railroad company held not liable for the act of construction contractors in scattering rock on adjoining land, where the contractors had not completed the construction of the road or delivered it to the railroad company. *Stephenville, N. & S. T. Ry. Co. v. Couch*, 56 C. A. 336, 121 S. W. 189; *Same v. Carter* (Civ. App.) 121 S. W. 192.

One who employs a contractor exercising an independent employment to do a piece of work is not in general liable for the wrongs of the contractor, his subcontractors, or servants. *Id.*

"Independent contractor" defined. *Id.*

Exceptions to the rule of nonliability for the acts of an independent contractor stated. *Id.*

Where an independent contractor in the prosecution of his work exercises, in whole or in part, a franchise granted to his employer, the latter is liable for his torts. *Id.*

The defense of independent contractor is not available, where the work or the manner of its execution involves a duty to the public incumbent on the proprietor or employer. *Id.*

The defense of independent contractor is not available, where the injury is the direct or necessary consequence of the work to be done. *Id.*

The defense of independent contractor is not available where the act contracted to be done is wrongful or tortious in itself. *Id.*

The defense of independent contractor is not available, where the proprietor interferes with the contractor in the performance of the work, or it has been completed and accepted. *Id.*

Statement as to individual liability for injury to property from construction and operation of a railroad, where one company constructs and continues to own it and permits other companies to run their trains thereon. *Trinity & B. V. Ry. Co. v. Johnson* (Civ. App.) 131 S. W. 1137.

6. — **Cause of injury.**—In an action for damages to property caused by the construction of a railroad, plaintiff held not required to show what part of the damage is attributable to the construction of the road and what part to other causes. *Pochila v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

7. — **Negligence.**—Where a gate opening onto a railroad right of way was used by the public, and cattle entered and destroyed plaintiffs' crops, plaintiffs could not recover from the railroad company without proof that the damage was caused by its fault. *Gulf, B. & G. N. Ry. Co. v. Tucker*, 38 C. A. 224, 85 S. W. 461.

In an action against a railroad company for injuries to property, by constructing the railroad in the street in front of it, held no defense that the roadbed and track were constructed with skill and care and the trains carefully handled. *Schier v. Cane Belt Ry. Co.*, 45 C. A. 295, 100 S. W. 360.

Under the constitutional provision that one's property shall not be taken or damaged without compensation held, that a landowner may recover for damages caused by the construction of a railway spur track nearby without proof of negligence. *Houston & T. C. R. Co. v. Davis*, 45 C. A. 212, 100 S. W. 1013.

The right of an owner of property abutting on a street to recover for damages caused by the operation of trains on the street held not to depend on a defective con-

struction of the road over the street, or negligent operation of the trains. *Trinity & B. V. Ry. Co. v. Jobe* (Civ. App.) 126 S. W. 32.

8. — **Measure of damages.**—Measure of damages for construction of a railroad in front of plaintiff's property held the difference in the values immediately before and immediately after the construction. *Denison & P. Suburban Ry. Co. v. Evans* (Civ. App.) 47 S. W. 280.

The measure of damages to property from construction and operation of a railroad in a street is the difference in its market value just before and just after the construction. *Eastern Texas R. Co. v. Eddings*, 30 C. A. 170, 70 S. W. 98.

The measure of damage to property by the construction of a railroad held to be the difference in value with and without the railroad. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.* (Civ. App.) 72 S. W. 1038.

The measure of damages by the construction of a railroad in the street in front of it is the diminution in the market value thereof. *Boyer & Lucas v. St. Louis, S. F. & T. Ry. Co.*, 97 T. 107, 76 S. W. 441; *Settegast v. Houston, O. L. & M. P. Ry. Co.*, 38 C. A. 623, 87 S. W. 197.

In an action against a railroad company for damages to property abutting on a street in which the tracks were laid, an instruction on the measure of damages held not erroneous. *Texas Short Line Ry. Co. v. Clifford* (Civ. App.) 94 S. W. 168.

In an action by an owner of property abutting on a street, for injuries caused by the construction and maintenance by a railroad of a tunnel and its approaches in the street, the abutting owner held not entitled to damages on the theory that the street had been discontinued. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

The measure of damages to adjoining property by construction of a railroad on a raised grade in a street is the difference in market value. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

9. — **Matters to be considered in general.**—In an action against a railroad company for damages to certain property, caused by the construction of a railroad adjacent thereto, the fact that the plaintiff's possession extended into the street occupied by the railroad company, and that he had not acquired the right thereto, was a proper subject of consideration in determining the extent of the injury. *Pochila v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

10. — **Trespass.**—See, also, notes under Arts. 6505, 6531.

Railroad held liable for damages to real property by throwing dirt beyond the limits of its prescriptive right on a highway. *Tietze v. International & G. N. R. Co.*, 35 C. A. 136, 80 S. W. 124.

Railroad held liable for damages to real property by trimming trees in unwarranted manner beyond the limits of its prescriptive right on a highway. *Id.*

11. — **Ingress and egress.**—When a railroad is so constructed along a street as to deprive the owner of free ingress and egress to an adjacent lot, the owner is entitled to recover damages resulting therefrom. *Williams v. G., C. & S. F. R. R. Co.*, 1 App. C. C. § 312.

The measure of damages for a railroad company wrongfully obstructing the entrance to one's place of business held the loss of profits in the business thereby sustained. *International & G. N. R. Co. v. Capers*, 33 C. A. 283, 77 S. W. 39.

In action for damages to land rendered inaccessible by a railroad embankment, the measure of damages stated. *Red River, T. & S. Ry. Co. v. Hughes*, 36 C. A. 472, 81 S. W. 1235.

Whatever impairs the right to free access and egress to a lot constitutes damage within the meaning of Const. art. 1, § 17. *Powell v. Houston & T. C. R. Co.*, 104 T. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615.

12. — **Increased traffic.**—An owner of land abutting on a street on which a railroad maintained and operated its tracks held entitled to recover for the damages resulting in consequence of the increase of traffic. *Hutcheson v. International & G. N. R. Co.*, 102 T. 471, 119 S. W. 85.

An abutting owner may recover for damages caused by heavy increase of traffic on the line of a railroad in a street. *Connor v. International & G. N. R. Co.* (Civ. App.) 129 S. W. 196.

Plaintiff, in an action for damages by the use of a street by a railroad company, held not precluded from relief on the theory that the action involved a mere increase of operation. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

13. — **Switches or spur tracks.**—An adjoining landowner held entitled to recover for damages to his property by the construction of a railway spur track without proof that it is used in such manner as in law constitutes a nuisance, though it is used only as a private switch. *Houston & T. C. R. Co. v. Davis*, 45 C. A. 212, 100 S. W. 1013.

An adjoining property owner held not entitled to recover damages for the construction of a railroad spur track in a street unless he showed actual damages. *Lloyd v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 145 S. W. 266.

14. — **Cuts or excavations.**—A railroad held liable for negligently constructing a cut adjoining plaintiff's land, where the damage could have been prevented by building retaining walls. *Nading v. Denison & P. Suburban Ry. Co.* (Civ. App.) 62 S. W. 97.

Plaintiff may recover the expense incurred in good faith to prevent damage to his property, including the value of his labor. *Id.*

The jury could consider the value of the property at the time of the excavation, and the amount of injury thereto as developed by the subsequent caving of the bank resulting from the negligent construction. *Id.*

Owner of property adjacent to a railroad cut held not entitled to recover compensation for depreciation in value of his property by reason of the unsightliness of the cut, no other injury being shown. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

In an action against a railroad for damage to adjacent property, caused by excavating in a road which the company claimed was a part of its right of way, evidence held to show that the property had been actually damaged by the excavation. *Id.*

15. — **Annoyance, discomfort and inconvenience.**—In a suit for damages caused by the maintenance of railroad yards near plaintiff's dwelling, plaintiff may recover, not only for injuries to his property, but for personal injury and inconvenience to himself and family. *Missouri, K. & T. Ry. Co. v. Texas v. Anderson*, 36 C. A. 121, 81 S. W. 781.

The personal inconvenience and discomfort occasioned to the owner of abutting property by the operation of a railroad in the street gives rise to no cause of action. *Grossman v. Houston, O. L. & M. P. Ry. Co.*, 99 T. 641, 92 S. W. 836.

An owner of property abutting upon a street in which railroad tracks are laid cannot recover from the railroad company for personal inconvenience, annoyance, and discomfort occasioned by the operation of the railroad, unless it is shown that it was operated negligently. *Texas Short Line Ry. Co. v. Clifford* (Civ. App.) 94 S. W. 168.

16. — **Noise, vibrations, smoke, noxious odors and cinders.**—One owning property adjoining a street in which a railway track was built may recover for noise, vibration, smoke, noxious vapors, cinders, and the increased danger from fire incident to and resulting from the operation of trains, if such matters are sufficient to reduce the value of the property. *Dallas Terminal Ry. & Union Co. v. Ardrey* (Civ. App.) 146 S. W. 616.

17. — **Benefits.**—In an action of this character the jury, in estimating the damages, may consider whether the property claimed to have been damaged was enhanced in value by the construction of the road in a sum equal to the special injury claimed to have been sustained, and if it was not, whether by reason of improvements made by the road-owners the street is in better condition than before the railway was built. But the benefits and loss which the plaintiff sustained by the building of the road, in common with the community generally, are to be excluded from the estimate in ascertaining the amount of damages. *G., C. & S. F. R. R. Co. v. Fuller*, 63 T. 467; *Railway Co. v. Ferris*, 26 T. 588; *Railway Co. v. Mathews*, 60 T. 215; *Railway Co. v. Pape*, 62 T. 313; *Railway Co. v. Cave*, 80 T. 137, 15 S. W. 786.

A general rise in the value of real estate, caused by the construction of a railroad, cannot be offset against the damage actually caused to an individual piece of property by the excavation of the street in front of it for the railroad's right of way. *Pochila v. Calvert, W. & B. V. Ry. Co.*, 31 C. A. 398, 72 S. W. 255.

Construction of a railroad depot and the plan of terminal improvements held not to be considered in determining the damages sustained by plaintiff's property by increase in the use of the street in front of the property by the railroad company. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

18. — **Prospective damages.**—All damages, present and prospective, done to abutting property by the construction of a railroad in the street, must be sued for in one action. *Settegast v. Houston, O. L. & M. P. Ry. Co.*, 38 C. A. 623, 37 S. W. 197.

An abutting owner on a street on which a commercial railroad is located has only one action for injury to his property by the nontortious existence or operation of the railroad. *Hutchinson v. International & G. N. Ry. Co.* (Civ. App.) 111 S. W. 1101.

A plaintiff, in an action against a railroad for injury to adjoining property from noises, vibrations, smoke, etc., from a railway built in a public street, is entitled to damages for any present or prospective injury which would lessen the value of the property and is not limited to damage from such negligence in the construction and operation of the road as occurred prior to a sale of the property. *Dallas Terminal Ry. & Union Co. v. Ardrey* (Civ. App.) 146 S. W. 616.

19. — **Lien for damages.**—An abutting landowner's right of action for depreciation in value by reason of the maintenance of a commercial railroad in a street held wholly unsecured by any lien. *Hutchinson v. International & G. N. Ry. Co.* (Civ. App.) 111 S. W. 1101.

20. — **Injunction.**—See Title 69 and notes.

21. — **Defenses.**—That lot owners generally on a street along which a railway is operated suffered similar damages will not prevent a recovery of damages suffered by plaintiff. *Texarkana & Ft. S. Ry. Co. v. Bulgier* (Civ. App.) 47 S. W. 1047.

A landowner held not bound to use ordinary care and to make a reasonable expenditure of money to prevent damage from a railroad's negligence in failing to rebuild pasture fences, etc., in the construction of its right of way. *Kendall v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 95 S. W. 757.

That a city gave its consent to a change of street grade by a railroad company did not render the work compulsory, nor relieve the railroad company from liability to abutting owners for damages sustained thereby. *International & G. N. R. Co. v. Bell* (Civ. App.) 130 S. W. 634.

In an action for damages for raising the grade of a railroad and obstructing the crossing, that the injury was common to all other property fronting on the street will not bar plaintiff's right of recovery. *Powell v. Houston & T. C. R. Co.*, 104 T. 219, 135 S. W. 1153, 46 L. R. A. (N. S.) 615.

22. — **Pleadings.**—See notes under Art. 1827.

23. — **Evidence.**—See also, ante, and notes under Art. 3687.

In an action to recover damages to a farm, owing to the acts of a railroad company, a verdict for the full sum claimed held not sustained by the evidence. *International & G. N. R. Co. v. Wiegrieffe* (Civ. App.) 78 S. W. 704.

In an action for injuries to property abutting on a street, by the construction and maintenance of a railroad tunnel and approaches in the street, a finding that the abutting property was not damaged held warranted. *Burton Lumber Corp. v. City of Houston*, 45 C. A. 363, 101 S. W. 822.

24. — **Instructions.**—See Chapter 13 of Title 37 and notes.

25. — **Limitation of actions.**—See Title 87 and notes.

26. **Negligence in construction or maintenance.**—See, also, "Injuries to abutting property," ante, and "Nuisances," post.

Where a railroad company lays its track along or across a highway, it is bound to use every reasonable precaution to prevent injury to these passing along the highway or crossing its track, and in default thereof is liable in damage for injuries sustained by those using reasonable care in approaching the obstruction. *T. & P. R. R. Co. v. Self*, 2 App. C. C. § 439.

A railway company has no right to obstruct the highway longer than is necessary for the transit or crossing of its train. The burden of proof rests upon the company to show that an obstruction for one-half hour was necessary and reasonable, and could not have been avoided by the use of proper care. What would be a reasonable time to obstruct a highway with a train is a question to be determined by the jury upon the evidence. *Id.*

As to absence of negligence in construction of a roadbed near a stream of water. *Railway Co. v. Meadows*, 73 T. 32, 11 S. W. 145, 3 L. R. A. 565.

A railroad company is not limited to that plan of construction which would inflict the least inconvenience and injury upon the landlord, but it may construct the road upon its own plan of selection, so that it is suited for the purpose intended and is done in a careful and skilful manner, etc. *Railway Co. v. Richards*, 11 C. A. 95, 32 S. W. 96.

Railway company held not liable for death of cattle occasioned by eating poisonous grass on right of way. *Brown v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 69 S. W. 178.

A railroad held not liable for injuries sustained by one riding into a barb-wire fence on its right of way. *Bishop v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 75 S. W. 1086.

Defendant railroad company held negligent in permitting oil which escaped from its tanks and flowed into a ravine near plaintiff's residence, where it could have prevented it from doing so, even though it could not have prevented its escape from the tanks. *Houston & T. C. R. Co. v. Crook*, 56 C. A. 28, 120 S. W. 594.

Evidence held to sustain a finding that defendant was negligent. *Id.*

Evidence held to sustain a verdict for plaintiff for \$500 for the personal discomfort suffered. *Id.*

Evidence held to show that a carrier was liable to the owner for the loss of the goods, and hence liable to a third person for injuries caused by the goods. *Gulf, C. & S. F. Ry. Co. v. Fowler*, 57 C. A. 556, 122 S. W. 593.

27. — **Injuries to children.**—The owner of land is not required to provide against remote and improbable injuries to children trespassing thereon. But he is liable when it is known that they are accustomed to go upon it, and that, from the peculiar nature and exposed condition of something thereon which is attractive to children, he ought reasonably to anticipate such injury as occurs. *Evansich v. Railway Co.*, 57 T. 126, 44 Am. Rep. 586; *Railway Co. v. Moore*, 59 T. 64, 46 Am. Rep. 265; *Railway Co. v. McWhirter*, 77 T. 356, 14 S. W. 26, 19 Am. St. Rep. 755; *Railway Co. v. Edwards* (Civ. App.) 32 S. W. 815.

A railroad company held not liable to the parents of a child falling into an excavation on its right of way. *Missouri, K. & T. Ry. Co. of Texas v. Dobbins* (Civ. App.) 40 S. W. 861.

Liability of railroad company for injury to a child playing on its turntable determined. *San Antonio & A. P. Ry. Co. v. Morgan* (Civ. App.) 45 S. W. 169.

A railroad company is not liable for an injury to a child playing about an unguarded turntable, where it was there without invitation, and the turntable was not unusually attractive to children. *San Antonio & A. P. Ry. Co. v. Morgan*, 92 T. 98, 46 S. W. 28.

In an action for injuries to a child on an unguarded turntable, an instruction withdrawing from the jury the invitation inferable from the unusual attractiveness of the turntable is properly refused. *San Antonio & A. P. Ry. Co. v. Skidmore*, 27 C. A. 329, 65 S. W. 215.

Where an invitation to children to go on a turntable to play is inferable from its attractiveness, it is immaterial on whose premises a child was when she accepted the invitation to play thereon. *Id.*

In an action for injuries to plaintiff, a minor, from hot water and steam escaping from a railroad pumping station, facts held to show that defendant was guilty of negligence, which was the proximate cause of the injury. *Houston & T. C. R. Co. v. Bulger*, 35 C. A. 478, 80 S. W. 557.

Facts held insufficient to show an implied invitation by defendant railroad company to the public or plaintiff's child to use stone steps of a railroad bridge abutment as a passway. *Williamson v. Gulf, C. & S. F. Ry. Co.*, 40 C. A. 18, 88 S. W. 279.

Where plaintiff's child, in using the stone abutment of a railroad bridge as a passway, was a trespasser, the railroad company owed him no duty, except to avoid willfully injuring him. *Id.*

28. — **Measure of damages.**—Where crops are destroyed from the want of repairs of the fence which could have been made at a moderate cost, the measure of damages would be an amount of money sufficient to make the necessary repairs. *Railway Co. v. Simonton*, 2 C. A. 558, 22 S. W. 385.

The measure of damages for the destruction of a gambling device is its salable value to the owner. *Railway Co. v. Johnson* (Civ. App.) 25 S. W. 1015.

Exemplary damages cannot be recovered on account of the willful or malicious conduct of the defendant's employé, but such conduct can be considered with reference to the award of actual damages. *Railway Co. v. Smith* (Civ. App.) 25 S. W. 1032; *Dillingham v. Russell*, 73 T. 47, 11 S. W. 139, 3 L. R. A. 634, 15 Am. St. Rep. 753; *Railway Co. v. Anderson*, 82 T. 516, 17 S. W. 1039, 27 Am. St. Rep. 902; *Railway Co. v. Mother*, 5 C. A. 87, 24 S. W. 79.

Actual damages cannot be recovered for mental anguish caused by fright without physical injury. *Railway Co. v. Hitt* (Civ. App.) 31 S. W. 1084.

29. — **Spread of disease.**—A railroad company is liable for the spread of a contagious disease through the negligence of its servants acting within the scope of their authority, whereby another is injured as the proximate result of such negligence. *Melody v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 124 S. W. 702.

In an action against a railroad company for injuries sustained through its negligence in permitting a section house to become infected with smallpox, which was communicated to plaintiff, evidence held insufficient to show negligence. *Id.*

30. — **Excavations.**—That a railroad company intended, when it partly closed a street while it was making an excavation thereunder, that the walk laid across it should only be used by its employés, did not make others who might use it trespassers, unless its

intention was communicated to the public in some manner. *Galveston, H. & S. A. Ry. Co. v. Schuessler*, 56 C. A. 410, 120 S. W. 1147.

If the public could assume that the walk was placed there for its use and defendant permitted such use, it was bound to use ordinary care to keep it in safe condition. *Id.*

Evidence held to sustain a finding that plaintiff was not guilty of contributory negligence in using the walk. *Id.*

Evidence held to sustain a finding that plaintiff was not a trespasser in going upon the walk. *Id.*

Evidence held to raise the issue whether defendant did not impliedly invite the public to use the passage way by failing to completely close it. *Id.*

**31. — Assumption of risk.**—One hiring a mule with its driver to a railroad company for use in grading, knowing the danger, assumes the risk of injury to the mule. *Gulf, C. & S. F. Ry. Co. v. Harris*, 22 S. W. 237, 2 C. A. 540.

**32. — Indemnifying city.**—City, accepting and acquiescing in railroad company's performance of contract to build bridges and approaches in city street on right of way, held estopped to claim indemnity from company for liability for injury to traveler from unguarded approach. *Gulf, C. & S. F. Ry. Co. v. Sandifer*, 29 C. A. 356, 69 S. W. 461.

**33. — Pleading.**—See Chapter 8 of Title 37.

**34. Nuisances—In general.**—See, also, "Injuries to abutting property" and "Negligence in construction or maintenance," ante.

Railroad company held liable for nuisance created by butchers depositing, under contract with company, near third person's premises, carcasses of cattle killed in accident. *Gulf, C. & S. F. Ry. Co. v. Chenault*, 31 C. A. 558, 72 S. W. 868.

A railway company placing ties on its right of way on a street in front of plaintiff's residence, held guilty of creating a nuisance and liable for damages. *Houston, E. & W. T. Ry. Co. v. Reasonover*, 36 C. A. 274, 81 S. W. 329.

Where a railroad company, lawfully occupying a street, constructed a ditch along its right of way, in which waters stagnated and polluted the air, it was a nuisance, for which the company was liable in damages to an abutting owner. *Cane Belt R. Co. v. Ridgeway*, 38 C. A. 108, 85 S. W. 496.

The mere increased use of a right of way granted a railroad over a street over what may have originally been contemplated, resulting from the erection of a depot on land adjoining the street, held not to constitute a nuisance. *Oklahoma City & T. R. Co. v. Dunham*, 39 C. A. 575, 88 S. W. 849.

The Legislature may legalize a nuisance committed by a railroad provided the damages be fully compensated by the payment of money. *Rainey v. Red River, T. & S. Ry. Co.*, 99 T. 276, 89 S. W. 768, 90 S. W. 1096, 3 L. R. A. (N. S.), 590, 122 Am. St. Rep. 622, 13 Ann. Cas. 580.

A railroad required to repair a track after a wreck of a train carrying petroleum held not required to delay the repair of the track to lessen the damage to adjacent property by preventing the flow of oil thereon. *Houston & T. C. R. Co. v. Anderson*, 44 C. A. 394, 98 S. W. 440.

The legislature held to have power to legalize a nuisance arising from the operation of a railroad. *Galveston, H. & S. A. Ry. Co. v. De Groff* (Civ. App.) 110 S. W. 1006.

A railroad company subdividing and selling its lands, but reserving a right, held not to reserve the right to create, or to give a lessee the right to erect, a nuisance on the right of way. *Stark v. Coe* (Civ. App.) 134 S. W. 373.

**35. — Cause of injury.**—Where a nuisance created by a railroad company, together with a similar nuisance on adjoining land for which the railroad company was not responsible, combined to cause plaintiff's injury, the railroad company was liable for its portion of the injury so sustained. *McFadden v. Missouri, K. & T. Ry. Co. of Texas*, 41 C. A. 350, 92 S. W. 989.

**36. — Measure of damages.**—The measure of damages for making of a ditch in a street by a railroad determined. *Cane Belt R. Co. v. Ridgeway*, 38 C. A. 108, 85 S. W. 496.

Where real estate has been depreciated in value by reason of the erection of railroad stock pens near it, the owner is entitled to damages, though property generally, including the real estate in question, has increased in value since the erection of the pens. *Gulf, C. & S. F. Ry. Co. v. Blue*, 46 C. A. 239, 102 S. W. 128.

The measure of damages in an action against a railway company for injuries to property resulting from its erection and use of a turntable and water tank determined. *Missouri, K. & T. Ry. Co. of Texas v. Perry*, 46 C. A. 374, 102 S. W. 1169.

A railroad company establishing on its right of way a turntable and water tank is liable for the depreciation of the value of adjacent property resulting from the use of the same. *Id.*

**37. — Annoyance, discomfort and inconvenience.**—Property owner held entitled to recover damages sustained by personal annoyance and inconvenience suffered by her and her family on account of operation of railway near her residence. *St. Louis, S. F. & T. Ry. Co. v. Shaw* (Civ. App.) 88 S. W. 817.

Damages cannot be recovered for personal inconvenience resulting naturally and without negligence from the operation of cars and engines. *Oklahoma City & T. R. Co. v. Scarborough*, 43 C. A. 338, 95 S. W. 1089.

Plaintiff held not entitled to recover for annoyance and discomfort caused by coal dust, etc., produced in constructing a railroad. *Cantelou v. Trinity & B. V. Ry. Co.* (Civ. App.) 101 S. W. 1017.

In an action against a railway company for injuries resulting from the erection and use of a turntable and water tank, one may recover for personal annoyance and discomfort without reference to the care exercised by the company, where the maintenance of the structures amounts to a nuisance. *Missouri, K. & T. Ry. Co. of Texas v. Perry*, 46 C. A. 374, 102 S. W. 1169.

**38. — Noise, cinders, etc.**—A railroad company is not liable for damages for annoyance from noise, cinders, etc., caused by a reasonable use of its switch tracks. *Houston & T. C. R. Co. v. Barr*, 44 C. A. 571, 99 S. W. 437.

A railroad company cannot defeat liability for nuisances arising from unnecessary noises because railroads generally are operated in the same way. *Passons v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 137 S. W. 435.

A railroad company constructing and maintaining, as authorized by ordinance, tracks in a street for the storage and loading and unloading of cars, in connection with its depot, is not liable for injuries to an abutting owner, caused by noises, dust, cinders, and odors, though the tracks were originally constructed for private concerns, and though the private concerns are deriving more benefit from the tracks than the general public, since the company could, under Art. 6504, have condemned the land for the tracks if owned by the abutting owner, especially where the construction and operation of the tracks did not depreciate the value of the abutting property but enhanced its value. *Ft. Worth & D. C. Ry. Co. v. Mapes* (Civ. App.) 156 S. W. 528.

39. — Evidence.—See, also, note under Art. 3687.

Evidence in an action for maintaining stagnant water on a railway right of way held insufficient to show that typhoid fever in plaintiff's family was caused by condition of defendant's right of way. *Gulf, C. & S. F. Ry. Co. v. Craft* (Civ. App.) 102 S. W. 170.

In an action by a householder, who lived adjacent to a railroad company's yard, evidence held sufficient to support a verdict that the operation of engines and cars was so careless as to be a nuisance. *Missouri, K. & T. Ry. Co. of Texas v. Passons* (Civ. App.) 154 S. W. 239.

40. — Defenses.—A railroad held not entitled to use a street for a switchyard which constituted a nuisance to adjoining property owners because such nuisance existed before such property owners built their houses. *Galveston, H. & S. A. Ry. Co. v. Miller* (Civ. App.) 93 S. W. 177.

In an action for damages against a railroad on the ground that a water tank constituted a nuisance, reasonable necessity for the location of the tank held no defense. Const. art. 1, § 17. *Texas & Pac. Ry. Co. v. Edrington*, 100 T. 496, 101 S. W. 441, 9 L. R. A. (N. S.) 988.

41. Injuries from operation of trains.—See notes at end of Chapter 10 of this title.

42. — Injuries to passenger, baggage or freight.—See Art. 707 et seq.

43. — Injuries to employés.—See Chapter 14 of this title.

44. — Injuries to animals on or near tracks.—See Art. 6603 and notes.

45. Notice of claim for damages.—See Art. 5714.

## CHAPTER NINE

### OTHER RIGHTS OF RAILROAD CORPORATIONS

Art.		Art.	
6535.	Shall have succession, etc.	6542.	Right to erect and maintain buildings, etc.
6536.	May have a seal, etc.	6543.	Right to regulate time, etc., of transportation.
6537.	Shall have the right to hold lands and other property.	6544.	Right to borrow money, issue bonds, etc.
6538.	Shall have the right to receive and hold grants, etc.	6545.	Mortgage invalid, unless, etc.
6539.	Shall alienate lands, except, etc.; forfeiture.	6546.	Resolution authorizing mortgage shall be recorded.
6540.	Preceding articles apply to all companies.	6547.	Directors may pay bonds with stock.
6541.	Right to convey persons and property.	6548.	When terminus on coast is destroyed.

**Article 6535. [4476] Shall have succession, etc.**—All railroad corporations shall have succession, and in their corporate name may sue and be sued, plead and be impleaded. [Act Aug. 15, 1876, p. 142, sec. 4.]

**Art. 6536. [4477] May have a seal.**—Any such corporation may have and use a seal, which it may alter at pleasure. [Id.]

**Art. 6537. [4478] Shall have the right to purchase and hold lands and other property.**—Any railroad company shall have the right to purchase, hold and use all such real estate and other property as may be necessary for the construction and use of its railway and the stations and other accommodations necessary to accomplish the objects of its incorporation, and to convey the same when no longer required for the use of such railway. [Id. p. 143, secs. 6, 23.]

Cited, *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

**Gravel pits.**—A railway company can acquire land for the facilities in obtaining gravel to keep its road in repair. *Small v. McMurphy*, 11 C. A. 409, 32 S. W. 788.

**Power to purchase other railroads.**—A railway company chartered under general laws cannot purchase the railway of another company. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156.

**Grants for right of way, etc., construction, conditions, use of land, etc.**—See notes under Art. 6538.

**Art. 6538. [4479]** Shall have the right to receive and hold grants, etc.—Such corporations shall have the right to take, hold and use such voluntary grants of real estate and other property as shall be made to it in aid of the construction and use of its railway, and to convey the same when no longer required for the uses of such railway, in any manner not incompatible with the terms of the original grant. [Id.]

**Grants for right of way or other purposes—Authority of husband.**—The husband cannot convey the right of way across land the separate property of his wife. *T. & P. R. R. Co. v. Durrett*, 57 T. 48; *G., C. & S. F. R. R. Co. v. Donahoo*, 59 T. 128; *Railway Co. v. Hall* (Civ. App.) 24 S. W. 324.

The husband may, without being joined by his wife, grant a right of way to a railroad company across a tract of land belonging to himself and wife and occupied by them as a homestead, when the use of the right of way by the railway does not materially affect the right of the wife to the enjoyment and the use and occupancy of the land for homestead purposes *Randall v. Tex. Cent. R. R. Co.*, 63 T. 586.

— **Certainty.**—The grant of "a right of way" across a certain land is sufficiently certain, and carries with it the right to use every part thereof within the limits of the right of way. *Olive v. Railway Co.*, 11 C. A. 208, 33 S. W. 139.

— **Title, estate or interest acquired.**—See, also, Art. 6531 and notes. The intention of the grantor to convey to a railroad only an easement for a right of way held to control a certain deed. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

A deed granting a right of way together with the right to take minerals held to give a right to take only surface minerals. *Id.*

A deed conveying a railroad right of way held to convey a mere easement, and not to give the railroad company the right to bore for oil or prospect for minerals. *Id.*

Under a parol agreement by the owner that defendant's right of way could be located on his land if a switch was located on the land, and that if no switch was located he should be paid \$4 per acre, the railroad, without locating the switch or paying for the land, did not obtain any interest or title to the land in the nature of an easement. *Chicago, R. I. & G. Ry. Co. v. Johnson* (Civ. App.) 156 S. W. 253.

— **Covenants and conditions.**—The right of way over land having been granted a railroad in consideration that a depot would be established and maintained on the land, the owner of the land has a cause of action against the railroad for removing the depot although the removal was made by the receiver of the railroad under the orders of the court. *Levy v. Tatum* (Civ. App.) 43 S. W. 941.

A contract for a right of way held an executory contract and a condition therein a condition precedent. *Sullivan-Sanford Lumber Co. v. Reeves* (Civ. App.) 125 S. W. 96.

Landowner who had conveyed an easement of right of way under conditions not performed held not required to tender back the money consideration before suing to recover the land. *Id.*

Fact that a lumber company contracting for a right of way upon condition that it would incorporate and operate a railroad could not itself do so would not render the condition impossible of performance and, therefore, void, assuming it to be a condition subsequent. *Id.*

— **Construction and effect.**—The grant of the right is a waiver of a claim for damages for depreciation in value or in convenience, not resulting from want of care or skill in the location or construction of the road. *Railway Co. v. Adams*, 53 T. 476; *Railway Co. v. Lougorio* (Civ. App.) 25 S. W. 1020.

When made without any reservation, it is a waiver of a right to damages caused by the removal of timber therefrom. *Railway Co. v. McKinney*, 55 T. 176; *Faires v. Railway Co.*, 80 T. 43, 15 S. W. 588.

In determining the construction to be placed on a grant of a right of way, certain facts held to indicate an intention that the land should not be used for a switchyard. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 36 C. A. 121, 81 S. W. 781.

— **Use of lands or rights acquired.**—See, also, Art. 6542 and notes.

As to grant of right of way and its uses, see *Olive v. Railway Co.*, 11 C. A. 208, 33 S. W. 139.

A conveyance of land to a railroad company for a right of way held to confer no right to erect stock pens, to the damage of plaintiff's right acquired by a similar chain of title. *Missouri, K. & T. Ry. v. Mott*, 98 T. 91, 81 S. W. 285, 70 L. R. A. 579.

A voluntary conveyance of lands to a railroad for its right of way gave it no greater right in the matter of erection of buildings, stock pens, etc., thereon, to the detriment of other property, than the railroad would have acquired by a condemnation under the statute. *Id.*

In an action against a railroad company arising from defendant's unauthorized use as a switchyard of land granted for a "right of way," evidence held sufficient to support a finding that such use was unauthorized. *Missouri, K. & T. Ry. Co. of Texas v. Anderson*, 36 C. A. 121, 81 S. W. 781.

— **Transfer of right of way.**—A corporation for public purposes cannot, except with the consent of the authority which created it, render itself incapable of performing its corporate duties to the public, by contract of lease, sale or otherwise. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156.

A grant of the right of way to one company does not authorize it to transfer the right of way to another without the consent of the owner of adjacent land. *Railway Co. v. Jennings*, 76 T. 373, 13 S. W. 270, 8 L. R. A. 180.

— **Abandonment or forfeiture.**—See, also, Art. 6531.

A railroad company held not to forfeit its right of way for failure to comply with the contract to pay without litigation for stock of grantor killed. *Beaumont Pasture Co. v. Sabine & E. T. Ry. Co.* (Civ. App.) 41 S. W. 543.

A railroad which graded its right of way, paid taxes, and never ceased trying to use

it for railroad purposes, and finally succeeded in so doing cannot be held to have abandoned it, though when first graded the company put gates in each fence, and the owners remained in possession. *Scott v. Missouri, O. & G. Ry. Co.* (Civ. App.) 151 S. W. 578.

**Licenses.**—The license to a railroad which results when a landowner permits its line to be constructed on his land, without objection, cannot be revoked after the track has been constructed, so long as it is used in the operation of the railroad. *Ft. Worth & N. O. Ry. Co. v. Sweatt*, 20 C. A. 543, 50 S. W. 162.

**Construction of release.**—A release by a property owner to a proposed railway running through his land, construed. *McNamara v. Denison & P. S. Ry. Co.* (Civ. App.) 45 S. W. 334.

**Estoppel.**—Acceptance by a railroad of deed from settler to part of a right of way granted it by the state held not to estop the railroad from suing for the entire grant. *Ft. Worth & D. C. Ry. Co. v. Western Stockyards Co.* (Civ. App.) 151 S. W. 1172.

By acceptance of contract wherein it admitted another's ownership of one-half the width of its right of way granted to it by the state, railroad company held estopped thereafter to claim the same. *Id.*

**Art. 6539. [4480] Shall alienate lands, except, etc.; forfeiture.**—All lands acquired by railroad companies under the provisions of this chapter, or any general laws, shall be alienated by said companies, one-half in six years, and one-half in twelve years, from the issuance of patents to the same, and all lands so acquired by railroad companies, and not alienated as herein required, shall be forfeited to the state and become a part of the public domain and liable to location and survey as other unappropriated lands. All lands purchased by or donated to a railroad corporation, except such as are used for depot purposes, reservations for the establishment of machine shops, turnouts and switches, shall be alienated and disposed of by said company in the same manner and time as is required when lands have been received from the state. [*Id.* Amend. 1895, Sen. Jour. No. 84, p. 482.]

**Art. 6540. [4481] Preceding articles to apply to all companies.**—The three preceding articles shall apply to such corporations as are prohibited by their acts of incorporation from purchasing or receiving donations of land, as well as to those corporations that are not so prohibited. [*Id.* p. 143, sec. 6.]

**Art. 6541. [4482] Right to convey persons and property.**—Such corporation shall have the right to receive and convey persons and property on its railway by the power and force of steam or by any mechanical power. [*Id.* p. 147, sec. 23.]

**Contract to ship certain tonnage.**—Where a contract with a proposed road securing the transportation of certain freight for a term of years has been performed by the construction of the road, refusal of specific performance in its behalf would be inequitable. *Lone Star Salt Co. v. Texas Short Line Ry. Co.* (Civ. App.) 86 S. W. 355.

Where the specific performance of a contract with a railroad company will enable it to earn operating expenses, and without the revenue secured by such performance it cannot operate specific performance cannot be refused because the company has an adequate remedy at law. *Id.*

Plaintiff railroad held not entitled to specific performance of a contract by defendant to deliver a percentage of its tonnage to plaintiff for transportation. *Lone Star Salt Co. v. Texas Short Line Ry. Co.*, 99 T. 434, 90 S. W. 863, 3 L. R. A. (N. S.) 828.

**Art. 6542. [4483] Right to erect and maintain buildings, etc.**—Such corporation shall have the right to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of its railway; but no railway company shall have the power, either by its own employés or other persons, to construct any buildings along the line of their railroad to be occupied by their employés or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employés, nor shall they use, occupy or cultivate any part of the right of way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways. [*Id.*]

**Fixtures.**—Railroad fixtures defined. *Railway Co. v. Danman* (Civ. App.) 35 S. W. 947.

**Right of way limited to use as such.**—The right of way acquired by condemnation is limited to the use of the premises for the purposes of a right of way as defined by the



statute. *Ft. Worth Ice Co. v. Railway Co.*, 11 C. A. 600, 33 S. W. 159; *Lumber Co. v. Harris*, 77 T. 23, 13 S. W. 453.

A voluntary conveyance of right of way gives a railway company no greater right to erect stock pens and other objectionable buildings thereon than if the company had acquired the right of way by condemnation proceedings. *M., K. & T. Ry. Co. v. Mott*, 98 T. 91, 81 S. W. 288, 70 L. R. A. 579.

Under this statute a railway has not the right to erect upon the right of way stock pens or any other improvements which in themselves would constitute a nuisance to those persons who might reside in proximity to the place of their location. *Id.*

This article and Art. 6504 seem to contemplate that a condemnation merely for right of way does not embrace or imply a use for machine or repair shops or yards, but that when such things are necessary property should be acquired or condemned for such purposes. When land is condemned for one purpose it cannot be applied to another purpose without compensation. *M., K. & T. Ry. Co. v. Anderson*, 36 C. A. 121, 81 S. W. 785.

**Does not apply to land owned in fee.**—This article does not apply to land in which a railway company owns an estate in fee, although its track is built upon it. *Calcasieu Lumber Co. v. Harris*, 77 T. 18, 13 S. W. 453.

This article does not apply to lands owned by a railway company in fee, and hence, where such ownership exists, an owner of a lot adjoining a right of way cannot rely upon the statute to defeat the company's right to construct a fence along the line of such lot. *Ft. Worth & D. C. Ry. Co. v. Ayers* (Civ. App.) 149 S. W. 1068.

**Art. 6543. [4484] Right to regulate time, etc., of transportation.**—Such corporation shall have the right to regulate the time and manner in which passengers and property shall be transported, and the compensation to be paid therefor, subject nevertheless to the provisions of this or any other law that may hereafter be enacted. [*Id.*]

**Regulations of carrier.**—See, also, Art. 6552.

A regulation by a railway company requiring persons engaged in hauling freight from its depot to receive the same on the platform from its servants, and not enter the warehouse for the purpose of there checking off freight, is a reasonable regulation which it has the right to enforce. *Donovan v. T. & P. R. R. Co.*, 64 T. 519.

A regulation that one of several trains should not stop at all stations is reasonable. *Railway Co. v. White*, 4 App. C. C. § 259, 17 S. W. 419.

Railway companies may make reasonable regulations for the conduct of their business, the use of seats, etc. *Railway Co. v. Moody* (Civ. App.) 30 S. W. 574.

Railroad companies may run their trains at any time and at any rate of speed, using reasonable care and precaution to prevent injury to persons at crossings. *Central T. & N. W. Ry. Co. v. Bush*, 12 C. A. 291, 34 S. W. 133.

This article does not justify an instruction in an action against a carrier for delay in delivering stock, that the carrier had a right to regulate the time to be occupied by its trains in the transportation of cattle between two points, and that the law presumes that the time fixed by the carrier was reasonable. *T. & P. Ry. Co. v. Currie*, 33 C. A. 277, 76 S. W. 810.

**Rule construed.**—A rule of a railroad company regulating the movement of trains construed. *El Paso & S. W. R. Co. v. Murtle*, 49 C. A. 273, 108 S. W. 998.

**Art. 6544. [4486] Right to borrow money, issue bonds, etc.**—Such corporation shall have the right, from time to time, to borrow such sums of money as may be necessary for constructing, completing, improving or operating its railway, and to issue and dispose of its bonds for any amount so borrowed, and to mortgage its corporate property and franchise to secure the payment of any debt contracted by such corporation for the purposes aforesaid, subject, however, to other provisions of this title. [*Id.* p. 147, sec. 23.]

**Effect of foreclosure.**—See, also, Art. 6624 et seq.

Under the statute authorizing a railway company to borrow money to construct, complete, improve or operate its road, and to give mortgages therefor, a purchaser may acquire title to the road by sale under a power in such a mortgage, or title may be acquired by purchase under judicial sale to pay such indebtedness. After such a sale the corporate existence continues, and the purchaser becomes in effect a stockholder of the corporation. *Railway Co. v. Morris*, 67 T. 692, 4 S. W. 156.

**Art. 6545. [4487] Mortgage invalid, unless, etc.**—No mortgage by such corporation shall be valid, unless authorized by a resolution adopted by a vote of two-thirds of all the stock of such company, after notice in a manner provided in this title for increasing the capital stock of such corporations. [*Id.*]

**Extension of previous lien.**—Where a party has a lien on a railroad and its equipment for labor done and material furnished to give such party a valid mortgage on the road property to secure the payment of the debt it is not necessary to follow the requirements of Arts. 6545, 6724, 6725, and kindred articles to make the mortgage legal, because the mortgage was not the creation of a new lien but the extension of the life of one already in existence. *G. B. & S. W. Ry. Co. v. Fontaine*, 23 C. A. 519, 57 S. W. 874.

**Art. 6546. [4488] Resolution authorizing mortgage shall be recorded.**—When any such resolution has been adopted in the manner provided in the preceding article, it shall be recorded in the office of the

secretary of state, and no such resolution shall take effect until so recorded. [Id.]

**Art. 6547. [4489] Directors may pay bonds with stock.**—The directors shall be empowered, in pursuance of any such resolution, to confer on any holder of any bond for money so borrowed as aforesaid, the right to convert the principal of such bond into the stock of such corporation at any time not exceeding ten years after the date of such bond, under such regulations as may be provided in the by-laws of such corporation. [Id.]

**Art. 6548. [4490] When terminus on coast is destroyed.**—Any railway company in the state of Texas having a terminus on the coast, the said terminus being a county site, and the same having been destroyed by storms and cyclones, and when said county site has been removed back from the coast near the line of said railway, it shall be lawful for said railway company to remove and take up its track from its original terminus on the coast to a point opposite or near said new county site; provided, said railway company make its terminus at and build its road to said new county site. [Acts 1887, p. 6.]

## CHAPTER TEN

### RESTRICTIONS UPON, DUTIES AND LIABILITIES OF RAILROAD CORPORATIONS

- |                                                                                  |                                                                          |
|----------------------------------------------------------------------------------|--------------------------------------------------------------------------|
| <b>Art.</b>                                                                      | <b>Art.</b>                                                              |
| 6549. Roads to pass through county seat.                                         | 6578. Penalty, evidence, venue of suits.                                 |
| 6550. Shall survey twenty-five miles of road, etc.                               | 6579. "Common carrier" defined.                                          |
| 6551. Subsequent survey of twenty-five miles.                                    | 6580. Provisions of foregoing articles do not apply.                     |
| 6552. Trains to be regular.                                                      | 6581. Shall provide suitable places for employés to work.                |
| 6553. Train dispatcher, to maintain, and duties of.                              | 6582. Penalty.                                                           |
| 6554. Refusal to transport, etc.                                                 | 6583. Suits, fees of attorneys.                                          |
| 6555. Double-decked cars for sheep.                                              | 6584. Employés limited to sixteen hours labor.                           |
| 6556. Rates of freight; penalty.                                                 | 6585. Penalties, suits for, venue, etc.                                  |
| 6557. Shall not collect more than specified in bill of lading.                   | 6586. Railroad telegraph and telephone operators eight hours a day work. |
| 6558. Freight to be delivered on payment of charges.                             | 6587. Penalty, suit and disposition of funds.                            |
| 6559. Penalty for refusal to deliver freight.                                    | 6588. Shall carry United States mails, and compensation therefor.        |
| 6560. Conductor shall wear badge.                                                | 6589. Stations shall be erected, etc.                                    |
| 6561. Without it, shall not collect, etc.                                        | 6590. No storage charged, except.                                        |
| 6562. Baggage shall be checked, etc.                                             | 6591. Depots opened, lighted, etc., penalty for failure.                 |
| 6563. Signs shall be erected at crossings.                                       | 6592. Water closets to be erected.                                       |
| 6564. Bell and steam whistle, duty as to.                                        | 6593. Separate closets, how constructed and maintained.                  |
| 6565. Duty to equip with electric headlights.                                    | 6594. Penalties and suits for.                                           |
| 6566. Penalty for failure.                                                       | 6595. Switch cars shall be furnished, when.                              |
| 6567. Shall keep lighted from sunset to sunrise, except, etc.                    | 6596. Cattle guards and stops, at what places.                           |
| 6568. Shall place derailing switches, etc., on sidings, when, etc.               | 6597. Same subject.                                                      |
| 6568a. Derailing devices on repair tracks, etc., required.                       | 6598. Character of.                                                      |
| 6569. Penalty.                                                                   | 6599. Owner may place, etc., cattle guards, etc.                         |
| 6570. Passenger trains, how formed.                                              | 6600. Liability for failure, etc.                                        |
| 6571. Brakes and brakemen.                                                       | 6601. Johnson grass not to be permitted to go to seed on right of way.   |
| 6571a. Airbrakes to be inspected by competent inspector, etc.; proviso.          | 6602. Penalty for damages.                                               |
| 6571b. Temporary inspector, when; not to apply to certain railroads.             | 6603. Liability for stock, etc.                                          |
| 6572. Passenger trains without full crew, unlawful to run.                       | 6604. Consolidation prevented, etc.                                      |
| 6573. Freight, gravel or construction trains without full crew, unlawful to run. | 6605. "Corporation" defined.                                             |
| 6574. Light engine without full crew, as defined, unlawful to run.               | 6606. Consolidation, etc.                                                |
| 6575. Penalty and venue of suits.                                                | 6607. Maps and profiles of roads to be recorded.                         |
| 6576. To what articles apply.                                                    | 6608. To receive freight, etc., from connecting lines.                   |
| 6577. Certain kind of ash pans required.                                         | 6609. What are connecting lines.                                         |
|                                                                                  | 6610. Terms for receiving, etc.                                          |

Art.	Art.
6611. All water craft freight to be received on same terms.	6614. Declared to be trustees, when.
6612. Penalty.	6615. Penalty for refusal, etc.
6613. Provisions of two foregoing articles, how construed.	6616. Equal facilities, etc.
	6617. Damage for failure, etc.
	6618. Passenger fare.

[In addition to the notes under the particular articles, see also notes on Injuries from Operation of Railroads, at end of chapter.]

**Article 6549. [4491] Road shall pass through county seat, when.**  
—No railroad hereafter constructed in this state shall pass within a distance of three miles of any county seat without passing through the same and establishing and maintaining a depot therein, unless prevented by natural obstacles, such as streams, hills or mountains; provided, such town or its citizens shall grant the right of way through its limits and sufficient ground for ordinary depot purposes. [Const., art. 10, sec. 9.]

**Constitutionality.**—The statute authorizing the recovery of a penalty for failure to comply with Const. art. 10, § 9, requiring railroads to pass through county seats within three miles of the line of road, is not unconstitutional. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**Reasonable construction.**—The provisions of this article should be given a reasonable construction both as to natural obstacles or otherwise. *Felton v. Kansas City, M. & O. Ry. Co.* (Civ. App.) 143 S. W. 650.

**Remedy for breach of duty.**—Private citizens of a county seat through which a railroad refuses to construct its line, although it passes within three miles thereof, and who offered a right of way and depot, can maintain mandamus to compel the railroad to construct its line through the city where the municipal officers fail to act. *Felton v. Kansas City, M. & O. Ry. Co.* (Civ. App.) 143 S. W. 650.

Under Const. art. 10, § 9, of which this article is a copy, if the town or its citizens grant a right of way and sufficient ground for ordinary depot purposes, the state may maintain a suit to compel compliance therewith by mandamus or mandatory injunction; the right of action not being vested exclusively in the town or its citizens, since the state is interested in the enforcement of its constitution and laws. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

— **Suit need not be brought before road is built.**—The courts may compel railroad companies to comply with Const. art. 10, § 9, requiring railroads to pass through county seats within three miles of the line of road, although the road has passed the town before suit is filed. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

— **Limitation of actions.**—See notes under Title 87.

— **Sufficiency of petition.**—In an action by the state for a writ of mandamus or mandatory injunction to compel compliance with Const. art. 10, § 9, of which this article is a literal copy, and to recover a penalty for the company's willful failure and refusal to comply therewith, a petition which alleged that the company had constructed its road within three miles of the county seat, an unincorporated town of about 400 inhabitants, without passing through it and without establishing and maintaining a depot, as required by the constitution and laws of the state, the citizens of the town having tendered to it, prior to the construction of the road, a practicable right of way through its limits and sufficient ground for ordinary depot purposes, that there were no natural obstacles to prevent it passing through the town, that the state and the people thereof had an interest in and right to have the company comply with such provision and in having a depot maintained in the town for the convenience and transaction of their business with county officials and with the various courts, and for receiving and delivering passengers and freight, and that the company's failure to comply with the constitution and laws would subject the people of the state to great inconvenience and expense, to which they would not be subjected if the railway was constructed through the town and a depot established and maintained therein, was not demurrable. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

— **Abatement of action.**—The pendency of an action brought by citizens of a county seat to compel a railroad company to comply with this section, which is a literal copy of Const. art. 10, § 9, was not ground for abating a subsequent action by the state to compel it to construct its road through the county seat and to recover a penalty for its failure and refusal to do so; the parties and the causes of action asserted not being the same. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

— **Admissibility of evidence.**—An experienced and skilled civil engineer, who had gone over the ground and examined the maps and profiles filed with the railroad commission, could testify that there were no hills, streams, or mountains preventing the building of the road through the town, and that no such obstacles were shown by the maps and profiles, especially where another witness testified to the same effect without objection. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

— **Conditional judgment.**—In an action by the state to compel the construction of a railroad through a county seat within three miles of its line of road, as required by Const. art. 10, § 9, the judgment ordered the company, within 30 days, to survey a route through the town and locate a depot site, and further ordered that the citizens of the town be allowed 90 days after notice of the completion of the survey to secure the grant of the right of way and sufficient ground for depot purposes, and to tender such grants and conveyances to the company, and that, in the event such deeds and grants could not be secured voluntarily, such citizens, or any of them, might execute an obligation, to be approved by the judge, conditioned for the payment of all expenses of procuring such right of way and depot grounds by condemnation proceedings, and tender such obligation, and ordered the company, when such tender had been made, to institute the necessary

condemnation proceedings and do all other things necessary to secure such right of way and depot grounds. Held, that the judgment was not objectionable as being against the citizens of the town, who were not parties to the suit, since no judgment was rendered against the citizens, but conditions imposed upon them merely as the measure of the company's obligation and duty, a failure to perform which would release the company from the requirements of the judgment. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**When right of way, etc., must be furnished.**—A railroad company, when it determines to pass within three miles of a county seat, must, unless prevented by natural obstacles, survey its line through the town and select a site for depot grounds, and not until then does the duty devolve upon the town or the citizens of furnishing such right of way and depot grounds. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**Construction of contract.**—A contract to procure a right of way for a railroad constructed. *Boyce v. Stringfellow*, 52 C. A. 504, 114 S. W. 652.

**Obstacles, etc.**—The question whether there were any natural obstacles preventing the construction of the road through the town was one of fact. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**Waiver of statute.**—A railroad company offered to construct its line near a county seat and to establish a depot at the nearest point thereto if the citizens of the county seat would grant a right of way through the county free of charge. The offer was unanimously accepted at a mass meeting of 35 or 40 citizens out of a population of 400, and a committee appointed, who, by a contract with the company, obligated themselves to furnish a right of way; the company binding itself to construct the road, but no provision being contained as to establishing a depot. The right of way was obtained, the road constructed, but no depot established. Held, that compliance with Const. art. 10, § 9, of which this article is a copy, had not been waived; the mass meeting having no authority to waive such requirement, and, even if they had, the company not having carried out the offer accepted by the meeting. *Kansas City, M. & O. Ry. Co. of Texas v. State* (Civ. App.) 155 S. W. 561.

**Art. 6550. [4492] Shall survey 25 miles of road, locate depot, etc.**—Every railroad company organized under this title shall make an actual survey of its route or line for a distance of twenty-five miles on its projected route, and shall designate the depot grounds along said first twenty-five miles before the roadbed is begun; and no railroad company shall change its route or depot grounds after the same have been so designated. [Act Aug. 15, 1876, p. 142, sec. 5.]

Cited, *Ft. Worth & D. C. Ry. Co. v. Mapes* (Civ. App.) 156 S. W. 528.

**Remedy for change in location of depot.**—A railroad company is not liable in damages caused by the depreciation of the value of property, caused by a change of the location of its depot. *Railway Co. v. Colburn*, 90 T. 230, 38 S. W. 153.

**Failure to keep depot open for business.**—See, also, Arts. 6591, 6639, 6654.

Where a deed conveying right of way to railroad company recites as part consideration "the establishment of a depot and side tracks upon the property" by the company, the parties meant that such depot should be maintained and kept open for business, and if the railroad company fails to maintain and keep the depot open for business it is liable to the grantor in the deed for damages sustained by him by reason of such failure. *G., C. & S. F. Ry. Co. v. Martin* (Civ. App.) 86 S. W. 28.

**Damages from proximity of railroad.**—See, also, notes at end of Chapter 8 of this Title. The mere location of railroad tracks and stations near the property of others, which results in discomfort by reason of noise, smoke, etc., but which causes no depreciation of value of the property, gives no right of action against the railroad company. *St. Louis S. W. Ry. Co. v. Shaw*, 99 T. 559, 92 S. W. 30, 6 L. R. A. (N. S.) 245, 122 Am. St. Rep. 663.

**Taxes to pay railroad subsidies.**—See Chapter 18 of Title 126.

**Art. 6551. [4493] Subsequent survey of each twenty-five miles of road.**—Every railroad company organized under this title shall, on the completion of the first twenty-five miles of its roadbed, make a survey of the next twenty-five miles, and of each subsequent twenty-five miles as the preceding twenty-five miles shall be completed, and every subsequent twenty-five miles shall be controlled by the provisions applicable to the first twenty-five miles of the road. [Id.]

Cited, *Ft. Worth & D. C. Ry. Co. v. Mapes* (Civ. App.) 156 S. W. 528.

**Art. 6552. [4494] Trains to be regular, and notice to be given.**—Every such corporation shall start and run their cars for the transportation of passengers and property at regular times to be fixed by public notice, and shall furnish sufficient accommodations for the transportation of all such passengers and property as shall, with a reasonable time previous thereto, offer or be offered for transportation at the place of starting and at junctions of other roads and at sidings and stopping places established for receiving and discharging way passengers and freights, and shall take, transport and discharge such passengers and property at, from, and to such places, on the due payment of the tolls, freight or fare legally authorized therefor. Failure on the part of rail-

road companies to comply with the requirements of this article shall be deemed an abuse of their rights and privileges and subject to regulation and correction by the railroad commission. [P. D. 4893. Amended Acts 1903, 1 S. S., p. 21.]

**Right to fix schedules.**—See, also, Art. 6543.

A railroad has the right to adopt reasonable regulations with reference to the time of starting and running its trains for the transportation of passengers, the time to be fixed by public notice, and shall take passengers from and to places named. Where a party insists in traveling on the trains, after the schedule has been published, to a point where he is informed the train will not stop, he cannot recover damages for being carried beyond that point. *Beauchamp v. Railway Co.*, 56 T. 239; *Railway Co. v. White*, 4 App. C. C. § 260, 17 S. W. 419.

**Rights of and duties toward passengers.**—See, also, Carriers, Title 20.

That a belated train arrived earlier than had been represented by the defendant's station agent to plaintiff prior to plaintiff's leaving the depot for breakfast held insufficient to raise an inference of negligence from the agent's failure to delay the train, that plaintiff might take passage thereon. *Southern Kansas Ry. Co. of Texas v. Emmett* (Civ. App.) 139 S. W. 44.

**Delay in transporting freight.**—See, also, notes under Art. 6610.

This article provides also for the transportation of property at regular times, and it is held that the shipper who is ready to pay freight can recover damages resulting from delay in transporting freight. *Railway Co. v. Schmidt* (Civ. App.) 25 S. W. 452.

**Prepayment of freight and other conditions.**—Under this article and Art. 6554, making railroads liable for refusal to so transport, etc., a complaint in an action for wrongful delay in transportation, alleging that the freight charges were "paid or agreed to be paid when the shipment was tendered," did not sufficiently allege a payment. *Dorrance & Co. v. International & G. N. R. Co.*, 103 T. 200, 125 S. W. 561.

Under this article and Art. 6554, providing that on refusal so to transport any property, or to deliver the same at the regularly appointed time, the railroad shall pay to the party aggrieved all damages sustained thereby, with costs of suit, etc. Held, that the words on "the refusal," etc., "so to take," etc., refer to this article and mean in case of the refusal to take under the conditions prescribed in this article. *Id.*

This article does not contemplate a prepayment of the freight, and hence there was a payment when, on the making out of the bill of lading, a draft was given the railroad for the freight, and was forwarded with the bill of lading and paid on presentation. *Id.*

Where a carrier did not require prepayment of freight charges as authorized by this article, it waived such prepayment, so that failure to prepay was not a defense to an action under Art. 6554, imposing a penalty for delay in transportation. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

**Liability for freight charges.**—In the absence of an agreement to the contrary, a consignor is generally responsible for the freight charges. *Keeling & Field v. Walter Conally & Co.* (Civ. App.) 157 S. W. 232.

**Actions for failure to transport.**—See notes under Art. 6554.

**Art. 6553. Train dispatcher, to maintain, and duties of.**—Every such railroad corporation operating trains in this state shall employ a competent train dispatcher whose duty it shall be to keep informed of the movement of all trains upon the lines of such railroad corporation. Said train dispatcher shall also keep all agents at stations having telegraph offices in or near them, informed of the movement of all passenger trains one hour prior to the time such passenger train or trains are due, according to the published schedule at such stations. And in the event any such passenger train is delayed for more than one hour, than the published schedule, then it shall be the duty of such train dispatcher to inform such local agents how late said train is and the last telegraph station passed. If such train dispatcher shall fail or refuse to furnish the information concerning the movement of trains to agents as herein required, then such dispatcher shall be deemed guilty of a misdemeanor, and upon conviction, shall be punished by a fine of not less than fifty nor more than two hundred dollars for each offense. [Acts 1903, 1 S. S., p. 21. Acts 1913, p. 318, sec. 1, amending Art. 6553, Rev. St. 1911.]

**Duties of dispatcher.**—It is the duty of the company to dispatch orders to avoid collision of trains. *Railway Co. v. Smith*, 76 T. 611, 13 S. W. 562, 18 Am. St. Rep. 78.

It is not error to instruct that a train dispatcher owes to those operating the company's trains the duty to use ordinary care to give such information as is necessary to the operation of the trains in a reasonably safe manner. *Houston & T. C. R. Co. v. Stuart* (Civ. App.) 48 S. W. 799.

The law does not require that the train dispatcher of a railroad shall give information necessary to enable employes to operate trains safely. *Houston & T. C. R. Co. v. Stewart*, 92 T. 540, 50 S. W. 333.

**Injuries to servants of railroad.**—See Art. 6648 and notes.

**Art. 6554. [4496] Refusal to transport passenger or property.**—In case of the refusal by such corporation or their agents so to take and transport any passenger or property, or to deliver the same, or either of

them, at the regular appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit; and in case of the transportation of property shall in addition pay to such party special damages at the rate of five per cent per month upon the value of the same at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for its transportation; provided, that in all suits against such corporation under this law the burden of proof shall be on such corporations to show that the delay was not negligent. [Acts 1887, p. 116.]

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|-----------------------------------------------------|----------------------------------------|
| 1. Constitutionality.                               | 11. Pleading—Petition.                 |
| 2. Sufficiency of title of act.                     | 12. — Answer.                          |
| 3. Not repealed.                                    | 13. Evidence.                          |
| 4. Nature and purpose.                              | 14. Measure of damages.                |
| 5. Construction.                                    | 15. — Passengers.                      |
| 6. Conditions to be performed by shipper.           | 16. — Live stock.                      |
| 7. Failure or refusal to furnish cars or transport. | 17. — Penalty.                         |
| 8. Delay in transportation.                         | 18. Other remedies.                    |
| 9. — Burden of proof.                               | 19. Duty to lessen injury.             |
| 10. Excuses for delay or failure to transport.      | 20. Conversion of freight by railroad. |
|                                                     | 21. Information as to rates.           |

1. **Constitutionality.**—This article does not amount to "cruel or unusual punishment" within the state and federal constitutions. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

This article is not in violation of Const. art. 16, § 11, providing that contracts for a greater rate of interest than 10 per cent. per annum shall be deemed usurious, since the constitution does not prohibit the legislature from enacting a statute allowing shippers to recover damages for negligent delay in the transportation of their property, even though the amount is fixed at five per cent. per month on the value of the property. *Id.*

Nor does it violate Const. U. S. Amend. 14, providing that no state shall deprive any person of life, liberty, or property without due process of law. *Id.*

Nor is it contrary to Const. U. S. Amend. 14, forbidding any state to make or enforce any law which shall abridge the privileges and immunities of citizens of the United States. *Id.*

This article does not violate Const. art. 1, § 13, declaring that excessive fines should not be imposed, nor cruel and unusual punishment inflicted. *Texas Cent. R. Co. v. Hannay-Frerichs Co.*, 104 T. 603, 142 S. W. 1163.

2. **Sufficiency of title of act.**—The title of the act of which this article is a part, "An act to regulate railroad companies," is sufficiently broad to enable the legislature thereunder to prescribe a penalty against railroad companies for delay in the transportation of property, and the article and the damages therein prescribed being germane to the bill, it was proper for the legislature to provide a penalty for its violation. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

3. **Not repealed.**—Arts. 6670, 6671, prohibit discrimination of traffic. Held, that the object of this article is to prevent negligent delay, and the others to prevent discrimination against a class of traffic, and there being no repugnancy between them, Arts. 6670, 6671, do not repeal this article. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

Art. 6670 provides that if any railroad shall charge or collect a greater or less compensation for any service rendered or to be rendered than it charges or collects from any other person for doing a like service it shall be deemed guilty of unjust discrimination, and Art. 6671 gives a right to recover a penalty and damages for a violation of the statute, the penalty being in a named sum, and Art. 6677 saves the rights of parties to recover under other provisions of the statute. Held, that this article is not repealed by implication by the other statutes, there being no conflict. *Texas Cent. R. Co. v. Hannay-Frerichs Co.*, 104 T. 602, 142 S. W. 1163.

4. **Nature and purpose.**—This article is in the nature of a police regulation, designed to enforce care on the part of railroad companies, and to prevent delay in the transportation of freight. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

5. **Construction.**—In construing this article the court should ascertain what the legislature intended by the language used therein, and so construe the statute as to carry out the intent of the legislature. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

6. **Conditions to be performed by shipper.**—If a railroad company refuses to furnish transportation to a shipper, he is not bound to prepare and offer his freight in order to be entitled to damages. *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

The words on "the refusal," etc., "so to take," etc., refer to Art. 6552, and mean in case of the refusal to take under the conditions prescribed in that article. *Dorrance & Co. v. International & G. N. R. Co.*, 103 T. 200, 125 S. W. 561.

To effectuate a contract of shipment of a corpse with a common carrier, where the body is held by an undertaker for undertaker charges, the person seeking to have the body shipped must satisfy such charges, and it is not the legal duty of the carrier, in anticipation of the shipment, to itself either pay or guarantee them for the shipper. *Pacific Express Co. v. Gathright* (Civ. App.) 130 S. W. 1035.

Where a carrier did not require prepayment of freight charges as authorized by Art. 6552 it waived such prepayment, so that failure to prepay was not a defense to

an action under this article for delay in transportation. *Texas Cent. R. Co. v. Hannay-Frerichs Co.*, 104 T. 603, 142 S. W. 1163.

7. **Failure or refusal to furnish cars or transport.**—See, also, notes under Art. 6678 et seq.

A railway company, failing to take and transport property in the order in which it is offered, is liable for damages resulting therefrom. *H. & T. C. Ry. Co. v. Smith*, 63 T. 322.

A railway company is liable for the damages resulting from failure to furnish cars for shipment of cattle according to contract. *Cross v. McFaden*, 1 C. A. 461, 20 S. W. 846; *Railway Co. v. Anderson*, 21 S. W. 691, 3 C. A. 8.

In case of refusal to take and transport property offered, the refusing corporation must pay party aggrieved all damages sustained thereby. *Red River, T. & S. Ry. Co. v. Eastin & Knox*, 39 C. A. 579, 88 S. W. 532.

8. **Delay in transportation.**—Though a railway company which receives cattle for transportation may not contract to carry them on a train devoted to that exclusive purpose, or at a designated rate of speed, the duty remains to carry them with reasonable dispatch. If in transporting the stock the cars can be stopped and started without doing it so abruptly as to throw the cattle down and injure them, it is the duty of the company to do so. *Railway Co. v. Ellison*, 70 T. 491, 7 S. W. 785.

This article and Art. 6552 are not applicable to an action for delay in delivering freight tendered the carrier in another state. *Missouri, K. & T. Ry. Co. of Texas v. Stark Grain Co.*, 103 T. 542, 131 S. W. 410.

9. — **Burden of proof.**—In an action against a carrier under this article for delay in transportation, the burden was on defendant to show that the delay was not negligent. *Texas Cent. R. Co. v. Hannay-Frerichs Co.*, 104 T. 603, 142 S. W. 1163.

10. **Excuses for delay or failure to transport.**—When a carrier from an unexpected and unprecedented press of business is unable to comply with the requirements of this article, it will, in general, furnish a legal excuse for refusing to accept freight. *H. & T. C. R. Co. v. Smith*, 63 T. 323.

A railway company is not liable for any delay in shipment of goods caused solely by the lawless and irresistible violence of strikers. *Railway Co. v. Levy*, 4 App. C. C. § 9, 14 S. W. 1062; *Railway Co. v. Tisdale*, 74 T. 8, 11 S. W. 900, 4 L. R. A. 545.

A break in the railroad track, after a breach of a contract to receive and transport cattle, is not a defense in an action for damages. *Railway Co. v. McCorquodale*, 71 T. 41, 9 S. W. 80.

The plaintiff is not bound by an allegation as to the time when a quarantine went into effect, as the material inquiry was whether the railroads had time to transport the cattle from the time of tender to the time when the quarantine did take effect. *Purcell v. T. & P. R. Co.* (Civ. App.) 43 S. W. 836.

That a car offered by a connecting carrier to defendant for transportation was not suitable or the usual car in which freight was transported, though safe, was no defense to an action for a statutory penalty for such subsequent carrier's delay in transportation. *Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 26 C. A. 531, 63 S. W. 1025.

The fact that a person is drunk and staggering furnishes no excuse for a railroad company to refuse to receive him as a passenger. But if he is so drunk as to be mentally and physically incapable of appreciating and avoiding danger, the company might refuse to receive him unattended. *Paris & G. N. Ry. Co. v. Robinson*, 53 C. A. 12, 114 S. W. 661.

Where nearly all live stock shipments were received each year by a railroad company at the same season of the year as the shipment of plaintiff, a custom of shippers to give ten or twenty days' prior notice to furnish cars did not excuse a delay of a connecting carrier of four days in the shipment of plaintiff's stock; plaintiff being under no duty to give such notice. *Texas & P. Ry. Co. v. Leslie* (Civ. App.) 131 S. W. 824.

That shippers were notified by a carrier of conditions which prevented delivery of shipments in the usual time was no defense to an action for the penalty for delay in transportation under this article, as a knowledge of the existence of the facts would not be sufficient to charge the shipper with notice of their effect on the carrier. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

11. **Pleading—Petition.**—In a suit against a railway company for continuous withholding and refusal to furnish facilities for shipping lumber, an allegation setting forth the points to which it was desired to ship lumber, and a tender and refusal of the freight to such point, need not be averred. *Railway Co. v. Morris*, 68 T. 49, 3 S. W. 457.

A complaint in an action for wrongful delay in transportation, alleging that the freight charges were "paid or agreed to be paid when the shipment was tendered," did not sufficiently allege a payment. *Dorrance & Co. v. International & G. N. R. Co.*, 103 T. 200, 125 S. W. 561.

The complaint in an action to recover 5 per cent. per month as damages must allege the value of the property, and a petition having annexed certain exhibits of the number and bales of cotton shipped, but not alleging that this was the true value, and further terming the value therein set down as "the invoice value," was insufficient. *Id.*

In order to recover under this article it is necessary to aver not only a negligent delay, but the specific time of shipment and the value of the goods, and these cannot be supplied by statements in exhibits attached to the petition as to the dates of the bills of lading and the invoice value of the cotton. *Dorrance & Co. v. International & G. N. R. Co.*, 53 Civ. App. 460, 126 S. W. 694.

In order to recover for delay in transportation of cotton by an initial and a connecting carrier, under this article the petition should allege the dates the shipments were delivered to the connecting carrier, since otherwise there was nothing to show negligence of the initial carrier between the time it received the shipment until delivery to the connecting line, or of the connecting carrier between the time it received the shipments and delivered them to the consignee. *Id.*

This article imposes a penalty, and a petition thereunder, failing to allege the value of the property at the time it should have been shipped, or to charge that any

delay in delivery at destination resulted, is insufficient. *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 149 S. W. 753.

A petition to recover this penalty must allege all the statutory requirements with the same certainty as is required in an indictment. *Id.*

12. — **Answer.**—In an action under this article to recover the penalty for delay in the transportation of freight, an answer alleging that there was great prosperity in the country at the time, and that trade conditions demanded a larger number of cars than had ever been required, was demurrable, in the absence of any allegation of how the ability of defendant to move freight was thereby affected. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

13. **Evidence.**—In an action under this article to recover the penalty for delay in transporting goods, evidence of any circumstances which contributed to produce the delay in spite of ordinary diligence on the part of the carrier was admissible to disprove negligence. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

14. **Measure of damages.**—If a company wrongfully refuses to take produce offered for shipment, it is the duty of the owner to take care of and protect his property thus delayed, and for the expenses thus incurred the company is liable. It is also liable for the loss occasioned by the delay in getting the produce to its market place of destination, to be estimated by ascertaining its price there, when it should have arrived, had it been taken when offered, and its price at the time when it did arrive. *H. & T. C. R. Co. v. Smith*, 63 T. 322.

A carrier's failure to transport and deliver property within a reasonable time is a breach of contract and not a conversion of the goods, and the owner cannot therefore refuse to receive them on account of the delay, and recover their full value, unless the delay or negligence results in the loss of the goods or destroys their full value. *G., H. & S. A. R. R. Co. v. Watson*, 1 App. C. C. § 815.

Where there is unreasonable delay in the transportation of articles, the measure of damages is the difference in the market value of the article at the time and place it should have been delivered. *Mo. P. R. Co. v. White*, 3 App. C. C. § 160. Citing *G., H. & S. A. R. R. Co. v. Watson*, 1 App. C. C. § 813; *Railway Co. v. Byers* (Civ. App.) 35 S. W. 1082.

In an action against a railroad company for damages and for the penalty prescribed by this article for negligent delay in transporting cotton, where plaintiff alleged the value of the cotton and that it was detained beyond the time reasonably necessary for its transportation, they were entitled to recover six per cent. per annum interest on its value for the time it was so delayed as actual damages, and in addition thereto five per cent. per month as special damages for its negligent detention. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

15. — **Passengers.**—In case of failure to transport passengers in accordance with contract, damages may include mental suffering. *Railway Co. v. Berry*, 4 App. C. C. § 166, 15 S. W. 48.

The breach of a drover's return passage, occurring on a line on the route not bound by a limited liability contract, entitles the holder of such ticket to actual damages—fare, hotel expenses and loss of time; damages for mental suffering not allowed. *Railway Co. v. Campbell*, 1 C. A. 509, 20 S. W. 845.

16. — **Live stock.**—In cases of shipping of live animals, the loss for negligent delay may include not only such as arises from a fall in the market, but shrinkage or injury to the animals occasioned by detention and care and expense bestowed upon them. *G., H. & S. A. R. R. Co. v. Stovall*, 3 App. C. C. § 251.

Measure of damages for delay in the transportation of cattle is the deterioration in the value of the cattle from shrinkage and loss of weight. *Railway Co. v. Hume*, 24 S. W. 915, 6 C. A. 653. See *Railway Co. v. Ritchie* (Civ. App.) 26 S. W. 840; *Railway Co. v. Startz* (Civ. App.) 33 S. W. 575.

The measure of damages for a carrier's failure to furnish cars for the transportation of live stock is the difference between the market value at the destination to which the cattle were to be carried at the time they would have arrived if the carrier had furnished cars, and their value at the same time at the place from which they were to be shipped, less the freight, though the shipper treated the carrier's obligation to furnish cars as at an end by selling his cattle, and though the breach complained of was of the carrier's common-law, instead of contract, duty. *Southern Kansas Ry. Co. v. O'Loughlin Land & Cattle Co.* (Civ. App.) 127 S. W. 568.

17. — **Penalty.**—A contention that the statute implied that other damages accrued and that the 5 per cent. was to be given only "in addition" to other damages was without merit. *Texas Cent. R. Co. v. Hannay-Frerichs Co.*, 104 T. 603, 142 S. W. 1163.

18. **Other remedies.**—Construing Art. 709 and this article, each prescribes a penalty for the same act—the former being applicable to all carriers, and the latter to railway companies only. The intention in the amended Art. 6554 was to make a distinction as to railway companies, and it seems that the latter statute was intended to cover the whole field as to railway companies, and to lay down the only rule for a recovery against them for the particular wrongs it points out. *Railway Co. v. Kay*, 85 T. 558, 22 S. W. 665.

No matter whether the commission act repeats this article or not, or whether the penalty fixed by the commission law is merely cumulative of the penalty fixed by it, a party has the right to recover the penalty provided in Art. 6671. *G., C. & S. F. Ry. Co. v. Lone Star Salt Co.* (Civ. App.) 63 S. W. 1027.

19. **Duty to lessen injury.**—A shipper is not required to employ another to transport freight to lessen the injury resulting from breach of contract. *Railway Co. v. Hodge*, 10 C. A. 543, 30 S. W. 829.

20. **Conversion of freight by railroad.**—This article does not apply when the case is one not of negligent detention, but of conversion. Where freight is sold not in accordance with Arts. 726 and 727, it is a conversion and the measure of damages is its value at the time, with legal interest and costs of suit, and the greater damage by way of penalty is not permissible, unless clearly authorized by statute. *M., K. & T. Ry. Co. v. Rines & Co.*, 37 C. A. 618, 84 S. W. 1093.



21. **Information as to rates.**—Where the complaint, in an action to recover the difference between the rate stated by the initial carrier for a through interstate shipment and the authorized published rate which he was required to pay, did not show any disregard of his instructions in the matter of routing, or any refusal to transport the shipment by the route carrying the lowest rate, and it is undisputed that he chose and directed the route, and the shipment went according to the route so chosen, the action is not one for damages for refusal of the initial carrier to transport the shipment over the least expensive route, but for damages for failure of the initial carrier to give plaintiff correct information in regard to the rate. *Texas & P. Ry. Co. v. Leslie* (Civ. App.) 131 S. W. 824.

**Art. 6555. [4502a] Double-decked cars for sheep, etc.**—All railroad companies operating any railroad, or any part thereof, within the limits of this state, are required to provide cars with double decks for the shipment of sheep, goats, hogs and calves; the said cars must be in every way as large as those now in use upon the respective roads of this state; the distance between the floor and the second deck shall be the same as the distance between said second deck and the roof; the floor of said second deck shall be so constructed as to protect the animals beneath; and said cars must be furnished by the railroad company to any person who shall offer to ship at one time hogs, sheep, goats, or calves, in carload lots. [Acts 1887, p. 57, sec. 1; Sen. Jour. 1895, p. 483, No. 88.]

**Demand will be implied.**—A demand by the shipper of such animals for a double-deck car will be implied. *Ft. Worth & R. G. Ry. Co. v. Starr* (Civ. App.) 141 S. W. 1084.  
**Actions for the penalty for failure to furnish.**—See notes under Art. 6556.

**Art. 6556. [4502b] Rates of freight; penalty.**—It shall not be lawful for any railroad company to charge more for shipping a double-decked carload of sheep, goats, hogs, or calves than is charged for shipping a carload of other cattle or horses the same distance, and in the same direction; and any railroad company that shall fail or refuse to furnish double-decked cars of the dimensions prescribed in the preceding article to any person who may wish to ship as much as a double-decked carload of sheep, hogs, goats, or calves, or shall charge more for shipping a double-decked carload of sheep, hogs, goats, or calves, than for shipping a carload of other cattle or horses for the same distance and in the same direction, shall be liable to pay to the owner or shipper of said sheep, hogs, goats, or calves, the sum of five hundred dollars as liquidated damages, to be recovered in any court of competent jurisdiction; provided, that if any railroad companies shall transport sheep, hogs, goats, and calves, on single-decked cars at one-half the price per carload charged for shipping horses, or other cattle, then the penalties prescribed in this article for failure to provide double-decked cars shall be inoperative. [Id. sec. 2.]

**Demand implied.**—Under this and the preceding article a demand by the shipper of sheep, goats, hogs or calves for a double-deck car will be implied. *Ft. Worth & R. G. Ry. Co. v. Starr* (Civ. App.) 141 S. W. 1084.

**Right to recover penalty.**—A shipper of sheep, etc., has no actionable right to recover the penalty for failure to provide double-deck cars, unless he has been charged and required to pay a greater amount for his shipment in single-deck cars than one-half the price per car load charged for horses and other cattle. *Ft. Worth & R. G. Ry. Co. v. Starr* (Civ. App.) 141 S. W. 1084.

**Connecting carriers.**—A connecting carrier on being tendered single-deck cars of sheep is entitled to assume that the shipper desired the shipment to continue in the same cars in which the animals were loaded, and was not liable for continuing the shipment in such cars, in the absence of a request that they be changed to a double-deck car. *Ft. Worth & R. G. Ry. Co. v. Starr* (Civ. App.) 141 S. W. 1084.

Where an initial carrier refused to provide double-deck cars for the shipment of plaintiff's sheep, and the terminal carrier collected full rates for the transportation of the sheep in single-deck cars, the initial carrier was liable for the penalty, unless it sustained the burden of proof that such terminal carrier had no authority to act for it in collecting such rate. *Id.*

**Constitutionality of statute.**—*Sayles' Ann. Civ. St. Supp. 1897-1904, arts. 4502c-4502e*, providing for penalties against railroads for each day freight is held after payment or tender of freight charges, or holding freight for collection of excess of freight thereon, is in conflict with Act Cong. Feb. 4, 1887, c. 104, 24 Stat. 379 (U. S. Comp. St. 1901, p. 3154), regulating interstate commerce, and as to interstate shipments of freight is void. *Trinity & B. V. Ry. Co. v. Geppert* (Civ. App.) 135 S. W. 164.

**Art. 6557. Shall not collect more than specified in the bill of lading.**—It shall be unlawful for any railroad company in this state, its officers, agents or employes, to charge and collect, or to endeavor to charge and

collect, from the owner, agent or consignee of any freight, goods, wares and merchandise, of any kind or character whatsoever, a greater sum for transporting said freight, goods, wares and merchandise than is specified in the bill of lading. [Acts 1899, p. 70.]

**Art. 6558. Freight to be delivered on payment of charges.**—Any railroad company, its officers, agents or employes, having possession of any goods, wares and merchandise, of any kind or character whatsoever, shall deliver the same to the owner, his agent or consignee, upon payment of the freight charges, as shown by the bill of lading. [Id.]

**Demurrage charges.**—A consignee held liable on an implied contract to pay a carrier demurrage charges required to be paid to a connecting carrier for the release of the shipment. *Quannah, A. & P. Ry. Co. v. Drummond* (Civ. App.) 147 S. W. 728.

**Art. 6559. Penalty for refusal to deliver freight.**—Any railroad company, its officers, agents or employes that shall refuse to deliver to the owner, agent or consignee, any freight, goods, wares and merchandise, of any kind or character whatsoever, upon the payment, or tender of payment, of the freight charges due as shown by the bill of lading, the said railroad company shall be liable in damages to the owner of said freight, goods, wares and merchandise, to an amount equal to the amount of freight charges, for every day said freight, goods, wares and merchandise is held after payment, or tender of payment, of the charges due as shown by the bill of lading, to be recovered in any court of competent jurisdiction. [Id.]

**Art. 6560. [4503] Conductor, etc., shall wear badge.**—Every conductor, baggage master, engineer, brakeman, or other servant of such railroad corporation employed in a passenger train, or at stations for passengers, shall wear upon his hat or cap a badge which shall indicate his office and the initial letters of the style of the corporation by which he is employed. [P. D. 4891.]

**Art. 6561. [4504] Without badge shall not receive fare, etc.**—No conductor or collector without such badge shall demand or be entitled to receive from any passenger any fare, toll, ticket, or exercise any of the powers of his office, and no other of the said officers or servants, without such badge, shall have any authority to meddle or interfere with the passengers, their baggage or property. [Id.]

**Duty to procure ticket.**—See, also, Art. 707 et seq.

As to duty of passenger to secure tickets, see *Eddy v. Rowell* (Civ. App.) 26 S. W. 876.

**Unlawful act of conductor.**—As to liability of company for unlawful act of conductor, see *Southern Pac. Co. v. Kennedy*, 29 S. W. 394, 9 C. A. 232.

**Authority of brakeman.**—As to the authority of a brakeman. *Galaviz v. Railway Co.*, 15 C. A. 61, 38 S. W. 234.

**Art. 6562. [4505] Baggage shall be checked, etc.**—A check shall be affixed to every package or parcel of baggage when taken for transportation by the agent or servant of such corporation, and a duplicate thereof given to the passenger or person delivering the same on his behalf; and, if such check be refused on demand, the corporation shall pay to such passenger the sum of ten dollars, to be recovered in an action of debt; and, further, no fare or toll shall be collected or received from such passenger; and, if such passenger shall have paid his fare, the same shall be refunded by the conductor in charge of the train. [P. D. 4895.]

See notes under Art. 707.

**Art. 6563. [4506] Signs shall be erected at cross-roads, etc.**—Such corporations shall erect at all points where its road shall cross any first or second class public road, at a sufficient elevation from such public road to admit of the free passage of vehicles of every kind, a sign with large and distinct letters placed thereon, to give notice of the proximity of the railroad and warn persons of the necessity of looking out for the cars; and any company neglecting or refusing to erect such signs shall

be liable in damages for all injuries occurring to persons or property from such neglect or refusal. [P. D. 4890.]

**Accidents at crossings.**—See notes at end of Chapter 10 of this title.

— **Failure to provide signboards.**—Failure of defendant in providing signboards at crossings held not to render it liable for the person injured at such crossing. *Gulf, & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

**Art. 6564. [4507] Bell and steam whistle; duty as to.**—A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road, or stopped; and each locomotive engine approaching a place where two lines of railway cross each other, shall, before reaching such railway crossing, be brought to a full stop; and any engineer having charge of such engine, and neglecting to comply with any of the provisions of this article, shall be punished for such neglect as provided in the Penal Code; and the corporation operating such railway shall be liable for all damages which shall be sustained by any person by reason of any such neglect; provided, however, that the full stop at such crossings may be discontinued when the railroads crossing each other shall put into full operation at such crossing an interlocking switch and signal apparatus, and shall keep a flagman in attendance at such crossing. [Acts 1883, p. 28. Amend. 1893, p. 87.]

**When and where signals must be sounded—In general.**—The whistle must be blown at some point sufficiently near the crossing to be reasonably calculated to give warning to persons about to use the same; such point not to be nearer such crossing than 80 rods. *Railway Co. v. O'Neal*, 91 T. 671, 47 S. W. 95.

The signals required by statute relate to public crossings and not to passengers attempting to board a train at a station. *Gulf, C. & S. F. Ry. Co. v. Morgan*, 26 C. A. 378, 64 S. W. 691.

In order to comply with the statute the whistle must be blown at some point sufficiently near the crossing as to be reasonably calculated to give warning to people about to use such crossing, such point not to be nearer to such crossing than 80 rods. *Ft. Worth & R. G. Ry. Co. v. Greer*, 29 C. A. 561, 69 S. W. 422.

The whistle must be blown sufficiently near the crossing to give warning, but not nearer than 80 rods. *International & G. N. Ry. Co. v. Ives*, 31 C. A. 272, 71 S. W. 773.

This statute does not apply in a case where the train backed from a switch onto the main track at a point only about 150 yards from the crossing and rolled down to the crossing. *Texas & P. Ry. Co. v. Berry*, 32 C. A. 259, 72 S. W. 424.

The statute has no application to trains which are not approaching any crossing. *Houston & T. C. R. Co. v. Garcia* (Civ. App.) 90 S. W. 713.

In order to comply with the statute the whistle must be sounded at a point sufficiently near the crossing to be reasonably calculated to give warning to persons about to cross the same, such point being not nearer the crossing than 80 rods. *Missouri, K. & T. Ry. Co. of Texas v. Saunders* (Civ. App.) 103 S. W. 457.

Where a charge precludes a finding of negligence for failure to blow the whistle at a distance greater than 80 rods from the crossing, and which authorizes the inference of negligence in event of a failure to blow the whistle when within 440 yards of the crossing, it is so erroneous as to require reversal. *Texas & P. Ry. Co. v. Stoker* (Civ. App.) 103 S. W. 1184.

This article requires the operatives of an engine, when approaching a public road crossing, to ring the bell continuously for a distance of 80 rods from the crossing and until the engine crosses or stops, so that a charge to such effect is not error. *Galveston, H. & S. A. Ry. Co. v. Huttner* (Civ. App.) 131 S. W. 630.

This article only requires the whistle to be blown at such a point beyond 80 rods from the crossings as would give reasonable notice of the train's approach, and does not require it to be blown at any particular distance beyond such 80 rods. *Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 105 T. 404, 151 S. W. 289.

— **Engine starting less than 80 rods from crossing.**—It is not required to ring the bell or blow the whistle on starting at a railway crossing. *Railway Co. v. Brin*, 77 T. 174, 13 S. W. 886. It is not necessary to do both. *Railway Co. v. Kirschoffer* (Civ. App.) 24 S. W. 577.

When an engine has passed the crossing a distance less than 80 rods, on returning the bell must be rung while the engine is in motion within 80 rods of the crossing. *Railway Co. v. Bailey*, 83 T. 19, 18 S. W. 481.

The statute does not apply when the engine starts within 80 rods of the crossing. *Houston & T. C. R. Co. v. Patterson*, 20 C. A. 255, 48 S. W. 747.

This article requires the bell to be rung, though the train is within less than 80 rods of the crossing when it starts. *Ft. W. & R. G. Co. v. Greer*, 32 C. A. 606, 75 S. W. 552.

Where the point from which the locomotive starts in approaching a crossing is less than 80 rods, the duty to blow the whistle is not imposed, and a charge that a failure to blow whistle in such case is negligence is erroneous, and requires a reversal of the case. However, in view of the facts, it might have been proper for the trial court to have submitted to the jury the question as to whether the failure to blow the whistle was negligence or not. *G., C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 135.

Where the locomotive starts towards a crossing from a point less than 80 rods distant from the crossing, it is negligence not to ring the bell continuously until the crossing is passed. *Id.*

— **Public road.**—When a railroad company has for several years recognized and maintained a road crossing over its line of railway, as a crossing for the public, it is estopped from denying that it is a public road. *T. & P. R. R. Co. v. Anderson*, 2 App. C. C. § 204; *I. & G. N. R. R. Co. v. Jordan*, 1 App. C. C. § 862.

A railway company that constructs a crossing under an agreement with the landowner whose land it appropriates for its roadbed, which it recognizes and maintains as a road crossing for the public, is estopped from setting up in action against it, as a defense, that it is not a public road within the meaning of the statute. The power conferred on the county commissioners to lay out, establish and change public roads does not negative the existence of public roads otherwise established. The extent of the use of a road determines its character. One of the chief purposes of the statute in imposing duties on railway companies in running their trains across a public road was to protect human life. That policy attaches to the crossing of every road which is in fact public, and where the extent of travel makes it the duty of the owners of railway trains to look after the safety of those using the road as a highway. *Railway Co. v. Lee*, 70 T. 496, 7 S. W. 857.

Evidence held to sustain a finding that a road crossing a railroad was a public one. *Galveston, H. & S. A. Ry. Co. v. Eaten* (Civ. App.) 44 S. W. 562.

The provisions contained in this article apply to any public crossing whether in a city or in the country. *Railroad Co. v. Dalwigh* (Civ. App.) 48 S. W. 527.

**For whose benefit duty is imposed—In general.**—Evidence of failure of railroad company to give warning signals at crossing, and while passing through town, is admissible in action for personal injury received near crossing in town. *Texas & P. Ry. Co. v. Short* (Civ. App.) 58 S. W. 56.

Where plaintiff was injured by falling on a railroad trestle while running to save his infant son from being run over by an approaching train, not at a crossing, and plaintiff saw the danger before the train reached a crossing, it was error to charge that failure to perform the statutory duty of whistling and ringing the bell at crossings rendered the defendant liable. *San Antonio & A. P. Ry. Co. v. Gray*, 95 T. 424, 67 S. W. 763.

Where plaintiff was rightfully on defendant's track, within several hundred feet of a crossing, when run into by a train, and near enough to the crossing to have had the benefit of signals prescribed by statute, had they been given, the fact that he was not right on the crossing did not preclude his recovery. *Missouri, K. & T. Ry. Co. of Texas v. Taff*, 31 C. A. 657, 74 S. W. 89.

This article was intended not only to prevent collisions, but also to protect persons who might be lawfully at such crossings. *St. L. S. W. Ry. Co. v. Matthews*, 34 C. A. 302, 79 S. W. 73.

The duty of a railroad to give signals at a crossing is not owed to persons at other places along the track. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 451, 84 S. W. 1049.

This statute does not exclude from its protection persons traveling along a public highway at or near a railroad crossing who do not intend to use the crossing. It is not restricted to those who are about to use, or have just used the crossing. *St. L. S. W. Ry. Co. v. Kilman* (Civ. App.) 86 S. W. 1052.

A person walking on a railroad track between a whistling post and a public crossing held entitled to rely on the railroad company's giving statutory signals for such crossing. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

The statute construed, and held to provide for the protection of those using railroad crossings only. *Missouri, K. & T. Ry. Co. of Texas v. Saunders*, 101 T. 255, 106 S. W. 321, 14 L. R. A. (N. S.) 998, 16 Ann. Cas. 1107.

The law requires the railway company to give the signals as set out in this article, and the signals are intended to protect those who are approaching the crossing (and are in close proximity thereto) and those who have just crossed, as well as those who are crossing the same when the signals are given. In this case appellee was driving along a public highway close to the railroad towards the crossing and had passed the point eighty rods from the crossing, and the train came along behind him and gave no signal, frightened his horse so that he ran to, and over the crossing and appellee was injured on the crossing. *Texas Cent. Ry. Co. v. Horn*, 53 C. A. 35, 115 S. W. 913.

— **Railroad employés.**—A railroad track employé, injured within 220 yards of a whistling post and of a public crossing, held entitled to the benefit of statutory signals. *International & G. N. R. Co. v. Tisdale*, 39 C. A. 372, 87 S. W. 1063.

The statute is for the benefit of section men on the track, as well as for persons using the crossings. *Houston & T. C. R. Co. v. Burnet*, 49 C. A. 244, 108 S. W. 404.

— **Injuries to animals.**—See, also, notes under Art. 6603.

The statute applies to cases where stock is on public crossing. *Houston & T. C. R. Co. v. Red Cross Stock Farm*, 22 C. A. 114, 53 S. W. 834.

The statute applies to dumb animals running at large. *Texas & P. Ry. Co. v. Crutcher* (Civ. App.) 82 S. W. 341.

In an action for the death of a mare struck by defendant's train, the fact that the operatives of the train failed to sound the bell or blow the whistle for the crossing a short distance beyond the place of the accident is immaterial, and it was proper not to instruct on it, since the duty of giving these signals is imposed for the benefit of those who are using or about to use the crossing, and the question in this case being whether, in the exercise of ordinary care, the operatives of the train should have given the warning to have avoided injury to the mare. *Gulf, C. & S. F. Ry. Co. v. Bennett* (Civ. App.) 126 S. W. 607.

In an action against a railroad company for killing animals on its track, it is error to charge the law as laid down in this article, unless the cause of action sued on is based on injury occurring thereat, and where the evidence shows that animals were injured 250 to 350 yards from the east end of a depot, and the only public crossing in the vicinity was

west of the depot, it was error to instruct that failure to signal as provided by the statute was negligence as matter of law. *Texas Cent. R. Co. v. Mallard* (Civ. App.) 127 S. W. 1117.

— **Frightening teams.**—A railroad company is liable for injuries received through the frightening of a team caused by the failure of the engineer to ring the bell when approaching a crossing. *Railroad Co. v. Magee* (Civ. App.) 49 S. W. 156.

The law applies to cases of teams becoming frightened, as well as to cases of collision. *Missouri, K. & T. Ry. Co. of Texas v. Magee*, 92 T. 616, 50 S. W. 1013.

**City ordinances regarding signals.**—See, also, Art. 863.

A city ordinance may require that engine bells shall be rung while engines are moving within the city limits. *Railway Co. v. Calvert*, 11 C. A. 297, 32 S. W. 246.

A city ordinance prohibiting locomotive whistles from being sounded within 80 rods of a street crossing is void, because it cannot suspend a statute in that particular. *Curtis v. G., C. & S. F. Ry. Co.*, 26 C. A. 304, 63 S. W. 149.

**Accidents at crossings—In general.**—See notes at end of this chapter.

— **Failure to signal negligence per se.**—Negligence imputed to a railway company, when. *Railway Co. v. Wilson*, 60 T. 143.

The failure to ring a bell or blow a whistle on approaching the crossing of a public road is negligence per se. *T. & P. R. R. Co. v. Anderson*, 2 App. C. C. § 205; *Markham v. H. & T. C. R. R. Co.*, 1 App. C. C. § 81.

Failure of a railroad to observe, in operating its trains, statutory requirements, is per se negligence, but the questions whether there was such failure, and whether it was the proximate cause of an injury, are for the jury. *Galveston, H. & S. A. Ry. Co. v. Harris*, 22 C. A. 16, 53 S. W. 599.

In an action for negligently killing a man at a public crossing, a charge that failure to whistle at least 80 rods from the crossing, and in such close proximity to 80 rods that it would likely be heard at the crossing, was negligence, held error. *Missouri, K. & T. Ry. Co. of Texas v. Melugin* (Civ. App.) 63 S. W. 338.

Failure of servants of a railroad company to give signals at crossings, as required by the statute, is negligence per se as to animals running at large. *Texas & P. Ry. Co. v. Crutcher* (Civ. App.) 82 S. W. 341.

The failure to ring the bell as required by statute is negligence per se, whether it causes the injury or not, and an instruction to this effect is not error. *Galveston H. & S. A. Ry. Co. v. Vollrath*, 40 C. A. 46, 89 S. W. 282.

The failure of operatives in charge of a train to ring the bell or blow the whistle on approaching a crossing, if proximately causing an accident to a traveler on the highway, is negligence per se. *Johnson v. Texas & G. Ry. Co.*, 45 C. A. 146, 100 S. W. 206.

Under the statute, failure to whistle held negligence authorizing a recovery by one injured as a result thereof, in the absence of proof of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Saunders* (Civ. App.) 103 S. W. 457.

A failure to give the signals is by law made negligence with respect to those for whose protection the statute was designed. As to others the omission may or may not constitute negligence in fact; the question depending on the circumstances of the particular case and being one for the jury, and not for the court to determine. *Ft. Worth & D. C. Ry. Co. v. Poteet*, 53 C. A. 44, 115 S. W. 885.

While it is negligence as a matter of law for those in charge of a locomotive to fail to blow the whistle at a crossing, as required by this article, such negligence is not actionable, unless it was a proximate cause of injury. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 125 S. W. 340.

— **Duty of persons approaching crossing.**—See, also, notes at end of this chapter.

There is no statutory enactment or fixed rule of law prescribing what a person must do who approaches a railway crossing. If aware of it, he is held to use such precautions as a prudent man would resort to under similar circumstances. *Railway Co. v. Chapman*, 57 T. 82; *Railway Co. v. Lee*, 70 T. 501, 7 S. W. 857; *Railway Co. v. Anderson*, 76 T. 244, 13 S. W. 196.

Persons approaching railroad crossings should exercise due care to ascertain whether there are trains approaching. The measure of such care is that which would be exercised by a reasonably cautious and prudent person under like circumstances. *T. & P. R. R. Co. v. Anderson*, 2 App. C. C. § 207; *H. & T. C. R. R. Co. v. Lovett*, 1 App. C. C. § 137; *H. & T. C. R. R. Co. v. Wilson*, 60 T. 142.

One who knows he is approaching a railroad crossing and whose view of the track is unobstructed, so that he can see an approaching train in time to avoid injury from it, cannot, as matter of law, recover damages for injuries inflicted by the train in his effort to cross the track, even though the railway company may neglect to give the signals required by the statute in crossing the road. One approaching a railway track must look up and down the track, and a failure to do so is negligence. *Railway Co. v. Moore*, 4 App. C. C. § 214, 15 S. W. 714; *Railway Co. v. Bracken*, 59 T. 71; *Railway Co. v. Kutac*, 72 T. 643, 11 S. W. 127. See *Railway Co. v. Garteiser*, 29 S. W. 939, 9 C. A. 456, as to evidence.

Contributory negligence at crossings; crossing ahead of hand car; plaintiff not bound to anticipate an unusual occurrence, where he has reasonable time to pass, under ordinary circumstances. *Johnson v. Gulf, C. & S. F. Ry. Co.*, 2 C. A. 139, 21 S. W. 275.

Failure to give signals at crossing held not to relieve a person approaching it from exercising care. *Gulf, C. & S. F. Ry. Co. v. Hamilton*, 17 C. A. 76, 42 S. W. 358.

Where plaintiff was injured as a result of defendant's failure to give the signals mentioned in this article, a charge that "a failure to comply with such requirements as the statute says is negligence," is not on the weight of the evidence. There is no good reason why the court should not declare as negligence that which the law itself punishes as a crime. *M. K. & T. Ry. Co. v. Taff*, 31 C. A. 657, 74 S. W. 90.

Person crossing railroad track held not guilty of contributory negligence in law in relying on the performance by an approaching train of statutory duties as to speed, signals, etc. *St. Louis Southwestern Ry. Co. of Texas v. Matthews*, 34 C. A. 302, 79 S. W. 71.

Where the view of one approaching a railroad crossing was obstructed until he was within a very short distance of the crossing, he had a right to expect warning signals

from any locomotive that might be approaching. *St. Louis Southwestern Ry. Co. of Texas v. Shelton*, 52 C. A. 437, 115 S. W. 877.

— **Proximate cause.**—If the injured party had notice of the approach of a railway train from which injury resulted, the failure to ring the bell would be immaterial in an action for such injury. *H. & T. C. R. R. Co. v. Nixon*, 52 T. 19.

The failure to ring a bell or blow a whistle, which had nothing to do with causing the injury, cannot be considered in determining the liability of the company. *T. & P. R. R. Co. v. Wright*, 62 T. 515.

Refusal of instruction that failure to give signals was immaterial if person on the track knew of the approach of the train in time to avoid injury held error. *Chicago, R. I. & T. Ry. Co. v. Williams* (Civ. App.) 41 S. W. 501.

Where a train, carrying no headlight and without signaling, about dark approached a crossing, where tall weeds obscured the view from the road, and struck a passing wagon, the jury might find that the railroad's negligence was the proximate cause of the accident. *Galveston, H. & S. A. Ry. Co. v. Eaton* (Civ. App.) 44 S. W. 562.

Failure to sound whistle or ring bell on approaching crossing held not the proximate cause of injury to a team near the track. *Houston & T. C. R. Co. v. Carruth* (Civ. App.) 50 S. W. 1036.

A charge, in an action for injuries resulting from a fright caused by passing train at a public crossing, that plaintiff can recover if her fright ought to have been foreseen as a natural consequence of failure to give signals, held not objectionable. *St. Louis S. W. Ry. Co. of Texas v. Mitchell*, 25 C. A. 197, 60 S. W. 891.

Where plaintiff was injured in attempting to avoid collision with a switch engine approaching a crossing without warning, it was held that the negligence of defendant's employes was the proximate cause of the injury. *Houston & T. C. R. Co. v. Byrd* (Civ. App.) 61 S. W. 147.

Evidence in action for injuries at crossing held to show that the injury was due solely to defendant's neglect to blow the whistle or ring the bell. *Sherman, S. & S. Ry. Co. v. Eaves*, 25 C. A. 409, 61 S. W. 550.

Railroad, failing to give signals prescribed by statute, must not only show that noise made by train was sufficiently loud to warn injured party, but also that he actually heard the noise. *Missouri, K. & T. Ry. Co. of Texas v. Taff*, 31 C. A. 657, 74 S. W. 89.

If the failure to ring the bell or sound the whistle was the proximate cause of the injury, and one is not guilty of contributory negligence, he is entitled to recover. *McKerley v. Red River, T. & S. Ry. Co.* (Civ. App.) 85 S. W. 500.

A railroad company is not liable for injuries to a person driving over a railroad crossing merely because it failed to give the statutory signals, unless the person injured could have prevented the injury if the signals had been given. *Texas Cent. R. Co. v. Horn*, 53 C. A. 35, 115 S. W. 911.

Failure to blow the whistle is not actionable, unless it be the proximate cause of the injury. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 125 S. W. 340.

In an action against a railroad company for injuries at a crossing, where plaintiffs had knowledge that the train was approaching and attempted to cross, it was immaterial whether the whistle was blown or not. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 125 S. W. 933.

The failure of a railroad company's employes in charge of an engine approaching a highway crossing to give signals required by statute would be a proximate cause of a collision with a team at the crossing, the natural and probable consequence of such failure, even though the person injured were also guilty of negligence, proximately contributing to the injury. *Chicago, R. I. & G. Ry. Co. v. Coffee* (Civ. App.) 126 S. W. 638.

The failure to give statutory signals of the approach of a train to a crossing is not actionable negligence, where it is not the proximate cause of a collision with a team at the crossing. *Texas Midland R. R. v. McKissack Bros.* (Civ. App.) 152 S. W. 815.

— **Burden of proof.**—See note under Art. 3687, Rule 12.

— **Evidence.**—Evidence held to justify a charge as to a railroad's duty in ringing the bell when approaching a crossing. *Missouri, K. & T. Ry. Co. of Texas v. Magee*, 92 T. 616, 50 S. W. 1013.

In an action for injury at railroad crossing, evidence held to support a finding that a railway company's servants failed to give the signals required by statute. *Galveston, H. & S. A. Ry. Co. v. Tirres*, 33 C. A. 362, 76 S. W. 806.

In an action against a railroad for killing stock, evidence held insufficient to authorize an instruction on defendant's statutory duty to signal at a public crossing. *Houston, E. & W. T. Ry. Co. v. Wilson*, 37 C. A. 405, 84 S. W. 274.

— **Questions for jury.**—See Chapter 13 of Title 37.

— **Instructions.**—See Chapter 13 of Title 37.

**Crossing with another railroad.**—See, also, Art. 6704.

It is negligence not to bring an engine to a full stop before reaching the crossing at such distance therefrom as under the circumstances common prudence would dictate as necessary to avoid colliding. *Railway Co. v. Mackney*, 83 T. 410, 18 S. W. 949.

The requirement of a full stop applies only to crossings at grade. *Railway Co. v. Thomas*, 87 T. 282, 28 S. W. 343.

It is negligence for a train to approach a crossing, at which a train on an intersecting road is due, without giving a warning of its approach. *Missouri, K. & T. Ry. Co. of Texas v. Settle*, 19 C. A. 357, 47 S. W. 825.

One who is injured in attempting to alight from a train at a railroad crossing cannot complain that it is negligence for the company not to bring the train to a full stop, when the ticket on which he is riding calls for a station beyond the crossing. If he is hurt in a collision caused by failure to stop at such crossing he might complain. The statute is intended to prevent collisions at crossings of railroads. *Mercher v. T. M. Ry. Co.* (Civ. App.) 85 S. W. 469.

Train first arriving at crossing held to have precedence over trains subsequently arriving. *El Paso & S. W. R. Co. v. Polk*, 49 C. A. 269, 108 S. W. 761.

An employe of a railroad company in charge of a train about to cross the tracks of another company may presume that the employes of the latter company in control of an

approaching engine will obey the law, and stop before reaching the crossing. *El Paso & S. W. R. Co. v. Murtle*, 49 C. A. 273, 108 S. W. 998.

This law applies in a case where switch engines are operating as well as in other cases, and the law requires each locomotive engine approaching the crossing of another line to come to a full stop, whether there is present visible necessity for so doing or not. *El Paso & S. W. Ry. Co. v. Murtle*, 49 C. A. 273, 108 S. W. 1001.

**Negligent blowing of whistle.**—See, also, notes at end of this chapter.

The company is liable for damages caused by the negligent blowing of the whistle by which teams near the track are frightened. *Hargis v. Railway Co.*, 75 T. 19, 12 S. W. 953. See *Edwards v. Bonner*, 12 C. A. 236, 33 S. W. 764.

A continuous blowing of the whistle after the engineer was apprised of the fright of a team near by, endangering life, is negligence. *Railway Co. v. Box*, 81 T. 670, 17 S. W. 375.

A railroad company may be liable for frightening a horse by locomotive whistle for crossing, required by statute. *Gulf, C. & S. F. Ry. Co. v. Milner*, 28 C. A. 86, 66 S. W. 574.

That plaintiff had a license to place his team near a railroad station platform did not deprive the railroad company of its right to operate its locomotives in the usual manner, nor deprive it of the privilege of giving the necessary and customary signals. *Galveston, H. & S. A. Ry. Co. v. Graham* (Civ. App.) 101 S. W. 846.

**Injuries to servants of railroad.**—See Art. 6648 and notes.

**Art. 6565. Duty to equip with electric headlights.**—It shall be the duty of every railroad corporation, or receiver or lessee thereof, operating any line of railroad in this state, to equip all locomotive engines used in the transportation of trains over said railroad with electric headlights of not less than fifteen hundred candle power, measured without the aid of a reflector, or other headlights of not less than fifteen hundred candle power, measured without the aid of a reflector; provided, that this article shall not apply to locomotive engines regularly used in the switching of cars or trains. [Acts 1907, p. 54, sec. 1.]

**Injuries to employés.**—See Art. 6648 and notes.

**Art. 6566. Penalty for failure.**—Any railroad company or the receiver or lessee thereof, doing business in the state of Texas, which shall violate the provisions of the preceding article, shall be liable to the state of Texas for a penalty of not less than one hundred dollars nor more than one thousand dollars for each offense; and such penalties shall be recovered and suit brought in the name of the state of Texas, in a court of proper jurisdiction in Travis county, Texas, or in any county in or through which such line of railroad may run, by the attorney general, or by the county or district attorney in any county, in or through which such line of railroad may be operated; and such suits shall be subjected to the provisions of article 6673. [Id. sec. 2.]

**Art. 6567. Shall keep lighted from sunset to sunrise, except, etc.**—It shall be the duty of every railway corporation operating any line of railway in the state of Texas to place and maintain good and sufficient switch lights on all their main line switches connected with the main line, and to keep the same lighted from sunset until sunrise; provided, that this article shall not apply to railways which have all their locomotives equipped with electric headlights. [Acts 1905, p. 77, sec. 1.]

**Constitutionality.**—The legislature in the exercise of the police power of the state may regulate a railroad company's business, and may pass a law requiring them to place switch lights on all main line switches, and keep them lighted from sunset until sunrise. *Missouri, K. & T. Ry. Co. of Texas v. McDuffey*, 50 C. A. 202, 109 S. W. 1104.

This law held not to impair the obligation of contracts, which a railroad company might make with another company owning a switch, for its joint use by both companies, and for the maintenance and lighting of the switches by the owner. *Id.*

**Art. 6568. Shall place derailing switches on sidings, when, etc.**—It shall be the duty of every railway corporation operating any line of railway in the state of Texas to place and maintain good and safe derailing switches on all of their sidings connecting with the main line of such railway, and upon which sidings cars are left standing; provided, that no derailing switches shall be required where the siding connects with main line on an up grade in the direction of the main line of one-half of one per cent or over; provided, further, that no derailing switches shall be required on inside tracks at terminal points where regular switching crews are employed. [Id. sec. 2.]

**Art. 6568a. Derailing devices on repair tracks, etc., required.**—It shall be unlawful for any person, firm, corporation or receiver operating any railroad, machine shop or other concern engaged in repairing or manufacturing cars within this state to use any tracks not equipped with derailing devices upon which to repair or manufacture cars; such derailing devices to be provided with private locks, to be kept locked at all times when tracks are in use; provided, that nothing in this Act shall be construed as prohibiting temporary repairs to cars on tracks other than where cars are regularly repaired or manufactured. [Acts 1913, p. 334, sec. 1.]

**Art. 6569. Penalty.**—Any railway corporation which shall wilfully violate any of the provisions of the two preceding articles [6567, 6568] shall be liable to the state of Texas for a penalty of not less than one hundred dollars nor more than one thousand dollars for each offense; and such penalty shall be recovered and suits therefor be brought by the attorney general, or under his direction, in the name of the state of Texas, in Travis county, or in any county through which such railway may run or be operated; and such suits shall be subject to the provisions of article 6673; provided, the provisions of article 6567 shall not apply on railroad lines or divisions on which no trains are regularly run or operated at night. [Acts 1907, p. 54, sec. 3.]

**Art. 6570. [4508] Passenger trains, how formed.**—In forming a passenger train, baggage, or freight, or merchandise, or lumber cars shall not be placed in rear of passenger cars; and if they or any of them shall be so placed and any accident happen to life or limb, the officer or agent who so directed or knowingly suffered such arrangement and the conductor and engineer of the train shall each and all be held guilty of intentionally causing the injury, and be punished accordingly. [P. D. 4896.]

**Violation of statute as negligence.**—In action against railroad for injury to engineer in collision with forward section of his train, defendant held not liable for negligence in having a freight box car caboose on the rear of the forward section, in violation of statute. *Quinn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 84 S. W. 395.

**Art. 6571. [4517] Brakes and brakeman.**—Every such company shall have a good and sufficient brake upon the hindmost car on all trains transporting passengers and merchandise, and also permanently stationed there a trusty and faithful brakeman, under a penalty of not exceeding one hundred dollars for each offense, to be recovered by suit in the name of the state. [P. D. 4907.]

**Not applicable to passenger trains.**—This statute does not apply to trains carrying exclusively passengers, or in other words passenger trains. *State v. International & G. N. Ry. Co.*, 29 C. A. 149, 68 S. W. 534.

**Art. 6571a. Air brakes to be inspected by competent inspector, etc.; proviso.**—It shall be unlawful for any person, corporation or receiver to operate or cause to be operated any train, on any line of railroad in this state, without first having the air brakes and air brake attachments inspected and tested before leaving the division terminals for such trains, by a competent inspector, who shall have had at least three years' experience as a car inspector or car repairer. Provided that this Act shall not apply to tram roads engaged in hauling logs to any saw mill. [Acts 1911, p. 106, sec. 1.]

**Injuries to servants from defective appliances.**—See Art. 6648 and notes.

**Art. 6571b. Temporary inspector, when; not to apply to certain railroads.**—The provisions of this Act shall not apply in case of emergency where such companies cannot obtain the employes mentioned in this Act who have the qualifications prescribed by the provisions thereof; then such companies may employ temporary inspectors. Provided, the provisions of this Act do not apply to railroads under forty miles in length. [Id. sec. 2.]



**Art. 6572. Passenger trains without full crew, unlawful to run.**—It shall be unlawful for any railroad company, or receiver of any railroad company, doing business in the state of Texas, to run over its road, or part of its road, outside of the yard limits, any passenger train with less than a full passenger crew consisting of four persons, one engineer, one fireman, one conductor and one brakeman. [Acts 1909, p. 179, sec. 1.]

**Constitutionality.**—This law discussed and held to be constitutional. *M., K. & T. Ry. Co. v. State* (Civ. App.) 109 S. W. 867.

This law is unconstitutional because its subject is not expressed in its title. *M., K. & T. Ry. Co. v. State*, 102 T. 153, 113 S. W. 917.

**Art. 6573. Freight, etc., trains, without full crew, unlawful to run.**—It shall be unlawful for any railroad company, or receiver of any railroad company, doing business in the state of Texas, to run over its road, or part of its road, outside the yard limits, any freight train, gravel train or construction train with less than a full crew consisting of five persons, one engineer, one fireman, one conductor and two brakemen. [Id. sec. 2.]

**Authority of conductor.**—A conductor of a railroad train had no authority to employ a physician to attend a trespasser who had been run over by the train owing to his own negligence. *Wills v. International & G. N. R. Co.*, 41 C. A. 58, 92 S. W. 273.

**Art. 6574. Light engine without full crew, unlawful to run.**—It shall be unlawful for any railroad company, or receiver of any railroad company, doing business in the state of Texas, to run over its road, or part of its road, outside of the yard limits, any light engine without a full train crew consisting of three persons, one engineer, one fireman and one conductor; provided, that nothing in the two preceding articles shall be construed as applying in the case of disability of one or more of any train crew while out on the road between division terminals, or to switching crews in charge of yard engines, or which may be required to push trains out of yard limits. [Id. sec. 3.]

**Art. 6575. Penalty and venue of suits.**—Any railroad company, or any receiver of any railroad company, doing business in the state of Texas, which shall violate any of the provisions of the three preceding articles shall be liable to the state of Texas for a penalty of not less than one hundred dollars or more than one thousand dollars for each offense; and such penalty shall be recovered and suit brought in the name of the state of Texas in a court of proper jurisdiction in Travis county, Texas, or in any county in or through which such line of railroad may run, by the attorney general, or under his direction, or by the county or district attorney in any county [in], or through which such line of railroad may be operated; and such suits shall be subject to the provisions of article 6673. [Id. sec. 4.]

**Art. 6576. To what articles apply.**—The provisions of the four preceding articles shall not apply to or include any railroad company, or receiver or manager thereof, of any line of railroad in this state, less than twenty miles in length. [Id. sec. 4a.]

**Art. 6577. Certain kind of ash pans required.**—It shall be unlawful for any common carrier, engaged in moving commerce in the state of Texas by railroad, to use in moving such commerce in said state any locomotive not equipped with an ash pan which can be dumped or emptied and cleaned without the necessity of any employé going under such locomotive. [Acts 1909, p. 67, sec. 1.]

**Art. 6578. Penalty; evidence; venue of suits.**—Any such common carrier using any locomotive in violation of the provisions of the preceding article shall be liable to the state of Texas for a penalty of not less than one hundred dollars and of not more than one thousand dollars for each offense; and such penalty shall be recovered, and suit brought in the name of the state of Texas, in any court of proper jurisdiction in Travis county, Texas, or in any county into or through which such car-

rier may be operating a line of railroad, by the attorney general, or under his direction, or by the county or district attorney in any such county. The rules of evidence in suits arising under this article shall be the same as in ordinary civil actions; and the same compensation shall be allowed to the attorney bringing such suit as is provided in article 6673 of the Revised Statutes of the state of Texas. [Id. sec. 2.]

**Art. 6579. "Common carrier" defined.**—The term, "common carrier," as used in the two preceding articles, shall include the receiver or receivers, or other persons or corporations charged with the duty of managing and operating the business of a common carrier. [Id. sec. 3.]

**Art. 6580. Articles do not apply.**—Nothing contained in the three preceding articles shall apply to any locomotive upon which, by reason of the use of oil, electricity or other such agency, an ash pan is not necessary. [Id. sec. 4.]

**Art. 6581. Shall provide suitable places for employés to work.**—Every person, corporation, or receiver, engaged in constructing or repairing railroad cars, trucks or other railroad equipment, shall erect and maintain a building or shed at every station or other point where as many as five men are regularly employed on such repair work, the building or shed to cover a sufficient portion of its track so as to provide that all men regularly employed in the construction and repair of cars, trucks, or other railroad equipment shall be sheltered from rain and protected from other inclement weather. The provisions of this article shall not apply at points where less than five men are regularly employed in the repair service, nor at division terminals, or other points where it is necessary to make light repairs only on cars, nor to cars loaded with time or perishable freight, nor to cars when trains are being held for the movement of said cars. [Acts 1910, p. 123, sec. 1.]

**Art. 6582. Penalty.**—Any person, corporation, or receiver who shall violate the provisions of the foregoing article shall be liable to the state of Texas for a penalty in any sum not less than fifty dollars nor more than one hundred dollars, and each ten days of such failure or refusal to so comply shall be considered a separate infraction authorizing the recovery of a separate penalty; provided, however, that all persons, corporations, or receivers, affected by the preceding article, shall have until June 1, 1911, within which to comply with the provisions thereof. [Id. sec. 2.]

**Art. 6583. Suits; fees of attorneys.**—Suit for recovery of penalties hereunder shall be brought by the attorney general of this state or by the county or district attorney of the county in which suit is brought, and the county or district attorney, as the case may be, shall receive a fee of ten per cent upon each penalty recovered and collected by him, and said fee shall be over and above the fee allowed him by law at this time, and over and above the fees allowed under the general fee bill in force in this state. [Id. sec. 2.]

**Art. 6584. Employés limited to sixteen hours labor.**—It shall be unlawful for any railroad company, or receiver of any railroad company, operating any line of railroad in whole or in part in this state, or any officer, or agent of such railroad company or receiver to require or permit any conductor, engineer, fireman or brakeman to be or remain on duty for a longer period than sixteen consecutive hours; and whenever any such conductor, engineer, fireman or brakeman shall have been continuously on duty for sixteen hours, he shall be relieved and shall not be required or permitted again to go on duty until he has had at least ten consecutive hours off duty; and no such conductor, engineer, fireman or brakeman who has been on duty sixteen hours in the aggregate in any twenty-four hour period shall be required or permitted to continue or

again go on duty without having had at least eight consecutive hours off duty. [Acts 1909, p. 180, sec. 1.]

**Art. 6585. Penalties, suits for, venue, etc.**—Any railroad company, or receiver of any railroad, operating a line of railroad in whole or in part in this state, or any officer or agent of such railroad or receiver who shall violate any of the provisions of the preceding article shall be liable to a penalty of not to exceed five hundred dollars for each and every violation; and any such penalty shall be recovered and suit therefor shall be brought in the name of the state of Texas in any court having jurisdiction of the amount, in Travis county, or in any county into or through which said railroad may pass. Any suit or suits to recover a penalty or penalties for violating any of the provisions of the preceding article may be brought either by the attorney general, or under his direction, or by the county attorney or district attorney of any county or judicial district into or through which said railroad may pass, and such attorney bringing any such suit or suits shall be entitled to compensation of one-third of any penalty or penalties recovered therein. In all prosecutions under this and the preceding article against any railroad company, or receiver of any railroad company, such company or receiver shall be deemed to have had knowledge of all acts of all of its officers and agents; provided, that the provisions of this and the preceding article shall not apply in any case of casualty or unavoidable accident, or the act of God; nor where the delay was the result of a cause not known to the carrier or its officer or agent in charge of any conductor, engineer, fireman or brakeman at the time such conductor, engineer, fireman or brakeman left a terminal, and which act could not have been foreseen; provided, further, that the provisions of this and the preceding article shall not apply to crews of wrecking or relief trains. [Id. sec. 2.]

**Art. 6586. Railroad telegraph and telephone operators, eight hours a day work.**—It shall be unlawful for any person, corporation or association, operating a railroad within this state, to permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone under what is known and termed, "Block System," defined as follows: Reporting trains to another office or offices, or to a train dispatcher operating one or more trains under signals, and telegraph or telephone levermen who manipulate interlocking machines in railroad yards, or on main tracks out on the lines connecting side tracks or switches, or train dispatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines or trains on its railroad by the use of the telegraph or telephone, in dispatching or reporting trains, or receiving or transmitting train orders, as interpreted in this article, to be on duty for more than eight hours in any twenty-four consecutive hours; provided, that the provisions of this article shall not apply to railroad telegraph or telephone operators at stations where the services of only one operator is needed. [Acts 1907, p. 222, sec. 1.]

**Interstate commerce.**—This act is void as being in conflict with Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416, upon the same subject, though the act of the legislature only lessens the hours of labor prescribed by the act of congress. *State v. Texas & N. O. R. Co.* (Civ. App.) 124 S. W. 984.

Congress having passed an act (Act Cong. March 4, 1907, c. 2939, § 2, 34 Stat. 1416) prescribing the hours of labor of railroad telegraph operators engaged in interstate commerce, to take effect August 12, 1907, this act is not operative during the time intervening between the passage and the taking effect of the act of congress. *Id.*

**Art. 6587. Penalty, suit, and disposition of funds.**—Any violation of the preceding article by any person, corporation or association, shall subject him or it to a penalty of one hundred dollars for each violation thereof, to be recovered by an action of debt in the name of the state of Texas for the use of the state; said action to be instituted in any court of the state having appropriate jurisdiction; and the penalty, when

so recovered, shall be paid into the public school fund of the state of Texas. [Id. secs. 2, 4 and 5.]

**Art. 6588. [4518] Shall carry U. S. mails, and compensation therefor.**—Every such corporation shall, when applied to by the postmaster-general, convey the mail of the United States on its road or roads; and in case such corporation shall not agree as to the rate of transportation therefor, and as to the time, rate of speed, manner and condition of conveying the same, it shall be lawful for the governor to appoint three commissioners, who, or a majority of them, after fifteen days' notice in writing of the time and place of meeting, to the corporation, shall determine and fix the prices, terms and condition aforesaid; but such price shall not be less for conveying such mails in the regular passenger trains than the amount which such corporation would receive as freight on a like weight of merchandise transported in their merchandise trains, and a fair compensation for the postoffice car; and in case the postmaster-general shall require the mail to be carried at other hours, or at a higher speed than the passenger train be run at, the corporation shall furnish an extra train for the mail and be allowed an extra compensation for the expenses and wear and tear thereof, and for the services, to be fixed as aforesaid. [P. D. 4903.]

**Art. 6589. [4519] Station depots shall be erected, etc.**—Each and every railroad company is hereby required to erect at each and every depot, station or place established by such company for the reception and delivery of freight, suitable buildings or inclosures to protect produce, goods, wares and merchandise and freight of every description from damage by exposure to the weather, stock or otherwise; in default of which such railroad company shall be liable to the owner of such produce, goods, wares or merchandise for the amount of damages or loss sustained by reason of such improper exposure, together with all costs and expenses of recovering the same, including necessary attorney's fees. [P. D. 4923.]

Where depots must be built.—See, also, Art. 6654.

The railroad commission not only can require railroad companies to erect depots at places where stations are designated, but also require them to build depots at places where in the judgment of the commission it is proper for the roads to furnish station facilities. *Railroad Commission v. Chicago, R. I. & G. Ry.*, 102 T. 393, 117 S. W. 795.

The mere construction of a railroad with "starting points," establishes such points for the reception and delivery of freight and brings them within the language of this article and the railroad commission has the power to require the erection of suitable depot buildings at such places. *Id.*

**Cattle pens.**—The court very much doubts whether the language of this article admits of the construction that it requires railway companies to keep suitable pens for the shipment of cattle. On the contrary, the terms employed seem to limit the scope of the article to dead freight. *Ft. Worth & R. G. Ry. Co. v. Cage Cattle Co.* (Civ. App.) 95 S. W. 706.

A carrier contracting to transport and deliver live stock at the stockyards at the point of destination is not subject to the liability imposed by this article for failing to establish cattle pens at such point, since if it had provided pens there and had unloaded the stock its contract would not have been performed until a delivery in the stockyards. *Texas & P. Ry. Co. v. Isenhower* (Civ. App.) 131 S. W. 297.

**Facilities for watering stock.**—This article does not impose on a carrier the duty of equipping its cattle pens with facilities for watering stock preparatory to loading, and, in the absence of a statute requiring a carrier to water stock at stated intervals or designated places, the question whether its failure to do so is negligence is for the jury. *San Antonio & A. P. Ry. Co. v. Broad-Davis Cattle Co.* (Civ. App.) 140 S. W. 514.

**Toilets.**—A railroad company, not having constructed a passenger station building at a specified place as required by this article, could not by reason of its violation of such section be made liable for failure to comply with article 6592, requiring the construction of proper toilets in or near railroad passenger stations. *State v. Jasper & E. R. Co.* (Civ. App.) 154 S. W. 331.

**When responsibility ceases.**—The railroad is bound to tender stock at destination within a reasonable time and within reasonable hours, and the owner is not bound to receive his stock at 12 o'clock at night when he did not have with him the money with which to pay the freight, and did not know the location of the pens where he proposed to feed them and the company's liability as carrier did not cease when it unloaded the cattle and put them in its stock pens. *Houston & T. C. Ry. Co. v. Trammell*, 28 C. A. 312, 68 S. W. 716, 717.

**Art. 6590. [4520] No storage to be charged, except, etc.**—Railroad companies shall in no case be allowed to charge storage upon freight

received by them for delivery, unless the owner or consignee thereof neglect to remove it from the depot of the company within three days after notice of its reception; which notice may be given by posting the same on the depot door; and, after the expiration of such time, the company may remove and store said freight at the expense of the owner or consignee, and said freight shall be held liable for the freight and charges due thereon. [P. D. 4923.]

**Lien for charges—Stoppage in transitu.**—A railway company has a lien upon goods transported by it for freight charges, but an unpaid vendor's right of stoppage is higher in its nature than a carrier's lien for a general balance. Goods in transitu cannot be attached without the payment of freight charges, and the officer paying them is entitled to the carrier's lien. The right of stoppage is not divested, though the goods be levied on by execution or attachment at the suit of a general creditor of the vendee, provided the right be exercised before the transitus is at an end, and there has been a delivery of the goods, either actual or constructive, to the vendee. *Stuart v. Mau*, 2 App. C. C. §§ 784-787.

**Incorrect statement of charges in bill of lading.**—Carrier may maintain an action for excess of freight over charges shown by bill of lading, but he must deliver freight on tender of charges in the bill. *Railway Co. v. Carden* (Civ. App.) 26 S. W. 747.

**When responsibility as carrier ceases.**—A consignee failing to receive freight within the statutory time, the company's liability as a common carrier ceases, and its liability as a warehouseman attaches. *Railway Co. v. Hunt* (Civ. App.) 32 S. W. 549.

**Collection of charges after sale without notice.**—A carrier failing to comply with this article in regard to notice is not entitled to charges for storage of freight remaining unclaimed for three months, and then sold. *Gulf, C. & S. F. Ry. Co. v. Patten Mfg. Co.* (Civ. App.) 151 S. W. 1158.

**Art. 6591. [4521] Passenger depots opened, lighted, warmed, etc.; penalty for failure.**—Every railroad company doing business in this state shall keep its depots or passenger houses in this state lighted and warmed, and open to the ingress and egress of all passengers who are entitled to go therein, for a time not less than one hour before the arrival and after the departure of all trains carrying passengers on such railroad; and every such railroad company, for each failure or refusal to comply with the provisions of this article, shall forfeit and pay to the state of Texas the sum of fifty dollars, which may be sued for and recovered in the name of the state in any court of competent jurisdiction, and shall be liable to the party injured for all damages by reason of such failure. [Acts 1891, p. 29. Sen. Jour. 1895, No. 89, p. 483.]

See *Inman v. St. Louis S. W. R. Co.*, 14 C. A. 39, 37 S. W. 37.

**Lighting and heating depot, etc.**—Duty to keep lights at depots. *Rozwadofskie v. Railway Co.*, 20 S. W. 872, 1 C. A. 487; *Railway Co. v. Cooper*, 70 T. 67, 8 S. W. 68.

A carrier held not liable to plaintiff for failure to warm and open depot, where it did not appear that plaintiff would have used it. *Texas & P. Ry. Co. v. Moore* (Civ. App.) 41 S. W. 499.

Failure of a carrier to keep its ticket office open 30 minutes before the departure of a passenger train, as required by statute, is negligence per se. *International & G. N. R. Co. v. Lister* (Civ. App.) 72 S. W. 107.

Damages suffered by reason of exposure to inclement weather during such time as was reasonably necessary to enable passengers who had gotten off the train to secure accommodations were the proximate result of defendant's breach of duty, in not having its depot lighted, warmed and open, for which it was liable. *St. L. S. W. Ry. Co. v. Wallace*, 32 C. A. 312, 74 S. W. 581.

The duty of a railroad company to have its depot warmed as required by this article is absolute, and it cannot escape liability for injurious consequences resulting to one on account of violation of that duty, who waited in the depot for hours for a delayed train, and did not abandon his trip and go home. *St. L. S. W. Ry. Co. v. Lowe* (Civ. App.) 97 S. W. 1088.

If the depot was kept open for appellee for one hour before the arrival and departure of passenger trains on the day she was there to become a passenger, the duty imposed was discharged and no recovery can be had. *Texas Midland R. R. Co. v. Griggs* (Civ. App.) 106 S. W. 412.

The statute held not applicable to through passengers awaiting connections at junctions. *St. Louis Southwestern Ry. Co. of Texas v. Foster* (Civ. App.) 112 S. W. 797.

A railroad company is liable for damages growing out of sickness caused by failure to have its depot lighted and warmed and open for the benefit of passengers, the required length of time. *St. L. S. W. Ry. Co. v. Rumfield*, 55 C. A. 73, 118 S. W. 810.

Where an agent of a railroad forcing a woman to leave the waiting room at a depot while waiting there for a train was informed that she was in no condition to go out into the rain at night, he had notice of her condition resulting from her monthly sickness, and the railroad was liable for the injuries received by her in consequence of being forced to leave the room in the rain. *Texas Midland R. Co. v. Geraldton*, 103 T. 402, 128 S. W. 611, 29 L. R. A. (N. S.) 799, Ann. Cas. 1913A, 45, affirming judgment 54 C. A. 71, 117 S. W. 1004.

In an action for injuries to a passenger resulting from exposure in a cold depot while she was waiting for a train, held that the statute only required that the depots be lighted and warmed for a period not less than an hour before the actual arrival and departure of

passenger trains, and not for an hour before the time such trains are scheduled to arrive Southern Kansas Ry. Co. of Texas v. Caylor (Civ. App.) 135 S. W. 1087.

— **Common-law obligation.**—Irrespective of the statute it is the duty of a railroad company to provide suitable station to accommodate its passengers departing and arriving and the purpose of the statute is to fix a time that the stations should be warmed, lighted and kept open. International & G. N. Ry. Co. v. Pevy et al., 30 C. A. 460, 70 S. W. 779.

If the negligence of the railway company makes it necessary for a passenger to remain at the depot a longer time than named in the statute, it is the duty of the company so long as he is required to remain and the night is cold and inclement to keep its depot building warm and comfortable, and if it negligently fails in this it is liable for injuries proximately resulting therefrom. I. & G. N. Ry. Co. v. Doolan, 56 C. A. 503, 120 S. W. 1121, 1122.

A carrier's duty to keep its passenger station open and warm for a period longer than an hour before and an hour after the actual arrival and departure of trains, as provided by this article, to avoid liability to a passenger for injuries from exposure, depends solely on the carrier's common-law obligation to exercise due care for the safety and comfort of passengers. Southern Kansas Ry. Co. of Texas v. Caylor (Civ. App.) 135 S. W. 1087.

Where a petition in an action for injuries to a passenger by reason of the carrier's alleged failure to keep its waiting station warm only alleged that it was defendant's duty to keep its station lighted and warm for a time not less than an hour before the arrival and after the departure of all trains carrying passengers, as provided by this article, and charged a failure to keep the station warm for an hour prior to the time scheduled for the arrival of a train, but not for an hour prior to the actual arrival of the train plaintiff and his wife expected to take, but did not allege that there was any want of due care on the carrier's part to have and keep the depot warm, the petition did not allege a cause of action for breach of the carrier's common-law duty to exercise proper care for the safety and comfort of passengers. Id.

— **Contributory negligence.**—A passenger made sick by remaining in a cold waiting room after arrival at her destination was not chargeable with contributory negligence for remaining so long as was reasonably necessary. Texas Cent. R. Co. v. Perry (Civ. App.) 147 S. W. 305.

In an action by a passenger for injuries from exposure in a cold waiting room, an instruction that plaintiff could not recover if she was negligent in remaining in the room for several hours was properly refused, as she was entitled to remain for a reasonable time without being chargeable with negligence in so doing. Id.

A carrier could not escape liability for injuries to a passenger from exposure in a cold waiting room on her arrival at destination by showing that the whole or a part of the waiting room was so cold that it was contributory negligence for the passenger to remain there. Id.

Where some of the injuries sustained by a passenger from exposure in a cold waiting room were sustained before plaintiff could be chargeable with negligence in failing to leave the station and go to a hotel, her cause of action was not wholly barred on the ground of contributory negligence. Id.

A passenger made sick by remaining in a cold waiting room was not chargeable with contributory negligence for failure to call the station agent's attention to his breach of the duty imposed by this article, and of the common-law obligation to keep the room warm for a reasonable length of time, especially where the agent was at the station while she remained there. Id.

— **Lighting platform, etc.**—A railway company which leases or owns ground near its roadbed to be used by the lessee for hotel purposes is under no implied obligation to keep in repair or well lighted that portion of the passway beyond its platform leading from its roadbed to the hotel, and which is situated on the rented premises. Railway Co. v. Mangum, 68 T. 342, 4 S. W. 617.

Carrier held not liable to a passenger stepping through a hole in the part of the depot platform used, to his knowledge, exclusively for freight; he having gone there on a dark night to relieve himself. Houston, E. & W. T. Ry. Co. v. Grubbs, 23 C. A. 367, 67 S. W. 519.

Evidence in an action against a railroad company by a prospective passenger for an injury occasioned by falling at night into a hole in the depot grounds considered, and held not to show negligence in defendant in failing to keep its grounds lighted and in a safe condition. Davis v. Houston, E. & W. T. Ry. Co., 29 C. A. 42, 68 S. W. 733.

Where a passenger was directed to alight from a moving train at night, the railroad was negligent in not having the platform sufficiently lighted. Gulf, C. & S. F. Ry. Co. v. Shelton, 30 C. A. 72, 69 S. W. 653.

Railway companies are bound to use ordinary care to have their station platform sufficiently lighted to enable coming or departing passengers to board and to alight in reasonable safety to the person. Texas Cent. Ry. Co. v. Wheeler, 52 C. A. 603, 116 S. W. 88.

— **Injuries to licensees or trespassers.**—See, also, notes at end of this chapter.

One entering a depot waiting room for the purpose of taking a train is not a trespasser, and he may remain there until his train arrives, subject to the right of the railroad to close its building at such hour as its reasonable rules may require. Texas Midland R. Co. v. Geraldson, 103 T. 402, 123 S. W. 611, 29 L. R. A. (N. S.) 799, Ann. Cas. 1913A, 45, affirming judgment 54 C. A. 71, 117 S. W. 1004.

**Safe means of ingress and egress.**—A railroad company must provide means of access to and from its stations, and where said way is faulty in construction and repair, and a passenger is injured by reason thereof, he is entitled to recover. Farmer v. International & G. N. Ry. Co. (Civ. App.) 134 S. W. 356.

**Use of water in water cooler.**—A passenger awaiting a train has the right to assume that water in a cooler in a station is good to drink, in the absence of something to put him on notice that it is not. Trinity & B. V. Ry. Co. v. Smith (Civ. App.) 155 S. W. 361.

**False Imprisonment.**—In an action against a railroad company for damages for unlawfully locking plaintiff in a box car, where he had taken refuge from the rain because the depot was closed when he alighted from a train, and causing his arrest and imprisonment, a judgment of conviction on a plea of guilty entered by a justice without complaint or warrant was no defense to damages accruing prior to the judgment. *Texas & P. Ry. Co. v. Parker*, 29 C. A. 264, 68 S. W. 831; *Same v. Cope*, *Id.*

**Art. 6592. Water closets to be erected.**—Each railroad and railway corporation operating a line of railway in the state of Texas for the transportation of passengers thereon are required to construct and maintain, and keep in a reasonably clean and sanitary condition, suitable and separate water closets or privies for both male and female persons at each passenger station on its line of railway, either within its passenger depot or in connection therewith, or within a reasonable and convenient distance therefrom at such station for the accommodation of its passengers who are received and discharged from its cars thereat, and of its patrons and employes who have business with such railroads and corporations at such station. [Acts 1909, p. 175, sec. 1.]

Cited, *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223; *St. Louis S. W. Ry. Co. of Texas v. Griffin*, 154 S. W. 583.

**Constitutionality.**—This act is constitutional and the prescribed penalty for failing to comply with the law can be enforced. *Missouri, K. & T. Ry. Co. v. State* (Civ. App.) 97 S. W. 721.

This act violates the fourteenth amendment to the constitution of the United States in that it deprives a citizen of his property without due process of law and is therefore unconstitutional. *Missouri, K. & T. Ry. Co. v. State*, 100 T. 420, 100 S. W. 766.

The part of this law requiring railroad companies to keep existing water closets in a sanitary condition and well lighted at night is not unconstitutional and void. *Houston & T. C. Ry. Co. v. State* (Civ. App.) 103 S. W. 451, 452.

This act is unconstitutional because it fails to designate with sufficient certainty what is required of the railroad companies, and therefore fails to apprise them in advance what they must do in order to conform with the act. *State v. Texas & N. O. Ry. Co.* (Civ. App.) 103 S. W. 654.

This entire act is not unconstitutional. It can be enforced for a failure to keep an existing closet in a proper sanitary condition and properly lighted. *Houston & T. C. Ry. Co. v. State*, 101 T. 333, 107 S. W. 526.

This article, though not applying to receivers operating railroads, is not invalid as denying to railroad corporations the equal protection of the laws, because the act creates a class, and treats all within the class alike. *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223.

This article is not so indefinite and uncertain as to be incapable of being practically obeyed, so as to deprive railroad corporations of their property without due process of law. *Id.*

This act does not deny to railroad corporations the equal protection of the laws merely because it makes them liable for costs in civil or criminal prosecutions, while it exempts the state from such liability, since the proviso exempting the state from liability for costs adds nothing to the effect of the act; the state not being liable for costs even aside from the provision. *Id.*

This act is not invalid as denying to railroad corporations the equal protection of the laws, because it does not apply to individuals, copartnerships, associations, and trustees, since, as a practical matter, railroads are owned and operated by corporations, and the legislature may deal with practical conditions. *Id.*

Acts 31st Leg. c. 96, approved March 20, 1909, required all railroads within the state, within ninety days after the act took effect, to construct and maintain proper toilets in or reasonably near their passenger stations constructed and maintained within the state. The act was carried into this article, except that the words "within ninety days of the taking effect of this act" were omitted. Held, that the act having been in effect two years when the provision was embodied in this article, there was no necessity then for continuing the ninety-day provision, and that the article as contained in the statutes was therefore not violative of Const. U. S. Amend. 14, as depriving the railroads of their property without due process of law, because it did not afford the railroad companies a reasonable time in which to comply therewith. *State v. Jasper & E. R. Co.* (Civ. App.) 154 S. W. 331.

Acts 31st Leg. c. 96, § 3, exempting the state from liability for costs in suits under the act to enforce the penalty for failure to maintain and light water-closets at railroad depots, as required by sections 1 and 2, does not violate the provisions of the federal and state constitution relating to the equal protection of the law. *State v. Texas & P. Ry. Co.* (Sup.) 154 S. W. 1159.

This act does not violate the equality clause of Const. U. S. Amend. 14, even if it applies only to railway "corporations," because, theoretically, individuals, partnerships, etc., operating railroads are excluded from its operation, since railroads affected by the act are owned only by corporations; nor is the classification of the act unreasonable because it does not apply to receivers operating railroads. *Id.*

**Repeal of former statute.**—Acts 29th Leg. c. 133, requiring railroads to provide toilet rooms at stations, and providing a penalty for violations thereof, was, by implication, repealed by Acts 31st Leg. c. 96, relating to the same subject, the only change of the former by the latter act being in the length of time before and after the arrival of trains the room should be open and lighted, a reduction of the amount of penalty incurred for a violation of the act, and the date of the accrual of such penalty. *State v. Texas & N. O. R. Co.* (Civ. App.) 125 S. W. 53.

**Penal statute.**—This act is a penal statute, and the rules governing the construction of penal statutes are applicable. *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223.

**Receivers of railroads.**—This act cannot be construed to apply to receivers operating railroads. *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223.

**Lessee of railroad.**—This law applies to a lessee railway company as well as to the company owning the railroad, and the fact that a judgment has been obtained against the owner, will not bar a judgment against the lessee for failing to provide closets at the same station. The law applies to both companies operating a line of railway. *State v. Southern K. Ry. Co.* (Civ. App.) 99 S. W. 167.

**Where there is no depot.**—This act only requires the erection and maintenance of toilets by railroads at stations where it has constructed and maintains a building, commonly known as a "depot," for the accommodation and protection of passengers received and discharged thereat, and does not require such maintenance at way or flag stations, where no depot or building has been erected. *State v. Jasper & E. R. Co.* (Civ. App.) 154 S. W. 331.

**Application.**—The statute held to apply to a station where trains stop at night to leave passengers having tickets thereto, or by flagging. *San Antonio & A. P. Ry. Co. v. State*, 55 C. A. 452, 120 S. W. 1077.

**Pleading.**—Where, in an action by the state against a railroad company for failing to construct and maintain proper toilets in or near a passenger depot, as required by this article, the petition alleged that defendant established and had maintained for more than four years a depot or place for the discharging, receiving, etc., of both passengers and freight for hire at such place, and that during such time defendant had failed or refused to erect and maintain toilets in said depot, or within a reasonable and convenient distance therefrom, the petition sufficiently alleged that the railroad company maintained a building at such point for the accommodation and protection of passengers; the word "depot" being used in its ordinary sense to mean a building, "a railway station, a building for the accommodation and protection of railway passengers or freight." *State v. Jasper & E. R. Co.* (Civ. App.) 154 S. W. 331.

**Amount of penalty.**—The penalty prescribed in this act for failing to erect water closets is \$100 a week for each week the railroad company may fail to comply with the statute at any station in the county and not \$100 a week for each station it fails to comply with the statute in the county. That is, if there is a failure to comply at two stations in a county, the penalty is \$100 a week and not \$200 a week for the two. *Missouri, K. & T. Ry. Co. v. State* (Civ. App.) 97 S. W. 724, 725.

**Interest.**—A judgment imposed as a penalty for violating this statute does not draw interest. *Missouri, K. & T. Ry. Co. v. State* (Civ. App.) 97 S. W. 724, 725.

**Art. 6593. Separate closets, how constructed and maintained.**—Said railroads and corporations are hereby required to keep said water closets and depot grounds adjacent thereto well lighted at such hours in the night time as its passengers and patrons at such stations may have occasion to be at the same, either for the purpose of taking passage on its trains, or waiting for the arrival thereof, or after leaving the same for at least thirty minutes before the schedule time for the arrival of its said train and after the arrival thereof at said station; provided, that said railroad or incorporation shall not be required by the provisions hereof to keep said closets lighted at such stations where the said railroad does not receive and discharge thereat in the night time passengers on and from its cars. [Id. sec. 2.]

**Constitutionality and other matters relating to act.**—See notes under Art. 6592.

**Art. 6594. Penalties, and suits for.**—Any railroad or railway corporation which fails, neglects or refuses to comply with the provisions of the two preceding articles shall forfeit and pay to the state of Texas the sum of fifty dollars for each week it so fails and neglects. The county attorney of the county in which such station is located, and in case there is no such county attorney, then the attorney for the district including said county, shall, upon credible information furnished him, institute suit or suits in the name of the state of Texas against such defaulting railroad or railway corporation for the recovery of said penalties; and, in case of said recovery, the said attorney shall be entitled to one-fourth the amount thereof as commission for his said services, and the remainder thereof shall be paid into the road and bridge fund of said county; provided, that the state of Texas shall in no event be liable for any costs in suit authorized by this law to enforce its provisions. [Id. sec. 3.]

**Constitutionality and other matters relating to act.**—See notes under Art. 6592.

**Art. 6595. [4522] Switch cars shall be furnished.**—When a company constructs a switch on its road for the accommodation of freighters, they shall be bound to furnish a sufficient number of cars for the transportation of freight therefrom when requested so to do, and in de-



fault shall be subject to the same penalties as in other cases of neglect of the like character. [P. D. 4934.]

Cited, *City of Denison v. Denison & S. Ry. Co.*, 103 T. 344, 127 S. W. 804.

To what switches applicable.—Only switches at which the company has an agent are within the meaning of the statute, and the failure to furnish cars at a place where the company has no agent does not subject it to the penalties provided in Arts. 6678–6683. *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

**Art. 6596. [4523] Cattle-guards and stops at what places.**—Each and every railroad company, whose railway passes through a field or inclosure, is hereby required to place a good and sufficient cattle-guard or stop at the points of entering such field or inclosure, and keep them in good repair. [P. D. 4925.]

**Purpose of statute.**—The purpose of the statute relating to railroads erecting cattle guards held to include the protection of the owner of land against the escape of cattle. *Southwestern Telegraph & Telephone Co. v. Krause* (Civ. App.) 92 S. W. 431.

**Where cattle guards must be maintained.**—A company is not required to maintain a cattle guard at a place where its depot platform extends into a pasture, where it was constructed after the pasture was fenced. *Railway Co. v. Simonton*, 22 S. W. 285, 2 C. A. 558.

The company must place cattle guards at the entrance of every inclosure, and of course, at cross-fences, though both sides may be in use by the same person. The owner or occupant may turn his cattle into any of his fields at his pleasure, and is not guilty of contributory negligence although he knows the cattle guards leading into other fields are defective. He is not required to repair them, although he is permitted to do so at the expense of the company. Art. 6599; *St. Louis S. W. R. Co. v. Blackwell* (Civ. App.) 40 S. W. 860.

A railroad company, under the statute, is not required to construct cattle guards at a private crossing in an inclosure through which its right of way is fenced. *San Antonio & A. P. Ry. Co. v. Robinson*, 17 C. A. 400, 43 S. W. 76.

This statute applies to a large pasture as well as to a small field. *Railroad Co. v. Isaacs*, 20 C. A. 466, 49 S. W. 690.

That a railway company had acquired title to its right of way through plaintiff's land by warranty deed, and had fenced the same, did not exempt it from liability for damages for failure to erect and maintain cattle guards at the point where the railroad entered plaintiff's inclosure. *Missouri, K. & T. Ry. Co. of Texas v. Wetz*, 97 T. 581, 80 S. W. 988.

These articles (6596–6600) apply to a case where a railroad is constructed through an inclosure where the railroad company obtained title by conveyance to the land on which the railroad is constructed, instead of getting right of way by condemnation proceedings. *Id.*

The duty is imposed upon the railroad company to provide cattle guards or stops whether its right of way is fenced or not, and the company is liable for damages occasioned by failure to provide them, although its right of way is fenced. *M.; K. & T. Ry. Co. v. Wetz*, 38 C. A. 563, 87 S. W. 374, 375.

The failure of a railroad company to place cattle guards at the points where its track entered a pasture held a violation of the statute. *Southwestern Telegraph & Telephone Co. v. Krause* (Civ. App.) 92 S. W. 431.

This article and Arts. 6598, 6600, did not require a railroad company to place cattle guards at the entrance of a planked trestle at the edge of a switch yard connected with the station, beyond which the right of way was fenced on both sides to an unplanked trestle. *San Antonio & A. P. Ry. Co. v. Harrison* (Civ. App.) 146 S. W. 596.

Where a railroad company maintaining a track through a plantation fenced its right of way, and constructed cattle guards at the points of entry, and the owner subsequently inclosed the land and joined his fences to the right of way fences without intending to subdivide his land into separate fields, the track passed through a field within Arts. 6596–6598. *St. Louis Southwestern Ry. Co. of Texas v. Lee* (Civ. App.) 151 S. W. 331.

The word "field," in Arts. 6596–6598, means land inclosed by a fence which will prevent the ingress of live stock, and a railroad company need not provide cattle guards unless its track passes through an undivided field inclosed by the owner, as distinguished from separate fields so inclosed. *Id.*

**Liability for negligence respecting cattle guards.**—See notes under Art. 6600.

**Contributory negligence of owner.**—See notes under Art. 6599.

**Art. 6597. [4524] Same subject.**—In case an inclosure or field through which a railway passes shall be enlarged or extended, or the owner of the land over which a railway runs shall clear and open a field so as to embrace the track of a railway, such railroad company is hereby required to place good and sufficient cattle-guards or stops at the margins of such extended inclosures or fields, or such new fields and keep the same in repair.

**Where cattle-guards must be maintained.**—See notes under Art. 6596.

**Liability for negligence respecting cattle-guards.**—See notes under Art. 6600.

**Contributory negligence of owner.**—See notes under Art. 6599.

**Art. 6598. [4525] Character of cattle-guards and stops.**—Such cattle-guards or stops shall in all cases be so constructed and kept in repair as to protect such fields and inclosures from the depredations of stock of every description.

**Art. 6599. [4526] Owner may place and keep in repair cattle-guards and stops at cost of company, when.**—Should any such company fail to construct and keep in repair such cattle-guards and stops, the owner of such inclosure or field may have such cattle-guards and stops placed at the proper places and kept in repair, and may recover the costs thereof from such railroad company, unless it be shown that the enlargement or extension, as above provided, was made capriciously and with intent to annoy and molest such company. [P. D. 4925.]

Where cattle-guards must be maintained.—See notes under Art. 6596.

Liability for negligence respecting cattle-guards.—See notes under Art. 6600.

Contributory negligence of owner.—This article does not impose any duty upon the landowner. He may exercise his option without liability for contributory negligence in case of damage to his inclosure. *Railway Co. v. Young*, 60 T. 201; *Railway Co. v. Adams*, 63 T. 200; *Railway Co. v. Knoepfli*, 82 T. 270, 17 S. W. 1052.

When a railway acquires a right of way across lands, it has its option either to fence its right of way and pay for it, or rely on cattle-guards where it crosses an inclosure. If it relies on cattle-guards and so negligently constructs them that the crops of the landowner are destroyed by cattle, the company cannot shield itself from liability on the ground that the landowner was guilty of contributory negligence in not keeping up cattle-guards, or building a fence on both sides of the company's right of way. *H., E. & W. T. R. R. Co. v. Adams*, 63 T. 200; *T. & St. L. R. R. Co. v. Young*, 60 T. 201; *Railway Co. v. Searight*, 28 S. W. 39, 8 C. A. 593.

The owner or occupant may turn his cattle into any of his fields at his pleasure, and is not guilty of contributory negligence although he knows the cattle-guards leading into other fields are defective; he is not required to repair them, although he is permitted to do so at the expense of the company. *St. Louis S. W. R. Co. v. Blackwell (Civ. App.)* 40 S. W. 860.

An owner of property adjoining a railroad is not required to repair railroad cattle-guards to protect his property from cattle on the railroad's right of way. *Houston & T. C. R. Co. v. Dugger (Civ. App.)* 77 S. W. 1046.

In an action against a railroad company for damages to cotton by cattle entering plaintiff's cotton pen from the railroad's right of way, the owner of the cotton held not guilty of contributory negligence in failing to move the cotton or make the pen stock-proof. *Id.*

Owner of stock, injured on cattle-guard on railroad, held not guilty of contributory negligence. *Saine v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.)* 85 S. W. 487.

That the owner of a mule pastured the same in a field adjacent to a railroad with knowledge that a cattle-guard in a lane leading from the field was defective held not contributory negligence. *Texas & P. Ry. Co. v. Sproles*, 47 C. A. 294, 105 S. W. 521.

Where a railroad company failed to maintain cattle-guards at the points of entry into a field, the owner was not bound to minimize damage by fixing the cattle-guards and the right of way fence built by the company to exclude trespassing animals. *St. Louis Southwestern Ry. Co. of Texas v. Lee (Civ. App.)* 151 S. W. 331.

**Art. 6600. [4527] Liability of company for neglect to place and keep in repair cattle-guards and stops.**—Should any such company neglect to construct the proper cattle-guards and stops and keep the same in repair as required by law, such company shall be liable to the party injured by such neglect for all damages that may result from such neglect, to be recovered by suit in any court having jurisdiction. [*Id.*]

See *Railway Co. v. Yarbrough (Civ. App.)* 35 S. W. 422.

Where cattle-guards must be maintained.—See notes under Art. 6596.

Liability for negligence respecting cattle-guards—In general.—A railroad is responsible for damages resulting from the negligent construction of cattle-guards. *Railway Co. v. Adams*, 63 T. 200.

Under statute requiring company to construct and keep in repair cattle-guards at margins of inclosures intersected, owner of adjoining inclosures may recover for damages resulting from cattle escaping from one to another over defective guard. *St. Louis S. W. Ry. Co. of Texas v. Blackwell (Civ. App.)* 40 S. W. 860.

The railroad is not liable for damages other than those resulting proximately from the neglect to construct the cattle-guard, nor is it liable to party injured for damages done by himself to his own property unless there should arise a necessity, real or apparent, to injure his own property in order to prevent a greater loss. *Railroad Co. v. Isaacs*, 20 C. A. 466, 49 S. W. 690.

In an action for injuries to an animal found under a cattle-guard located as required by law, the location thereof could not be considered in determining whether the railroad was liable. *Houston & T. C. R. Co. v. White & Baskin*, 49 C. A. 582, 108 S. W. 971.

A railroad required to erect and maintain a cattle-guard held bound to exercise ordinary care to see that the guard did not become so defective that stock might fall into it. *Houston & T. C. R. Co. v. White & Baskin (Civ. App.)* 120 S. W. 947.

— Cause of injury.—A failure to construct a cattle-guard held not the proximate cause of the killing of stock by a train. *Southern Kansas Ry. Co. of Texas v. McKay (Civ. App.)* 47 S. W. 479.

Both the failure of a railway company to erect cattle-guards at the points where its track entered a pasture and the act of a telegraph company in cutting the fence inclosing the right of way held to operate to bring about a loss of cattle escaping from the pasture. *Southwestern Telegraph & Telephone Co. v. Krause (Civ. App.)* 92 S. W. 431.

— Excuses.—The duty of placing stock-guards, preserving or supplying fences, at least on the right of way, and protect the inclosure from injury in the construction of the

road, devolves upon the company, and the failure to perform that duty is not excused by the fact that its nonperformance resulted from the negligence of an independent contractor. *G., C. & S. F. R. R. Co. v. Flake*, 1 App. C. C. § 254.

— **Measure of damages.**—The inquiry as to value should be confined to the very time and place when and where the injury occurred, and it should not extend to the date of the maturity of the crops, nor to the place where it would usually find a market. *S. & E. T. R. R. Co. v. Joachimi*, 58 T. 456; *T. & P. R. R. Co. v. Bayliss*, 62 T. 571; *T. & St. L. R. R. Co. v. Young*, 60 T. 201.

When a crop has been wrongfully destroyed, the proper measure of damages is the value of the crop at the time and place of its destruction. *Railroad Co. v. Young*, 60 T. 201; *Railway Co. v. Bayliss*, 62 T. 570.

When, by the failure of a railway company to erect and keep in repair cattle-guards, the growing crops of the landowner are destroyed by cattle, the company is liable in damages for their value at the time of their destruction (*H., E. & W. T. R. R. Co. v. Adams*, 63 T. 200), and interest (*G., C. & S. F. R. R. Co. v. Holliday*, 65 T. 512).

Damages for injury to a growing crop is the actual value of so much thereof as was injured or destroyed at the time of such injury or destruction, with legal interest on the amount from that date. *Wamble v. Graves*, 1 App. C. C. § 482; *Mo. Pac. Ry. Co. v. Cox*, 2 App. C. C. § 288.

**Art. 6601. Johnson grass not permitted to go to seed on right of way.**—It shall be unlawful for any railroad or railway company or corporation doing business in this state to permit any Johnson grass or Russian thistle to mature or go to seed upon any right of way owned, leased or controlled by such railroad or railway company or corporation in this state. [Act 1901, p. 283.]

**Constitutionality.**—Laws 1901, c. 117, making it unlawful for a railway company to permit Johnson grass to go to seed upon its right of way, and authorizing the recovery of damages and a penalty by a civil suit, does not deny the equal protection of the laws guaranteed by Const. U. S. Amend. 14, § 1. *Missouri, K. & T. Ry. Co. of Texas v. Letot* (Civ. App.) 135 S. W. 656.

**Exclusive remedy.**—Aside from this act a railroad company is not liable for permitting Johnson grass or other noxious vegetation to grow on its right of way, where the same is spread by wind, water flowing in its natural course, or other natural causes. *Bangle v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 140 S. W. 374.

A railroad company would not be liable for failure to prevent Russian thistles from growing or going to seed on its right of way or for bringing them there, independent of this act, and hence the remedy given by the statute is exclusive. *Vance v. Southern Kansas Ry. of Texas* (Civ. App.) 152 S. W. 743.

**Actions to recover penalty or damages.**—See notes under Art. 6602.

**Art. 6602. Penalty and damages.**—If it shall appear upon the suit of any person owning, leasing or controlling land contiguous to the right of way of any such railroad or railway company or corporation that said railroad or railway company or corporation has permitted any Johnson grass or Russian thistle to mature or go to seed upon their right of way, such person so suing shall recover from such railroad or railway company or corporation the sum of twenty-five dollars, and any such additional sum as he may have been damaged by reason of such railroad or railway company or corporation permitting Johnson grass or Russian thistle to mature or go to seed upon their right of way; provided, any owner of land, or any person controlling land, contiguous to the right of way of any such railroad or railway company, who permits any Johnson grass or Russian thistle to mature or go to seed upon said land, shall have no right to recover from such railroad or railway company as provided for in this article. [Id.]

**Constitutionality.**—This article held constitutional. *International & G. N. R. Co. v. Shelton* (Civ. App.) 81 S. W. 794; *Missouri, K. & T. Ry. Co. v. May*, 194 U. S. 267, 24 Sup. Ct. 638, 48 L. Ed. 971.

The supreme court doubts the constitutionality of that part of the law which gives right of action for damages to owner of contiguous land, because the subject of damages is not mentioned in the caption. It does not decide the point because it is not specifically embraced in the certified question. *S. A. & A. P. Ry. Co. v. Burns*, 99 T. 154, 87 S. W. 1146.

So much of this act as authorizes a recovery of damages, must be declared void, unless we adopt the theory that the legislature intended the damages which might be recovered as part of the penalty, and this position is regarded as untenable. *Gulf, C. & S. F. Ry. Co. v. Stokes* (Civ. App.) 91 S. W. 329; *St. L. S. W. Ry. Co. v. Gentry*, 43 C. A. 299, 95 S. W. 74.

So much of this act as gives the right of action to the owner of land contiguous to the right of way of a railroad company is valid. The act contains but one subject and that is sufficiently expressed in the title. *Deoppenschmidt v. I. & G. N. Ry. Co.*, 100 T. 532, 101 S. W. 1081.

The statute imposing a penalty upon a railroad which allows Johnson grass or Russian thistle to go to seed on its right of way is not a violation of Const. U. S. Amend. 14, in denying such company the equal protection of the laws. *Missouri, K. & T. Ry. Co. of Texas v. Forrest* (Civ. App.) 148 S. W. 1176.

The statute does not violate Const. art. 1, §§ 19, 28, not taking the property of railroad companies without due process of law by reason of unjust discrimination. *Id.*

**More than one tract of land.**—If the company allows Johnson grass or Russian thistle to go to seed, the landowner may recover only one penalty for one contiguous tract of land, though it be subdivided and rented to numerous tenants; but, if the tracts of land are separated by some distance, he may recover a penalty for each tract. *Missouri, K. & T. Ry. Co. of Texas v. Forrest (Civ. App.) 148 S. W. 1176.*

**Permitting weeds to mature more than once.**—The owner of land damaged by a railroad company allowing Johnson grass to go to seed on its right of way can recover the penalty of \$25 for each year the company so allows the grass to go to seed. *G., C. & S. F. Ry. Co. v. Henderson, 38 C. A. 419, 86 S. W. 372.*

The owner of contiguous land can recover from a railway company who permits Johnson grass to go to seed on its right of way, a separate penalty for each specific act in permitting the grass to go to seed, that is to say the recovery of penalty for one act does not prevent recovery for subsequent acts. *I. & G. N. Ry. v. Voss, 49 C. A. 566, 109 S. W. 985.*

The railroad company is liable for the penalty each time Johnson grass is permitted to mature on its right of way. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280.*

**Contiguous land.**—In order to entitle an owner to recover damages from a railway company, it is not required that his land be contiguous to that part of the right of way on which the Johnson grass has been permitted to mature or go to seed; if the company has permitted the grass to mature or go to seed on any part of its right of way it violates the law, and if the owner's land is contiguous to the right of way, and as a result of the company permitting the grass to mature or go to seed the owner has suffered damage he can recover. *International & G. N. Ry. Co. v. Doeppenschmidt (Civ. App.) 120 S. W. 929.*

**Does not depend on negligence.**—The right to recover damages under this law does not depend upon the question of negligence of the railway company (except as to grass allowed to grow before the law went into effect), nor can a recovery be had if the plaintiff allowed Johnson grass to go to seed upon his own land. *St. L. S. W. Ry. Co. v. Terhune (Civ. App.) 81 S. W. 75.*

The right of an owner of land adjoining a railroad right of way to recover a penalty imposed on railroads for permitting Johnson grass or Russian thistles to go to seed on their rights of way does not depend on the railroad company's negligence. *International & G. N. R. Co. v. Shelton (Civ. App.) 81 S. W. 794.*

An action against a railroad for permitting Johnson grass to grow may be maintained under the statute, without showing negligence. *San Antonio & A. P. Ry. Co. v. Burns, 39 C. A. 32, 89 S. W. 21.*

One suing a railroad company for penalties and damages under the statute making it unlawful for a railroad company to permit Johnson grass to mature on its right of way need not allege or prove negligence. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280.*

**When action accrues.**—An action for the penalty accrues when the grass has been permitted to mature or go to seed but an action for damages accrues when the damage has been done to the owner's land by being infested with the Johnson grass, which may not be at the time when the grass matures or goes to seed on the right of way. *International & G. N. Ry. Co. v. Doppenschmidt (Civ. App.) 120 S. W. 929.*

**Owner permitting Johnson grass, etc., to mature on his land.**—An owner of land, who permits Johnson grass to go to seed upon his land, has no right of action against the railway company for permitting such grass to go to seed upon its right of way. *S. A. & A. P. Ry. Co. v. Burns, 99 T. 154, 87 S. W. 1146.*

A railroad company is not liable for allowing Johnson grass on its right of way, notwithstanding the adjoining owner permits grass communicated from the right of way to mature on his own premises. *San Antonio & A. P. Ry. Co. v. Burns, 39 C. A. 32, 89 S. W. 21.*

That plaintiff permitted Johnson grass to grow on his land held not to defeat recovery from defendant railroad company for negligence in constructing its road, whereby Johnson grass seed was washed on plaintiff's land. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280.*

An action against a railroad company for permitting Johnson grass to mature on its right of way in violation of the statute may be defeated by the company proving that plaintiff had permitted the grass to mature on his land during the time complained of. *Id.*

A landowner who permitted Russian thistles to go to seed on his land for any reason cannot recover damages from a railroad company for permitting thistles to grow on its right of way and be cast upon the adjoining land. *Vance v. Southern Kansas Ry. of Texas (Civ. App.) 152 S. W. 743.*

**Measure of damages.**—Measure of damages occasioned by permitting Johnson grass to go to seed and by washing the same on to the land of another determined. *Missouri, K. & T. Ry. Co. of Texas v. Malone (Civ. App.) 126 S. W. 936.*

Where land has been damaged by the spread of Johnson grass thereon in consequence of the act of a railroad company in diverting surface water from its natural course so as to flow along its right of way and onto plaintiff's land so as to carry the grass seed and roots to the land, the owner may recover the difference in the value of the land with the grass as situated thereon and the value of the land without the grass. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert (Civ. App.) 134 S. W. 280.*

**Judicial notice regarding Russian thistles.**—The court cannot take judicial notice that a particular locality along a railroad right of way was free from Russian thistles at a particular time, though it may take judicial notice that the thistles grew throughout the state and were a great nuisance. *Vance v. Southern Kansas Ry. of Texas (Civ. App.) 152 S. W. 743.*

**Admissibility of evidence.**—Plaintiff in an action under Acts 1901, c. 117, relating to Johnson grass on railroad rights of way, pleaded as part of his cause of action the expenditure of money and the performance of labor without alleging that such expense was reasonable and necessary. No exception was taken to the petition. Held, that plain-

tiff's testimony that the labor done and money expended were reasonable and necessary was admissible. *Missouri, K. & T. Ry. Co. of Texas v. Letot* (Civ. App.) 135 S. W. 656.

**Suit independent of statute.**—At common law an action will not lie against a railroad for allowing noxious weeds to grow on its right of way, unless it actually conveyed the noxious seed to the adjoining premises. *San Antonio & A. P. Ry. Co. v. Burns*, 39 C. A. 32, 89 S. W. 21.

In an action against a railroad for failing to destroy Johnson grass on its right of way, in the absence of proof sufficient to show negligence at common law, plaintiff could only recover under Laws 27th Leg. p. 283, c. 117. *Gulf, C. & S. F. Ry. Co. v. Stokes* (Civ. App.) 91 S. W. 328.

Where a cause of action against a railroad company for injuries to land from the growth and spread of Johnson grass is based on the negligence of defendant in respect to the drainage of surface water by which the seed of such grass was carried to plaintiff's land, that plaintiff permitted Johnson grass to grow on his land would not defeat recovery, though such act would have prevented recovery of the statutory penalty. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Civ. App.) 134 S. W. 280.

Though Acts 27th Leg. p. 283, c. 117, gives a right of action to any one owning land adjoining a railroad right of way upon which Johnson grass is permitted to go to seed, in an action against a railroad company for overflowing land, it was not error to instruct that no damages should be allowed for washing of such grass upon plaintiff's land, unless it was caused by diversion of water from its natural course, where plaintiff permitted Johnson grass to go to seed upon his land; suit not being based upon the statute, and the evidence not showing that the company had permitted such grass to go to seed on its right of way. *Bangle v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 140 S. W. 374.

A railroad company would not be liable for failure to prevent Russian thistles from growing or going to seed on its right of way or for bringing them there, independent of this act, and hence the remedy given by the statute is exclusive. *Vance v. Southern Kansas Ry. of Texas* (Civ. App.) 152 S. W. 743.

**Art. 6603. [4528] Liability of companies for stock killed or injured.**—Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. Such liability shall also exist in counties and subdivisions of counties which adopt the stock law prohibiting the running at large of horses, mules, jacks, jennets and cattle; provided, however, that in all cases, if the railroad company fence its road, it shall only be liable for injury resulting from a want of ordinary care. [Acts 1905, p. 226.]

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|----------------------------------------------------------------------------|------------------------------------------------------------------|
| 1. Constitutionality.                                                      | 20. — Places where fences are not required.                      |
| 2. Change of law.                                                          | 21. — Necessity of showing negligence.                           |
| 3. Purpose of statute.                                                     | 22. What constitutes fence—In general.                           |
| 4. Liability of receiver.                                                  | 23. — Repair and maintenance.                                    |
| 5. Train operated by contractor.                                           | 24. — Negligence of contractor.                                  |
| 6. Street railway.                                                         | 25. Liability for stock injured at private crossings—In general. |
| 7. Dogs not stock.                                                         | 26. — Duty to keep gates closed.                                 |
| 8. Applies only to injuries from collision.                                | 27. — Repair of gates.                                           |
| 9. Care required and liability in general—Signals and lookouts.            | 28. Excuses for failure to fence.                                |
| 10. — Rate of speed.                                                       | 29. Contributory negligence of owner.                            |
| 11. — Violation of ordinance as negligence.                                | 30. Proximate cause of injury.                                   |
| 12. — Care as to animals seen on or near track.                            | 31. Presumptions and burden of proof.                            |
| 13. Liability where right of way is fenced.                                | 32. Admissibility of evidence.                                   |
| 14. Liability where right of way is not fenced.                            | 33. Sufficiency of evidence—In general.                          |
| 15. Liability where stock are prohibited from running at large—In general. | 34. — Negligence of defendant.                                   |
| 16. — Not required to keep lookout.                                        | 35. — Proximate cause.                                           |
| 17. — Proclamation of stock law.                                           | 36. Measure of recovery—In general.                              |
| 18. — Damages for trespass.                                                | 37. — Exemplary damages.                                         |
| 19. Liability where right of way cannot be fenced—In general.              | 38. — Interest.                                                  |
|                                                                            | 39. — Attorney's fees.                                           |
|                                                                            | 40. Questions for jury and instructions.                         |
|                                                                            | 41. Indemnity.                                                   |

1. **Constitutionality.**—Provisions of this article constitutional. *Railway Co. v. Ellis*, 26 S. W. 985, 87 T. 19.

This section added to the stock law as originally passed (Acts 1899, p. 220, ch. 128), is constitutional. *Railway v. Polson* (Civ. App.) 106 S. W. 429; *Texas & P. Ry. Co. v. Webb*, 102 T. 210, 114 S. W. 1171.

2. **Change of law.**—The amendment of 1905 (Acts 1905, p. 226), changes the pre-existing law so as to make railroad companies liable in all cases where their roads are not fenced for stock killed or injured, thereby taking away a defense which the railroad company might urge if the owner of the animal is a violator of the law in permitting his animal to run at large. *Texas & P. Ry. Co. v. Webb*, 102 T. 210, 114 S. W. 1172, 1173.

3. **Purpose of statute.**—The statute is not only for the protection of animals, but especially for the protection of human life. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686.

4. **Liability of receiver.**—The receiver of a railroad is liable under this article. *Railway Co. v. Bender*, 26 S. W. 1047, 87 T. 99.

5. **Train operated by contractor.**—The railroad company is not responsible for the killing of an animal by a train operated by an independent contractor in the construction of the road. *H. & G. N. R. Ry. Co. v. Bayless*, 1 App. C. C. § 250.

6. **Street railway.**—This article does not apply to a street railway. *San Antonio St. Ry. Co. v. Wray* (Civ. App.) 37 S. W. 461.

7. **Dogs not stock.**—A dog is not stock within the meaning of this article, and railroads are not required to fence against that class of animals. *Railway Co. v. Scott*, 4 App. C. C. § 277, 17 S. W. 1116.

8. **Applies only to injuries from collision.**—This statute does not apply to a case when animals are injured through fright caused by a train, and not by actual collision with a locomotive or car. *Railway Co. v. Felton*, 4 App. C. C. § 39, 14 S. W. 1072; *Railway Co. v. Harris*, 3 App. C. C. § 224.

To authorize a recovery under this article, it devolved upon plaintiff to prove by a preponderance of evidence that the injury resulted from an actual contact with him of the appellant's train. If the horse killed ran upon the bridge and fell off, and thus received the injury which resulted in his death, plaintiff is not entitled to recover. *Railway Co. v. Ritter*, 4 App. C. C. § 148, 16 S. W. 909; *Railway Co. v. Leal*, 4 App. C. C. § 149, 16 S. W. 909; *Railway Co. v. Mitchell*, 4 App. C. C. § 261, 17 S. W. 1079.

Railroad company held not liable for animals frightened at its trains. *Beaumont Pasture Co. v. Sabine & E. T. Ry. Co.* (Civ. App.) 41 S. W. 190.

It is only where stock is killed or injured by locomotives or cars that the railroad can be held absolutely liable under this article. *San Antonio & A. P. Ry. Co. v. Tamborello* (Civ. App.) 67 S. W. 926.

A railroad company which does not fence its track is not liable for cattle injured on a trestle on the right of way. *Id.*

A railroad held not liable for injuries to a horse that went upon the right of way and fell into a bridge. *Padgitt v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 90 S. W. 67.

Where a railroad company leaves the right of way unfenced, and animals go upon the track and are injured, the company is liable when the injury results from the cattle coming in contact with trains but not otherwise, unless its results from negligence on the part of the company. *San Antonio & A. P. Ry. Co. v. Harrison* (Civ. App.) 146 S. W. 596.

9. **Care required and liability in general—Signals and lookouts.**—An instruction held to place too high a duty on a railroad company as to keeping a lookout for stock on the track. *Houston & T. C. R. Co. v. Van Ness*, 45 C. A. 633, 101 S. W. 265.

In an action against a railroad for killing a cow, failure to ring bell held a fact that could be considered by jury in determining whether railroad had exercised ordinary care. *Texarkana & Ft. S. Ry. Co. v. Bell* (Civ. App.) 101 S. W. 1167.

Where a cow had been on the track five minutes when killed, railroad's liability depends upon whether ordinary care required a lookout for animals, and, if so, whether in the exercise of such care the cow would have been discovered in time to prevent injury. *Id.*

A finding of negligence in the killing of mules by a locomotive held warranted. *Texas Cent. R. Co. v. Estes* (Civ. App.) 113 S. W. 547.

It being customary for railroad companies to give sharp blasts of the whistle to clear the track of live stock, it must be presumed that the whistle would, in some instances at least, result in avoiding an injury to them. *Texas & P. Ry. Co. v. Corn*, 102 T. 194, 114 S. W. 103.

It was the duty of an engineer to keep a constant lookout and use reasonable care not to hit persons or animals at street crossings. *International & G. N. Ry. Co. v. Diaz* (Civ. App.) 156 S. W. 907.

10. — **Rate of speed.**—In an action against a railroad for killing a cow, held error to charge jury to find for plaintiff if the speed of the train at the time of the accident exceeded that prescribed by the regulations. *San Antonio & A. P. Ry. Co. v. Clark*, 26 C. A. 280, 62 S. W. 546.

In an action for killing stock, held, that the mere fact that a train running 30 miles an hour approaches a public road crossing on a downgrade and from around a curve is not sufficient to impose on the trainmen the duty to slacken the speed in making the crossing. *Missouri, K. & T. Ry. Co. of Texas v. Morris* (Civ. App.) 63 S. W. 888.

In an action against a railroad company for killing ponies, that the train was run at a high rate of speed might be considered negligence in the operation of the train at the point where animals might be expected to be on the track. *Gulf, C. & S. F. Ry. Co. v. Anson* (Civ. App.) 82 S. W. 785.

Negligence on the part of a railroad is not inferred from the fact that a train is moving at a rapid rate of speed and killing cattle on the track at a depot. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686.

Operators of a special train held under no obligation to anticipate the presence of cattle on the track at a depot. *Id.*

It is not negligence under all circumstances to run a train at a high rate of speed. *Gulf, C. & S. F. Ry. Co. v. Anson*, 101 T. 198, 105 S. W. 989.

11. — **Violation of ordinance as negligence.**—See notes under Arts. 821 and 863.

12. — **Care as to animals seen on or near track.**—A railroad held under no duty to look out for a horse on the track until the horse is discovered in a place where it is reasonably to be expected that he will be injured. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 738.

On discovering animals on railroad tracks, the operatives of a train are bound to observe proper precautions to avoid running into them. *Galveston, H. & S. A. Ry. Co. v. Huttner* (Civ. App.) 131 S. W. 630.

A railroad company may move its trains at farm crossings with the usual and necessary noise, without keeping a lookout for frightened teams. *Edwards v. St. Louis Southwestern Ry. Co. of Texas*, 105 T. 404, 151 S. W. 289.

13. **Liability where right of way is fenced.**—If the right of way is fenced the burden of proving want of due care rests upon the plaintiff. *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151; *Railway Co. v. Hudson*, 77 T. 494, 14 S. W. 158.

A railroad company, in the absence of negligence, is not responsible for the killing of stock entering upon the right of way inclosed by a fence. *Railway Co. v. Glenn*, 30 S. W. 845, 8 C. A. 301; *Railway Co. v. Meithvein* (Civ. App.) 33 S. W. 1093.

A railroad company which has fenced its track held liable for stock killed only by want of ordinary care. *San Antonio & A. P. Ry. Co. v. Robinson*, 17 C. A. 400, 43 S. W. 76; *International & G. N. Ry. Co. v. Richmond*, 23 C. A. 513, 67 S. W. 1030; *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 54 C. A. 516, 118 S. W. 234.

When a railroad company has once fenced its right of way as required by law it is only liable for stock killed or injured in the absence of ordinary care in the operation of trains or in failing to keep fences in repair. *Galveston, H. & S. A. Ry. Co. v. Reitz*, 27 C. A. 411, 65 S. W. 1088.

If its track is fenced the railroad company is liable only when the injury has resulted from want of care on the part of its servants to prevent the injury. *Ft. W. & R. G. Ry. Co. v. Swan*, 97 T. 338, 78 S. W. 921.

A railway company having fenced its right of way held liable for stock killed only in case the killing was the result of the railway company's negligence in maintaining such fences or in the operation of its trains. *Ft. Worth & D. C. Ry. Co. v. Worsham*, 47 C. A. 350, 105 S. W. 853.

Where a railroad right of way was inclosed by a sufficient fence and cattle guards, and there was nothing to indicate that stock were likely to be trespassing there, those in charge of the train did not, as a matter of law, owe a duty to keep a lookout for stock; and an instruction that they did was improper. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 154 S. W. 602.

14. **Liability where right of way is not fenced.**—Where a railway line is not fenced, the law presumes negligence on the part of the company if stock are injured by the passage of a train. *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151; *Railway Co. v. Hudson*, 77 T. 494, 14 S. W. 158.

A railway company is liable to the owner for the value of all stock killed or injured, and this without regard to the degree of care or negligence which may have attended it, absolutely and at all events, where the company has not fenced its road. *T. C. R. R. Co. v. Childress*, 64 T. 346; *H. & T. C. R. R. Co. v. Muldrow*, 54 T. 233; *G., H. & S. A. R. R. Co. v. Davis*, 1 App. C. C. § 149; *T. & P. R. R. Co. v. Miller*, 1 App. C. C. § 263.

As to negligent killing of stock where fence has been removed, see *Railway Co. v. Downey* (Civ. App.) 23 S. W. 109.

Under the provisions of this article a railroad company is liable for the killing of animals without proof that it was in some manner guilty of negligence which was the proximate cause of such killing. *M., K. & T. Ry. Co. v. Hanacek*, 93 T. 446, 55 S. W. 1117; *Id.*, 23 C. A. 215, 55 S. W. 1119.

A railroad company that has not fenced its track is absolutely liable for damages for the killing or injuring of live stock by the operation of its locomotives or cars. *Ft. W. & R. G. Ry. Co. v. Swan*, 97 T. 338, 78 S. W. 921.

Railroad held liable for killing a cow at a place where it was bound to fence and failed to do so. *Galveston, H. & S. A. Ry. Co. v. Kropp* (Civ. App.) 91 S. W. 819.

In an action for killing plaintiff's horses, an instruction that, if the right of way was not fenced, and public necessity did not require that it be unfenced, plaintiff was entitled to recover, held erroneous. *Gulf, C. & S. F. Ry. Co. v. Simpson*, 41 C. A. 125, 91 S. W. 874.

A railroad held liable for killing stock passing onto its right of way not fenced as required by statute. *International & G. N. R. Co. v. Seiders*, 50 C. A. 568, 110 S. W. 997.

Where an animal is killed on the unfenced track of a railroad the company is liable for damages regardless of the degree of care or negligence which may have attended the killing. *Rio Grande & E. P. Ry. Co. v. Garcia* (Civ. App.) 117 S. W. 204.

15. **Liability where stock are prohibited from running at large.**—In general.—As to the law of railways for injuries to animals unlawfully upon their tracks, see *H. & T. C. R. R. Co. v. Smith*, 52 T. 178; *H. & T. C. R. Co. v. Symkins*, 54 T. 618, 38 Am. Rep. 632; *H. & T. C. R. R. Co. v. Richards*, 59 T. 377; *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151.

If cattle enter unlawfully upon a railway track, which is fenced up by the company, or at a place where by law such cattle are prohibited from running at large, the company will not be liable in damages for their injury by a moving train, if its employés use such care, after the danger becomes known, as a prudent man would under the circumstances use to void the injury. *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151. And the burden of proof is on the plaintiff to show the negligence of the defendant. *I. & G. N. R. R. Co. v. Samora*, 1 App. C. C. § 155; *Bethje v. H. & T. C. R. R. Co.*, 26 T. 604.

A railway company is not liable to owners for killing animals, or for injury done by its cars to animals, entering upon its tracks at a place where by law the running at large of animals is made unlawful, unless the conduct of its employés amounts to gross negligence. Gross negligence is where there is an entire failure to exercise care, or by the exercise of so slight a degree of care as to justify the belief that the person on whom the care was incumbent was indifferent to the interests and welfare of others. *Mo. Pac. R. R. Co. v. Lawler*, 3 App. C. C. §§ 19, 20, citing *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151.

When the running of stock at large is prohibited, the company is liable only when guilty of gross negligence. *Railway Co. v. Dunham*, 68 T. 231, 4 S. W. 472, 2 Am. St. Rep. 484; *Missouri, K. & T. Ry. Co. of Texas v. Russell*, 43 S. W. 576; *Ft. Worth & R. G. Ry. Co. v. Hudgens*, 43 C. A. 201, 94 S. W. 378.

A railroad company is liable for negligently killing animals, although running at large in violation of law. *Houston & T. C. Ry. Co. v. Hollingsworth*, 29 C. A. 306, 68 S. W. 724.

Where stock not permitted to run at large go upon a railroad track which has been fenced in, and are then killed by the locomotives or cars, recovery can only be had upon showing negligence on part of the train operatives in failing to prevent the injury after the discovery of the presence of such animals on or dangerously near the

track, or otherwise showing such gross negligence as would amount to this. Under such circumstances the animals are trespassers, and their bare presence is negligence on the part of their owner. *Red River T. & S. Ry. Co. v. Dooley*, 35 C. A. 364, 80 S. W. 566.

A railroad company held not liable for killing an animal entering on its tracks in a county where the stock law is in force. *Houston & T. C. R. Co. v. Atlas Press Brick Works*, 36 C. A. 368, 81 S. W. 792.

A railway company is not liable in damages for stock killed on its tracks in a county in which the stock law has been adopted, in the absence of negligence in the operation of the trains killing the stock. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Civ. App.) 90 S. W. 508.

The question of the negligence of a railway company, killing stock at a place where the stock law was in force, held unaffected by the care exercised by the owner in confining the animal. *Id.*

It is error to instruct the jury that the burden is on defendant to establish its plea of contributory negligence in a case where the animal was killed on the track within territory where the stock law is in force, the plea consisting alone of allegations setting up the existence of the stock law and of the appellee permitting the animal to run at large, and the facts being undisputed as stated in the plea. *Ft. Worth & R. G. Ry. Co. v. Hudgens* (Civ. App.) 94 S. W. 379.

The stock law supersedes the fence law and in the absence of negligence in the operation of the train, the railroad company is not liable on account of stock killed by the train. *Houston & T. C. Ry. Co. v. Nussbaum & Scharff*, 43 C. A. 410, 94 S. W. 1102.

The defense that the stock law was in force at the place where an animal was killed held valid. *Houston & T. C. R. Co. v. Thompson* (Civ. App.) 97 S. W. 106.

Railroad held not relieved by adoption of stock law from liability for the killing of a jack. *Gulf, C. & S. F. Ry. Co. v. Coffin* (Civ. App.) 97 S. W. 1066.

A railroad company killing an animal at a public crossing in a district in which stock is prohibited from running at large held not liable, unless gross negligence is shown. *Missouri, K. & T. Ry. Co. of Texas v. Scofield* (Civ. App.) 98 S. W. 435.

A railway company held not liable for killing an animal on its tracks, where, after the engineer discovered the animal, he could not prevent the killing by the use of the means at his command. *Id.*

The effect of the amendment of 1905 (Acts 1905, p. 226, § 20a) is to put a case for killing an animal by a railroad in the same attitude as if the stock law had never been adopted. The liability of the company is absolute, unless it has complied with the law as to fencing its track. *Texas & P. Ry. Co. v. Webb*, 102 T. 210, 114 S. W. 1174.

Employees of a railroad must exercise ordinary care to avoid injuring animals unlawfully running at large, if they know of their presence. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 993.

16. — Not required to keep lookout.—A railway company operating a train through a district which has adopted the stock law is not required to anticipate animals on its track. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Civ. App.) 90 S. W. 508.

Operatives of a railroad train held not bound to exercise diligence to avoid injuring animals improperly permitted to run at large in a stock-law district until the animals were discovered on the track, or it was seen that they would probably not get off the track in time to avoid being injured. *Ft. Worth & R. G. Ry. Co. v. Hudgens*, 43 C. A. 201, 94 S. W. 378.

A railroad held under no duty to keep a lookout for an animal unlawfully running at large. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 738.

17. — Proclamation of stock law.—Where no contest is shown to have been made, and the stock law appears to have prevailed, that is to say, is being enforced in the designated territory, prima facie it has been legally proclaimed. *Galveston, H. & S. A. Ry. Co. v. Kropp* (Civ. App.) 91 S. W. 819.

18. — Damages for trespass.—In a suit for the recovery of the value of an animal killed, the railroad can reconvene for damages resulting from the animal being unlawfully on its track. *G., C. & S. F. R. Co. v. Tacquard*, 3 App. C. C. § 250.

19. Liability where right of way cannot be fenced.—In general.—Railway not liable beyond ordinary care for injuries to stock at a public or private crossing. *Railway Co. v. Saunders* (Civ. App.) 26 S. W. 128.

Where horses were killed on track at a place which defendant was not required to fence, the fact that another portion of the track was unfenced was immaterial. *Missouri, K. & T. Ry. Co. of Texas v. Willis*, 17 C. A. 228, 42 S. W. 371.

Where grantor of right of way refuses to consent to its fencing by railroad company, he cannot recover for stock killed without showing negligence. *San Antonio & A. P. Ry. Co. v. Adams* (Civ. App.) 45 S. W. 844.

The first duty of an engineer in charge of a train on discovering animals on the track at a place where the railroad is not required to fence its track is to care for the safety of the passengers. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686.

With all other negligence eliminated, liability of a railroad company depends upon its killing an animal at a point where it was permitted to fence. *Louterstein v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 144 S. W. 310.

20. — Places where fences are not required.—A station held not of such a character as to exempt the railroad company from fencing its tracks to shield itself from presumed negligence in killing stock. *Southern Kansas Ry. Co. of Texas v. McKay* (Civ. App.) 47 S. W. 479.

A railroad need not fence its tracks within its switch limits in a town. *Ft. Worth & D. C. Ry. Co. v. Hodge & Speer* (Civ. App.) 125 S. W. 350.

In an action against a railroad for killing mules, where defendant contended that it was not required to fence its track at the place of the accident, the burden to establish this defense by a preponderance of the testimony was upon it. *Texas Cent. R. Co. v. Hico Oil Mill* (Civ. App.) 126 S. W. 627.

An instruction that defendant was not required to fence such portions of its track between the switch stands and other parts of the track as was necessary to be used in switching the cars and in operating the switch stands, was not misleading or confusing. *Id.*



A charge that the burden of proof was on defendant to show that it was necessary to keep the track unfenced at the place of the accident, and unless it was found that it was necessary to keep the track unfenced at that place plaintiff could recover, was erroneous as containing no guide to govern the jury in their determination as to what conditions would render it necessary to keep the track unfenced. *Id.*

That a railroad company has constructed switches, side tracks, and a depot house on a particular point on its line, and that plaintiff's colt was killed within such switching limits, does not exempt the railroad company from liability in the absence of negligence as a matter of law. *St. Louis Southwestern Ry. Co. of Texas v. Seay* (Civ. App.) 127 S. W. 908.

The courts from the necessity of the case held to read exceptions into the statute requiring railroad companies to fence their tracks. *International & G. N. R. Co. v. Schram* (Civ. App.) 138 S. W. 195.

To make a prima facie case against a railroad company for the killing of an animal by a train, it is only necessary to prove the killing by the train, and to meet the case the company must prove either that its track was fenced, or that it was exempted from fencing at the point of the accident; but mere proof that such place is within the switching bounds arbitrarily established by the company, but not in fact used by it for switching purposes, is not sufficient. *Id.*

A railroad company held not permitted to fence on public crossings or within station limits. *Louterstein v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 144 S. W. 310.

21. — **Necessity of showing negligence.**—This article does not apply to such places as public necessity or convenience require to be left unfenced, as the crossing of highways and other like places, unless the want of ordinary care is shown. *Railway Co. v. O'Neal*, 4 App. C. C. § 86, 16 S. W. 537; *Railway Co. v. Cocke*, 64 T. 151; *Railway Co. v. Dunham*, 68 T. 231, 4 S. W. 472, 2 Am. St. Rep. 484; *Swanson v. Melton*, 4 App. C. C. § 264, 17 S. W. 1088; *Railway Co. v. Balkam* (Civ. App.) 20 S. W. 860.

Where stock is killed at a point where a railroad company is not required to fence its track, the burden of proof is on the plaintiff. *Railway Co. v. Blankenbeckler*, 13 C. A. 249, 35 S. W. 331. See, also, *I. & G. N. R. R. Co. v. Samora*, 1 App. C. C. § 155; *Bethje v. H. & C. T. R. R. Co.*, 26 T. 604.

In an action against a railroad company for the killing of a cow, at a street crossing where the railroad could not be fenced, negligence of some character on the part of the railroad must be shown. *San Antonio & A. P. Ry. Co. v. Clark*, 26 C. A. 280, 62 S. W. 546.

In an action against a railroad for killing a mule while within defendant's station yard, where it was not required to fence its tracks, plaintiff must prove negligence. *Southern Kansas Ry. Co. of Texas v. Cooper*, 32 C. A. 592, 75 S. W. 328.

Where an animal is struck by a railroad train at a public crossing, mere proof of the killing is not sufficient to establish the railroad's liability. *International & G. N. R. Co. v. Carr* (Civ. App.) 91 S. W. 858.

To justify a recovery from a railroad for the killing of cattle on the part of its track not required to be fenced, proof of negligence on the part of the railroad is essential. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 638.

One suing a railroad for injuring cattle within its switch limits in a town must, to recover, prove negligence resulting in the injury. *Ft. Worth & D. C. Ry. Co. v. Hodge & Speer* (Civ. App.) 125 S. W. 350.

Where plaintiff's mare was killed within defendant's switch limits at a certain town, and at a place where public policy prevented the fencing of the tracks, the burden was on plaintiff to establish negligence by defendant which proximately caused the death of the mare. *Gulf, C. & S. F. Ry. Co. v. Bennett* (Civ. App.) 126 S. W. 607.

Where the owner of a colt proved that it was killed by a train, the mere fact that the colt was found dead on a highway which could not be fenced did not relieve the railroad of the necessity of showing that it was not guilty of negligence, where the highway was adjacent to an unfenced portion of the right of way, as the animal might have gone on the tracks at one of the unfenced places. *International & G. N. R. Co. v. Merideth* (Civ. App.) 137 S. W. 923.

One suing for the death of an animal struck by cars in switch yards, where the railroad company could not fence its tracks, must, to recover, show that the trainmen were guilty of negligence. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 155 S. W. 1184.

22. **What constitutes fence—In general.**—A fence along a railroad 100 feet from the track on each side and including the right of way and a public highway, along which people traveled is not such a fence as is contemplated by this statute. *Ft. Worth & D. C. Ry. Co. v. Roberts*, 29 C. A. 566, 69 S. W. 985.

The duty of a railroad company to fence its track imports the duty to securely fence it, so as to exclude live stock. *Texas & P. Ry. Co. v. Corn*, 102 T. 194, 114 S. W. 103.

A fence with an unnecessary gate in it through which animals may and do pass to the track is not such a fence as the statute contemplates. *Texas & P. Ry. Co. v. Webb*, 102 T. 210, 114 S. W. 1174.

To escape absolute liability to the owner of stock killed by trains, a railway company must show that it had its road so fenced as to prevent stock of ordinary disposition from entering the right of way. *Texas Cent. Ry. Co. v. Wills* (Civ. App.) 116 S. W. 145.

The defendant's right of way was fenced, but a gate in its right of way fence stood open most of the time, and it was not shown to be an opening authorized under Arts. 6486-6493. Plaintiff's mule went through the gate upon defendant's right of way and was killed. Held, that defendant's road was not "fenced in" as required by the statute, and that it was absolutely liable for the injury. *Houston E. & W. T. Ry. Co. v. Lee* (Civ. App.) 135 S. W. 694.

23. — **Repair and maintenance.**—Liability is made absolute by this article without any question as to negligence, unless the track be fenced, but where the fence is so out of repair as to be no fence at all, it is in law no fence at the place, and the case is to be controlled by the statute applicable to unfenced tracks and no question of negligence arises. *Missouri, K. & T. Ry. Co. v. Tolbert*, 100 T. 483, 101 S. W. 208.

A railroad company permitting its right of way fence to become and remain out of repair held negligent and liable for killing animals passing through the fence onto the track. *Ft. Worth & R. G. Ry. Co. v. Hickox* (Civ. App.) 103 S. W. 202.

To escape absolute liability the company must not only so "fence in" but keep so "fenced in" its right of way as to prevent stock of ordinary kind from going upon its roadbed and tracks. *Texas & P. Ry. Co. v. Sproles*, 47 C. A. 294, 105 S. W. 521, 522.

A railroad is not exempt from liability for killing stock when it is shown that its cattle guard is out of repair sufficient to permit the ingress of stock upon its right of way. *Ft. Worth & D. C. Ry. Co. v. Polsom* (Civ. App.) 106 S. W. 429, 430.

It is the duty of a railroad company, after it has fenced in its right of way to maintain the fence in such condition as under ordinary circumstances to effectually turn live stock of ordinary disposition and docility. There is nothing said about maintaining the fence, but it is clearly implied that the fence must not only be erected but duly maintained as a fence. *Texas Cent. Ry. Co. v. Pruitt*, 101 T. 548, 109 S. W. 927.

Where a railroad company erects a fence along its tracks, it owes to the adjacent owners the duty to exercise ordinary care to keep the fence in proper condition. *International & G. N. R. Co. v. Dixon*, 49 C. A. 506, 109 S. W. 978.

It is the duty of a railroad company after it has fenced in its right of way to maintain the fence in such condition as under ordinary circumstances to effectually turn live stock of ordinary disposition and docility. *Texas Cent. Ry. Co. v. Pruitt*, 49 C. A. 370, 110 S. W. 967.

Where a railroad fence was down, leaving an extensive gap, through which plaintiff's stock lawfully at large, might be expected and did wander onto the track, and when in that position they were virtually in a trap by reason of adjacent obstacles to their escape, the railroad company was liable for injuring them. *Gulf, C. & S. F. Ry. Co. v. Benaist* (Civ. App.) 122 S. W. 587.

24. — **Negligence of contractor.**—A railway company held liable for horses killed on a track through independent contractor's negligence in leaving the fence down. *Missouri, K. & T. Ry. Co. of Texas v. Armstrong* (Civ. App.) 99 S. W. 431.

25. **Liability for stock injured at private crossings.**—In general.—A railroad company held not liable for an animal killed on its track by failure of plaintiff to put in a gate at a farm crossing as agreed. *Texas & P. Ry. Co. v. Smith* (Civ. App.) 41 S. W. 83.

A railroad company held not liable for the killing of stock on a crossing maintained with proper cattle guards for the benefit of adjoining landowner. *Gulf, C. & S. F. Ry. Co. v. Mitchell*, 18 C. A. 380, 45 S. W. 819.

When a railroad has fenced its right of way, where it passes through an inclosure, and it has put gates in the fences on each side of the right of way so as to allow passage over the right of way from one part of the inclosure to the other, and stock has gotten on the right of way through one of the gates and been killed, the railway company is only liable for injury resulting from want of ordinary care. *Railway Co. v. Hanacek*, 93 T. 446, 55 S. W. 1117.

Railroad held not liable for killing of stock, owing to a gate which it had erected in the fence inclosing the right of way being left open by a third person. *St. Louis S. W. Ry. Co. of Texas v. Adams*, 24 C. A. 231, 58 S. W. 1035.

Where a railroad company leaves a private crossing open at the request of the owner of the inclosure or in accordance with a contract with him for an open crossing, and stock of the owner is killed or injured at such crossing, the company is not liable under this article for failure to have the crossing fenced. *M., K. & T. R. Co. of Texas v. Chenaute*, 24 C. A. 481, 60 S. W. 59.

In an action against a railroad company for killing a mule, a charge held erroneous which permitted a verdict for plaintiff without negligence of the trainmen, if the fence was defective, though the mule escaped through the open gate. *International & G. N. R. Co. v. Erwin* (Civ. App.) 67 S. W. 466.

Where stock go through an opening made for the benefit of the owner of the land and not for the general public and are killed, the railroad company is liable as if the tracks were not fenced. *International & G. N. Ry. Co. v. Richmond*, 28 C. A. 513, 67 S. W. 1030.

Evidence held to show that the opening in the fence of the railroad right of way, through which the animals went on defendant's track, was one of mere convenience to the adjacent landowner. *Id.*

A railroad company held not liable for killing an animal on a private crossing. *San Antonio & A. P. Ry. Co. v. Aycok* (Civ. App.) 68 S. W. 1001.

Where plaintiff's land, in a county having adopted the stock law, did not adjoin a fenced railroad right of way, and one of his mules escaped from his pasture across an intervening tract of land, and passed onto the right of way through a gate which had been left open, and was killed, the railroad company was not liable therefor. *Texas & P. Ry. Co. v. Huffman* (Civ. App.) 71 S. W. 779.

A railroad company held not liable for mules killed, which passed through an alleged defective fence gate, unless the mules escaped by reason of the defect, and not by reason of the gate being left open. *Missouri, K. & T. Ry. Co. of Texas v. Bradshaw* (Civ. App.) 83 S. W. 897.

A request to charge that, if the mules got on the track through a gate left open by some person, defendant was entitled to a verdict, held properly refused. *Id.*

In an action for the killing of certain mules, it was not error for the court to refuse to charge that the engineer was not required to look out for animals coming on the track through a private gate in a right of way fence. *Missouri, K. & T. Ry. Co. of Texas v. Rodgers* (Civ. App.) 86 S. W. 625.

Where plaintiff's mules escaped onto defendant railroad company's right of way through its defective gate and were killed, that they previously escaped from the pasture into plaintiff's cotton land held no defense to defendant's liability. *Missouri, K. & T. Ry. Co. of Texas v. Dunnaway*, 43 C. A. 350, 95 S. W. 760.

In an action against a railway company for killing plaintiff's horses, an instruction requiring plaintiff to show that the gates of his inclosure were closed, and that the horses entered through a defective right of way fence, held properly refused. *Missouri, K. & T. Ry. of Texas v. Cassinoba*, 44 C. A. 625, 99 S. W. 888.

A railway company is not liable for killing stock, where it escaped through open right of way fence gates maintained for the benefit of the property owner. *Ft. Worth & D. C. Ry. Co. v. Worsham*, 47 C. A. 350, 105 S. W. 853.

A railroad company held not liable for injuries to stock passing upon the right of way through a private gate, in the absence of negligence in the operation of a train. *Missouri, K. & T. Ry. Co. of Texas v. Butler* (Civ. App.) 121 S. W. 176.

Where animals, coming upon the track through gates which it is the duty of the railroad to keep closed, are injured, the railroad is liable therefor. *Chicago, R. I. & G. Ry. Co. v. Wilson* (Civ. App.) 124 S. W. 132.

26. — **Duty to keep gates closed.**—Where a private crossing over a railway track is gated at the request of the owner of the pasture through which the railroad ran, it is not the duty of the railroad company to see that the gates are kept closed, and in making out a case it devolved upon the owner to show that his stock entered on the railroad track through the fence and not the gate. *S. A. & A. P. Ry. Co. v. Robinson*, 17 C. A. 400, 43 S. W. 76.

A railroad company held not bound to keep closed gates erected for the protection of landowners in fences inclosing its right of way, and not to be liable for injuries to stock arising from its neglect to do so. *Missouri, K. & T. Ry. Co. v. Hanack*, 23 C. A. 394, 56 S. W. 938.

A railroad company is not, under all circumstances, liable for injuries to live stock resulting from leaving open a private gate in its right of way fence, constructed for the accommodation of the owner of adjoining land, and is not bound to keep watch to see that it is at all times closed. *Texas & P. Ry. Co. v. Corn*, 102 T. 194, 114 S. W. 103.

A railway company, placing a gate in its right of way fence for the accommodation of landowners, is not required to see that the gate is closed. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 54 C. A. 516, 118 S. W. 234.

If a railroad company erects a sufficient fence and gate and keeps it in repair, the landowner must keep it closed and cannot recover against the company for injury to stock caused by his failure to do so. *Texas Cent. R. Co. v. Jenkins* (Civ. App.) 120 S. W. 948.

It is the duty of the person for whose benefit private gates are placed in a fence inclosing a railroad right of way to keep the same closed, and where stock enters through such gates, which are left open, the railway company is not liable either for stock belonging to the person for whose benefit the gates have been placed in the fence, or the stock of third persons passing through such gates, in the absence of negligence in the operation of its train. *Missouri, K. & T. Ry. Co. v. Butler* (Civ. App.) 121 S. W. 176.

27. — **Repair of gates.**—Railroad held not liable for killing of stock owing to trivial defects in a gate which it had erected for an adjoining landowner's benefit and which the latter had assumed to repair. *St. Louis S. W. Ry. Co. of Texas v. Adams*, 24 C. A. 231, 58 S. W. 1035.

Where an owner of land adjoining a railroad contracted to keep the fence at a private crossing in repair and the gate shut, he could not recover for the killing of a mule which got on the track because of a defect in the gate. *Texas & P. Ry. Co. v. Owens*, 36 C. A. 54, 81 S. W. 62.

Under the statute, instructions imposing an absolute duty on the railroad company to make substantial gates in its right of way fence and to repair substantial defects held error. *Missouri, K. & T. Ry. Co. of Texas v. Bradshaw* (Civ. App.) 83 S. W. 897.

It was not liable for killing mules which passed through the gate by reason of a defect which could have been remedied by the landowner with slight labor and trifling expense. *Id.*

If a railroad company constructs a gate as part of the fence inclosing its right of way for the convenience of owner of adjoining land it must exercise ordinary care to keep the gate in repair, so that same may be properly closed; and when that is done the owner of, or person occupying, the land must keep the gate closed. The railroad will be liable for damages occasioned by failure to keep the gate in repair. *Cole v. St. Louis S. W. Ry. Co.* (Civ. App.) 94 S. W. 1129.

A railroad company, having constructed gates in its right of way fence for the benefit of the adjoining proprietor, held not liable for animals which escaped through the gate onto the track by reason of the gate being left open or falling into disrepair. *International & G. N. R. Co. v. Russell*, 48 C. A. 155, 106 S. W. 438.

28. **Excuses for failure to fence.**—That a railway company would be inconvenienced in the operation of its road, and in the loading and unloading of its cars, by the fencing of a road at a particular point, does not exempt it from liability for stock killed. *H. & T. C. R. Co. v. Simpson*, 2 App. C. C. § 670.

The fact that the farm of the owner of stock is fenced does not relieve a railway company from fencing its road. *Railway Co. v. Peterson*, 27 S. W. 969, 8 C. A. 367.

29. **Contributory negligence of owner.**—An action cannot be maintained against a railroad company for killing stock straying on its unfenced right of way, where the owner is guilty of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Roberts*, 37 C. A. 108, 83 S. W. 250.

In an action against a railroad company for negligently killing plaintiff's team, plaintiff held chargeable with negligence in leaving team untied and unattended as he did. *Galveston, H. & S. A. Ry. Co. v. Graham*, 46 C. A. 98, 101 S. W. 846.

A railroad company killing horses on its track held not entitled to defend on the ground that the owner of the horses was guilty of contributory negligence. *Ft. Worth & R. G. Ry. Co. v. Hickox* (Civ. App.) 103 S. W. 202.

30. **Proximate cause of injury.**—In an action for killing plaintiff's horses, plaintiff held entitled to recover only if defendant's negligence in maintaining its stock gap was the proximate cause of the injury. *Gulf, C. & S. F. Ry. Co. v. Simpson*, 41 C. A. 125, 91 S. W. 874.

Where plaintiff's animals escaped onto defendant's track through a right of way fence gate and were killed, the negligence of a third person in leaving the gate open during the night held the proximate cause of the accident. *International & G. N. R. Co. v. Russell*, 48 C. A. 155, 106 S. W. 438.

Where a railroad company fails to keep its fence in proper condition, and horses escaping onto the track are frightened by a train, and are injured by falling through a bridge, the negligence in not keeping the fence repaired is the proximate cause of the injury. *International & G. N. R. Co. v. Dixon*, 49 C. A. 506, 109 S. W. 978.

In an action for the killing of plaintiff's cattle by defendant's train by reason of their escaping onto the track through a gate, the defective condition of the gate under the circumstances stated, held the proximate cause of the gate's being left unfastened and the cattle escaping. *Texas & P. Ry. Co. v. Corn* (Civ. App.) 110 S. W. 485.

A railroad company held not liable for injury to a horse getting its shoe hung on a spike standing above the flange of the rail. *Texas & P. Ry. Co. v. Dean*, 55 C. A. 406, 118 S. W. 804.

A finding that negligence in the operation of a train at an excessive speed was the proximate cause of the killing of an animal on the track cannot be sustained in the absence of proof of causal connection between the negligence found and the accident. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 738.

Although a mare was a trespasser on a railroad track, if the negligence of the railroad company's employes was the proximate cause of her death, the company is liable. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 993.

A railroad company cannot escape liability for injuries inflicted on a horse on its tracks by showing that the injuries were in part caused by box cars standing on a side track. *San Antonio & A. P. Ry. Co. v. Stewart* (Civ. App.) 146 S. W. 598.

That the negligence of trainmen might be the proximate cause of killing a horse it must appear that it was on the track under such circumstances that the accident was the natural consequence of the negligence. *Texas & P. Ry. Co. v. Bailey* (Civ. App.) 150 S. W. 962.

31. Presumptions and burden of proof.—See the foregoing notes and also notes under Art. 3687.

32. Admissibility of evidence.—See notes under Art. 3687.

33. Sufficiency of evidence.—In general.—Liability of railroad company for horses killed on track determined. *Missouri, K. & T. Ry. Co. of Texas v. Willis*, 17 C. A. 228; 42 S. W. 371.

Evidence held sufficient to sustain a verdict for plaintiff in an action against a railroad for killing a horse. *International & G. N. R. Co. v. Barton* (Civ. App.) 54 S. W. 797.

Evidence that a horse was killed on railroad crossing held to justify recovery, without evidence that the crossing was fenced or could not be fenced, or that the horse was unlawfully on the track. *Louisiana Western Extension R. Co. v. Deon* (Civ. App.) 56 S. W. 104.

Evidence in an action for the killing of a mule by defendant's train held to sustain a judgment for defendant. *Henry v. Missouri, K. & T. Ry. Co.* (Civ. App.) 65 S. W. 644.

Evidence held insufficient to show that plaintiff's jack was killed by defendant's railroad. *Galveston, H. & N. Ry. Co. v. Blau*, 31 C. A. 644, 73 S. W. 1074.

In an action against a railroad company for the death of a horse, evidence held not to require a finding for defendant. *Texas & P. Ry. Co. v. Crutcher* (Civ. App.) 82 S. W. 341.

In an action against a railroad for the death of a mule, evidence held to support a finding that the mule entered defendant's right of way through a defective fence. *Texas & P. Ry. Co. v. Owens* (Civ. App.) 87 S. W. 846.

In an action against a railroad company for killing plaintiff's horses, evidence held to warrant a finding that they entered on the track through a defective right of way fence. *Missouri, K. & T. Ry. Co. of Texas v. Cassinoba*, 44 C. A. 625, 99 S. W. 888.

Evidence held insufficient to warrant recovery against a railroad for a mule found dead on its right of way. *Texas & P. Ry. Co. v. King Bros.*, 45 C. A. 265, 99 S. W. 1030.

The sufficiency of the evidence to authorize a recovery from a railway company for an animal struck by a train determined. *Beaumont S. L. & W. Ry. Co. v. Langford* (Civ. App.) 104 S. W. 920.

Evidence held to justify a finding that the animal was killed by defendant's train. *Ft. Worth & D. C. Ry. Co. v. Polson* (Civ. App.) 106 S. W. 429.

In an action against a railway company for killing stock, evidence held not to show that the fastening of the gate on the right of way was defective. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 54 C. A. 516, 113 S. W. 234.

Evidence held sufficient to show that the animals were killed by defendant. *Missouri, K. & T. Ry. Co. of Texas v. Crews*, 54 C. A. 548, 120 S. W. 1110.

In an action for the killing of a horse, unlawfully running at large, by a train running at an excessive speed, evidence held insufficient to show that the railroad employes discovered the horse to be where he might be expected to be injured by the train in the manner they operated it. *Missouri, K. & T. Ry. Co. of Texas v. Byrd* (Civ. App.) 124 S. W. 738.

Facts held to establish a prima facie case of liability of a railroad company for the killing of an animal by a train. *International & G. N. R. Co. v. Schram* (Civ. App.) 138 S. W. 195.

Evidence held insufficient to show that injured animals, entering the right of way at a place not fenced, were struck by a train. *San Antonio & A. P. Ry. Co. v. Harrison* (Civ. App.) 146 S. W. 596.

Evidence held not to support a finding that a train struck and killed an animal. *Marshall & E. T. Ry. Co. v. Boaz* (Civ. App.) 157 S. W. 216.

34. — Negligence of defendant.—Evidence held insufficient to show that cattle on the track were killed by defendant's negligence. *San Antonio & A. P. Ry. Co. v. Robinson*, 17 C. A. 400, 43 S. W. 76.

In the following cases the evidence was held insufficient to show that a horse or horses were killed by defendant's negligence: *Missouri, K. & T. Ry. Co. of Texas v. Parker* (Civ. App.) 46 S. W. 280; *St. Louis S. W. Ry. Co. of Texas v. Adams*, 24 C. A. 231, 58 S. W. 1035; *Texas Cent. R. Co. v. Harbison* (Civ. App.) 75 S. W. 549; *Id.*, 88 S. W. 414; *Galveston, H. & S. A. Ry. Co. v. Graham*, 46 C. A. 98, 101 S. W. 846; *Gulf, C. & S. F. Ry. Co. v. Bennett* (Civ. App.) 126 S. W. 607; *Texas & P. Ry. Co. v. Miller*, 127 S. W. 566; *International & G. N. Ry. Co. v. Wilson*, 129 S. W. 849.

Evidence held sufficient to sustain a finding that the killing of a horse at a railroad crossing was through the negligence of the railroad company. *San Antonio & A. P. Ry. Co. v. Harris* (Civ. App.) 79 S. W. 341.

In an action against a railroad for the killing of a mule, evidence held insufficient to show negligence on the part of the defendant. *Houston, E. & W. T. Ry. Co. v. McMillan*, 37 C. A. 483, 34 S. W. 296.

In an action against a railroad company for the killing of certain mules, evidence held to justify a finding of negligence on the part of defendant. *Missouri, K. & T. Ry. Co. of Texas v. Rodgers* (Civ. App.) 86 S. W. 625.

In an action against a railroad for killing plaintiff's cattle at an open crossing, evidence examined, and held not to show negligence on defendant's part. *Mahler v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 90 S. W. 206.

Evidence in an action against a railway company for killing an animal on its track held as a matter of law not to show actionable negligence. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Civ. App.) 90 S. W. 508.

Evidence held insufficient to show negligence of a railroad company in killing a horse at a crossing. *Missouri, K. & T. Ry. Co. of Texas v. Baker*, 99 T. 452, 90 S. W. 869; *Same v. Baker*, 42 C. A. 74, 93 S. W. 211; *Houston, E. & W. T. Ry. Co. v. Foster* (Civ. App.) 142 S. W. 846.

Evidence in an action against a railroad for killing stock at a place where it was not required to fence its track held not to show actionable negligence on its part. *Texas & N. O. R. Co. v. Langham* (Civ. App.) 95 S. W. 686; *St. Louis Southwestern Ry. Co. of Texas v. Conley*, 142 S. W. 36.

In an action against a railroad company for killing plaintiff's mule, evidence held sufficient to authorize a finding that the engineer was negligent in not having observed the animal. *Gulf, C. & S. F. Ry. Co. v. Josey* (Civ. App.) 95 S. W. 638.

In an action against a railroad for the killing of ponies on its track, a finding that it was negligent held authorized. *Gulf, C. & S. F. Ry. Co. v. Anson* (Civ. App.) 102 S. W. 136.

In an action against a railroad for the killing of ponies on its track, proof of a certain fact held not proof of negligence. *Gulf, C. & S. F. Ry. Co. v. Anson*, 101 T. 198, 105 S. W. 989.

Evidence held insufficient to authorize a finding of negligence essential to render the company liable. *Id.*

In an action for injuries to plaintiff's horse which entered defendant railway company's right of way through an open fence gate, evidence held to show that the railway company was negligent. *Texas & P. Ry. Co. v. Webb* (Civ. App.) 114 S. W. 1170.

Evidence held to justify a finding that defendant's train, which killed plaintiff's horse, was negligently operated. *Houston & T. C. R. Co. v. Kincheloe*, 56 C. A. 123, 119 S. W. 905.

In an action against a railroad for injuring cattle, certain testimony held not to prove actionable negligence. *Ft. Worth & D. C. Ry. Co. v. Hodge & Speer* (Civ. App.) 125 S. W. 350.

In an action against a railroad company, evidence held to warrant a finding that a cow was killed through defendant's negligence. *Houston, E. & W. T. Ry. Co. v. Skeeters Bros.* (Civ. App.) 126 S. W. 282.

Evidence held not to show that the trainmen failed to keep a proper lookout or discover the mare in time to have avoided striking her by reasonable care. *Texas & P. Ry. Co. v. Bailey* (Civ. App.) 150 S. W. 962.

In an action for the death of an animal struck by cars in switch yards, evidence held not to show the negligence of the railroad company. *Galveston, H. & S. A. Ry. Co. v. Blumberg* (Civ. App.) 155 S. W. 1184.

In an action against a railroad company for killing a mule at a city street crossing, facts held to charge the railroad company with actionable negligence. *International & G. N. Ry. Co. v. Diaz* (Civ. App.) 156 S. W. 907.

35. — **Proximate cause.**—In an action against a railroad for killing plaintiff's dog, evidence held insufficient to show that defendant's negligence was the proximate cause of the dog's death. *Gulf, C. & S. F. Ry. Co. v. Blake*, 43 C. A. 180, 95 S. W. 593.

In an action against a railroad company for killing a horse, evidence held insufficient to show that defendant's negligence was the proximate cause of the injury to the horse. *Texas Cent. R. Co. v. Randal*, 48 C. A. 637, 108 S. W. 505.

A finding that negligence in the operation of a train was the proximate cause of the killing of an animal on the track cannot be sustained in the absence of proof of causal connection between the negligence found and the accident. *Chicago, R. I. & G. Ry. Co. v. Latham*, 53 C. A. 210, 115 S. W. 890.

Evidence in an action for the death of a mare on the track held not to show that any negligence in running at an excessive speed or failure to give signals was the proximate cause of the mare being killed. *Texas & P. Ry. Co. v. Bailey* (Civ. App.) 150 S. W. 962.

In an action for the death of a mule struck by a railroad train, evidence held insufficient to show that the company was negligent, or that its negligence was the proximate cause of the death. *Southern Kansas Ry. Co. of Texas v. Graham* (Civ. App.) 155 S. W. 653.

36. **Measure of recovery.**—In general.—The general rule of the value of a thing is what it will bring in market. To constitute market value it must appear that similar things have been bought and sold in the way of trade in sufficient quantity or frequency to establish a market value for such things. Where there is no market value, the value of the thing must be ascertained by the circumstances of the case, its intrinsic value, cost, usage, prices asked and offered, and other facts which would naturally affect the minds of parties buying or selling. *G., H. & S. A. R. R. Co. v. Davis*, 1 App. C. C. § 147.

The measure of damages for killing stock is the value of the animal killed. *G., H. & S. A. R. R. Co. v. Turner*, 1 App. C. C. § 641; *G., H. & S. A. R. R. Co. v. Schrader*, 1 App. C. C. § 1147; *Same v. Buckley*, 1 App. C. C. § 687. Reasonable expense incurred in taking care of and curing an animal injured by the wrong of a railway company can be recovered. *I. & G. N. R. R. Co. v. Cocke*, 64 T. 151.

The owner may recover reasonable expenses incurred in taking care of and curing the animal. *Railway Co. v. Dunman*, 6 C. A. 101, 24 S. W. 995.

The measure of damage under the statute, when stock is killed and the track is not fenced, is the market value at the time of the killing, with 6 per cent. interest until judgment. *Houston & T. C. R. Co. v. Jones*, 16 C. A. 179, 40 S. W. 745.

Where it does not clearly appear that stock was rendered worthless by injuries, plaintiff is entitled to recover, as part of his measure of damages, the value of care reasonably expended in an attempt to render such stock serviceable or cure it. *St. Louis S. W. Ry. Co. of Texas v. Chambliss* (Civ. App.) 54 S. W. 401.

The proper measure of damages for injuries to stock stated. *Texas & P. Ry. Co. v. Meeks* (Civ. App.) 74 S. W. 329.

In an action for negligently killing a horse the measure of damages would be the market value of such horse at the time and place of the killing if there was a market value at that place, and, if not, its value at the nearest market. *St. Louis, B. & M. Ry. Co. v. Drodgy* (Civ. App.) 114 S. W. 902.

Where plaintiff's horse was so injured that he might as well have been killed, by defendant railroad company's alleged negligence, the measure of plaintiff's damages was the original value of the horse. *Texas & P. Ry. Co. v. Webb* (Civ. App.) 114 S. W. 1170.

In a statutory action for the killing of animals, the measure of damages is the market value of the stock injured or killed. *Ft. Worth & R. G. Ry. Co. v. Chisholm* (Civ. App.) 146 S. W. 988.

37. — **Exemplary damages.**—If the killing of an animal be the wanton, malicious and wicked act of the engineer or other employé of the railroad company, the company will not be liable for exemplary damages unless it authorized or approved the act. *G., H. & S. A. R. R. Co. v. Davis*, 1 App. C. C. § 148, citing *Hays v. H. & G. N. R. R. Co.*, 46 T. 281.

38. — **Interest.**—The recovery is limited to the value of stock killed or injured, without interest. *Railway Co. v. Klepper* (Civ. App.) 24 S. W. 567; *Railway Co. v. Dromgoole* (Civ. App.) 24 S. W. 372; *Railway Co. v. Greathouse*, 82 T. 104, 17 S. W. 834.

The owner may recover interest on the value of stock killed. *Railway Co. v. Dunman*, 24 S. W. 995, 6 C. A. 101.

The measure of damages is the value of the stock killed or injured, and interest upon such value is not recoverable. *Railroad Co. v. Chambliss* (Sup.) 53 S. W. 343.

The recovery is limited to the value of the stock at the time it is killed, but does not include interest on such value. *Railroad Co. v. Terry*, 22 C. A. 176, 54 S. W. 431.

Where one sues under this article for \$1,000 damages for killing stock, and claims in the petition interest from the date of the killing, the county court has jurisdiction, because this article only allows damages for the value of the stock killed, and interest on the judgment from its date. *St. L. S. W. Ry. Co. v. Earl*, 43 C. A. 127, 95 S. W. 1086.

39. — **Attorney's fees.**—See Art. 2178.

40. **Questions for jury and instructions.**—See Chapter 13 of Title 37.

41. **Indemnity.**—A judgment against a telegraph company in favor of a railway company against which a judgment for loss of cattle escaping from a pasture in consequence of the telegraph company cutting a right of way fence had been rendered held proper. *Southwestern Telegraph & Telephone Co. v. Krause* (Civ. App.) 92 S. W. 431.

**Art. 6604. [4529] Consolidation prevented.**—It shall be unlawful for any railroad corporation, or other corporation, or the lessees, purchasers or managers of any railroad corporation, to consolidate the stocks, property, works or franchises of such corporation with or lease or purchase the stocks, property, works or franchises of any other railroad corporation owning or having under its control or management a competing or parallel line; nor shall any officer, agent, manager, lessee or purchaser of such railroad corporation act as or become an officer, agent, manager, lessee or purchaser of any other railroad corporation in leasing or purchasing any parallel or competing line. [Acts 1887, p. 137.]

**What are competing lines.**—The Missouri, Oklahoma & Gulf Railway Company, which runs substantially north from Denison, Tex., to Waggoner, Okl., was not a competing or parallel line within this article, prohibiting the leasing of one of such lines by the other, to the Denison, Bonham & New Orleans Railway Company. *Scott v. Missouri, O. & G. Ry. Co.* (Civ. App.) 151 S. W. 578.

**Rights and liabilities after consolidation.**—When railroads are consolidated by the contract of parties, ordinarily the consolidated corporation, for the purpose of answering for the liabilities of the old corporations, is deemed the same as each of its constituents, and may be sued under its new name for their debts, as if no change had been made in the name of the original corporation. But this rule does not apply when a road is purchased by a railway company under a trust sale to satisfy indebtedness, and the consolidation of the corporations is thereafter authorized by the legislature. *H. & T. C. R. R. Co. v. Shirley*, 54 T. 125.

After one railway company has consolidated with another, as allowed by their respective charters, and authorized and confirmed by legislative acts conferring all rights, powers and privileges belonging to either on the new company thus formed, all liabilities of either can thenceforward only be enforced against and in the name of the consolidated company. *Indianola R. R. Co. v. Fryer*, 56 T. 609.

In a case of a voluntary consolidation of a railway company, when authorized by law, the consolidated corporation is responsible for the liability of each of its constituents, and may be sued for their debts as if no change had occurred. *G., C. & S. F. R. R. Co. v. Hutcheson*, 3 App. C. C. § 97; *Mo. Pac. R. R. Co. v. Owens*, 1 App. C. C. § 386; *Stephenson v. T. & P. R. R. Co.*, 42 T. 162; *T. & P. R. R. Co. v. Murphy*, 46 T. 356, 26 Am. Rep. 272; *H. & T. C. R. R. Co. v. Shirley*, 54 T. 125. As to the purchase of the fran-

chise and property of one company by another, see *Railway Co. v. Newell*, 73 T. 334, 11 S. W. 342, 15 Am. St. Rep. 788; *Railway Co. v. Rushing*, 69 T. 306, 6 S. W. 834.

A new railway corporation, created as a result of the consolidation of certain roads, held bound by a contract of one of the roads to maintain a switch and side track, and entitled to be relieved from liability as provided in the contract. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 95 T. 461, 68 S. W. 159.

**Leases, sales, etc., of railroad.**—See, also, notes under Arts. 6415, 6417 and 6697 et seq.

A railway which by agreement acquires the property and franchises of another railway company becomes its successor, succeeding to its rights, powers and privileges, and may continue business in its name and make itself party to judicial proceedings to which the sold-out company was a party. *Acres v. Moynes*, 59 T. 623; *Stephenson v. T. & P. R. R. Co.*, 42 T. 163.

Companies will not be permitted, under the pretense of leasing, to enjoy the advantages of a consolidation without bearing the liabilities attaching thereto. *Mo. Pac. R. R. Co. v. Owens*, 1 App. C. C. § 384.

The lease of a railway does not relieve lessor from liability. *Railway Co. v. Morris*, 68 T. 59, 3 S. W. 457; *Railway Co. v. Kuehn*, 70 T. 582, 8 S. W. 484.

A railway company cannot, in the absence of authority conferred by statute, lease its road to another so as to absolve itself from its obligations to the public. If, without such authority, it surrenders the control of its road to another, it becomes liable for the torts of the company operating it which are committed on its line. *I. & G. N. R. R. Co. v. Underwood*, 67 T. 589, 4 S. W. 216; *Woodhouse v. Railway Co.*, 67 T. 416, 3 S. W. 323; *Railway Co. v. Eckford*, 71 T. 274, 8 S. W. 679; *Railway Co. v. Moody*, 71 T. 614, 9 S. W. 465; *Railway Co. v. Lee*, 71 T. 538, 9 S. W. 604.

In order to render a sale of one railroad to another company effective, there must be both a power to sell in the vendor, and a power to purchase in the vendee. 2. If the roads are parallel or competing lines the right to sell does not exist. 3. The facts that roads cross each other does not necessarily establish the fact that they are competing lines; whether they are or not is a matter of fact to be found by a jury. 4. The claim of one railway to purchase the property and franchises of another road is the assertion of a right not accorded to railways generally, either by statute or common law, and can only be recognized upon allegations and proof bringing it clearly within the terms of the statute. No railway can absolve itself from liability to the public for torts by transferring its franchises to another road, in the absence of a statute conferring the right. *Railway Co. v. Rushing*, 69 T. 306, 6 S. W. 834.

**Judicial notice respecting railroads.**—It is within the judicial knowledge of the court that the Texas Pacific Railway was a part of the Missouri Pacific Railway system, and proof of this fact is not required. *Mo. P. R. R. Co. v. White*, 3 App. C. C. § 163, citing *Mo. P. R. R. Co. v. Graves*, 2 App. C. C. § 679.

It is a matter of public and general notoriety and judicial information that the Missouri Pacific Railway system embraces the Missouri Pacific Railway, the central branch of the Union Pacific Railway, and the Missouri, Kansas & Texas Railway, the St. Louis, Iron Mountain & Southern Railway, the Texas Pacific Railway, and the International & Great Northern Railway. *T. & P. R. Co. v. Logan*, 3 App. C. C. § 188.

Judicial knowledge must be taken that the Houston & Texas Central Railway and the Gulf, Colorado & Santa Fé Railway are parallel and competing lines. *G., C. & S. F. Ry. Co. v. State*, 72 T. 404, 10 S. W. 81, 1 L. R. A. 849, 13 Am. St. Rep. 815.

**Art. 6605. [4530] Corporation defined.**—Railroad corporation, or other corporation, as used in the preceding article, is declared to mean any corporation, company, person or association of persons who own or control, manage or operate any line of railroad in this state. [Id. sec. 3.]

**Art. 6606. [4531] Consolidation, etc.**—No railroad company organized under the laws of this state shall consolidate, by private or judicial sale or otherwise, with any railroad company organized under the laws of any other state, or of the United States.

**Art. 6607. [4532] Map and profile of road, etc., shall be recorded.**—Every such corporation shall, within a reasonable time after their road shall be located, cause to be made:

1. A map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office of the railroad commission. Every such map shall be drawn on a scale and on paper to be designated by the railroad commission and certified and signed by the president of the corporation.

2. A certificate specifying the line upon which it is proposed to construct the railroad and the grades and curves, certified and signed and filed as aforesaid.

3. Any railroad company failing or refusing to comply with the provisions of this article shall forfeit to the state of Texas any sum not less than five hundred dollars nor more than one thousand dollars, to be recovered in any court of competent jurisdiction in any county through which such railway company may pass; and each day such railroad company fails or refuses to comply with the provisions of this law shall be considered a separate offense. [P. D. 4904.]

**Art. 6608. [4535] To receive freights and passengers from connecting lines.**—All railway companies doing business in this state shall be and they are hereby required to receive from all other railway companies with which they may connect at the state line of this state, or at any place within this state, or at any or all places where they may cross the line of any other railway doing business, or operating a line of railway, in this state, all freights and passengers coming to it from such connecting line and destined to points on its line, or to points beyond its line or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the next connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against the line from which such freight or passengers are received, and upon the same terms and conditions with those made by such line for like or similar service against any other railway in or out of this state with which it does business; provided, however, that the words, "without delay or discrimination," as used herein, are hereby declared to mean that the freight received for transportation as herein required shall be shipped in the order in which it is received, giving preference in all cases to live stock and other perishable freight in the order received; and the charges for the business required by this article to be interchanged shall be no greater pro rata per cent per mile for freight, and no greater rate per mile for passengers and baggage, than is charged to any other line for transporting like freight and passengers and baggage, or that it accept for itself when transported wholly on its own line, no matter on what part of the line or in what direction the transporting is done. [Acts 1887, p. 110.]

See *Inman v. St. Louis S. W. R. Co.*, 14 C. A. 39, 37 S. W. 37.

**Historical.**—The codifiers who prepared the Revised Statutes of 1895 collected into Chapter 10 of Title 94 (Title 115 herein) many provisions of pre-existing statutes regulating the duties and liabilities of railroad companies, among them, as articles 4535-4539 (Arts. 6608-6615 herein), the five articles of the act of 1887. To article 4537 (Art. 6610 herein) was added the provisions of section 8 of the act of 1883, in reference to forwarding goods in the order in which they are received, so that the language in article 4539 (article 4255 of 1887; Art. 6615 herein), "or shall violate in any manner any other provisions of this and the four preceding articles," seems to make the prescribed penalty apply to the violation of the act of 1883, to which it did not before apply. None of the language in either of the statutes was so altered as to indicate an intention to make a change in the law. The compilers only "arranged and collated into the proper titles, chapters, and articles" laws already existing without material change. *St. Louis S. W. Ry. Co. of Texas v. Hill & Morris*, 97 T. 506, 80 S. W. 368, 369.

**Liability of connecting carriers.**—L. bought a railway ticket at Birmingham, Alabama, for passage to Cameron, Texas, on the several connecting lines between the points. The ticket was limited as to time, and the limit had expired from fault of one of the lines before he reached the line of the defendant. Passage was refused by conductor on defendant's train on the ticket because it had expired before it was presented. Suit for damages for the refusal, etc. Held, that if the ticket was a joint undertaking on the part of all the lines of railway, the defendant would be responsible for the default of the connecting line causing the delay, at least to extent of honoring the ticket when presented. *Railway Co. v. Looney*, 85 T. 158, 19 S. W. 1039.

Connecting carrier liable on shipping contract without proof that it received part of the freight. *Railway Co. v. Anderson*, 21 S. W. 691, 3 C. A. 8.

As to liability of connecting lines, see *Galveston, H. & S. A. Ry. Co. v. Johnson* (Civ. App.) 37 S. W. 243.

When one railroad refuses to receive property tendered it from another, the one refusing is liable for damages caused thereby. *Red River T. & S. Ry. Co. v. Eastin & Knox*, 39 C. A. 579, 88 S. W. 532.

The M., K. & T. Ry. Co. received freight to be carried to Taylor on the I. & G. N. Ry. Co.'s line. In delivering the freight to the I. & G. N. at Trinity, it required the latter road to carry the freight to Houston and there redeliver to the M., K. & T. to carry to Taylor, instead of permitting it to carry the freight via Palestine and then on to Taylor over its line, the route which the owner of the freight wished to be used. While the M., K. & T. forced its connecting line (the I. & G. N.) to violate this article, by requiring it to deliver the freight at Houston to the M., K. & T. and not at Taylor on its own line, yet it is not liable, for so doing, for the penalties prescribed in Art. 6670, because it does not fail or refuse to receive and transport freight; but simply forces its connecting line to route the freight contrary to the wish of the shipper. Penalty statutes are construed strictly. *M., K. & T. Ry. Co. v. Thompson*, 55 C. A. 12, 118 S. W. 623.

**Contracts to carry beyond own line.**—See, also, note under Art. 6615.

A railroad company may bind itself to transport passengers and freight beyond its own line. *H. & T. C. R. R. Co. v. Hill*, 63 T. 381, 51 Am. Rep. 642.



**Contracts limiting liability.**—See Art. 708 and notes.

**Interstate commerce.**—Act of congress regulating commerce between the states, liability under. *Railway Co. v. Lumber Co.*, 1 C. A. 553, 21 S. W. 290. See *Railway Co. v. Looney*, 85 T. 158, 19 S. W. 1039.

In *St. Louis S. W. Ry. Co. v. Carden* (Civ. App.) 34 S. W. 145, it is held that provisions of the statutes of the state applying to interstate commerce, in conflict with the acts of congress upon the same subject, are invalid.

**Excuses for refusal to receive.**—Where goods are damaged by other companies, a company may refuse to receive them until indemnified against liability for the injury; and if delay is caused through a mistake in billing goods with others that are damaged, the company is not liable. *Missouri Pac. R. R. Co. v. Weisman*, 21 S. W. 426, 2 C. A. 86.

The existence of quarantine established by sanitary commission of Texas does not excuse a railroad for refusing to receive and carry cattle from one connecting line to another, the quarantine line not running across its road, but running across the road to which it was required to carry and deliver the cattle. *Ft. Worth & D. C. Ry. Co. v. Masterson*, 95 T. 262, 66 S. W. 834, 835.

Where nearly all live stock shipments were received each year by a railroad company at the same season of the year as the shipment of plaintiff, a custom of shippers to give ten to twenty days' prior notice to furnish cars did not excuse a delay of a connecting carrier of four days in the shipment of plaintiff's stock; plaintiff being under no duty to give such notice. *Texas & P. Ry. Co. v. Leslie* (Civ. App.) 131 S. W. 824.

**Art. 6609. [4536] What are connecting lines.**—Whenever any two or more railroads doing business in this state shall connect with each other by crossing each other's tracks or otherwise so as to form a continuous or connected line from one point in the state to another point in this state, such lines so crossing are hereby declared to be connecting lines; and when such connecting lines receive from any other railway or transportation line passengers or freight for transportation over the combined line at a rate or division agreed upon between themselves and such other railway or transportation line from which the business is received as aforesaid, then, in every such case, it shall be the duty of such connecting railways forming such through line, and of either or both of them, to receive from every other railway or transportation line with which they or either of them may connect by crossing of track or otherwise, all passengers or freight that may be destined to points on either of the lines making up such combined line, and transport the same to the point of destination, if on such combined lines, or either of them, or to the next connection or crossing in the direction of the destination of such freight or passengers, without delay or discrimination, and at no greater rate than is paid, and on the same conditions as is or shall be required by such combined line for like or similar services from any other railway or transportation line with which they or either of them shall interchange business. [Id.]

**Connecting lines.**—Where a railroad owns switches or Y's connecting it with other roads that have no interest in the switches or Y's it is not thereby made a connecting line within the meaning of this article so that it can be compelled to receive freight or passengers from one road and haul the same over its switches or Y's to another road with which it is thus connected, when the freight is routed over the two roads with neither of which the owner of the switches or Y's has anything to do. The service so demanded is a switching or transfer service, where the freight tendered is not routed over any part of the line of the road owning the switches and the latter need not transport such freight over the switches unless it wishes so to do. *Railroad Co. v. Gulf & I. Ry. Co.* (Civ. App.) 54 S. W. 1031.

A railroad train when it goes over the track of another railroad, crosses that track as completely as if it had crossed at grade; and when it does so, and the other conditions exist, the two lines become connecting lines within the purview of this article. *I. & G. N. Ry. Co. v. Railroad Commission* (Civ. App.) 86 S. W. 16.

**Art. 6610. [4537] Terms for receiving, etc.**—Every railroad, or person, or corporation operating a railway for the carriage of freight and passengers in this state shall receive freight, passengers and baggage for transportation to or into this state, or through any part thereof, from every other connecting railway, upon the same terms and conditions as to the division of charges for carrying or transporting the same upon a mileage, or any other basis, and upon terms and conditions as to bills of lading, way-bills, tickets, coupon tickets and baggage checks, that any such person, or corporation or transportation line may receive or contract to receive from any other person or corporation engaged in like business in this state; and, where railroads within this state receive goods for transportation into their warehouses or depots,

they shall forward them in the order in which they are received, the first received to be the first forwarded, without giving the preference to one over another; and in case of failure to do so they shall be liable for all loss occurring while the goods remain, and for all damage occasioned or in any wise resulting from delay; provided, that the trip or voyage shall be considered as having commenced from the time of the signing of bill of lading, and as having ended upon the arrival of freight at point of destination, and written notices served upon the consignee that it is ready for delivery upon payment of freight and charges; provided, further, that should the consignee of the goods fail to receive them promptly after such notice is served the liability of the railroads thereafter shall be the same as that of warehousemen. [Id. Acts 1883, p. 69.]

**What constitutes receipt of freight.**—In order to recover a statutory penalty the plaintiff must bring his case clearly within the terms of the statute. In order to recover in this case the plaintiff must show that the defendant (railway company) not only received his cotton but that it received it in its warehouse or depot. Being received upon a platform wholly disconnected from the warehouse and depot is not sufficient. *Hill & Morris v. St. L. S. W. Ry. Co.* (Civ. App.) 75 S. W. 876.

**Must receive impartially.**—If a railway refuses to take and transport property in the order in which it is offered, and exercises partiality in accepting property tendered by some and rejecting that offered by other persons, it is liable for all damages resulting therefrom. *H. & T. C. R. R. Co. v. Smith*, 63 T. 322.

**Art. 6611. All water craft freight to be received on same terms.**—All railway companies doing business in this state shall be and they are hereby required to receive from all steamships, steamboats and other water craft and vessels, at their usual places for receiving such freights at the several ports on the coast of Texas, and on the inland waterways in this state, all freights and passengers coming to it from such steamships, steamboats and other water craft and vessels, and destined to points on its line, or to points beyond its line, or any other line of railway with which said line may connect or cross, and shall transport the same over its said line to destination, if on its line, or to the connecting or cross line in the direction of destination, if beyond its line, without delay or discrimination in favor of or against such steamship line, steamboat owner or company, or the owner of any other water craft or other vessels from whom such freight or passengers are received, and upon the same terms and conditions with those made by such railway company for like or similar service with any other person, steamship company, steamboat company or owners, or any other water craft or vessel, with which it does business at such points or stations as aforesaid. [Acts 1899, p. 101, sec. 1.]

**Art. 6612. Penalty.**—If any railway company doing business in this state shall fail or refuse to interchange business with any steamship line or company, or any steamboat line or company, or any other water craft or vessel, on the same terms and conditions, or for the same compensation or pro rata that it interchanges business with any other steamship line or company, steamboat line or company, or any other water craft or vessel, it shall be deemed guilty of discrimination within the meaning of this chapter; and every railroad company so offending shall, for every such offense, forfeit and pay to the state of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars, to be collected in the manner and in the courts as prescribed for the collection of other penalties, in article 6673, and in addition thereto shall forfeit and pay to the corporation, person or persons aggrieved thereby the sum of one thousand dollars as penal damages for each and every act of discrimination or violation of this law which may be recovered in a civil action in any court in this state having jurisdiction by law of the amount in controversy, in the name of the corporation, person or persons so suing; provided, that nothing in this article shall be so construed as to prevent the recovery of any other damages by an aggrieved person, firm or corporation accruing by reason of the violation of this article, or to

relieve any railway company, or its officers, managers or agents, from prosecution under any penal law of this state. [Id. sec. 2.]

**Art. 6613. Provisions of two preceding articles, how construed.**—The two preceding articles shall not have the effect to relieve or waive any right of action by the state, or any other person, firm or corporation for any right, penalty or forfeiture which may have arisen, or may hereafter arise, under any law of this state; and all penalties accruing under the two preceding articles shall be cumulative of each other, and a suit for or recovery of one shall not be a bar to the recovery of any other penalty. [Id. sec. 3.]

**Art. 6614. [4538] Declared to be trustees, etc.**—Every railway which may interchange business with any other connecting railway under the provisions of this chapter, or otherwise, is hereby declared to be a trustee for such connecting railway to the extent of all sums of money received by it for the joint business interchanged between them, and which may properly belong to such other railway. Such sums of money shall be due and payable from one connecting line to the other once every ninety days; and each connecting railway shall have a lien upon the property and franchises of connecting railways to the extent of balances due each quarter, which lien shall be superior to all other liens upon said property and franchises, save and except laborers' liens, as already provided by law, and may be enforced in any of the courts of this state having jurisdiction by law of the subject matter and the parties. [Id.]

**Traffic balance liens.**—The lien created by this article extends to all property of the connecting road which may be indebted for traffic balance due by it and is not restricted to the same species of property covered by the laborer's lien. *I. & G. N. Ry. Co. v. Coolidge*, 26 C. A. 595, 62 S. W. 1097.

Debt incurred by the receiver for the benefit of all the lien holders in bettering the road and operating it, is a lien superior to the traffic balance lien, in the absence of affirmative proof that no part of such debt was incurred for the benefit of the property which is sought to be subjected to traffic balance lien. *Id.*

Debts which accrued six months before road was put in hands of receiver, not evidenced by receiving certificates, not secured by statutory lien on town lots of the road are inferior to traffic balance lien on the said town lots. *Id.*

Certificates of indebtedness issued to pay employes before the receivership, in the absence of proof showing that they were issued for the benefit of the road during the receivership are subordinate to the traffic balance lien. *Id.*

**Art. 6615. [4539] Penalty for refusing to receive from connecting lines.**—If any railway company doing business in this state shall fail or refuse to interchange business with any other railway company, or shall fail or refuse to interchange business on the same terms or for the same pro rata that it interchanges business with any other railway company in this state, or shall fail or refuse to honor or receive the tickets, coupon tickets, way-bills or baggage checks of any connecting railway upon the same terms and conditions that it receives or honors the tickets, coupon tickets, waybills or baggage checks of any other railway company, or shall violate in any manner any other provisions of this and the four preceding articles, such railway company so offending shall be deemed guilty of discrimination within the meaning of this title, and shall forfeit and pay to the person or corporation aggrieved thereby the sum of one thousand dollars as penal damages for each and every act of discrimination or violation of this law, which may be recovered in a civil action in any of the courts of this state having jurisdiction by law of such an amount, in the name of the person or corporation so suing; provided, nothing in this article shall be so construed as to prevent the recovery of any other damages by any aggrieved person, firm or corporation, occurring by reason of the violation of this or the four preceding articles, nor to relieve any railway company, or its officers, managers or agents, from prosecution for violation of any penal law of this state. [Acts 1887, p. 112.]

See *Inman v. St. Louis S. W. R. Co.*, 14 C. A. 39, 37 S. W. 37.

**Liability of connecting lines.**—See notes under Art. 6608.

**Art. 6616. [4540] Equal facilities to be furnished.**—Every railroad company operating a railroad within this state shall furnish reasonable and equal facilities and accommodations, and upon reasonable and equal rates, to all corporations and persons engaged in the express business, for the transportation of themselves, agents, servants, merchandise and other property, and for the use of their cars, depots, buildings and grounds and for exchanges at points of junction with other roads. [Acts 1887, p. 113.]

**Art. 6617. [4541] Damages for failure to comply, etc.**—Any railroad company, which shall fail to comply with the provisions hereof, shall be liable to the aggrieved party, in an action on the case, for damages; and such railway company, in addition to liability to said action for damages, shall be subject to a writ of mandamus, to be issued by any court of competent jurisdiction, to compel compliance with the provisions of the preceding article; and the said writ of mandamus shall issue at the instance of any party or corporation aggrieved by a violation hereof, and any violation of said writ shall be punishable as a contempt. [Id. sec. 2.]

**Art. 6618. [4542] Passenger fare three cents per mile.**—The passenger fare upon all railroads in this state shall be three cents per mile, with an allowance of baggage to each passenger not to exceed one hundred pounds in weight; provided, however, that, where the fare is paid to the conductor, the rate shall be four cents per mile, except from stations where no tickets are sold, and that the minimum charge in no case shall be less than twenty-five cents; and provided, further, that when the passenger fare does not end in five or naught, the nearest sum so ending shall be the fare; provided, further, that in no case shall children under ten years of age be charged a higher rate of fare than two cents per mile; provided, further, railroads shall be required to keep their ticket offices open half an hour prior to the departure of trains, and upon failure to do so they shall not charge more than three cents per mile. [Acts 1883, p. 70, sec. 9.]

**Charge for crossing bridges.**—An extra charge cannot be made for crossing a bridge, *Railway Co. v. Patterson*, 7 C. A. 451, 27 S. W. 194.

**Keeping ticket office open.**—If a railway company fails to keep its ticket office open for half an hour previous to the departure of the train, it can in no case rightfully demand fare of a passenger having no ticket, at the rate of more than three cents per mile. *Mo. Pac. R. R. Co. v. McClanahan*, 66 T. 530, 1 S. W. 576. There must also be an agent in the office to sell tickets. *Fordyce v. Manuel*, 82 T. 527, 18 S. W. 657.

An instruction that a railroad is required to keep its ticket office open half an hour before arrival of trains and until departure thereof is erroneous and imposes a greater burden than is imposed by law. *Missouri, K. & T. Ry. Co. v. Mills*, 27 C. A. 245, 65 S. W. 74.

It is the duty of a railroad company to keep its ticket office open half an hour prior to the departure of its train. And where a conductor causes one to return from the train to the ticket office to get a ticket it is his duty to give him a reasonable time to procure his ticket and return to the train before starting it. *Missouri, K. & T. Ry. Co. of Texas v. Gist*, 31 C. A. 662, 73 S. W. 858.

If the ticket office is not kept open half an hour before the arrival and departure of a train the company cannot charge more than three cents per mile, and some one must be in the office to sell tickets. *Gulf, C. & S. F. Ry. Co. v. Dyer*, 43 C. A. 93, 95 S. W. 13, 14.

**Authority of ticket agent.**—See notes under Art. 6637.

**Excursion rates.**—A contract made with a general passenger agent, within the line of his authority, for the transportation of excursionists over the railroad for which he is agent, is binding on the company. For the breach of such contract a proximate basis for damages would be the profit above the contracting price which the other party would have realized on delivery of tickets negotiated by him and contracted for by others. Conjectural profits not based on actual agreements with those desiring to make the excursion, and with no definite knowledge of how many tickets could have been sold under the original contract, or for what profit, can form no legal basis for recovery. *H. & T. C. R. R. Co. v. Hill*, 63 T. 381, 51 Am. Rep. 642.

One who contracts with a railway company for the transportation of excursionists at reduced rates, and whose contract is afterwards, and before the excursion, repudiated by the company, after he has contracted to sell and deliver tickets at an advanced rate, may recover as damages the amount he would have received as net profits on the tickets he would have sold, after deducting expenses incurred in getting up the excursion. See opinion for facts on which the rule is announced. *Railway Co. v. Hill*, 70 T. 51, 7 S. W. 659.

**Rights of and liabilities toward passengers.**—See Carriers, Title 20.

## INJURIES FROM OPERATION OF RAILROAD

- I. Injuries from construction or maintenance of railroad.
- II. Companies and persons liable for injuries.
  1. Ownership, possession and control of road in general.
  2. Lessors and lessees.
  3. Companies permitting use of road by others.
  4. Companies operating or using roads of others.
  5. Joint liabilities.
  6. Sufficiency of evidence as to ownership and operation.
- III. Injuries to passengers or freight.
- IV. Injuries to licensees or trespassers in general.
  7. Degree of care in general.
  8. Injuries to persons at stations.
  9. Injuries to persons working on or about cars.
  10. Injuries to persons on trains—Care required and liability as to trespassers.
  11. — Care required and liability as to licensees.
  12. — Care required and liability as to children.
  13. — Persons riding at invitation or by acquiescence of employés.
  14. Removal of trespassers.
  15. Contributory negligence of person injured—In general.
  16. — Persons working on or about cars.
  17. — Persons riding on trains or cars.
  18. Proximate cause of injury.
  19. Willful or wanton injury.
  20. Acts or omissions of employés or others.
  21. Actions for injuries to licensees or trespassers—Pleading, including issues, proof and variance.
  22. — Admissibility of evidence.
  23. — Weight and sufficiency of evidence.
  24. — Damages.
  25. — Questions for jury and instructions.
  26. Notice of claim for damages.
- V. Accidents to trains.
  27. Care in management of trains in general.
  28. Collisions—In general.
  29. — At railroad crossings.
  30. Defects in roadbeds or tracks.
  31. Contributory negligence of person injured.
  32. Notice of claim for damages.
- VI. Accidents at crossings.
  33. Public or private character of crossings.
  34. Mutual rights and duties at public crossings.
  35. Defects in crossings and approaches.
  36. Obstructions at crossings.
  37. Frightening animals—Liability in general.
  38. — By signals and escape of steam.
  39. Signboards, signals, flagmen and gates at crossings.
40. Care in running trains in general.
41. Mode of running at crossings.
42. Lights, signals and lookouts from trains or cars.
43. Obstruction of view or hearing.
44. Rate of speed.
45. Violation of ordinance as negligence.
46. Brakes and means of control.
47. Precautions as to persons seen at or near crossing—In general.
48. — Children.
49. Contributory negligence of person injured—Care in going on or near tracks in general.
50. — Care required of children and others under disabilities.
51. — Use of defective or obstructed crossings.
52. — Duty to stop, look, and listen.
53. — Duty where view or hearing obstructed.
54. — Knowledge of danger.
55. — Reliance on precautions on part of railroad company.
56. — Effect of directions of railroad employés.
57. — Crossing near standing trains or cars.
58. — Crossing near approaching trains or cars.
59. — Acts in emergencies.
60. — Effect in general.
61. Proximate cause of injury.
62. Injury avoidable notwithstanding contributory negligence.
63. Acts or omissions of employés or others.
64. Actions for injuries—Pleading, including issues, proof and variance.
65. — Presumptions and burden of proof.
66. — Admissibility of evidence.
67. — Sufficiency of evidence.
68. — Questions for jury and instructions.
69. Notice of claim for damages.
- VII. Injuries to persons on or near tracks.
  70. Right to go on or near track—In general.
  71. — Customary use of track.
  72. Care required in general.
  73. Care required as to licensees.
  74. Care required as to trespassers.
  75. Frightening animals near railroad.
  76. Defects in roadbed, tracks or equipment.
  77. Derailment of trains.
  78. Articles projecting, falling or thrown from trains.
  79. Mode of running trains or cars.
  80. Signals and lookouts—In general.
  81. — Persons entitled to benefit of signals and lookouts.
  82. — Places for giving signals or keeping lookout.
  83. Rate of speed.

- VII. Injuries to persons on or near tracks—Cont'd.**
84. Violation of ordinance as negligence.
  85. Precautions as to persons seen on or near track—In general.
  86. — Right to presume that person will leave track or avoid danger.
  87. — Children.
  88. — Infirm or helpless persons.
  89. Contributory negligence of person injured—Care required of persons on or near tracks in general.
  90. — Care required of children and others under disabilities.
  91. — Failure to look or listen for approaching train.
  92. — Knowledge of danger.
  93. — Reliance on precautions on part of railroad company.
  94. — Acts in emergencies.
  95. Proximate cause of injury.
  96. Injury avoidable notwithstanding contributory negligence.
  97. Willful or wanton acts and gross negligence.
  98. Acts or omissions of employes or others.
  99. Actions for injuries—Pleading.
  100. — Presumptions and burden of proof.
  101. — Admissibility of evidence.
  102. — Sufficiency of evidence.
  103. — Damages.
  104. — Questions for jury.
  105. — Instructions.
  106. Notice of claim for damages.
- VIII. Injuries to animals on or near tracks.**
- IX. Fires.**
107. Care required and liability as to fires in general.
  108. Defects in construction of engines.
  109. Management of engines.
  110. Combustibles on railroad property.
  111. Preventing spread of fire.
  112. Contributory negligence of owner of property—In general.
  113. — Combustibles near railroad.
  114. — Precautions against communication of fire.
  115. Proximate cause of injury—In general.
  116. — Spread of fire.
  117. Injury avoidable notwithstanding contributory negligence.
  118. Property injured or destroyed.
  119. Contracts for exemption from liability.
  120. Persons entitled to damages.
  121. Actions for injuries by fire—Rights of action and defenses.
  122. — Presumptions and burden of proof.
  123. — Admissibility of evidence.
  124. — Sufficiency of evidence.
  125. — Damages.
  126. — Questions for jury and instructions.
  127. Notice of claim for damages.
- X. Injuries to employes.**

## .. INJURIES FROM CONSTRUCTION OR MAINTENANCE OF RAILROAD

See notes at end of Chapter 8 of this title.

## II. COMPANIES AND PERSONS LIABLE FOR INJURIES

1. **Ownership, possession and control of road in general.**—A shipper, in loading the railway car of another, placed by defendant railroad on its tracks, in the street, negligently overturned the car, frightening plaintiff's horses, and injuring plaintiff. Held, that defendant was not liable. *Washington v. Texas & Ft. S. Ry. Co.*, 22 C. A. 189, 54 S. W. 1092.

A railroad corporation organized by the consent of a lumber company owning a railroad held liable to one injured thereon, though the road had not been transferred to the corporation. *San Jacinto & S. Ry. Co. v. McLin*, 26 C. A. 423, 64 S. W. 314.

Evidence held to show that a railroad company's duty as to a car on a side track had not ceased at a particular time. *Gulf, C. & S. F. Ry. Co. v. Fowler*, 57 C. A. 556, 122 S. W. 593.

2. **Lessors and lessees.**—A charge as to the negligence of a railroad company and its lessee in permitting an obstruction to remain in the right of way held erroneous. *Houston & T. C. R. Co. v. Kimbell (Civ. App.)* 43 S. W. 1049.

In the absence of statutory authority to lease its tracks, a railroad company is liable for injuries caused by the negligence of the servants of another company operating its trains over the former's tracks under a lease. *Missouri, K. & T. Ry. Co. of Texas v. Owens (Civ. App.)* 75 S. W. 579.

3. **Companies permitting use of road by others.**—A railway company cannot, by permitting persons other than its own servants to move cars on a side track, or by consenting thereto, escape liability to a person injured through the negligence of such persons. *Gulf, C. & S. F. Ry. Co. v. Bryant*, 30 C. A. 4, 63 S. W. 804.

Ownership by another road engine which struck person walking on tracks held immaterial on the issue of liability of road whose tracks they were. *Gulf, C. & S. F. Ry. Co. v. Miller*, 35 C. A. 116, 79 S. W. 1109.

A railroad company held liable for injury from negligent operation of a train, which was on its road with its permission, though owned and operated by another. *Ray v. Pecos & N. T. Ry. Co.*, 35 C. A. 123, 80 S. W. 112.

A railroad company held liable for injury from a defective roadbed to an engineer of another company using the road with its permission. *Southern Kansas Ry. Co. of Texas v. Sage (Civ. App.)* 80 S. W. 1038.

A railroad company, having no control of the cars on a switch track constructed through an elevator building, held not liable for the death of an employé of such elevator company by the negligent operation of such cars by other elevator employés. *Sauls v. Chicago, R. I. & T. Ry. Co.*, 36 C. A. 155, 81 S. W. 89.

4. **Companies operating or using roads of others.**—Operatives of plaintiff's logging train, who were required to run the train over defendant's railroad in obedience to the latter's orders, held not servants of defendant, so as to relieve plaintiff from responsibility for their negligence. *Roganville Lumber Co. v. Gulf, B. & K. C. Ry. Co.*, 36 C. A. 563, 82 S. W. 816.

Statement of duty of a refrigerator car company to employés of a railroad company as to condition of a car which it furnishes for transportation over the railroad. *Leas v. Continental Fruit Express*, 45 C. A. 162, 99 S. W. 859.

A car company engaged with railroads in operating its cars held liable for injury to a brakeman from a defective fastening on a car when it came to the railroads, concealed by paint, and so not observable on inspection. *Continental Fruit Express v. Leas*, 50 C. A. 584, 110 S. W. 129.

A contract between the Pullman Company and a railroad company held valid, and to bind the former to pay to the latter any damages the latter may pay, by reason of injuries to employés of the former. *San Antonio & A. P. Ry. Co. v. Tracy* (Civ. App.) 130 S. W. 639.

5. **Joint liabilities.**—In an action for injuries to a street car passenger while alighting to escape a threatened collision between the car and a railroad train, the railroad and street car companies held guilty of concurring negligence rendering each liable. *Galveston, H. & S. A. Ry. Co. v. Vollrath*, 40 C. A. 46, 89 S. W. 279.

6. **Sufficiency of evidence as to ownership and operation.**—Evidence held insufficient to show railroad company jointly using track to be connected with the leaving of an engine on the crossing, so as to render it liable for any negligence in so doing. *Texas Midland R. R. v. Cardwell* (Civ. App.) 59 S. W. 288.

Evidence held to sustain a finding that a car company was engaged with railroads in operating its refrigerator fruit cars. *Continental Fruit Express v. Leas*, 50 C. A. 584, 110 S. W. 129.

### III. INJURIES TO PASSENGERS OR FREIGHT

See notes under Art. 707 et seq.

### IV. INJURIES TO LICENSEES OR TRESPASSERS IN GENERAL

7. **Degree of care in general.**—A railroad company in possession of freight as warehouseman for delivery to the consignee must exercise ordinary care in guarding the same so as to prevent injury to others. *Gulf, C. & S. F. Ry. Co. v. Fowler*, 57 C. A. 556, 122 S. W. 593.

The rule that a carrier need not acquaint itself with the character of goods received for transportation held subject to the exception that it does not apply to dangerous articles, and a carrier receiving dangerous articles must exercise ordinary care to prevent injury to others. *Id.*

8. **Injuries to persons at stations.**—A railroad company held liable for defects in a platform used by persons hauling fruit for transportation over its lines. *Ft. Worth & N. O. Ry. Co. v. Nesmith* (Civ. App.) 40 S. W. 1071.

A person who goes upon the railroad platform to meet another is not a trespasser and it is the duty of the railroad company to exercise due diligence to secure his safety. *G., C. & S. F. Ry. Co. v. Williams*, 21 C. A. 469, 51 S. W. 653.

A railroad held to owe no duty to one in charge of a team in the depot grounds, except to use all means to prevent injuries to him and his team when seen in a position of danger. *Texas Cent. R. Co. v. Harbison* (Civ. App.) 88 S. W. 414.

In an action against a railroad company for injuries to plaintiff while standing on a gang plank, extending into the door of a freight car, evidence examined, and held to show that defendant, in the absence of knowledge of plaintiff's presence, owed him no duty of care for his safety at the place of his injury. *Louthian v. Ft. Worth & D. C. Ry. Co.*, 50 C. A. 613, 111 S. W. 665.

The law does not permit even trespassers to be exposed wantonly, and a railroad company owes a licensee in its waiting room the duty of taking ordinary care to avoid injuring him. *Texas Midland R. Co. v. Geraldson*, 54 C. A. 71, 117 S. W. 1004.

An expulsion from a depot waiting room held a tort for which the company was liable independent of any contractual relation. *Id.*

The servants of a railway company held bound to exercise ordinary care to prevent injuring persons rightfully on a depot platform. *International & G. N. Ry. Co. v. Kent* (Civ. App.) 124 S. W. 179.

A railroad is under no duty to keep in repair the streets and sidewalks in a town or city. *Farmer v. International & G. N. Ry. Co.* (Civ. App.) 134 S. W. 356.

A railroad is not liable for injuries to person falling through hole in sidewalk maintained by the town. *Id.*

A railroad's responsibility for defects in walks relates only to the approach from a street to its depot, and it is not liable to keep in repair the crossing of such street. *Id.*

That a railroad permitted the town to use part of its right of way on which to construct a walk is not sufficient to impose liability for defects therein on the railroad. *Id.*

One held to be impliedly invited at a railroad station, and hence entitled to reasonable care. *Mack v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 134 S. W. 846.

Where plaintiff was going to defendant's depot for a lawful purpose, and in crossing a walk over several tracks to reach it was struck by an engine on one of the tracks, he was not a trespasser. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

9. **Injuries to persons working on or about cars.**—Evidence in action for injuries to a team and wagon in a railroad yard by collision with a train held sufficient to support a verdict for plaintiff. *Houston & T. C. R. Co. v. Rippetoe* (Civ. App.) 64 S. W. 1016.

Where, in an action for personal injuries sustained while loading a car standing on a side track of defendant, the evidence showed he was loading the right car, it was immaterial whether defendant's servants pointed out the car to be loaded. *Gulf, C. & S. F. Ry. Co. v. Bryant*, 30 C. A. 4, 66 S. W. 804.

One engaged in unloading corn from a car which was standing on a siding did not assume the risk of injuries caused by a train backing against the car without warning. *St. Louis Southwestern Ry. Co. of Texas v. Kennemore* (Civ. App.) 81 S. W. 802.

Where the substantial issue in an action for personal injuries was the striking of a standing car, which plaintiff was on, with moving cars, failure to show how the standing car was struck does not prevent a recovery. *Houston, E. & W. T. Ry. Co. v. Ollis*, 37 C. A. 231, 83 S. W. 850.

One of a gang of men unloading for a contractor gravel from cars hauled by defendant, who at noon sat on a tie, back to a car, which was moved by the switch crew, injuring him, held not a trespasser. *Texas & N. O. R. Co. v. McDonald* (Civ. App.) 85 S. W. 493.

Defendant railroad held under no obligation to plaintiff, which it did not owe to the public generally, who might be about the track and cars. *Texas & N. O. Ry. Co. v. McDonald*, 99 T. 207, 88 S. W. 201.

A railroad company transporting and delivering a foreign oil tank car as a connecting carrier held bound to use reasonable care to inspect the unloading appliances, as well as the outward condition of the car, before delivery. *Gulf, W. T. & P. Ry. Co. v. Wittnebert* (Civ. App.) 104 S. W. 424.

Where plaintiff was injured while attempting to unload an oil tank car, he did not assume the risk of injury by the fact that the discharge valve had been negligently left open when the car was delivered. *Id.*

Plaintiff in an action against a railroad company for personal injuries held to have been on a car by invitation of the railroad company. *Missouri, K. & T. Ry. Co. of Texas v. Thomas*, 48 C. A. 646, 107 S. W. 868.

Where a car is placed on a side track by a railroad company to be unloaded, the company is bound to anticipate the presence of a person at the car, and must exercise ordinary care not to injure him, whether it knows of his presence in the car or not. *Dooley v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 298, 110 S. W. 135.

A railroad owes one rightfully beside its track the duty of exercising ordinary care to avoid injuring him. *Ft. Worth & R. G. Ry. Co. v. Eddleman*, 52 C. A. 181, 114 S. W. 425.

Plaintiff held not entitled to recover for injuries sustained by jumping in front of a moving car which he knew could not be stopped by the brake, unless he did so to rescue his fellow servant on the car from a position of danger. *Texas & P. Ry. Co. v. Brooks* (Civ. App.) 118 S. W. 744.

A car wheel company maintaining a switch track connected with a railroad, placing a barrier on the track to separate the part on which repair work should be done from that on which switching cars should be done, need not provide a barrier sufficient to withstand an unusual and unnecessary impact of a car against the barrier. *Houston & T. C. R. Co. v. Hanks* (Civ. App.) 124 S. W. 136.

A railroad is not bound before moving its train to ascertain whether or not any one is between the cars who may be injured by the movement thereof. *Freeman v. Huffman* (Civ. App.) 130 S. W. 195.

Where the employes of defendant railroad company prematurely removed a flag placed on the end of a car which was being repaired, held, that defendant was bound to inform plaintiff of the removal of the flag, or to operate its engine upon the repair track so as not to injure plaintiff. *Atchison, T. & S. F. Ry. Co. v. Classin* (Civ. App.) 134 S. W. 358.

A railroad company held chargeable with notice of a defective handhold on a car delivered to another road, upon which a brakeman was injured. *St. Louis, I. M. & S. Ry. Co. v. Bass* (Civ. App.) 140 S. W. 860.

A railway company held liable for injury to a brakeman employed by another company, caused by a defect in a car owned by the first company while being used by the second. *Id.*

A car repairer while repairing cars on a switch track leading to defendant's elevator held not a trespasser or bare licensee, but on defendant's property by right. *J. Rosenbaum Grain Co. v. Mitchell* (Civ. App.) 142 S. W. 121.

Defendant held chargeable with actionable negligence in permitting cars to descend from an elevator and violently collide with other cars on a switch track, causing injury to a car repairer. *Id.*

10. **Injuries to persons on trains—Care required and liability as to trespassers.**—A railroad company held not liable for the death of plaintiff's husband, who was killed while riding on a work train in violation of a rule forbidding the carrying of passengers on such trains, where the evidence showed that deceased was a trespasser on the train when injured. *International & G. N. Ry. Co. v. Hanna* (Civ. App.) 58 S. W. 548.

In an action to recover damages for injuries sustained in attempting to board a moving train, an instruction that, though plaintiff were a trespasser, it was the duty of defendant's servants to assist plaintiff, without any reference to his being in imminent and known peril, held erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Mills*, 27 C. A. 245, 65 S. W. 74.

A railroad, having knowledge of the usual presence of trespassers on its tracks, owes them the duty of using ordinary care to avoid injury to them. *Ollis v. Houston, E. & W. T. Ry. Co.*, 31 C. A. 601, 73 S. W. 30.

11. **Care required and liability as to licensees.**—An employe of an independent contractor with a railroad company held not a trespasser while on the company's train, as regards its duty to him. *Gulf, C. & S. F. Ry. Co. v. Lovett* (Civ. App.) 74 S. W. 570.

A railroad company held not negligent in the sudden checking of a train to prevent its collision with another, whereby an employe of an independent contractor with it was thrown off. *Id.*

In action for injuries sustained by one riding on a gravel train, evidence held not to show lack of ordinary care on the part of the railroad. *Lovett v. Gulf, C. & S. F. Ry. Co.*, 97 T. 436, 79 S. W. 514.



A railroad company owes a licensee on its train the duty of exercising ordinary care for his safety. *Gulf, C. & S. F. Ry. Co. v. Walters*, 49 C. A. 71, 107 S. W. 369.

12. — **Care required and liability as to children.**—If a minor injured in attempting to get on a moving train possess such a degree of intelligence as to appreciate the danger, held, that he could not recover. *Missouri, K. & T. Ry. Co. of Texas v. Tonahill*, 16 C. A. 625, 41 S. W. 875.

Employés of a work train held guilty of negligence in not preventing children from riding thereon. *St. Louis S. W. Ry. Co. v. Abernathy*, 28 C. A. 613, 68 S. W. 539.

Employés in a railroad yard held bound to use ordinary care to prevent injuring the boys riding on the trains there. *Davis v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 92 S. W. 831.

The act of a brakeman in ejecting a boy trespassing on a train held negligence as a matter of law. *Texas & N. O. R. Co. v. Buch* (Civ. App.) 102 S. W. 124.

Railroad employés held required to use ordinary care to prevent injuring boys trespassing on freight trains. *Id.*

Evidence held insufficient to show that defendant's servants were negligent in failing to ascertain the presence of the injured boy upon the car and in not removing him therefrom. *St. Louis Southwestern Ry. Co. of Texas v. Davis* (Civ. App.) 110 S. W. 939.

Railroad trains held not attractive articles so as to be classed with turntables. *Id.*

Employés held not required to inspect their trains after starting to see that trespassing children do not leap on the cars as they pass. *Id.*

Proof required to be made in order to render railroad company guilty of actionable negligence rendering it liable for injuries to a child while stealing a ride on a freight car stated. *Id.*

Degree of vigilance required by railroad companies in dealing with trespassing children held to depend on age and intelligence of child. *Id.*

Railroad company held bound to exercise ordinary care not to injure a child, though a trespasser. *Ft. Worth & D. C. Ry. Co. v. Cushman*, 51 C. A. 308, 113 S. W. 198.

13. — **Persons riding at invitation or by acquiescence of employés.**—One who is injured in attempting to get on a moving train at the invitation of the employés, held required to show that the employés had authority to invite any one to ride on the train. *Missouri, K. & T. Ry. Co. of Texas v. Tonahill*, 16 C. A. 625, 41 S. W. 875.

Railroad company held to owe one riding on train with its permission only the duty of ordinary care to avoid injuring him. *Lovett v. Gulf, C. & S. F. Ry. Co.*, 97 T. 436, 79 S. W. 514.

One riding in a caboose of a railroad construction train with the consent of the railroad company held not a trespasser. *Gulf, C. & S. F. Ry. Co. v. Walters*, 49 C. A. 71, 107 S. W. 369.

14. **Removal of trespassers.**—A railroad company must use reasonable care in expelling trespassers from trains. *Texas & P. Ry. Co. v. Lyons* (Civ. App.) 50 S. W. 161.

A railway company held not liable for injuries caused by the conductor forcing a person to leave the train while in motion. *Grahn v. International & G. N. R. Co.*, 100 T. 27, 93 S. W. 104, 5 L. R. A. (N. S.) 1025, 123 Am. St. Rep. 767.

Evidence held to warrant the finding as a matter of law that a person knew that a conductor of a freight train had no authority to allow him to ride as a passenger. *Id.*

15. **Contributory negligence of person injured—In general.**—A finding that employés with reasonable care could have averted an accident held not justified. *Houston, E. & W. T. Ry. Co. v. Hartnett* (Civ. App.) 48 S. W. 773.

A company is liable where a trespasser falls under a moving car, and the engineer sees his danger, and could, with ordinary care, stop the engine and prevent the injury, but fails to do so. *Galveston, H. & S. A. Ry. Co. v. Zantzinger* (Civ. App.) 49 S. W. 677.

In an action against a railroad for injuries, held, that plaintiff was not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Kennemore* (Civ. App.) 81 S. W. 802.

In an action for injuries to a licensee at a railroad depot, an instruction that, if she was placed in a place of danger by defendant's negligence, her negligence in attempting to save herself from danger would not prevent a recovery, was proper. *Gulf, C. & S. F. Ry. Co. v. Tullis*, 41 C. A. 219, 91 S. W. 317.

In an action against a railroad company for personal injuries, plaintiff held guilty of negligence precluding a recovery. *Whitney v. Texas Cent. R. Co.*, 50 C. A. 1, 110 S. W. 70.

Plaintiff held not chargeable with contributory negligence in the handling of his team, where defendant railroad's negligence put him or the team in a position of peril, and he acted as seemed prudent to him under the circumstances. *Ft. Worth & R. G. Ry. Co. v. Eddleman*, 52 C. A. 181, 114 S. W. 425.

In an action for injuries to plaintiff on defendant's depot platform, evidence held not to show that he assumed the risk. *International & G. N. Ry. Co. v. Kent* (Civ. App.) 124 S. W. 179.

Plaintiff in attempting to pass between defendant railroad's cars, while defendant's employés were endeavoring to place a car in the train on scales, held guilty of contributory negligence. *Freeman v. Huffman* (Civ. App.) 130 S. W. 195.

16. — **Persons working on or about cars.**—Where one engaged in loading a car on a side track jumps from it and is injured, through fear that he would be struck by other cars coming down grade, held, the company was not relieved from liability by showing that there was no necessity for him to jump. *Gulf, C. & S. F. Ry. Co. v. Bryant*, 30 C. A. 4, 66 S. W. 804.

A railway company is liable for injuries sustained by persons lawfully on its tracks by reason of negligence in their construction. *Id.*

A car inspector engaged in inspecting cars for one company who knew that the yardmaster of another company had seen him at his work had the right to assume that the yardmaster would not run cars against those he was inspecting. *El Paso & S. R. Co. v. Darr* (Civ. App.) 93 S. W. 166.

Facts considered, and held insufficient to render a railroad company liable for injuries to a person loading a wagon from one of its cars. *Wood v. St. Louis Southwestern Ry. Co. of Texas*, 48 C. A. 328, 107 S. W. 563.

A person unloading a car placed on a side track by a railroad company for the purpose of being unloaded is not bound to warn the company of his presence in the car. *Dooley v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 298, 110 S. W. 135.

Plaintiff, who was injured while attempting to load a car, held guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Housman (Civ. App.)* 127 S. W. 251.

Where a railroad places a car at the customary place to be unloaded by the consignee, the latter's agent, engaged in unloading the car, may assume that the railroad will not without timely warning back a train into such car. *Houston & T. C. R. Co. v. Gerald (Civ. App.)* 128 S. W. 166.

A car repairer of another railroad company held negligent in going under one of defendant's cars which was being repaired, if he knew there was no blue flag up. *Atchison, T. & S. F. Ry. Co. v. Classin (Civ. App.)* 134 S. W. 358.

A car inspector of another railroad company going under one of defendant's cars to inspect it with knowledge that the blue repair flag placed thereon to protect it had been removed held to have assumed the risk of the car being run into by other of defendant's cars. *Id.*

A car inspector of another railroad company which had requested defendant company to repair one of its cars, so that it could be received by his own company, held not to have assumed the risks of injury from the negligence of defendant's servants in repairing the car, unless he knew, or should have known, thereof. *Id.*

17. — **Persons riding on trains or cars.**—Where a trespasser on defendant's train was killed, held proper to charge that defendant was not liable unless it knew of his presence, and could have prevented the accident by ordinary care. *Southerland v. Texas & P. Ry. Co. (Civ. App.)* 40 S. W. 193.

Boarding a freight train, and thereafter going on the platform, held not negligence, where the passenger had traveled on freight trains of that road before, and where the conductor insisted on his jumping off the moving train. *Texas & P. Ry. Co. v. Kelly (Civ. App.)* 47 S. W. 809.

Engineer of switch engine threw hot water upon trespasser riding on footboard, causing him to jump off and fall under wheels. Held, that act of trespasser in jumping was not negligence. *Galveston, H. & S. A. Ry. Co. v. Zantzinger*, 92 T. 365, 48 S. W. 563, 44 L. R. A. 553, 71 Am. St. Rep. 859.

Held a willful assault, and therefore negligence of trespasser in placing himself in such position was not contributory cause of injury. *Id.*

An instruction that, if plaintiff acted as a man of ordinary care in changing his position in a car whereby he was injured, he would not be prevented from recovering, held correct. *St. Louis & S. W. Ry. Co. of Texas v. Holmes (Civ. App.)* 49 S. W. 658.

A youth 11 years old held not guilty of contributory negligence in boarding a train while moving out of a depot. *Missouri, K. & T. Ry. Co. of Texas v. Tonahill (Civ. App.)* 54 S. W. 419.

One who boarded a freight train at a watering station, and jumped or fell from it while in rapid motion, held to have voluntarily assumed the risk. *Cunningham v. Ft. Worth & D. C. Ry. Co.*, 28 C. A. 15, 66 S. W. 467.

One thrown from a train and run over by it, by its being suddenly stopped, is prevented by contributory negligence from recovering therefrom; he having taken a position on the footboard of the engine, between it and the cars. *Gulf, C. & S. F. Ry. Co. v. Lovett (Civ. App.)* 74 S. W. 570.

One attempting to board moving car held guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133.

A boy over 16 years of age held to comprehend the danger of riding on top of a freight car, making him chargeable with contributory negligence. *Cockrell v. Texas & N. O. R. Co.*, 36 C. A. 559, 82 S. W. 529.

18. **Proximate cause of injury.**—The fact that an employé in charge of a freight train discovered a boy riding on top of a car held not to destroy the effect of the boy's contributory negligence. *Cockrell v. Texas & N. O. R. Co.*, 36 C. A. 559, 82 S. W. 529.

In an action for injuries to a car inspector, the failure to enforce a rule of the railway company held not the proximate cause of the injury. *El Paso & S. R. Co. v. Darr (Civ. App.)* 93 S. W. 166.

In an action against a railroad company for injuries to plaintiff while standing on a gang plank extending into the door of a freight car, evidence examined, and held to show that the negligence, if any, of defendant's switch crew in making a coupling was not the proximate cause of plaintiff's injury. *Louthian v. Ft. Worth & D. C. Ry. Co.*, 50 C. A. 613, 111 S. W. 665.

The liability of a railroad for the act of its switching crew engaged in switching cars on the track of a manufacturer, causing injury to an employé of the manufacturer, held to depend on the negligence of the crew and of the employé's guilt or innocence of contributory negligence. *Houston & T. C. R. Co. v. Hanks (Civ. App.)* 124 S. W. 136.

The act of defendant held not to be the proximate cause of plaintiff's injury, and that the accident causing such injury was not one which defendant should have anticipated. *Missouri, K. & T. Ry. Co. of Texas v. Housman (Civ. App.)* 127 S. W. 251.

Negligence of plaintiff's helper concurring with the negligence of defendant held not to defeat recovery. *J. Rosenbaum Grain Co. v. Mitchell (Civ. App.)* 142 S. W. 121.

19. **Willful or wanton injury.**—An engineer of a switch engine held guilty of a willful assault in throwing hot water on a trespasser, so as to render the company liable for injuries, though the trespasser was negligent in jumping from engine. *Galveston, H. & S. A. Ry. Co. v. Zantzinger (Civ. App.)* 49 S. W. 677.

Jury held authorized to find an engineer had authority to eject a trespasser from the footboard of his engine. *Galveston, H. & S. A. Ry. Co. v. Zantzinger*, 93 T. 64, 53 S. W. 379, 47 L. R. A. 282, 77 Am. St. Rep. 329.

Evidence held to show that defendant was not guilty of willful negligence in ordering plaintiff's son off its train, and hence she was not entitled to recover. *House v. Blum (Civ. App.)* 56 S. W. 82.

20. **Acts or omissions of employés or others.**—The engineer of a switch engine has authority to eject a trespasser standing on the footboard. *Galveston, H. & S. A. Ry. Co. v. Zantzinger (Civ. App.)* 49 S. W. 677.

In an action by a trespasser on a train for injuries caused by an expulsion by a brakeman, a refusal to charge that the trespasser could not recover if the brakeman acted to subvert his own malice held proper. *Texas & P. Ry. Co. v. Lyons* (Civ. App.) 50 S. W. 161.

Where evidence shows that rule forbidding brakemen to eject trespasser from train was customarily violated with knowledge of railroad company, it authorizes a finding that brakeman ejecting trespasser was acting within the scope of his duty. *Houston & T. C. Ry. Co. v. Rutherford* (Civ. App.) 62 S. W. 1069.

Members of a switching crew engaged in switching cars on the track of a manufacturer held the servants of the railroad, making it liable for their negligence. *Houston & T. C. R. Co. v. Hanks* (Civ. App.) 124 S. W. 136.

The act of a railroad section foreman in bringing his child afflicted with smallpox to a section house held not within the scope of his employment. *Mellody v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 124 S. W. 702.

That a trespasser was waiting to steal a ride on a freight train, did not justify a train guard on a passenger train in shooting at him. *Grubb v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 153 S. W. 694.

Where a train guard, not authorized to interfere with trespassers, wantonly and willfully, and without reference to his master's business, shoots a mere trespasser, the railroad company is not liable. *Id.*

That the person who shot plaintiff, a trespasser at a station, was on duty as a train guard at the time did not render the railroad company liable for the unlawful use of the pistol, which was in his possession by virtue of his employment. *Id.*

21. **Actions for injuries to licensees or trespassers—Pleading, including issues, proof and variance.**—See notes under Art. 1827.

22. — **Admissibility of evidence.**—See notes under Art. 3687.

23. — **Weight and sufficiency of evidence.**—The overwhelming weight of testimony in an action for injury to an employé of an independent contractor with a railroad company, riding on the company's gravel train, held to show that there was no sudden jerk, check, or stop of the train, but that he jumped therefrom, and was thereby injured. *Gulf, C. & S. F. Ry. Co. v. Lovett* (Civ. App.) 74 S. W. 570.

Evidence held sufficient to sustain a finding that plaintiff, riding on a freight train, was trespassing. *St. Louis Southwestern R. Co. of Texas v. Mayfield*, 35 C. A. 82, 79 S. W. 365.

Evidence in an action for injuries to a child held to sustain a finding that the injury resulted from defendant's negligence. *Houston, E. & W. T. Ry. Co. v. Ollis*, 37 C. A. 231, 83 S. W. 850.

In an action for injuries to a boy received while attempting to alight from an engine on which he was riding, a verdict finding that the employés had notice of the peril of the boy in time to have avoided the injury held authorized. *Gulf, C. & S. F. Ry. Co. v. Gibson*, 42 C. A. 306, 93 S. W. 469.

In an action for injuries to a boy stealing a ride on a freight car, a finding that the proximate cause of the injury was the wrongful act of the brakeman in compelling the boy to leave the car while the train was in motion held authorized. *Texas & N. O. R. Co. v. Buch* (Civ. App.) 102 S. W. 124.

In an action for injuries to plaintiff, a licensee, while alighting from defendant's train, evidence held insufficient to show negligence on defendant's part. *Gulf, C. & S. F. Ry. Co. v. Walters*, 49 C. A. 71, 107 S. W. 369.

In an action for injuries to one struck by a train in defendant's yards, evidence held to warrant an inference that defendant had impliedly licensed the use of its premises and tracks as a walkway, though it had posted notices to the contrary. *Missouri, K. & T. Ry. Co. of Texas v. Briscoe* (Civ. App.) 109 S. W. 453.

In an action against a railroad company for personal injuries sustained while a trespasser in defendant's yards, evidence held insufficient to show that plaintiff's position was discovered in time to prevent his injury. *Whitney v. Texas Cent. R. Co.*, 50 C. A. 1, 110 S. W. 70.

Evidence held to sustain a finding that fastening handholds on freight cars with log screws, instead of nuts and bolts, was negligence. *Continental Fruit Express v. Leas*, 50 C. A. 584, 110 S. W. 129.

In an action for injuries to plaintiff by jumping in front of a moving car, evidence held insufficient to warrant a recovery on the theory that plaintiff's act was to rescue his fellow servant. *Texas & P. Ry. Co. v. Brooks* (Civ. App.) 118 S. W. 744.

In an action for injuries to a child from being run over by an engine, evidence held insufficient to warrant a finding that defendant's employés knew of plaintiff's position on the engine. *Freeman v. Garcia*, 56 C. A. 638, 121 S. W. 886.

Evidence held to show that plaintiff was guilty of contributory negligence. *Id.*

In an action for injuries to a boy alleged to have been driven from a moving car by defendant's switchman, evidence held to authorize a finding that it was the practice of the switchman to eject trespassers from trains. *Texas & N. O. R. Co. v. Buch* (Civ. App.) 125 S. W. 316.

Evidence held to justify a finding that defendant by nonenforcement had abrogated a certain rule in so far as it applied to switching crews. *Id.*

In an action by a laborer injured while loading a car, evidence held sufficient to warrant a finding that the railroad employés knew of his presence. *Missouri, K. & T. Ry. Co. of Texas v. Morin* (Civ. App.) 144 S. W. 1191.

Evidence held to show that the team was left untied and unguarded in a public place. *Freeman v. McElroy* (Civ. App.) 149 S. W. 428.

Evidence held to warrant a finding that the baggagemaster's negligence, and not plaintiff's negligence in leaving his team untied, was the proximate cause of the injury. *Id.*

24. — **Damages.**—A minor held entitled to recover for his diminished earning capacity as a result of personal injuries, from the date of the death of his surviving parent. *Missouri, K. & T. Ry. Co. of Texas v. Tonahill*, 16 C. A. 625, 41 S. W. 875.

25. — **Questions for jury and instructions.**—See notes under Art. 1970 et seq.

26. **Notice of claim for damages.**—See Art. 5714.

## V. ACCIDENTS TO TRAINS

27. **Care in management of trains in general.**—The company is liable for damages resulting from the negligence of its servants. *Railway Co. v. Lauricella* (Civ. App.) 26 S. W. 302.

28. **Collisions—In general.**—Operatives of logging train held negligent in running it without orders and without protecting the same by flags. *Roganville Lumber Co. v. Gulf, B. & K. C. Ry. Co.*, 36 C. A. 563, 82 S. W. 816.

29. — **At railroad crossings.**—Failure of the engineer of defendant railroad to give signals, when he found the air brakes would not work so as to stop the train before reaching a crossing, held actionable negligence as against the conductor on intersecting road, who was injured in the collision. *Missouri, K. & T. Ry. Co. of Texas v. Settle*, 19 C. A. 357, 47 S. W. 825.

30. **Defects in roadbeds or tracks.**—A railroad company held liable for injuries caused by derailment of train by defect in track only when condition might have been discovered before the accident. *Houston, E. & W. T. Ry. Co. v. Norris* (Civ. App.) 41 S. W. 708.

The derailment of a train held not due to the failure of the operatives thereof to exercise ordinary care in its operation, or the failure of the railroad to exercise care in the maintenance of its track. *Houston & T. C. R. Co. v. Anderson*, 44 C. A. 394, 98 S. W. 440.

31. **Contributory negligence of person injured.**—Evidence held sufficient to sustain a conclusion that plaintiff was lawfully on the train on which he was injured, and was not guilty of contributory negligence. *San Jacinto & S. Ry. Co. v. McLin*, 26 C. A. 423, 64 S. W. 314.

Fact that employes on trains on which a person was injured might have anticipated a collision with another train held not to relieve the company operating such other train from liability for injuries caused by reckless negligence. *El Paso & S. W. R. Co. v. Polk*, 49 C. A. 269, 108 S. W. 761.

32. **Notice of claim for damages.**—See Art. 5714.

## VI. ACCIDENTS AT CROSSINGS

33. **Public or private character of crossings.**—Railroad company held liable for injuries to person on track, where the train could have been stopped in time to prevent the same. *Texas & P. Ry. Co. v. Roberts* (Civ. App.) 45 S. W. 218.

In an action for injuries at a railroad crossing, an instruction that it was defendant's duty to exercise ordinary care to prevent injury to persons at places used as crossings by the public over its tracks, held proper. *Galveston, H. & S. A. Ry. Co. v. Kief* (Civ. App.) 58 S. W. 625.

A railroad company held bound to exercise reasonable care for the safety of persons traveling on a road which crossed it, though not established as a road by dedication or prescription. *Pecos & N. T. Ry. Co. v. Bowman*, 34 C. A. 93, 78 S. W. 22.

That plaintiff could have reached her destination by a legally established public road was no defense. *Id.*

A railroad company held to the care of an ordinarily prudent person in the operation of its train at a place alleged not to have been a public crossing. *Houston, E. & W. T. Ry. Co. v. Adams*, 44 C. A. 238, 98 S. W. 222.

34. **Mutual rights and duties at public crossings.**—See, also, note under Art. 6485.

Negligence imputed to railway company, when. *Dillingham v. Parker*, 80 T. 314, 16 S. W. 335; *Railway Co. v. Sledge* (Civ. App.) 30 S. W. 1102; *Railway Co. v. Anderson*, 76 T. 244, 13 S. W. 196; *Missouri Pac. R. Co. v. Lee*, 70 T. 501, 7 S. W. 857; *T. & P. Ry. Co. v. Chapman*, 57 T. 75.

Duties of persons crossing a highway. *Railway Co. v. Cox* (Civ. App.) 27 S. W. 1050. See *Railway Co. v. Warner* (Civ. App.) 31 S. W. 66.

A railroad company must use ordinary care to avoid injury to travelers on a public road crossing its track. *Galveston, H. & S. A. Ry. Co. v. Eaton* (Civ. App.) 44 S. W. 562.

An instruction that, if plaintiff's son and his companions were on defendant's track to witness a fight and not as travelers, they were trespassers, though they were on a regular pathway, held error. *Texas & P. Ry. Co. v. Ball*, 38 C. A. 279, 85 S. W. 466.

35. **Defects in crossings and approaches.**—See, also, Arts. 6485, 6487, 6493 and 6494, and notes thereunder.

Where a railroad company voluntarily constructs a bridge over ditches along its right of way, it is liable to a party for whose use it was built, for injuries by failure to keep it in repair. *Texas & P. Ry. Co. v. Hall*, 17 C. A. 45, 43 S. W. 25.

A drayman using a private crossing at the implied invitation of a railroad company while unloading a car held entitled to recover for injuries received by reason of a defect therein. *Cowans v. Ft. Worth & D. C. Ry. Co.*, 40 C. A. 539, 89 S. W. 1116.

A drayman using a private crossing at the implied invitation of a railroad company while unloading a car held not bound to exercise ordinary care in selecting a crossing. *Id.*

Evidence held to warrant a finding that a drayman engaged in unloading a car used a private crossing on the invitation of the company. *Id.*

A railroad company held under obligation to a drayman to keep a private crossing in repair. *Id.*

One traveling on a road under a railroad bridge commonly and habitually used by the public with the knowledge of the railroad company is more than a licensee, and the company owes him the duty of ordinary care. *Missouri, K. & T. Ry. Co. of Texas v. Hollan*, 49 C. A. 55, 107 S. W. 642.

Where a road under a railroad bridge was commonly used by the public with the knowledge of the railroad company, it owed a duty to a person using the road, regardless of whether it was a public highway or not. *Id.*

If a railroad took a portion of a public highway for its right of way under an agreement to construct another highway in its place as good as that taken, any member of the public would have an action for injuries resulting from the breach of its agreement to do so. *Hall v. Houston & T. C. R. Co.*, 52 C. A. 90, 114 S. W. 891.

**36. Obstructions at crossings.**—A traveler held entitled to the unobstructed use of a public highway railroad crossing maintained by the public and recognized by the railroad company, and not compelled to cross or try to cross at some other crossing. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 180.

Defendant railroad company held guilty of negligence in obstructing a street crossing. *St. Louis Southwestern Ry. Co. of Texas v. Pool* (Civ. App.) 135 S. W. 641.

A person attempting to pass between two cars in a train obstructing a crossing held not a trespasser. *Freeman v. Terry* (Civ. App.) 144 S. W. 1016.

A railroad company unnecessarily obstructing the principal street of a town by its train held required to exercise reasonable care to avoid dangers to pedestrians attempting to pass between cars. *Id.*

A railroad company unnecessarily obstructing with its train a street of a town held chargeable with knowledge of what, with due diligence, it should have known. *Id.*

**37. Frightening animals—Liability in general.**—Obstructing crossing by hand car which frightened a horse held negligence, rendering railroad company liable for resulting accident. *Sherman, S. & S. Ry. Co. v. Bridges*, 16 C. A. 64, 40 S. W. 536.

Recovery on the ground that engineer carelessly started his engine, and frightened plaintiff's horse, held supported by the evidence. *Houston & T. C. R. Co. v. Abrahams* (Civ. App.) 40 S. W. 1034.

Railroad company causing a plaintiff's team to run away, and thereby one of his lines to break, which causes plaintiff's wagon to upset, is liable for damages. *Texas & P. Ry. Co. v. Moseley* (Civ. App.) 58 S. W. 48.

Railroad company held liable to person injured by his horse taking fright at a highway crossing. *Missouri, K. & T. Ry. Co. v. Ray*, 25 C. A. 567, 63 S. W. 912.

A charge that plaintiff could not recover for injuries occasioned by his team becoming frightened at a train, unless the actions of defendant's employes in frightening the team were wantonly and willfully done, held properly refused. *St. Louis S. W. Ry. Co. v. Stonecypher*, 25 C. A. 569, 63 S. W. 946.

A railroad company held liable for injury to a person by the frightening of his horse by negligence of a section crew in placing a hand car on the track as he was about to cross at a private crossing. *Houston & T. C. R. Co. v. Beard*, 42 C. A. 427, 93 S. W. 532.

Railroad employes on seeing teams near a crossing should make no unnecessary noise calculated to frighten them, and which might result in injury. *Paris & G. N. Ry. Co. v. Calvin* (Civ. App.) 103 S. W. 428.

A railroad company held liable for the negligence of its servants in frightening the team of plaintiff by the operation of an engine. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 107 S. W. 658.

In an action for injuries caused by frightening a horse at a crossing, an instruction denying plaintiff recovery if the employes of the defendant did not see her perilous position held erroneous. *Texas Cent. R. Co. v. Boesch*, 103 T. 256, 126 S. W. 8; *Same v. Morrison*, 103 T. 256, 126 S. W. 9.

Obligation of trainmen operating trains at private crossings to prevent injury to persons there and to prevent the frightening of stock stated. *St. Louis Southwestern Ry. Co. of Texas v. Edwards* (Civ. App.) 134 S. W. 264.

Though a railroad may make the usual and necessary noises in operating their trains at crossings, when the railroad employes see that a team is being frightened they must exercise care to avoid injury. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 146 S. W. 600.

**38. — By signals and escape of steam.**—See, also, notes under Art. 6564.

Where plaintiff's team ran away, owing to negligence of engineer in blowing the whistle after he saw the team crossing the track, and might have known that the team was frightened, held, that defendant was liable. *Gulf, C. & S. F. Ry. Co. v. Singer* (Civ. App.) 40 S. W. 1004.

Railroad company held liable for injury caused from blowing whistle at crossing, though not done willfully. *Texas & P. Ry. Co. v. Moseley* (Civ. App.) 58 S. W. 48.

A railroad company has the right to make such noises with its engines as are necessarily incident to their safe operation at a street crossing. *San Antonio & A. P. Ry. Co. v. Belt*, 24 C. A. 281, 59 S. W. 607.

Where defendant's engineer, on seeing plaintiff's buggy, made unnecessary noise by permitting the escape of steam, the court properly refused to instruct that the engineer was not chargeable with ordinary care to prevent an injury caused by the horse running away. *Id.*

Facts held sufficient to support a verdict against railroad company on the ground that the engineer was negligent in blowing the whistle, so as to frighten plaintiff's team, and in not checking the train after seeing plaintiff's danger. *Missouri, K. & T. Ry. Co. of Texas v. Weatherford*, 26 C. A. 20, 62 S. W. 101.

It is negligence as a matter of law for a locomotive engineer to continue to sound the whistle at a crossing after it has become reasonably apparent that a team is being frightened thereby. *Houston & T. C. R. Co. v. Blan* (Civ. App.) 62 S. W. 552.

Instruction that defendant in a personal injury suit against a railroad would not be liable, if the blowing of the whistle which caused plaintiff's injuries was not done in the performance of duty, held properly refused. *Id.*

A railroad company held guilty of negligence in leaving an engine unattended, with steam up, at a public crossing. *Texas Midland R. R. v. Cardwell* (Civ. App.) 67 S. W. 157.

The unnecessary sounding of a railroad whistle, which frightened plaintiff's horse while it was standing in close proximity to a street crossing, by which plaintiff was injured, held to constitute actionable negligence. *McGrew v. St. Louis, S. F. & T. Ry. Co.*, 32 C. A. 265, 74 S. W. 816.

Where a railroad causes injury by negligently whistling at a street crossing held not necessary to show that the act was in the scope of the employment of the railroad's servants or done in the necessary operation of the train. *Paris & G. N. Ry. Co. v. Calvin* (Civ. App.) 103 S. W. 428.

The blowing of a locomotive whistle on a street crossing, resulting in frightening the horse plaintiff was driving and causing it to run away and injure plaintiff, held negligence. *Id.*

A railroad company held liable for injuries to the driver of a team resulting from the frightening of the team by steam emitted from an engine at a railroad crossing. *St. Louis Southwestern Ry. Co. of Texas v. Nelson* (Civ. App.) 111 S. W. 1062.

A railroad company is liable for injuries at a crossing caused by negligently blowing the whistle so as to frighten plaintiff's mules and overturn his wagon. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

In an action against a railroad for injuries to plaintiff through his mules becoming frightened by a train, defendant held entitled to an instruction that if the injury resulted solely from the mules becoming frightened by the steam, and not by defendant's failure to signal at a crossing as alleged, defendant was not liable. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 125 S. W. 340.

A railroad company held liable for injury, under circumstances stated, by frightening a horse at a street crossing by unnecessarily emitting steam from an engine. *St. Louis Southwestern Ry. Co. of Texas v. Mitchell* (Civ. App.) 127 S. W. 876.

39. **Signboards, signals, flagmen and gates at crossings.**—See, also, Arts. 6563, 6564, and notes.

Failure of a railroad to keep a flagman at a crossing is negligence, where a person of ordinary prudence would, under all the circumstances, have done so. *Missouri, K. & T. Ry. Co. of Texas v. Magee*, 92 T. 616, 50 S. W. 1013.

A railroad is not negligent in failing to keep a flagman at a crossing, unless it is an exceptionally dangerous one. *Central Texas & N. W. R. Co. v. Gibson*, 35 C. A. 66, 79 S. W. 351.

Whether a railroad company is bound to maintain a watchman at a crossing depends not on whether persons are prevented from seeing the approach of trains by permanent obstructions, but on whether the conditions surrounding the crossing and the operation of the trains rendered it unusually hazardous. *Missouri, K. & T. Ry. Co. of Texas v. Hurdle* (Civ. App.) 142 S. W. 992.

40. **Care in running trains in general.**—When a locomotive, in backing into a siding, moves a line of cars which has been standing there several weeks, the company held not liable for injury to a child playing under the cars. *Texas-Mexican Ry. Co. v. Baldez* (Civ. App.) 43 S. W. 564.

Railroad company, in constructing its roadbed, held not bound to use care to prevent injury to licensee. *Houston & T. C. R. Co. v. Sgalinski*, 19 C. A. 107, 46 S. W. 113.

The duties of a railroad company as to crossing held to have no application where the street runs under the railroad. *Id.*

A railroad company is not bound to keep a bridge lighted for a licensee on the track. *Id.*

Duty of a railway company toward one attempting to cross a railway track at a crossing maintained by the company for her convenience and others residing on the premises through which the track extended stated. *San Antonio & A. P. Ry. Co. v. Mertink* (Civ. App.) 102 S. W. 153.

A railroad company is only required to use ordinary care to prevent crossing accidents. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

In walking over a crossing on a sidewalk, one is not a trespasser, and the railway company is required to exercise care proportionate to the risk. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

41. **Mode of running at crossings.**—The opening of a train when and where travelers are waiting to cross, and then suddenly closing it, is evidence of negligence, signals or no signals. *Railway Co. v. Dennis* (Civ. App.) 33 S. W. 884.

Evidence held to show such failure to take precaution at railroad crossing as to render defendant liable to person injured. *Missouri, K. & T. Ry. Co. v. O'Connell* (Civ. App.) 43 S. W. 66.

Where, when defendant's train was moved, the servants in charge knew that people were crossing between the cars, the doctrine of discovered peril applies, though they did not know that plaintiff, who was injured, was crossing at the time. *San Antonio & A. P. Ry. Co. v. Green*, 20 C. A. 5, 49 S. W. 670.

Defendant, in moving its train at crossing, held, under the evidence, guilty of negligence. *Id.*

Where defendant's employes moved a train knowing that many persons were in danger thereby, the fact that they did not know that plaintiff, who was injured, was in danger, held not to relieve them from liability. *San Antonio & A. P. Ry. Co. v. Green* (Civ. App.) 49 S. W. 672.

Though train employes do not intend to run cars into a street crossing, and cars do not reach the street, yet they may be so put in motion as to constitute negligence as to travelers on the street. *San Antonio & A. P. Ry. Co. v. Peterson*, 20 C. A. 495, 49 S. W. 924.

The physical injury to plaintiff's wife from fright should have been foreseen by trainmen, who, after opening a train at a crossing for plaintiff to pass, closed it so soon that plaintiff and family narrowly escaped injury. *St. Louis Southwestern Ry. Co. of Texas v. Murdock*, 54 C. A. 249, 116 S. W. 139.

Trainmen backing a train at a station held required to exercise ordinary care to see that no one is so situated as to be injured by the movement. *Texas & N. O. R. Co. v. Brouillette* (Civ. App.) 126 S. W. 287.

42. **Lights, signals and lookouts from trains or cars.**—See, also, Art. 6564 and notes.

While a railway has the right to use its own track, and while its engineer, ordinarily, when his train is in motion, seeing persons near the track ahead of him, has the right to presume that they will keep out of the way, yet when a train is moving in a town great watchfulness on the part of the company's servants is required. It is then the duty of the engineer, before starting his engine across a street, not only to give timely warning of his intention to start, but to look ahead and see that his train is not likely to hurt persons who are passing. *T. & P. R. R. Co. v. Lowry*, 61 T. 149.

Employes operating a railroad train are not bound to keep a lookout for teams near the track, and operate the train, so as not to frighten them. *Houston & T. C. R. Co. v. Carruth* (Civ. App.) 50 S. W. 1036.

To leave cars in a street so near a crossing that a coupling therewith cannot be made without forcing them onto the crossing, and to make the coupling without seeing whether the crossing is clear, is negligence. *St. Louis S. W. Ry. Co. of Texas v. Bowles*, 32 C. A. 118, 72 S. W. 451.

In action against railroad for injuries at crossing, a charge that plaintiff could not recover if he could have heard the noise made by the train held properly refused. *Missouri, K. & T. Ry. Co. of Texas v. Taff*, 31 C. A. 657, 74 S. W. 89.

Operatives of a railroad train held required to use ordinary care to discover persons in close proximity to the track, who may be about to cross at public crossings, as well as persons on the track. *McGrew v. St. Louis, S. F. & T. Ry. Co.*, 32 C. A. 265, 74 S. W. 816.

Where a railroad car was sent across a populous street, it was negligence not to give notice of the approach of the car. *Central Texas & N. W. R. Co. v. Gibson*, 35 C. A. 66, 79 S. W. 351.

The employés of a railway company must use ordinary care in keeping a proper lookout to prevent injury to persons on street crossings, and failure to exercise such care is negligence. *Missouri, K. & T. Ry. Co. of Texas v. Matherly*, 35 C. A. 604, 81 S. W. 589.

Held error to instruct that plaintiff could not recover if defendant's failure to ring the bell and the running of the train in excess of the six-mile speed limit were not the cause of the accident. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

It is the duty of a locomotive engineer to keep a lookout at crossings to prevent injuring persons crossing the track. *Missouri, K. & T. Ry. Co. of Texas v. King* (Civ. App.) 123 S. W. 151.

Where the hazard at a crossing was great, employés on the footboard of switch engines should be prepared to at once turn on the lever to the angle cock and stop the engine. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

43. **Obstruction of view or hearing.**—Held not negligence per se for a railroad to put on its right of way obstructions to view of one approaching crossing. *Missouri, K. & T. Ry. Co. of Texas v. Rogers*, 91 T. 52, 40 S. W. 956.

An instruction authorizing a finding that an obstruction to view on the right of way is negligence of the railroad company held error. *International & G. N. Ry. Co. v. Knight*, 91 T. 660, 45 S. W. 556.

An embankment on a railroad's right of way, obstructing the view of a public crossing, is not negligence per se. *San Antonio & A. P. Ry. Co. v. Stolleis* (Civ. App.) 49 S. W. 679.

The fact that the view of the track of one approaching a crossing was obstructed does not give him a right of action for injury sustained by a collision at the crossing, where the railroad company exercised ordinary care. *Id.*

It is not negligence for a railroad to place engine houses, tanks, etc., so as to obstruct view of a railroad crossing. *Galveston, H. & S. A. Ry. Co. v. Harris*, 22 C. A. 16, 53 S. W. 599.

44. **Rate of speed.**—In an action for injuries causing death, the speed of the train is to be considered by the jury on the question of negligence. *McDonald v. Railway Co.* (Civ. App.) 20 S. W. 847.

Evidence in an action for injuries resulting from an accident at a railroad crossing considered, and held, that defendant was guilty of negligence. *Texas & P. Ry. Co. v. Moore* (Civ. App.) 56 S. W. 248.

In an action against a railway company for a collision at a public crossing, facts held to authorize recovery for plaintiff if the train approached at a negligently high rate of speed. *Texas & P. Ry. Co. v. Tucker*, 48 C. A. 115, 106 S. W. 764.

Operation of a train within the limits of a town at a speed in excess of that fixed by city ordinance held negligence as a matter of law. *St. Louis & S. F. R. Co. v. Summers*, 51 C. A. 133, 111 S. W. 211.

Where defendant's engineer testified that, when 350 feet from a crossing, he saw an automobile on the track, and arose from his seat and applied the air brake and stopped the train, which was running 35 miles an hour, 50 feet after striking the automobile, an instruction submitting the issue as to whether the engineer was negligent in not having his engine under control was proper. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

45. **Violation of ordinance as negligence.**—See notes under Arts. 821, 863.

46. **Brakes and means of control.**—Liable for injury caused by hand car not equipped with most efficient brake. *Johnson v. Gulf, C. & S. F. Ry. Co.*, 2 C. A. 139, 21 S. W. 275.

47. **Precautions as to persons seen at or near crossing—In general.**—A railway company is liable if plaintiff in crossing its track was seen by the engineer in time to have stopped, and he did not stop. *International & G. N. R. Co. v. Dalwigh* (Civ. App.) 48 S. W. 527.

The duty of an engineer approaching a crossing, with respect to persons about to go on it or just leaving it, stated. *Missouri, K. & T. Ry. Co. of Texas v. Magee* (Civ. App.) 49 S. W. 156.

The rule that those in charge of a moving train may assume that one approaching a crossing will either cross at a safe distance or will await the passing of the train held not to apply in specified cases. *Horton v. Houston & T. C. Ry. Co.*, 46 C. A. 639, 103 S. W. 467.

Where those operating a locomotive discover the peril of one on a crossing in time to stop the engine, it is their duty to use all the means at hand to stop the engine. *Texas Mexican Ry. Co. v. De Hernandez*, 49 C. A. 360, 108 S. W. 765.

In an action for killing plaintiff's team at a railroad crossing, an instruction on discovered peril held not objectionable for failure to limit the duty of the train operatives to the use of ordinary care in endeavoring to stop the train or slacken speed. *St. Louis & S. F. R. Co. v. Summers*, 51 C. A. 133, 111 S. W. 211.

That those on an engine called to a person in a perilous position on a crossing, and tried to attract his attention and push him off the track, held not, of itself, to relieve the railroad company of liability. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 115 S. W. 340.

Presumption that a person seen on the track will get out of the way of danger held not to apply where it is apparent that he is unconscious of his danger. *Id.*

Where plaintiff was caught between tracks and struck by an engine, it was not error for the court to require of defendant's employes the use of ordinary care. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

In an action for injuries at a railroad crossing, an instruction as to defendant's duty to avoid injury to plaintiff who was unaware of the approach of the train held correct. *Id.*

48. — **Children.**—Evidence held not to show railroad liable for injuries sustained by boy by being struck by car being pushed by servants in a street. *Galveston, H. & S. A. Ry. Co. v. Kieff*, 94 T. 334, 60 S. W. 543.

Facts held to show railroad company guilty of negligence resulting in injuries to child on track. *Missouri, K. & T. Ry. Co. of Texas v. Nesbit*, 43 C. A. 630, 97 S. W. 825.

49. **Contributory negligence of person injured—Care in going on or near tracks in general.**—Contributory negligence shown. *Railway Co. v. Bailey*, 83 T. 19, 18 S. W. 481.

The law does not require of travelers more than ordinary care in passing over a railroad crossing. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 40 S. W. 849.

Where one is not responsible for the negligence of another, with whom he was riding, when approaching a railroad crossing, any act of the other will not defeat his right of recovery against the railroad company. *Bryant v. International & G. N. R. Co.*, 19 C. A. 88, 46 S. W. 82.

The fact that a traveler was standing in a wagon held not negligence precluding a recovery against a railroad company for injuries caused by an effort to avoid a train approaching a crossing. *International & G. N. R. Co. v. Bryant* (Civ. App.) 54 S. W. 364.

Where plaintiff was injured while driving his own wagon, in which two other persons were riding with his consent, but there was no evidence of joint management, on collision with a train, an instruction on the theory of imputed negligence was properly refused. *Gulf, C. & S. F. Ry. Co. v. Slater*, 22 C. A. 583, 56 S. W. 216.

A railroad, by posting signs forbidding the use of its depots and approaches, cannot make a person injured through negligence of the company at a public crossing guilty of contributory negligence, when such person was in the exercise of ordinary care. *Gulf, C. & S. F. Ry. Co. v. Marchand*, 24 C. A. 47, 57 S. W. 860.

Mere intention of one on street to board train held not to constitute him a trespasser, or to charge him with contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Hall*, 34 C. A. 535, 80 S. W. 133.

The fact that one injured by being struck by a moving railroad car stumbled and fell on the track, so that he could not escape the injury, held, under the circumstances, not to release the railroad from liability. *Gulf, C. & S. F. Ry. Co. v. Melville* (Civ. App.) 87 S. W. 863.

A person is not guilty of negligence as a matter of law in entering a railroad crossing while the gates are down, but whether the act is negligence depends upon the attendant circumstances. *Galveston, H. & S. A. Ry. Co. v. Walker*, 48 C. A. 52, 106 S. W. 705.

A traveler struck by cars at a crossing held not guilty of contributory negligence as a matter of law. *Boyd v. St. Louis Southwestern Ry. Co. of Texas*, 101 T. 411, 108 S. W. 813.

A traveler approaching a system of railroad tracks crossing the street held required to use ordinary care to avoid a collision. *Id.*

In an action for the killing of plaintiff's team, etc., in a railroad crossing accident, the driver, under the decisions of the federal courts in force in Indian Territory, where the accident occurred, held not negligent as a matter of law. *St. Louis & S. F. R. Co. v. Summers*, 61 C. A. 133, 111 S. W. 211.

Rule as to negligence in selection of pathway by one passing along railroad right of way held not to apply to person injured at public crossing. *Chicago, R. I. & P. Ry. Co. v. Reames* (Civ. App.) 132 S. W. 977.

Where plaintiff was struck by an engine, held it could not be said under the circumstances that he was negligent. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

In an action for damages from a collision between plaintiff's automobile and defendant's train, a special charge, to the effect that it was negligence per se to approach the railroad crossing at a speed above a certain limit, held properly refused where the rate set by city ordinance was higher. *Texas & P. Ry. Co. v. Hilgartner* (Civ. App.) 149 S. W. 1091.

50. — **Care required of children and others under disability.**—A minor, injured while crossing over a train standing on a street crossing, held not precluded from recovery by reason of his knowledge that there was some danger incident to his act. *Gulf, C. & S. F. Ry. Co. v. Grison*, 36 C. A. 630, 82 S. W. 671.

Facts held not to establish as a matter of law that a child, struck by an engine while crossing the track, should be held to the same degree of care as an adult. *Texas & P. Ry. Co. v. Ball*, 38 C. A. 279, 85 S. W. 456.

A person having an impediment in his walk is not required to exercise more care in looking and listening for an approaching railroad train when crossing a railroad track than one not so afflicted. *Gulf, C. & S. F. Ry. Co. v. Melville* (Civ. App.) 87 S. W. 863.

51. — **Use of defective or obstructed crossings.**—See, also, notes under Arts. 6485, 6493.

Plaintiff, while passing between the cars of a train standing on a crossing, held, under the evidence, not guilty of contributory negligence. *San Antonio & A. P. Ry. Co. v. Green*, 20 C. A. 5, 49 S. W. 670.

A person driving over a railroad crossing held not guilty of contributory negligence in driving over a switch track to wait for a train standing on the main track to leave the crossing. *St. Louis Southwestern Ry. Co. of Texas v. Pool* (Civ. App.) 135 S. W. 641.

52. — **Duty to stop, look and listen.**—A person who stopped some distance from, and, after looking and listening for a train, drove upon, a crossing, was not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Eaton* (Civ. App.) 44 S. W. 562.



Evidence held not to show person injured at railroad crossing guilty of contributory negligence as a matter of law. *Missouri, K. & T. Ry. Co. of Texas v. Oslin*, 26 C. A. 370, 63 S. W. 1039.

Evidence in an action for injuries at a railroad crossing held to show plaintiff guilty of contributory negligence as a matter of law. *St. Louis S. W. Ry. Co. v. Branom* (Civ. App.) 73 S. W. 1064.

Failure to look and listen before crossing a railway at a public crossing is not negligence as a matter of law. *Gulf, C. & S. F. Ry. Co. v. Dolson*, 36 C. A. 324, 85 S. W. 444.

The mere fact that it would have been possible for a person of ordinary prudence to have seen the train which struck plaintiff, but which plaintiff did not see, would not preclude plaintiff's recovery, since his failure to notice it may have been excused by the surrounding circumstances. *Texas & N. O. R. Co. v. Reed*, 54 C. A. 26, 116 S. W. 69.

The failure of a person approaching a railway crossing to stop, look, and listen is not negligence as matter of law. *International & G. N. R. Co. v. Tinton* (Civ. App.) 117 S. W. 936.

A traveler is not required to stop his team or get off his wagon unless he knows that a train is approaching. *Garber v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 118 S. W. 857.

In an action against a railroad company for injuries at a crossing, plaintiffs' failure to look and listen held to constitute negligence barring a recovery. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 125 S. W. 933.

An instruction that, if a driver of ordinary prudence would have stopped and listened before driving into a place of danger, plaintiff could not recover, if he failed to do so, held objectionable as leaving out of view plaintiff's duty to look for trains. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 146 S. W. 600.

It is error to charge that it is the duty of one approaching a railroad crossing to stop, look and listen in order to discover whether he may cross the track with safety, even though he be driving an automobile. *Texas & P. Ry. Co. v. Hilgartner* (Civ. App.) 149 S. W. 1091.

Failure of one whose team is run into at a railroad crossing to look and listen is not contributory negligence per se. *St. Louis Southwestern Ry. Co. of Texas v. Tarver* (Civ. App.) 150 S. W. 958.

53. — **Duty where view or hearing obstructed.**—Person injured by collision at railroad crossing held guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Younger* (Civ. App.) 40 S. W. 423.

That a view is obstructed at a railroad crossing is to be considered on the question of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Rogers*, 91 T. 52, 40 S. W. 956.

Evidence held insufficient to show plaintiff injured at railroad crossing guilty of contributory negligence. *Houston & T. C. R. Co. v. Pereira* (Civ. App.) 45 S. W. 767.

54. — **Knowledge of danger.**—A railroad company held not relieved from its duty of providing a crossing with a flagman, as against a person familiar therewith. *Missouri, K. & T. Ry. Co. of Texas v. Magee* (Civ. App.) 49 S. W. 156.

55. — **Reliance on precautions on part of railroad company.**—One on a railroad track used as a thoroughfare, who was injured by a switch engine making a running switch, held not guilty of contributory negligence. *International & G. N. R. Co. v. Mitchell* (Civ. App.) 60 S. W. 996.

Where a gate is maintained at a railroad crossing, the fact that it is open constitutes an assurance that the track may be crossed in safety. *San Antonio & A. P. Ry. Co. v. Votaw* (Civ. App.) 81 S. W. 130.

One struck by a train at a crossing held not guilty of contributory negligence as matter of law because he neither looked nor listened. *International & G. N. R. Co. v. Edwards* (Civ. App.) 91 S. W. 640.

Plaintiff in an action for injuries at a crossing held guilty of contributory negligence. *International & G. N. R. Co. v. Edwards*, 100 T. 22, 93 S. W. 106.

56. — **Effect of directors of railroad employes.**—One who uses a dangerous crossing of a railroad track instead of a safer one a little further away, is not, as a matter of law, guilty of negligence. *St. Louis & S. W. Ry. Co. of Texas v. Gill* (Civ. App.) 55 S. W. 386.

Driver, signaled by flagman to cross railroad track, held not required to use the same degree of care as if there had been no such invitation. *Missouri, K. & T. Ry. Co. v. Ray*, 25 C. A. 567, 63 S. W. 912.

Where a brakeman signaled to plaintiff to cross the track after a freight train had cleared the crossing, and plaintiff, in attempting to do so, was injured by his team becoming frightened by the sudden backing of the train, plaintiff was not guilty of contributory negligence. *St. Louis S. W. Ry. Co. v. Stonecypher*, 25 C. A. 569, 63 S. W. 946.

57. — **Crossing near standing trains or cars.**—Plaintiff was not guilty of contributory negligence in driving a gentle horse in close proximity to an engine, which started up suddenly and with unnecessary noise, from which his horse took fright, injuring him. *San Antonio & A. P. Ry. Co. v. Belt*, 24 C. A. 281, 59 S. W. 607.

Plaintiff, in an action for injuries caused by reason of his horse having been scared by an engine at a public crossing, held not guilty of contributory negligence. *Texas Midland R. R. v. Cardwell* (Civ. App.) 67 S. W. 157.

Plaintiff held not to have assumed the risk. *Id.*

Plaintiff held not precluded from recovering from a railway company for injury caused by his driving horse taking fright at a box car negligently permitted to remain at a street crossing because he attempted to drive the horse near the car after he saw it had become frightened. *Ft. Worth & R. G. Ry. Co. v. Morris*, 45 C. A. 596, 101 S. W. 1038.

The mere fact that one attempted to pass a railroad crossing obstructed by a car after he saw that the horse was shying and knew that there was danger in doing so, held not as matter of law to preclude his recovery for injuries. *Texas Cent. R. Co. v. Randall*, 51 C. A. 249, 113 S. W. 180.

Evidence, in an action against a railroad company for injury to a driver by his horse taking fright at a car standing partly in the street and running into a ditch, held not to

show as a matter of law that plaintiff was guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 53 C. A. 547, 116 S. W. 423.

58. — **Crossing near approaching trains or cars.**—Destruction of wagon and team at railroad crossing held to be due to contributory negligence of driver. *Gulf, C. & S. F. Ry. Co. v. Abendroth* (Civ. App.) 55 S. W. 1122.

Evidence held sufficient to show plaintiff guilty of contributory negligence, precluding recovery for injuries sustained by being run over by a railroad train. *Gulf, C. & S. F. Ry. Co. v. Wilson* (Civ. App.) 59 S. W. 539.

The fact that one crossing a railway knew that a train was approaching does not necessarily make him guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Matthews*, 34 C. A. 302, 79 S. W. 71.

There can be no recovery for injuries to one who goes on a railroad crossing in such close proximity to an approaching train that it cannot be stopped in time to avoid injury to him. *Id.*

59. — **Acts in emergencies.**—Where defendant company created an appearance of danger by its negligence, held, that plaintiff was not precluded from recovery because his subsequent acts contributed to his injury. *Bryant v. International & G. N. R. Co.* (Civ. App.) 46 S. W. 82.

Giving an instruction that, if plaintiff was injured in attempting to avoid only an imaginary danger, defendant company was not liable, held error. *Id.*

Where defendant company's negligence places plaintiff in a perilous position, the company is liable for his injuries, though he acts wildly and negligently. *Id.*

Whether or not plaintiff acted prudently or imprudently in attempting to avoid injury at a crossing from a switch engine negligently operated held not to affect her right to recover. *Houston & T. C. R. Co. v. Byrd* (Civ. App.) 61 S. W. 147.

Where plaintiff, riding in a buggy driven by another, was injured in attempting to avoid collision with a switch engine at a crossing, the evidence in an action against the railroad company held sufficient to sustain a finding that neither plaintiff nor the driver was guilty of contributory negligence. *Id.*

60. — **Effect in general.**—A railroad company held not relieved from its duty of providing a crossing with a flagman, as against a person who drove on it believing the train to be standing still. *Missouri, K. & T. Ry. Co. of Texas v. Magee* (Civ. App.) 49 S. W. 156.

In an action for an injury at a crossing, an instruction held erroneous as authorizing the inference that a recovery could be had notwithstanding plaintiff's contributory negligence. *Texas Midland R. R. v. Tidwell* (Civ. App.) 49 S. W. 641.

Where an approaching locomotive is seen by person before crossing railroad track, a claim for damages cannot be predicated on failure to give usual signals. *Gulf, C. & S. F. Ry. Co. v. Abendroth* (Civ. App.) 55 S. W. 1122.

61. **Proximate cause of injury.**—To give a right of action, negligence on the part of the defendant in failing to give crossing signals must be shown, and that it was the proximate cause of the injury. *Railway Co. v. Malone* (Civ. App.) 37 S. W. 640.

Evidence held to sustain a finding that a railroad company was negligent in permitting weeds to grow along its track so as to obstruct the view of passing cars from an intersecting road. *Galveston, H. & S. A. Ry. Co. v. Eaton* (Civ. App.) 44 S. W. 562.

A charge held properly refused which imputed no responsibility to defendant, if the accident would have been caused by something else if defendant's negligence had not contributed to it. *San Antonio & A. P. Ry. Co. v. Belt* (Civ. App.) 46 S. W. 374.

Negligence in permitting cars on a switch in a street to remain beyond the time prescribed by ordinance held not the proximate cause of an injury received by a person from such cars at a place beyond the street. *Williams v. Cross*, 19 C. A. 426, 47 S. W. 478.

Evidence held to show that blowing of a whistle on or near a crossing, which caused team to back into the train, was not negligence. *Houston & T. C. R. Co. v. Carruth* (Civ. App.) 50 S. W. 1036.

An instruction authorizing a recovery if plaintiff's death was caused by his horse running into a mud hole created by the road held erroneous. *Ft. Worth & R. G. Ry. Co. v. Neely* (Civ. App.) 60 S. W. 282.

The fact that defendant may have been negligent in obstructing a street with its cars held not the proximate cause of an injury resulting from an accident in driving around a car to avoid the obstruction. *Texas & P. Ry. Co. v. Kelly* (Civ. App.) 78 S. W. 372.

Evidence in an action against a railroad company for injuries to plaintiff's wife from fright held to show that the negligence of defendant's trainmen was the proximate cause of the injury. *St. Louis Southwestern Ry. Co. of Texas v. Murdock*, 54 C. A. 249, 116 S. W. 139.

62. **Injury avoidable notwithstanding contributory negligence.**—A railroad company, to avoid injury to a wagon negligently driven upon its tracks, should use the means that a person of ordinary care would use under such circumstances. *Railway Co. v. McCarty* (Civ. App.) 35 S. W. 675.

Contributory negligence bars a recovery for injuries at a crossing, though the railroad, by use of ordinary care and prudence, could have avoided it. *Texas Midland R. R. v. Tidwell* (Civ. App.) 49 S. W. 641.

Where the employes of a railroad saw a person going into a place of peril at a crossing, and by warning could have prevented the peril, the railroad was liable. *Central Texas & N. W. R. Co. v. Gibson*, 35 C. A. 66, 79 S. W. 351.

In an action for death of a trespasser on a railroad track caused by being struck by an engine, evidence examined, and held not to raise the issue of discovered peril. *San Antonio & A. P. Ry. Co. v. McMillan*, 100 T. 562, 102 S. W. 103.

Contributory negligence held not to bar a recovery for injuries sustained in a railroad crossing accident, if, after a discovery of the peril those in charge of the engine could have avoided running plaintiff down. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 115 S. W. 340.

Rule stated as to duty of locomotive operators on discovering peril of one on or near the track. *Missouri, K. & T. Ry. Co. of Texas v. King* (Civ. App.) 123 S. W. 151.

Trainmen discovering the peril of a traveler at a crossing, caused by his horse be-

coming frightened by a train, held required to refrain from unnecessarily doing anything calculated to add to the fright of the horse. *St. Louis Southwestern Ry. Co. of Texas v. Cambron* (Civ. App.) 131 S. W. 1130.

In an action for injuries at a crossing, where the recovery was sought on the ground of discovered peril, the company was not responsible, though its servants did not endeavor by all means to prevent the injury, if the peril was not discovered in time for the servants to have accomplished anything by those means. *Allen v. Texas Traction Co.* (Civ. App.) 149 S. W. 195.

If an engineer of a train approaching a crossing discovered an automobile approaching the track, and saw that it would go upon the track, and that its occupants would not be able to cross, there was a discovery of the peril, within the last clear chance rule. *Texas Cent. R. Co. v. Dumas* (Civ. App.) 149 S. W. 543.

63. **Acts or omissions of employes or others.**—Where plaintiff was injured at a crossing by a hand car used by a section foreman for his own private benefit held error to direct a verdict for the company, there being evidence of negligence in intrusting the car to the foreman. *Branch v. International & G. N. R. Co.* (Civ. App.) 48 S. W. 891.

64. **Actions for injuries—Pleading, including issues, proof and variance.**—See Chapters 2, 3 and 8 of Title 37.

65. — **Presumptions and burden of proof.**—See notes under Art. 3687.

66. — **Admissibility of evidence.**—See notes under Art. 3687.

67. — **Sufficiency of evidence.**—A finding that one who, in approaching a railroad crossing, looked for a train when he was about 50 feet from the track, and failed to look again, was not guilty of negligence, was proper. *Galveston, H. & S. A. Ry. Co. v. Huebner* (Civ. App.) 42 S. W. 1021.

Evidence held insufficient to show that person injured on track was guilty of contributory negligence. *Texas & P. Ry. Co. v. Roberts* (Civ. App.) 45 S. W. 218.

Evidence in an action for injuries at a street crossing held sufficient to support a finding that a railway company was negligent, and that plaintiff was free from contributory negligence. *International & G. N. R. Co. v. Dalwigh* (Civ. App.) 48 S. W. 527; *Marshall & E. T. Ry. Co. v. Waldrop*, 153 S. W. 410.

Evidence held to show that operatives of a train used ordinary care in stopping a train after knowing of presence of team near the track. *Houston & T. C. R. Co. v. Carruth* (Civ. App.) 50 S. W. 1036.

Evidence in an action for injuries at a railway crossing held to support a verdict for the plaintiff. *Gulf, C. & S. F. Ry. Co. v. Holland*, 27 C. A. 397, 66 S. W. 68; *Same v. Dolson*, 36 C. A. 324, 85 S. W. 444; *Texas & P. Ry. Co. v. Stoker*, 52 C. A. 433, 115 S. W. 910; *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

Evidence held to sustain a verdict that a person injured at a railroad crossing was not guilty of contributory negligence. *St. Louis S. W. Ry. Co. of Texas v. Carwile*, 28 C. A. 208, 67 S. W. 160.

Evidence held sufficient to sustain a finding that one injured by a railway train at a crossing was not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Tirres*, 33 C. A. 362, 76 S. W. 806; *Central Texas & N. W. R. Co. v. Gibson*, 35 C. A. 66, 79 S. W. 351.

Evidence, in an action by the driver of a vehicle injured at a railroad crossing, held insufficient to show plaintiff free from contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Wyatt*, 35 C. A. 119, 79 S. W. 349.

In an action for injuries at a railroad crossing, evidence held to justify a finding that after defendant's employes discovered plaintiff's peril they failed to do all in their power to prevent a collision. *Central Texas & N. W. Ry. Co. v. Gibson* (Civ. App.) 83 S. W. 862.

Evidence held to support findings that defendant's employes had knowledge that plaintiff was on the track, and that defendant's rules required an employe to see that the track approaching a street crossing was clear before giving a signal to move the train over the same. *Galveston, H. & S. A. Ry. Co. v. Fry*, 37 C. A. 552, 84 S. W. 664.

Evidence held to justify a finding that plaintiff's minor son, injured on track, was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Ball*, 38 C. A. 279, 85 S. W. 456.

In an action for personal injuries sustained in a collision between plaintiff's hack and one of defendant's cars, evidence examined, and held to show the plaintiff guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Boyd* (Civ. App.) 105 S. W. 519.

In an action for injuries at a crossing to the driver of a team which was frightened by an engine, and ran away, evidence considered, and held sufficient to show that the operatives of the engine saw the plaintiff, and were guilty of negligence proximately causing plaintiff's injuries, and that plaintiff was not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Moore* (Civ. App.) 107 S. W. 658.

In an action to recover for injuries resulting from the frightening of plaintiff's team at a railroad crossing by the noise of steam emitted from an engine near the crossing, evidence considered, and held sufficient to support a verdict for plaintiff. *St. Louis Southwestern Ry. Co. of Texas v. Nelson* (Civ. App.) 111 S. W. 1062.

Evidence held to sustain findings, in an action against a railway company for injury to a driver, caused by his horse taking fright at a car standing partly in the street and running into a ditch. *Missouri, K. & T. Ry. Co. of Texas v. Davis*, 53 C. A. 547, 116 S. W. 423.

Where plaintiff was struck by an engine, evidence held not to show such excitement on part of trainman whose duty it was to turn the angle cock as to excuse his failure to use ordinary care. *Missouri, K. & T. Ry. Co. of Texas v. Reynolds* (Civ. App.) 136 S. W. 279.

Evidence, in an action against a railroad for personal injuries resulting from fright of plaintiff's team at a crossing, held insufficient to show that those in charge of the train permitted or caused unnecessary and unusual noises. *Missouri, K. & T. Ry. Co. of Texas v. Burk* (Civ. App.) 146 S. W. 600.

In an action for injuries caused by a team becoming frightened at a railroad crossing, evidence as to whether steam was blown from an engine standing close to the crossing.

as alleged, held to support a verdict for plaintiff. *Galveston, H. & S. A. Ry. Co. v. West* (Civ. App.) 155 S. W. 343.

68. — Questions for jury and instructions.—See notes under Art. 1970 et seq.  
 69. Notice of claim for damages.—See Art. 5714.

#### VII. INJURIES TO PERSONS ON OR NEAR TRACKS

70. Right to go on or near track—In general.—Where plaintiff was injured while running on a railroad track to rescue his child, who was in danger of being run down by an approaching train, the fact that he was wrongfully on the track when he discovered his child's peril does not make him a trespasser in his subsequent efforts to save his child. *San Antonio & A. P. Ry. Co. v. Gray*, 95 T. 424, 67 S. W. 763.

The fact that he ran back along the track towards the train in an effort to save his child does not render him liable to a charge of contributory negligence. *Id.*

In an action for running over a pedestrian on the track, an instruction that, if the roadbed left sufficient room for pedestrians to walk outside of the ties in safety, it was their duty so to do, held erroneous. *Kroeger v. Texas & P. Ry. Co.*, 30 C. A. 87, 69 S. W. 809.

A boy, otherwise a licensee, is not a trespasser because he had gone to the place to see a fight. *Texas & P. Ry. Co. v. Ball* (Civ. App.) 73 S. W. 420.

Where one turns aside from a path at a point where it crosses a railroad, and loiters there on the tracks, the railroad's required measure of care stated. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

Railroad held under no duty to mere licensees to maintain path along its right of way in safe condition. *De La Pena v. International & G. N. R. Co.*, 32 C. A. 241, 74 S. W. 58.

There is no presumption that the servants of a railroad company, who operate its trains, have authority to grant permission for persons to use its tracks as a pathway for convenience in passing from one point to another. *St. Louis Southwestern Ry. Co. of Texas v. Shiflet*, 98 T. 326, 83 S. W. 677.

A servant of a construction company, riding a velocipede on the railroad's track, held not, as a matter of law, a trespasser. *Trinity & B. V. Ry. Co. v. Simpson* (Civ. App.) 86 S. W. 1034.

Where a railroad track is situated in a street, the railroad owes persons who may be upon the track the duty of exercising care to avoid running into them. *Rio Grande, S. M. & P. Ry. Co. v. Martinez*, 39 C. A. 460, 87 S. W. 853.

Defendant railroad company held bound to exercise ordinary care in keeping a lookout along its track to prevent injuries to plaintiff, where its right of way divided plaintiff's fields in which his stock was kept. *Houston & T. C. R. Co. v. O'Donnell* (Civ. App.) 90 S. W. 886.

In an action for injuries to a person while walking on defendant's railroad track, the fact that he found certain right of way fence gates, which he went to examine, in good condition, etc., held not necessarily to show that he was not lawfully on the track at the time. *Id.*

Where plaintiff was not a trespasser on the right of way, it was immaterial as to where he walked. *Id.*

One injured by being struck by a railroad train on the right of way held not a trespasser. *Houston & T. C. Ry. Co. v. O'Donnell*, 99 T. 636, 92 S. W. 409.

The fact that a public road treated as such by the general public and by a railroad was located on the railroad right of way did not affect the reciprocal rights and duties of the public and the railroad. *Johnson v. Texas & G. Ry. Co.*, 45 C. A. 146, 100 S. W. 206.

One standing on a highway near a railroad crossing held not a trespasser. *St. Louis & S. F. R. Co. v. Troutman* (Civ. App.) 138 S. W. 427.

A person in the stockyards of a railroad company to deliver stock for shipment is an invitee, and entitled to reasonable care for his safety and premises reasonably safe. *Barker v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 141 S. W. 298.

Where a railroad company provides adequate approaches to its stockyards, the relation of invitee of one to ship stock cannot be extended to other parts of its premises. *Id.*

71. — Customary use of track.—Person using railroad track as a footpath held not a trespasser. *Texas & P. Ry. Co. v. Phillips* (Civ. App.) 40 S. W. 344.

One passing along a railroad track used by pedestrians as a thoroughfare held not a trespasser, as the track was a general thoroughfare. *International & G. N. R. Co. v. Brooks* (Civ. App.) 54 S. W. 1056.

Where a railroad track had been used as a footpath for more than 25 years without objection, one walking thereon was not a trespasser. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

A railroad company, which permitted its track to be used by pedestrians, held obliged to exercise ordinary care to avoid injuring one so using it. *Law v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 134, 67 S. W. 1025.

One crossing a railroad track at a pathway when struck by an engine held a licensee, not a trespasser. *Texas & P. Ry. Co. v. Ball* (Civ. App.) 73 S. W. 420.

In an action against a railroad for injuries sustained by one struck by a car while crossing a path, held error to instruct that the employes of the railroad should have knowledge that the path was used by the public. *Over v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 535.

Evidence held to warrant a finding that a person injured while walking on the tracks of a railroad was not a trespasser. *St. Louis Southwestern Ry. Co. of Texas v. Bolton*, 36 C. A. 87, 81 S. W. 123.

Fact that persons are accustomed to use railroad track as pathway held insufficient to raise implication of permission of railroad. *St. Louis Southwestern Ry. Co. of Texas v. Shiflet*, 98 T. 326, 83 S. W. 677.

Persons who, without the express or implied permission of a railroad company, habitually use its track as a convenience in passing from one point to another, do not become licensees. *Id.*

Fact that persons were accustomed to walk on track of railroad at place where and time when deceased was killed by being struck by train held to have no tendency to establish railroad's liability. *Id.*

Where defendant railroad company had knowingly permitted the public to use its track within the limits of a city as a walkway for a number of years, a person so using the track was a licensee, and not a trespasser. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 99 T. 160, 88 S. W. 192.

Where one is walking along a pathway on a railroad right of way habitually used by the public with the knowledge of the officers and agents of the company, the jury is warranted in finding that he is a licensee. *Hutchens v. St. Louis Southwestern Ry. Co.*, 40 C. A. 245, 89 S. W. 24.

Person who walks on railroad tracks at a place where they are commonly used as a footpath held a licensee, toward whom the railroad owes the duty of ordinary care. *Gulf, C. & S. F. Ry. Co. v. Matthews (Civ. App.)* 89 S. W. 983.

Where a railroad trestle was commonly used by the public as a passageway, with acquiescence of the company, it will be considered as having licensed the public to so use such portion of its track. *Texas Midland R. R. v. Byrd*, 41 C. A. 164, 90 S. W. 185.

One held rightfully walking on a railroad track where it is used by pedestrians with the knowledge, consent, or acquiescence of the company. *International & G. N. R. Co. v. Ploeger (Civ. App.)* 93 S. W. 226.

Where a railroad trestle is commonly used by the public as a footpath with the company's acquiescence, the company will be considered as having licensed the public to so use it. *Texas Midland R. R. v. Byrd (Civ. App.)* 110 S. W. 199.

An implied license to use a railroad bridge as a footpath does not extend to such a use of the structure as would obstruct the railroad company's business. *Texas Midland R. Co. v. Byrd*, 102 T. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429, 20 Ann. Cas. 137.

Plaintiff's conduct, while using a path which defendant railroad company had licensed the public to use, held not to make him a loiterer, so as to deprive him of his status as a licensee. *Texas & P. Ry. Co. v. Endsley (Civ. App.)* 119 S. W. 1150.

One on a railroad track held not a trespasser, notwithstanding the notice given by the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Sharp (Civ. App.)* 120 S. W. 263.

One walking along the railroad track in a space commonly used by pedestrians for a walk with the knowledge and consent of the company was a licensee, and the company was bound to use ordinary care not to injure him. *St. Louis Southwestern Ry. Co. of Texas v. Wilcox*, 57 C. A. 3, 121 S. W. 583.

Evidence held insufficient to show that the person using defendant's tracks and yard as a passway was a trespasser. *Gulf, C. & S. F. Ry. Co. v. Cohen (Civ. App.)* 126 S. W. 916.

The duties of a railroad company where it permits its roadbed to be used as a walkway by the public generally, stated. *Texas & P. Ry. Co. v. Adkins (Civ. App.)* 126 S. W. 954.

Plaintiff held not precluded from recovery for injuries received on defendant's railroad track by failure to obtain defendant's consent to so use the track. *Id.*

In an action for injuries to a pedestrian while on a railroad side track, an instruction that plaintiff was not a trespasser if the railroad had acquiesced in the use of right of way as a footpath held erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Briscoe (Civ. App.)* 136 S. W. 278.

Public use of railroad yards as a passageway held to require employes to use ordinary care to prevent injury. *Ft. Worth & D. C. Ry. Co. v. Wininger (Civ. App.)* 151 S. W. 586.

**72. Care required in general.**—As to negligence in case of injury to a person on the track, see *Artusy v. Railway Co.*, 73 T. 191, 11 S. W. 177; *Railway Co. v. Garcia*, 75 T. 533, 13 S. W. 223; *Railway Co. v. Ryan*, 80 T. 59, 15 S. W. 588; *Railway Co. v. Robinson*, 4 C. A. 121, 23 S. W. 433; *Railway Co. v. Crum*, 6 C. A. 702, 25 S. W. 1126; *Smith v. Fordyce (Sup.)* 18 S. W. 663; *Railway Co. v. Brown (Sup.)* 18 S. W. 670; *Railway Co. v. Symkins*, 54 T. 615, 38 Am. Rep. 632; *Railway Co. v. Ormond*, 64 T. 485; *Railway Co. v. Smith*, 77 T. 179, 13 S. W. 972; *Rozwadofskie v. Railway Co.*, 1 C. A. 487, 20 S. W. 872.

Negligence imputed to railway company, when. *Gulf, C. & S. F. Ry. Co. v. Riordan (Civ. App.)* 22 S. W. 519.

The company is liable for damages resulting from the negligence of its servants. *Railway Co. v. Hall (Civ. App.)* 25 S. W. 52.

A railway company has a right to leave a string of cars half a mile long standing on a track used for switching and storing cars, and is not negligent in doing so. *Flores v. Atchison, T. & S. F. Ry. Co.*, 24 C. A. 328, 66 S. W. 709.

In an action against a railway company for negligently killing a person on its track, held error to direct a verdict for defendant. *Hutchens v. St. Louis Southwestern Ry. Co.*, 40 C. A. 245, 89 S. W. 24.

The care required of train operatives for the protection of one guilty of contributory negligence in walking on a railroad right of way stated. *Houston & T. C. Ry. Co. v. O'Donnell*, 99 T. 636, 92 S. W. 409.

Railroad operating trains in the streets of a town held bound to exercise only ordinary care. *International & G. N. R. Co. v. Hall (Civ. App.)* 92 S. W. 996.

In a personal injury case a charge held not to impose on defendant a higher degree of care than required by law. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

A railroad company is not bound to exercise care to avoid injuring persons on the track at night, at a point where the use of the track for such purpose at night had been infrequent, and was not notorious. *Missouri, K. & T. Ry. Co. of Texas v. Malone*, 102 T. 269, 115 S. W. 1153.

Trainmen owe no duty to one guilty of contributory negligence in lying on the track, until after his peril is actually discovered. *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488.

A railroad must use ordinary care to discover the presence of persons on the track at a place habitually in use by the public as a passway and must use such care to avoid injuring them. *Missouri, K. & T. Ry. Co. of Texas v. Sharp (Civ. App.)* 120 S. W. 263.

**73. Care required as to licensees.**—A railroad is bound to a greater degree of diligence in the exercise of ordinary care in the operation of a train over a track running beside a footpath than is required of a pedestrian walking along the path. *Missouri, K. & T. Ry. Co. of Texas v. Brown*, 46 C. A. 10, 101 S. W. 464.

The obligation of a railroad to exercise care to those who use a track for passage to and from its depot defined. *International & G. N. R. Co. v. Howell* (Civ. App.) 105 S. W. 560.

In an action against a railroad for injuries to one struck by a train while walking at night on a part of defendant's track used as a footpath evidence held sufficient to sustain a judgment for plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Malone* (Civ. App.) 110 S. W. 958.

Where a portion of a railroad track has been used for any considerable length of time by pedestrians as a footpath, it is the duty of the railroad company to exercise ordinary care in keeping a lookout for persons on the track where they may be expected to be to avoid injuring them. *Id.*

Duty of railroads towards pedestrians stated. *Gulf, C. & S. F. Ry. Co. v. Coleman*, 51 C. A. 415, 112 S. W. 690.

A railroad company is bound to use ordinary care to discover persons on the track and to avoid injuring them, where it has permitted the public, with its knowledge and consent, to use its roadbed and bridge as a footpath. *Missouri, K. & T. Ry. Co. of Texas v. Malone*, 102 T. 269, 115 S. W. 1158.

Trainmen may assume that the track used for a footpath is clear of pedestrians late at night. *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488.

Where plaintiff, a mail carrier, was using a footpath along a railroad track in delivering mail which was customarily used by pedestrians, the company owed him the duty of using ordinary care to prevent injuring him; he being a licensee. *Texas & P. Ry. Co. v. Endsley* (Civ. App.) 119 S. W. 1150.

Liability of railroad company for injury to persons on track, stated. *Gulf, C. & S. F. Ry. Co. v. Cohen* (Civ. App.) 126 S. W. 916.

Failure of operatives of a railroad train to use ordinary care to discover persons entitled to be on the track held negligence warranting recovery of damages by one injured thereby, if not himself negligent. *Howard v. Waterman Lumber & Supply Co.* (Civ. App.) 134 S. W. 387.

A railroad company held required to exercise due care in the operation of its trains so as not to injure licensees on the right of way. *St. Louis Southwestern Ry. Co. of Texas v. McCauley* (Civ. App.) 134 S. W. 798.

An engineer who discovers the peril of a traveler on a part of the right of way used by the public must use the means at hand to avoid threatened injury. *Id.*

One using railroad yards, according to the custom of the public to use them as a way, was at most a licensee, and the company was not liable for injuries resulting merely from any dangerous condition of the yards. *Ft. Worth & D. C. Ry. Co. v. Wininger* (Civ. App.) 141 S. W. 273.

A railroad company held not liable for an injury to a mere licensee received in falling off a bridge. *Barker v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 141 S. W. 298.

Public use of railroad yards as a passageway held to require employes to use ordinary care to prevent injury. *Wininger v. Ft. Worth & D. C. Ry. Co.*, 105 T. 56, 143 S. W. 1150.

**74. Care required as to trespassers.**—More diligence and watchfulness is required of an engineer to avoid collisions, where the roadbed is constantly used by pedestrians, than where it is not. *St. Louis & S. W. Ry. Co. of Texas v. Shifflet* (Civ. App.) 56 S. W. 897.

Evidence that a railroad's yard employes knew, and had long known, that people walked day and night continuously between its tracks in its yard, and never objected thereto, held sufficient to show license to walk over such place. *Texas & P. Ry. Co. v. Barrett*, 23 C. A. 545, 57 S. W. 602.

In an action for injuries to a child on track, an instruction that the degree of care required of the railroad company varied according to the probabilities of danger at different portions of the road was not erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Hammer*, 34 C. A. 354, 78 S. W. 708.

A railroad owes a trespasser the duty to use reasonable care in the operation of its trains, and to discover such trespasser's presence on its tracks. *St. Louis Southwestern Ry. Co. of Texas v. Bolton*, 36 C. A. 87, 81 S. W. 123.

The duty of the operatives of a train toward a trespasser on the track stated. *Houston & T. C. R. Co. v. Ramsey*, 43 C. A. 603, 97 S. W. 1067.

Operatives of a train held required to use ordinary care to discover, not only those who have a right to be on the track, but trespassers as well. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

Where, in an action against a railroad company for injuries to a child run over by its cars, the facts disclosed created no duty on the part of the company to the child, there could be no negligence. *International & G. N. R. Co. v. Vallejo*, 102 T. 70, 113 S. W. 4, 115 S. W. 25.

A railroad company is bound to exercise ordinary care to discover a child, not guilty of contributory negligence, though a trespasser, on its track. *Ft. Worth & D. C. Ry. Co. v. Poteet*, 53 C. A. 44, 115 S. W. 883.

Where the engineer of the train exercised ordinary care to discover plaintiff while lying on the track, but failed to see him in time to avoid injury, the railroad company would not be responsible, though plaintiff was free from contributory negligence by reason of his want of mental capacity to appreciate his danger and avoid the same. *Epper-son v. International & G. N. R. Co.* (Civ. App.) 125 S. W. 117.

If the railroad company had not permitted the public to use its roadbed in its train-yard as a thoroughfare, and plaintiff was injured by a train while so using the roadbed without permission, and the trainmen did not see plaintiff before he was injured, the company is not liable for such injury. *Texas & P. Ry. Co. v. Adkins* (Civ. App.) 126 S. W. 954.

One on a railroad track held a trespasser. *Laeve v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 136 S. W. 1129.

75. **Frightening animals near railroad.**—Where an engine near a public thoroughfare is carelessly permitted to "pop off" steam, those in charge knowing that passing teams might be frightened, the owner of a team so frightened may recover of the company for damages resulting. *Missouri, K. & T. Ry. Co. v. Traub*, 19 C. A. 125, 47 S. W. 232.

A trainman operating engine near highway parallel to track held negligent toward approaching rider in opening cylinder cocks of engine. *Texas & P. Ry. Co. v. Kennedy*, 29 C. A. 94, 69 S. W. 227.

Trainmen operating engine near highway parallel to track held to owe duty to approaching rider of refraining from opening cylinder cocks of engine, irrespective of his horse's fright therefrom or of their discovery thereof. *Id.*

One riding on highway parallel to railway held not guilty of contributory negligence, precluding recovery for injuries from fright of horse from approaching engine. *Id.*

It is the duty of railway employes to exercise ordinary care not to frighten teams by unnecessary noises. *Ft. Worth & D. C. Ry. Co. v. Partin*, 33 C. A. 173, 76 S. W. 236.

Plaintiff held entitled to recover if the operatives knew or had reason to believe that the whistle would frighten her horse. *Id.*

Evidence held to show that the engineer knew or should have known that the whistle would endanger plaintiff. *Id.*

In an action for injuries to plaintiff by her team becoming frightened, facts held insufficient to establish negligence on the part of the railroad company. *St. John v. St. Louis Southwestern Ry. Co. of Texas (Civ. App.)* 79 S. W. 603.

Evidence held to show that plaintiff was not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Kilman*, 39 C. A. 107, 86 S. W. 1050.

Statement as to duty of operators of a locomotive towards a team in a street parallel with the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Sanders*, 42 C. A. 545, 94 S. W. 149.

Where the operatives of defendant's engine knew, or had reasonable ground to believe, that the blowing of the whistle would frighten plaintiff's horse, it was their duty not to blow the whistle, unless it was necessary to avoid some other danger which could not otherwise be prevented. *Puppovich v. Galveston, H. & H. R. Co.*, 45 C. A. 138, 99 S. W. 1143.

Operatives of a train, discovering the peril of a person driving along a roadway parallel to the railroad track, held required to do everything in their power to avoid the danger of increasing the fright of the horse. *Johnson v. Texas & G. Ry. Co.*, 45 C. A. 146, 100 S. W. 206.

A railroad need not watch for persons along and near its right of way, but trainmen, becoming aware of the presence of a person on a public road near its track and that his horse is frightened, must desist from making noises frightening the horse, if consistent with their other duties. *Adams v. International & G. N. R. Co. (Civ. App.)* 122 S. W. 895.

A railroad held liable for the results of the frightening of horses by unnecessary and unusual whistling or letting off of steam, under circumstances amounting to negligence or willfulness. *Id.*

A railroad company is not liable for injuries resulting from plaintiff's team running away on taking fright at the ordinary noise by the sudden escape of steam from a locomotive. *Ford v. Houston & T. C. R. Co. (Civ. App.)* 124 S. W. 715.

Operators of engines on a track parallel to a part of right of way used by the public held required to exercise ordinary care in the operation thereof. *St. Louis Southwestern Ry. Co. of Texas v. McCauley (Civ. App.)* 134 S. W. 798.

Where a part of a railroad right of way had been used as a public street, the railroad company held liable for injuries to a traveler thereon, where her horse was frightened by unnecessary noises of an engine. *Id.*

A railroad company held not required to keep a lookout for travelers on a highway adjacent to a track to prevent frightening their teams. *McMillan v. Freeman (Civ. App.)* 138 S. W. 626.

76. **Defects in roadbed, tracks or equipment.**—The construction of a barb-wire fence by a railroad on its own land did not render it liable for injuries sustained by one accidentally riding into it. *Bishop v. Gulf, C. & S. F. Ry. Co. (Civ. App.)* 75 S. W. 1086.

The railroad held not required to clear underbrush, etc., from along the line of the fence, that it might be seen by travelers. *Id.*

77. **Derailment of trains.**—A railroad's negligence, which caused a wreck, held to render it liable for an injury received by one standing on a highway near the tracks. *St. Louis S. F. R. Co. v. Troutman (Civ. App.)* 138 S. W. 427.

78. **Articles projecting, falling or thrown from trains.**—In an action for injuries, an instruction making defendant railroad company liable if it knew that people were accustomed to stand on the skidway adjacent to its track, and propelled its car along the track with timber projecting from its sides, and plaintiff, while standing there, was struck, if so running the car was negligence, held proper. *Missouri, K. & T. Ry. Co. of Texas v. Scarborough*, 29 C. A. 194, 68 S. W. 196.

Since the natural and probable result of running a train upon a curve, on the outside of which was a pathway which the public was licensed to use, with an unfastened car door swinging loose would be to injure persons in the pathway, such condition would be negligence. *Texas & P. Ry. Co. v. Endsley (Civ. App.)* 119 S. W. 1150.

If a pedestrian was struck by a projection from a train while walking along the track at a safe distance from the train, the burden was upon the company in an action for resulting injuries to show that it was without fault. *St. Louis Southwestern Ry. Co. of Texas v. Wilcox*, 57 C. A. 3, 121 S. W. 588.

In absence of evidence to the contrary, negligence by the railroad company may be inferred from the projecting of a cross-tie on a passing train which struck a pedestrian walking along the track at a safe distance from the train. *Id.*

79. **Mode of running trains or cars.**—As great care is incumbent on operatives of a train passing along a public street as at a crossing. *Houston & T. C. R. Co. v. Laskowski (Civ. App.)* 47 S. W. 59.

Employes operating engines must use such care only as ordinarily prudent persons would exercise under like circumstances. *Houston E. & W. T. Ry. Co. v. Hartnett (Civ. App.)* 48 S. W. 773.

Where one, on a railroad track used by pedestrians as a thoroughfare, was injured by a train's making a running switch, the company was held guilty of negligence. *International & G. N. R. Co. v. Brooks* (Civ. App.) 54 S. W. 1056.

Where in a town a train blockaded a street while taking on water, it was the duty of the operatives before backing the train to use ordinary care to see that no one in crossing the rear of it was in danger, rendering the railroad company liable for neglect of such duty causing injury to one not guilty of contributory negligence. *Texas & N. O. R. Co. v. Brouillette* (Civ. App.) 130 S. W. 886.

**80. Signals and lookouts—In general.**—A railroad company has the legal right to operate its cars upon the streets of a city (*Limburger v. Railway Co.* [Civ. App.] 27 S. W. 198), and is liable in damages only for an injury caused by the carelessness of those operating them. It is the duty of the conductor of the car to watch the track upon which it is being propelled, and to avoid collisions and accidents upon the track. He is not required to keep a lookout for teams not upon or approaching the track. *Railway Co. v. Tippens*, 4 App. C. C. § 160, 14 S. W. 1067; *Hargis v. Railway Co.*, 75 T. 23, 12 S. W. 953; *City of El Paso v. Dolan* (Civ. App.) 25 S. W. 669.

It is the duty of the employees of a railway company to use reasonable care to discover and avoid injury to persons on its tracks. *Houston & T. C. R. Co. v. Harvin* (Civ. App.) 54 S. W. 629.

A railway company held liable for running over a person lawfully on its tracks and not guilty of contributory negligence, if its servants are negligent in running the train at an unlawful speed, or in failing to keep a proper lookout. *Kroeger v. Texas & P. Ry. Co.*, 30 C. A. 87, 69 S. W. 809.

The sending of a brakeman down the track before a contemplated switch is made held not to relieve the engineer in charge of the engine from the duty of keeping a reasonable lookout. *Galveston, H. & H. R. Co. v. Levy*, 35 C. A. 107, 79 S. W. 879.

Railroad, which negligently fails to give signals of the approach of a train, cannot escape liability to a person injured, on the ground that the latter could have heard the train approaching. *Trinity & B. V. Ry. Co. v. Simpson* (Civ. App.) 86 S. W. 1034.

In an action for injuries to one who was walking on a railroad trestle when a train approached, and who jumped from the trestle to avoid being struck by the train, it was no defense that the engineer had the train under control, and could or would have stopped it before striking appellee had he not left the track. *Texas Midland R. R. v. Byrd*, 41 C. A. 164, 90 S. W. 185.

Statement as to duty of persons operating a train in approaching places where the public is permitted to use the track with the consent of the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Saunders* (Civ. App.) 103 S. W. 457.

A railway company held not liable for injury to one struck by a car while attempting to cross a track, for failure to keep lookout for him. *Texas & P. Ry. Co. v. Shivers*, 48 C. A. 112, 106 S. W. 894.

The rule requiring a railroad company to use care to avoid injury to persons on its track in the daytime held not to apply to a person on the track in the nighttime. *Moore v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 123 S. W. 1142.

A railroad company must exercise ordinary care to discover persons on its track at places where they may be expected to be found. *St. Louis, S. F. & T. Ry. Co. v. Bolen* (Civ. App.) 129 S. W. 860.

Railroads are bound to keep a lookout for persons who may be on the track. *Missouri, K. & T. Ry. Co. of Texas v. Milburn* (Civ. App.) 142 S. W. 626.

**81. — Persons entitled to benefit of signals and lookouts.**—Railway company must keep a lookout and use proper watchfulness to prevent injury to an infant on its track. *Railway Co. v. Symkins*, 54 T. 615, 38 Am. Rep. 632; *Railway Co. v. Moore*, 59 T. 64, 46 Am. Rep. 265; *Williams v. Railway Co.*, 60 T. 205; *Railway Co. v. McWhirter*, 77 T. 356, 14 S. W. 26, 19 Am. St. Rep. 755; *Douglas v. Railway Co.* (Civ. App.) 26 S. W. 892.

It is the duty of the railway company to have a lookout kept not only where traveled ways cross their track, but throughout its length. The duty which is required for the safety of its passengers is also that of those who might otherwise be injured. *Railroad Co. v. Hewitt*, 67 T. 473, 3 S. W. 705, 60 Am. Rep. 32.

Where plaintiff injured on defendant's tracks was guilty of contributory negligence, he cannot recover where defendant's servants failed to discover his danger in time to prevent the injury. *Smith v. Houston & T. C. R. Co.*, 17 C. A. 502, 43 S. W. 34.

Railroad company held not liable to trespasser on track, if after discovery they used due care to prevent injury. *Louisiana W. E. Ry. Co. v. McDonald* (Civ. App.) 52 S. W. 649.

A railroad company held guilty of negligence in not using ordinary care to discover the presence of a young child on the track. *St. Louis & S. W. Ry. Co. of Texas v. Shifflet* (Civ. App.) 56 S. W. 697.

Facts held sufficient to support a verdict against a railroad company for injuries caused by plaintiff's horse becoming frightened by a train where the highway ran parallel to the railroad. *Missouri, K. & T. Ry. Co. of Texas v. Belew*, 26 C. A. 8, 62 S. W. 99.

In an action for injuries to a person on a railroad track, an instruction that failure to sound the whistle at a station and two road crossings could not be complained of by plaintiff held properly refused. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

Where plaintiff was injured while attempting to save his child from being run over by a railroad train, a charge that the fact that those in charge of the train saw his peril in time to avoid the injury could be proven by circumstantial evidence was proper. *San Antonio & A. P. Ry. Co. v. Gray* (Civ. App.) 66 S. W. 229.

Railway employes held not negligent in failing to discover child, trespassing under car, before moving it. *Flores v. Atchison, T. & S. F. Ry. Co.*, 24 C. A. 328, 66 S. W. 709.

Where a locomotive engineer is negligent in failing to see a child on the track, the exercise of due care in attempting to stop the train after the peril is discovered does not relieve the company from liability. *Texas & P. Ry. Co. v. Harby*, 28 C. A. 24, 67 S. W. 541.



Evidence held to show negligence of the engineer in failing to see the child in time to avoid the accident. *Id.*

A railroad company held not required to use care, or give warning of approaching cars, to a trespasser in its yards, in the absence of knowing of his presence on the track. *Missouri, K. & T. Ry. Co. of Texas v. Cowles*, 29 C. A. 156, 67 S. W. 1078.

Railroad held to owe no duty to a trespasser on one of its bridges to keep lookout for him. *McCowen v. Gulf, C. & S. F. Ry. Co. (Civ. App.)* 73 S. W. 46.

A license to use a railroad track as a thoroughfare does not authorize its use for sleeping and sitting, and persons so using it are trespassers. *Smith v. International & G. N. R. Co.*, 34 C. A. 209, 78 S. W. 556.

In an action for injuries to a child on a railroad track, it was proper to charge that the railroad's failure to keep a lookout for such children was negligence per se. *Missouri, K. & T. Ry. Co. of Texas v. Hammer*, 34 C. A. 354, 78 S. W. 708.

An instruction requiring the railroad company to keep a lookout for children on the track was proper. *Id.*

The duty of a railway company as to children on the track is to exercise ordinary care under all the circumstances. *Olivares v. San Antonio & A. P. Ry. Co.*, 37 C. A. 278, 84 S. W. 248.

Railroad held not bound to notify persons in vehicles near their tracks of movement of trains and switch engines. *Gulf, C. & S. F. Ry. Co. v. Hord*, 39 C. A. 319, 87 S. W. 848.

Where one while walking on a railroad company's right of way is a licensee, it is the duty of those operating trains to keep a lookout to discover him and avoid injuring him. *Hutchens v. St. Louis Southwestern Ry. Co.*, 40 C. A. 245, 89 S. W. 24.

Plaintiff held lawfully on defendant's railroad track at the time he was struck and injured. *Houston & T. C. R. Co. v. O'Donnell (Civ. App.)* 90 S. W. 886.

Statement of duty of railroad company to trespassers. *International & G. N. R. Co. v. Ploeger (Civ. App.)* 93 S. W. 226.

It is the duty of the servants of a railroad company to keep a lookout for licensees on the track, and exercise reasonable care not to injure them. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 50 C. A. 134, 109 S. W. 1126.

Servants of a railway held required to use ordinary care to avoid injuring a licensee while on a trestle, and ordinary care under the circumstances would require more diligence than under less dangerous circumstances. *Texas Midland R. R. v. Byrd (Civ. App.)* 110 S. W. 199.

That the engineer of a train had it under control, and could or would have stopped it before striking plaintiff, had he not jumped from a trestle on discovering the approach of a train which gave no warning until nearly upon him, held no defense. *Id.*

Railroad companies held required to keep lookout in direction in which cars are being moved to prevent injuring those who may be on the tracks. *St. Louis Southwestern Ry. Co. of Texas v. Davis (Civ. App.)* 110 S. W. 939.

Railway employes, while bound to keep a lookout for persons at street crossings, held not bound to take more than the usual precautions to discover a young child before backing the train. *Texas & N. O. R. Co. v. Brouillette*, 53 C. A. 33, 117 S. W. 1014.

A railroad reasonably chargeable with knowledge that persons are on the track must exercise ordinary care to discover their presence, and to avoid injuring them. *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 C. A. 87, 118 S. W. 198.

The operatives of a railway train owe the general duty of lookout, not only to those who are of right upon the track, but to trespassers as well. *Texas & N. O. R. Co. v. Brouillette (Civ. App.)* 130 S. W. 886.

Operatives of trains must use diligence in keeping a lookout for persons along its track, and to use proper precautions to prevent inflicting injury upon them. *Missouri, K. & T. Ry. Co. of Texas v. Schroeter (Civ. App.)* 134 S. W. 826.

A conductor in charge of a train, who saw persons crossing the yard in which it was located, held chargeable with the duty of keeping a lookout in their direction before giving a signal for the movement of such cars. *Ft. Worth & D. C. Ry. Co. v. Wninger (Civ. App.)* 151 S. W. 586.

82. — Places for giving signals or keeping lookout.—The burden of ordinary care was upon the defendant to ascertain the plaintiff's position while driving on the public road near its tracks, and to avoid acts which might result in injury to him. *Missouri, K. & T. Ry. Co. of Texas v. Bellew*, 22 C. A. 264, 54 S. W. 1079.

Railroad company cannot be required to look out for persons on path alongside of track if it does not know of such path. *Reichert v. International & G. N. Ry. Co. (Civ. App.)* 72 S. W. 1031.

At places where it is expected that persons will be rightfully found on a railroad track, ordinary care under the circumstances must be exercised to keep a lookout for them. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

83. Rate of speed.—Refusal to charge jury that it is not negligence per se for railroad company to run its trains at particular rate of speed held error. *Texas & P. Ry. Co. v. Short (Civ. App.)* 58 S. W. 56.

Liability of railroad company for injuries to a person on its track stated. *Epperson v. International & G. N. R. Co. (Civ. App.)* 125 S. W. 117.

Negligence in the speed of the freight train striking a licensee in railroad yards held not shown. *Ft. Worth & D. C. Ry. Co. v. Wninger (Civ. App.)* 141 S. W. 273.

A railroad company held guilty of negligence in running a train by a station at from 35 to 60 miles an hour. *Missouri, K. & T. Ry. Co. of Texas v. Muske (Civ. App.)* 141 S. W. 565.

84. Violation of ordinance as negligence.—See notes under Arts. 812 and 863.

85. Precautions as to persons seen on or near track—In general.—Reasonable care required in operating locomotive engine, where those in charge of it know person's danger therefrom in time to avoid it, stated. *Houston & T. C. R. Co. v. Wallace*, 21 C. A. 394, 53 S. W. 77.

Evidence held to show plaintiff injured by defendant's negligence while on the track in the exercise of due care. *Houston & T. C. R. Co. v. Harvin (Civ. App.)* 54 S. W. 629.

Facts held to show that servants of defendant railroad company had no knowledge of plaintiff's intention to pass between the cars of a train being made up in a switch yard. *Rodriguez v. International & G. N. R. Co.*, 27 C. A. 325, 64 S. W. 1005.

Where a father, seeing his two year old child on a railroad track in front of a rapidly advancing train, runs on the track in an attempt to save it, he is not a trespasser on the track. *San Antonio & A. P. Ry. Co. v. Gray* (Civ. App.) 66 S. W. 229.

An instruction that a railway company may be liable to injury to a trespasser, if after his peril was actually discovered the operatives failed to use the greatest precaution to avoid injury, held erroneous, as omitting the element of safety to the train in stopping. *Houston & T. C. R. Co. v. Ramsey*, 36 C. A. 285, 81 S. W. 825.

Railroad held liable for injury resulting from fright to person on the track whose presence and danger the railroad servants should have discovered. *Hendrix v. Texas & P. Ry. Co.*, 40 C. A. 291, 89 S. W. 461.

In an action for the death of a person killed by a locomotive, a charge that the engineer was not required to try to stop the train until he had actual knowledge that deceased would not get out of the way of the train held properly refused. *International & G. N. R. Co. v. Munn*, 46 C. A. 276, 102 S. W. 442.

Though the court confines the duty of those in charge of a train, after discovering a person's peril, to stopping the train, held, that the jury may consider evidence of their negligence in not using other means. *Houston & T. C. R. Co. v. Finn* (Civ. App.) 107 S. W. 94.

It is the duty of a locomotive fireman, on discovering the peril of one near the track, to resort to all available means to avoid injuring him. *Texas & P. Ry. Co. v. Crawford*, 54 C. A. 196, 117 S. W. 193.

In an action for killing a person lying on the track, evidence held to show that the company was free from negligence as matter of law. *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488.

Trainmen, discovering an object on the track in front of the train, must at least exercise ordinary care to ascertain what it is, and where, by failure to do so, a person lying on the track is killed, the company is liable. *Id.*

Operatives of a locomotive to use ordinary care are not bound to stop the train upon seeing an object on or near the track, which could not by the use of ordinary care be determined by them to be a person. *Houston, E. & W. T. Ry. Co. v. Sallee*, 56 C. A. 23, 120 S. W. 216.

Duty of those operating an engine on discovering the perilous position of a person on the track declared. *San Antonio & A. P. Ry. Co. v. Hodges*, 102 T. 524, 120 S. W. 848; *Texas & P. Ry. Co. v. Gullett* (Civ. App.) 134 S. W. 262.

A railroad engineer, on discovering the peril of a person on the track, must use every means within his power to avoid running him down, and this duty continues until the danger of a collision is past. *Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, 57 C. A. 134, 121 S. W. 871.

A railroad company on discovering the peril of a trespasser on the track need only exercise ordinary care to avoid injuring him. *Laeve v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 136 S. W. 1129.

That decedent was a trespasser when killed by defendant's train did not relieve defendant's employes from the duty on discovering decedent's danger to take steps to avoid injuring him. *Ft. Worth & D. C. Ry. Co. v. Broomhead* (Civ. App.) 140 S. W. 820.

Trainmen, discovering the peril of one lying on the track, must use the means at hand to prevent injury to him. *Texas & P. Ry. Co. v. Gullett* (Civ. App.) 145 S. W. 277.

Railroad employes in charge of a train standing in a railroad yard, and cars moving therein, were chargeable with the duty of using ordinary care to avoid injuring licensees, of whose presence they were aware. *Ft. Worth & D. C. Ry. Co. v. Wininger* (Civ. App.) 151 S. W. 586.

86. — **Right to presume that person will leave track or avoid danger.**—An engineer is not authorized to presume that a person seen on the track will leave the same in time to avoid injury, unless some warning is given. *Houston & T. C. R. Co. v. Harvin* (Civ. App.) 54 S. W. 629.

It is only necessary to stop a train when there is reasonable ground to believe that a person walking on the track will not get off in time to avoid accident. *Gulf, C. & S. F. Ry. Co. v. Hill* (Civ. App.) 58 S. W. 255.

A locomotive engineer held to have had a right to presume that a trespasser on the track would leave the same in time to avoid injury. *Houston & T. C. R. Co. v. Ramsey*, 43 C. A. 603, 97 S. W. 1067.

87. — **Children.**—Where an infant on a railroad track was of such tender years that it could not be presumed she would leave the track before the train approached, the operatives thereof were bound to use the highest degree of care to stop the train before reaching her. *Missouri, K. & T. Ry. Co. of Texas v. Hammer*, 34 C. A. 354, 78 S. W. 708.

A fireman on a moving train who sees a child approaching it is bound to act promptly to prevent its injury. *International & G. N. R. Co. v. Vallejo* (Civ. App.) 108 S. W. 1187.

The discovery by trainmen of a child, 25 months old, on the track, is a discovery of its peril, there being no presumption that it will leave the track. *Galveston, H. & N. Ry. Co. v. Olds* (Civ. App.) 112 S. W. 787.

Trainmen held, as a matter of law, to owe no duty to a child injured by being run over by cars. *International & G. N. R. Co. v. Vallejo*, 102 T. 70, 113 S. W. 4, 115 S. W. 25.

To impose on the crew of a train the duty to watch all children about railroad yards and tracks during the operation of the train is beyond the proper limitation of all correct principles of law. *Id.*

No negligence by train employes, contributing to the injury of one struck while crossing railroad yards with her father, held shown. *Ft. Worth & D. C. Ry. Co. v. Wininger* (Civ. App.) 141 S. W. 273.

88. — **Infirm or helpless persons.**—That a railroad company's engineer may presume that a person on the track would, after warning, leave the track, through such person was deaf, held not, as a matter of law, to render such a person guilty of negligence. *Houston & T. C. R. Co. v. Harvin* (Civ. App.) 54 S. W. 629.

The engineer of a train may presume that a person walking on the track has possession of his senses. *Gulf, C. & S. F. Ry. Co. v. Hill* (Civ. App.) 58 S. W. 255.

The operatives of a railroad train who see one walking upon the right of way have a right to treat him as a person in possession of his senses, and the fact that he is deaf charges them with no duty arising from the infirmity. *Houston & T. C. Ry. Co. v. O'Donnell*, 92 T. 636, 92 S. W. 409.

89. **Contributory negligence of person injured—Care required of persons on or near tracks in general.**—As to negligence in crossing the track at a place other than a street or highway, see *Railway Co. v. Crosnoe*, 72 T. 79, 10 S. W. 342; *Smith v. Fordyce* (Sup.) 18 S. W. 663; *Railway Co. v. Brown* (Sup.) 18 S. W. 670; *Railway Co. v. Watkins* (Civ. App.) 26 S. W. 760.

Contributory negligence shown. *Missouri Pac. Ry. Co. v. McKernan*, 82 T. 204, 17 S. W. 1057; *Sabine & E. T. Ry. Co. v. Hanks*, 79 T. 642, 15 S. W. 476; *Galveston, H. & S. A. Ry. Co. v. Ryon*, 80 T. 59, 15 S. W. 588.

Contributory negligence defined. *Railway Co. v. Young* (Civ. App.) 27 S. W. 145.

Plaintiff injured on track held guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Martin* (Civ. App.) 44 S. W. 703.

One on a railroad track used by pedestrians as a thoroughfare, who was injured by a train's making a running switch, held not guilty of contributory negligence. *International & G. N. R. Co. v. Brooks* (Civ. App.) 54 S. W. 1056.

Facts held to show that one injured while passing between the cars of defendant's train was guilty of contributory negligence. *Rodriguez v. International & G. N. R. Co.*, 27 C. A. 325, 64 S. W. 1005.

In action for personal injuries caused by frightening decedent's mule, evidence held not to show contributory negligence as matter of law. *Texas & P. Ry. Co. v. Hamilton* (Civ. App.) 66 S. W. 797.

In an action for injuries at a crossing, evidence held to warrant a finding that plaintiff was guilty of contributory negligence. *Shetter v. Ft. Worth & D. C. Ry. Co.*, 30 C. A. 536, 71 S. W. 31.

A person lying on a railroad track is guilty of contributory negligence as a matter of law. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 32 C. A. 137, 73 S. W. 413, 74 S. W. 803.

In an action for injuries to a person on a railway track in a city street, evidence held insufficient to show plaintiff guilty of contributory negligence as matter of law. *Missouri, K. & T. Ry. Co. of Texas v. Owens* (Civ. App.) 75 S. W. 579.

Persons lying or sitting on railroad tracks are guilty of the grossest negligence, and, if not discovered before they are struck by a train, the company is not liable. *Smith v. International & G. N. R. Co.*, 34 C. A. 209, 78 S. W. 556.

Plaintiff held not guilty of contributory negligence, in law, in stepping on defendant's track. *Gulf, C. & S. F. Ry. Co. v. Miller*, 35 C. A. 116, 79 S. W. 1109.

A pedestrian held not necessarily negligent in using a street on which a railroad is located; the public having an equal right with the railroad to use the street. *International & G. N. R. Co. v. Hall*, 35 C. A. 545, 81 S. W. 82.

A person held not guilty of contributory negligence in walking along a railroad track situated in a street. *Rio Grande, S. M. & P. Ry. Co. v. Martinez*, 39 C. A. 460, 87 S. W. 853.

Plaintiff's decedent held not guilty of contributory negligence as a matter of law in walking on defendant's railroad track within the limits of a city. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 99 T. 160, 88 S. W. 192.

One sitting on a railroad track held guilty of contributory negligence, precluding recovery for negligence of those operating the cars in failing to discover his presence and to avoid injuring him. *Texas & N. O. Ry. Co. v. McDonald*, 99 T. 207, 88 S. W. 201.

A licensee on a railroad right of way is not as a matter of law guilty of contributory negligence in being there. *Hutchens v. St. Louis Southwestern Ry. Co.*, 40 C. A. 245, 89 S. W. 24.

In an action for injuries to plaintiff owing to his horse becoming frightened at a hand car, the test as to contributory negligence held to be whether plaintiff was acting as an ordinarily prudent person. *St. Louis Southwestern Ry. Co. v. Everett*, 40 C. A. 285, 89 S. W. 457.

A person walking on a railroad track, when he could walk by the side of it, held guilty of contributory negligence as a matter of law. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 100 T. 63, 93 S. W. 1068.

The fact that defendant railway company had permitted the use of its roadbed and trestle as a footpath would not excuse a person walking thereon for failure to exercise ordinary care to guard and protect himself from injury while so doing, and more diligence and caution would be required of him to constitute ordinary care than under less dangerous conditions. *Texas Midland R. R. v. Byrd* (Civ. App.) 110 S. W. 199.

In an action for injuries through being struck by a car in front of which plaintiff was attempting to cross the track, plaintiff held not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Clark* (Civ. App.) 113 S. W. 169.

In an action for injuries to plaintiff while attempting to cross a railroad bridge, plaintiff held a trespasser, and negligent as a matter of law. *Missouri, K. & T. Ry. Co. of Texas v. Malone*, 102 T. 269, 115 S. W. 1158.

One voluntarily continuing to walk in a dangerous place, along and close to a railroad track, when there was a safe place at a convenient distance, where he might have walked, held guilty of contributory negligence, preventing recovery for death by being struck by the engine. *Missouri, K. & T. Ry. Co. of Texas v. Wall*, 102 T. 362, 116 S. W. 1140.

A license to use a railroad track for a footpath does not include the right to use it as a place to lie or sit. *Caldwell v. Houston & T. C. Ry. Co.*, 54 C. A. 399, 117 S. W. 488.

One using a railroad track either as a licensee or under a lawful claim of right must exercise ordinary care for his own safety, and one exercising no care whatever is guilty of contributory negligence. *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 C. A. 87, 118 S. W. 198.

A person injured by having his hand run over by a switch engine held guilty of contributory negligence. *Roper v. Texas Cent. R. Co.*, 55 C. A. 620, 119 S. W. 696.

Where plaintiff was using a footpath along a railroad track which was customarily used by the public, it was his duty, in the exercise of ordinary care, to step back far enough from the track to prevent injury from the usual and probable dangers from passing trains. *Texas & P. Ry. Co. v. Endsley* (Civ. App.) 119 S. W. 1150.

In an action for injuries by being struck by a projection from a passing freight train, plaintiff held not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Wilcox*, 57 C. A. 3, 121 S. W. 588.

One who voluntarily undertakes to drive through railroad yards for his own convenience rather than to drive further around assumes the risk of his team becoming frightened at steam suddenly escaping from a locomotive. *Ford v. Houston & T. C. R. Co.* (Civ. App.) 124 S. W. 715.

Plaintiff held not guilty of contributory negligence as matter of law in using a railroad track after looking in vain for an approaching train. *Texas & P. Ry. Co. v. Adkins* (Civ. App.) 126 S. W. 954.

Rule as to negligence in selection of pathway by one passing along a railroad right of way held not to apply to one who supposed the path he took was safe for the time being. *Chicago, R. I. & P. Ry. Co. v. Reames* (Civ. App.) 132 S. W. 977.

In an action for injuries to one struck by a wire cable operated in connection with a sand train while walking on a path near the railroad track, evidence held insufficient to show contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Schroeter* (Civ. App.) 134 S. W. 826.

Presence of one within railway yards held not to show contributory negligence, or assumption of risk. *St. Louis Southwestern Ry. Co. of Texas v. Driver* (Civ. App.) 137 S. W. 409.

Where a railroad company operated tracks within a street, a pedestrian injured while using the street was not negligent in failing to use other available streets. *Missouri, K. & T. Ry. Co. of Texas v. Milburn* (Civ. App.) 142 S. W. 626.

In an action for injuries in a collision with a railroad train in a street, plaintiff's wife held not negligent as a matter of law. *Id.*

An injured licensee held not guilty of contributory negligence, barring recovery, as a matter of law merely because there was some danger in his walking upon the track. *Thompson & Ford Lumber Co. v. Thomas* (Civ. App.) 147 S. W. 296.

A licensee, injured by being struck by a train while he was walking upon the track, is not guilty of contributory negligence, as matter of law, merely because there is another way by which he could possibly travel. *Id.*

One who goes upon a track while trying to turn his horses back, and remains thereon in front of an approaching train, is negligent as a matter of law and cannot recover unless his peril was discovered in time to avoid injury. *Higginbotham v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 155 S. W. 1025.

90. — **Care required of children and others under disability.**—Evidence held to show person injured at crossing guilty of contributory negligence. *Texas & P. Ry. Co. v. Walker* (Civ. App.) 49 S. W. 642.

A father is not guilty of contributory negligence in permitting his boy to frequently cross a railroad track without warning of the danger. *Texas & P. Ry. Co. v. Ball* (Civ. App.) 73 S. W. 420.

A boy 11 years old may, through undeveloped judgment, not appreciate the danger of attempting to cross in front of an approaching engine, and so not be guilty of contributory negligence. *Id.*

Ordinarily, but not necessarily, the fact that an injured person has no right to be on the track of a railroad is evidence of contributory negligence, preventing recovery. *St. Louis Southwestern Ry. Co. of Texas v. Bolton*, 36 C. A. 87, 81 S. W. 123.

A person suddenly stricken, and thereby rendered unconscious while on a railroad track, could not, on account thereof, be held guilty of contributory negligence, but the negligence, if any, would consist of going on the track with the knowledge that he might likely be overtaken by some such mental disturbance. *Epperson v. International & G. N. R. Co.* (Civ. App.) 125 S. W. 117.

91. — **Failure to look or listen for approaching train.**—In an action for injuries to a person on a railroad track, held, that plaintiff was not guilty of contributory negligence. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

Plaintiff, injured while walking on a railroad track by being run into from the rear by an engine, held guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Miller*, 30 C. A. 122, 70 S. W. 25.

A person struck by a train while walking along a railroad track when he could with equal convenience and safety have walked at the side of it, held guilty of contributory negligence as a matter of law. *International & G. N. R. Co. v. Ploeger* (Civ. App.) 96 S. W. 56.

Evidence in an action for injury to one struck by a car while walking through defendant's yards held to show contributory negligence, entitling the company to a directed verdict. *Texas & P. Ry. Co. v. Shivers*, 48 C. A. 112, 106 S. W. 894.

Failure to look and listen before walking near a railway track held not negligence per se. *Missouri, K. & T. Ry. Co. of Texas v. Wall* (Civ. App.) 110 S. W. 453.

92. — **Knowledge of danger.**—Facts held to show that plaintiff, injured while passing between the cars of defendant's train, was chargeable with notice that the cars were liable to be moved at any time. *Rodriguez v. International & G. N. R. Co.*, 27 C. A. 325, 64 S. W. 1005.

Knowledge of the defective condition of a railroad track, without knowledge that such condition would make it dangerous for one to travel a path beside the track while cars were passing thereover, would not render one traveling the path guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Brown*, 46 C. A. 10, 101 S. W. 464.

A person jumping from a railroad bridge to escape a train held negligent, and precluded from recovering from the railroad company, though pedestrians had a license to use the bridge as a footpath. *Texas Midland R. Co. v. Byrd*, 102 T. 263, 115 S. W. 1163, 20 L. R. A. (N. S.) 429, 20 Ann. Cas. 137.

93. — **Reliance on precautions on part of railroad company.**—One on a railroad track may in some measure depend on the company operating its trains in the usual manner, and may rely on the exercise of the usual precautions for the safety of those whose presence on the track is to be anticipated. *Ft. Worth & D. C. Ry. Co. v. Longino*, 54 C. A. 87, 118 S. W. 198.

94. — **Acts in emergencies.**—A railroad company held liable for injuries to one walking on a trestle when a train approached, who jumped therefrom to avoid injury, whether he acted prudently or imprudently in his attempt to avoid the injury. *Texas Midland R. R. v. Byrd*, 41 C. A. 164, 90 S. W. 185.

A railroad company held liable for negligence in not signaling sooner where plaintiff was upon a trestle without negligence, and through terror jumped therefrom, notwithstanding his imprudence in so doing. *Texas Midland R. R. v. Byrd* (Civ. App.) 110 S. W. 199.

A railroad company cannot avoid liability for death of a pedestrian, struck by a train running at a high rate of speed, because he might have avoided injury by remaining where he was when he discovered his peril. *Missouri, K. & T. Ry. Co. of Texas v. Muske* (Civ. App.) 141 S. W. 565.

95. **Proximate cause of injury.**—Where one on a railroad track used as a thoroughfare was injured by an engine making a running switch, the company's negligence was held the proximate cause of the injury. *International & G. N. R. Co. v. Mitchell* (Civ. App.) 60 S. W. 996.

In an action for injuries to a person on a railroad track, held, that the proximate cause of the injury was the negligence of the defendant's employes. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

Obstruction of street crossings by railroad cars held not proximate cause of injury to one injured on right of way while walking around cars. *De La Pena v. International & G. N. R. Co.*, 32 C. A. 241, 74 S. W. 53.

The failure of persons on an engine to keep a proper lookout can only be deemed the proximate cause of the death of a person on the track when the keeping of such lookout would have prevented the fatality. *Texas & P. Ry. Co. v. Shoemaker*, 98 T. 451, 84 S. W. 1049.

In an action for injuries to a traveler on a highway in consequence of his horse becoming frightened by an approaching train, the existence of a certain fact held immaterial as not operating as a contributing cause of the accident. *Johnson v. Texas & G. Ry. Co.*, 45 C. A. 146, 100 S. W. 206.

An engineer's failure to use all means to prevent injury, after discovering the peril, is not actionable, unless the use of such means would reasonably have prevented the accident. *Parham v. Ft. Worth & D. C. Ry. Co.*, 51 C. A. 511, 113 S. W. 154.

Any negligence by train employes in failing to look out for plaintiff while she was in the yards, and in not ringing the bell, held not the proximate cause of her injuries by being struck by a train. *Ft. Worth & D. C. Ry. Co. v. Winger* (Civ. App.) 141 S. W. 273.

96. **Injury avoidable notwithstanding contributory negligence.**—Where employes of a railroad company failed to use every means to prevent injury to a person under the cars, the railroad company is liable. *Garza v. Texas Mexican Ry. Co.* (Civ. App.) 41 S. W. 172.

Where plaintiff was struck and injured by engine, which those in charge could have easily stopped in time after discovering her peril, her contributory negligence will not preclude recovery. *Houston & T. C. R. Co. v. Wallace*, 21 C. A. 394, 53 S. W. 77.

Where an engineer could have avoided an injury to a person on the track, the company is liable, though the injured party was guilty of negligence. *Houston & T. C. R. Co. v. Harvin* (Civ. App.) 54 S. W. 629.

Contributory negligence held not available as a defense, where those in charge of defendant railroad company's train discovered plaintiff on the track in time to avoid injuring him. *Law v. Missouri, K. & T. Ry. Co. of Texas*, 29 C. A. 134, 67 S. W. 1025.

A railway company held liable for running over a pedestrian on its track by a train, though he was intoxicated and guilty of contributory negligence. *Kroeger v. Texas & P. Ry. Co.*, 30 C. A. 87, 69 S. W. 809.

Plaintiff, injured by being run into by an engine while walking along the track, held not entitled to recover, notwithstanding his contributory negligence, on the ground that the operatives of the train might have stopped the same on discovering his peril. *Gulf, C. & S. F. Ry. Co. v. Miller*, 30 C. A. 122, 70 S. W. 25.

In an action for the death of one killed by a locomotive, plaintiff held entitled to recover because of the failure of the operatives to give warning signals. *St. Louis Southwestern Ry. Co. of Texas v. Allen*, 35 C. A. 355, 80 S. W. 240.

Where the peril of a trespasser on the track was discovered too late to stop the train, the railway company was not liable. *Houston & T. C. R. Co. v. Ramsey*, 36 C. A. 285, 81 S. W. 825.

Statement of rule of discovered peril. *International & G. N. R. Co. v. Ploeger* (Civ. App.) 93 S. W. 226.

Where one who is guilty of negligence in being too near a railroad track is not discovered by the engineer or fireman in time to prevent striking him by a train running from station to station, there is no actionable negligence. *Texas & N. O. R. Co. v. Scarborough* (Civ. App.) 104 S. W. 408.

Trainmen, knowing of the peril of a person on the track, held required to use every means within their power consistent with the safety of the train to avoid running him down. *Maxfield v. Texas & P. Ry. Co.*, 54 C. A. 519, 117 S. W. 483.

In the absence of actual discovery by trainmen of a person on the track and their appreciation of his peril, the rule of discovered peril has no application. *Pillow v. Texarkana & F. S. Ry. Co.*, 55 C. A. 597, 119 S. W. 128.

To raise the issue of discovered peril in an action for the death of a person struck by a train, the proof must show that the trainmen saw decedent in the position of danger, that they recognized his danger, and realized that he would remain in that position. *Missouri, K. & T. Ry. Co. of Texas v. Sharp* (Civ. App.) 120 S. W. 263.

A person's contributory negligence, in being on a railroad track, is no defense in an action for injuries from being struck by a train, based on discovered peril. *Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, 57 C. A. 134, 121 S. W. 871.

That the track was properly fenced and cattle guards erected at the place where plaintiff was struck was no defense. *Id.*

Evidence of the use of the track at the place of the accident by pedestrians held immaterial. *Id.*

Where trainmen see one upon the track and realize his peril in time to avoid injuring him and fail to use every means consistent with the safety of the train to prevent injury, the railroad is liable notwithstanding the injured person was negligent, and it is only necessary, in order to charge it with such duty, that the trainmen should have thought it probable that he would not get off. *Higginbotham v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 155 S. W. 1025.

97. **Willful or wanton acts and gross negligence.**—Imprudence in driving too near a railroad track will not bar recovery, where a horse was frightened by steam intentionally thrown upon it. *Texas & N. O. R. Co. v. Syfan* (Civ. App.) 43 S. W. 551.

Evidence held to show that the engineer or fireman unnecessarily threw steam upon plaintiff's horse, thereby frightening it. *Id.*

98. **Acts or omissions of employes or others.**—In an action for injuries to plaintiff's wife by his team becoming frightened at a motor car on defendant's railroad, the car being owned jointly by a lumber company and defendant and kept in the company's shop when not in use, and only the general manager of the company and defendant's superintendent being authorized to use it, and it having been taken out by a foreman for the company without the knowledge of the manager or superintendent, held, that there was no negligence on defendant's part. *King v. Nacogdoches & S. E. Ry. Co.* (Civ. App.) 146 S. W. 300.

99. **Actions for Injuries—Pleading.**—See Chapters 2, 3 and 8 of Title 37.

100. — **Presumptions and burden of proof.**—See notes under Art. 3687.

101. — **Admissibility of evidence.**—See notes under Art. 3687.

102. — **Sufficiency of evidence.**—Evidence held to warrant a verdict for plaintiff for injuries from frightening of his team by escaping steam from an engine. *Houston & T. C. R. Co. v. Taylor*, 20 C. A. 654, 49 S. W. 1055.

Evidence held sufficient to support a verdict finding the employes of the defendant railroad company guilty of negligence in not stopping their train. *Missouri, K. & T. Ry. Co. of Texas v. Stone*, 23 C. A. 106, 56 S. W. 933.

Facts in an action for injuries to plaintiff while near a railroad crossing by being struck with a cow thrown from the track by a train of defendant company held sufficient to sustain a verdict in favor of plaintiff. *Gulf, C. & S. F. Ry. Co. v. Marchand*, 24 C. A. 47, 57 S. W. 860.

In an action for injuries to a person on a track, evidence held to support a judgment for plaintiff. *International & G. N. R. Co. v. Woodward*, 26 C. A. 389, 63 S. W. 1051.

In an action against railroad company for personal injuries caused by frightening decedent's mule, evidence as to whether unnecessary noise was made held to support verdict against company. *Texas & P. Ry. Co. v. Hamilton* (Civ. App.) 66 S. W. 797.

Evidence in an action for injuries to one walking along the track held not to disclose negligence in the company. *Reichert v. International & G. N. Ry. Co.* (Civ. App.) 72 S. W. 1031.

Evidence held to show that one run over by a railroad train was lying on the track when struck. *Gulf, C. & S. F. Ry. Co. v. Matthews*, 43 C. A. 137, 73 S. W. 413, 74 S. W. 803.

In an action for injuries to a child on a railway track, evidence held to justify a finding that the engineer of the train had previously seen children playing on the right of way near a crossing. *Missouri, K. & T. Ry. Co. of Texas v. Hammer*, 34 C. A. 354, 78 S. W. 708.

In an action against a railroad for the death of one killed by a locomotive, evidence held sufficient to sustain a finding that the operatives of the locomotive were negligent in failing to give any warning. *St. Louis Southwestern Ry. Co. of Texas v. Allen*, 35 C. A. 355, 80 S. W. 240.

In an action for injuries to a child 11 years of age, walking on a railroad trestle, evidence held to warrant a finding that plaintiff was not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Bolton*, 36 C. A. 87, 81 S. W. 123.

Evidence held to sustain a finding that the train operatives, after they discovered the peril of plaintiff, failed to use every means to avoid injuring her. *Id.*

Evidence in an action for injuries to a person while walking on defendant's track held insufficient to entitle plaintiff to recover. *Gulf, C. & S. F. Ry. Co. v. Townsend* (Civ. App.) 82 S. W. 804.

In an action for injuries caused by collision with a licensee riding a velocipede on the railroad's track, evidence held sufficient to support a verdict for plaintiff. *Trinity & B. V. Ry. Co. v. Simpson* (Civ. App.) 86 S. W. 1034.

Evidence held to support a finding that plaintiff was not guilty of contributory negligence. *Id.*

Evidence held to sustain a finding that a blast of steam was emitted, which frightened plaintiff's horse, and that defendant was negligent in regard thereto. *Chicago, R. I. & T. Ry. Co. v. Jones*, 39 C. A. 480, 88 S. W. 445.

A peremptory instruction for defendant held proper. *Kelley v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 101 S. W. 1166.

In an action for injuries received by plaintiff through being struck by defendant's train, evidence held sufficient to sustain a finding of freedom from contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Saunders* (Civ. App.) 103 S. W. 457.

In an action for injuries to plaintiff through being struck by an engine while walking on defendant's track, evidence examined, and held to authorize a finding that the operatives of the engine discovered plaintiff's peril in time to have avoided the injury, and negligently failed to prevent it. *Nacogdoches & S. E. R. Co. v. Beene*, 47 C. A. 585, 106 S. W. 456.

In an action for injuries from being struck by a railroad car while walking near the track, evidence held to support a verdict for plaintiff. *Houston & T. C. R. Co. v. Finn* (Civ. App.) 107 S. W. 94.

Evidence held to sufficiently show the circumstances in which a child was run over by railway cars. *International & G. N. R. Co. v. Vallejo* (Civ. App.) 108 S. W. 1187.

In an action for injuries received by being struck by a car, evidence held insufficient to warrant a verdict for plaintiff on the issue of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Briscoe* (Civ. App.) 109 S. W. 453.

In an action against a railroad for injuries to a person on the track, evidence held sufficient to support a finding that the injured person was a licensee, and not a mere trespasser. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 50 C. A. 134, 109 S. W. 1126.

In an action for injuries from jumping from a trestle on discovering the proximity of a train, evidence held to sustain a judgment for plaintiff on the theory of defendant's negligence and plaintiff's freedom from contributory negligence. *Texas Midland R. R. v. Byrd* (Civ. App.) 110 S. W. 199.

Evidence held to sustain findings of negligence, in an action against a railway company for injury to a child on the track. *Gulf, C. & S. F. Ry. Co. v. Coleman*, 51 C. A. 415, 112 S. W. 690.

In an action against a railroad for injuries to plaintiff through being struck by a train while walking near the track, evidence held to support findings that defendant was negligent, and that plaintiff was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Crawford*, 54 C. A. 196, 117 S. W. 193.

In an action for personal injuries, claimed to have been caused by being struck by a swinging freight car door while plaintiff was standing near the track, evidence held to sustain a finding that plaintiff was injured as claimed. *Texas & P. Ry. Co. v. Endsley* (Civ. App.) 119 S. W. 1150.

Evidence held to sustain a finding that the injury was caused by defendant's negligence. *Id.*

Evidence held to sustain a finding that plaintiff was not guilty of contributory negligence. *Id.*

Evidence held to show that operatives in charge of a locomotive which injured a child on the track exercised proper care to discover persons on the track. *Houston, E. & W. T. Ry. Co. v. Sallee*, 56 C. A. 23, 120 S. W. 216.

In an action for injuries to a pedestrian by being struck by a projection from a passing freight train, evidence held not to show contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Wilcox*, 57 C. A. 3, 121 S. W. 588.

Evidence held to sustain a verdict for plaintiff. *Id.*

Evidence held to show that plaintiff's peril was discovered in time to have enabled the engineer to stop. *Missouri, K. & T. Ry. Co. of Texas v. Mitcham*, 57 C. A. 134, 121 S. W. 871.

Evidence held to show that the noise from escaping steam which frightened plaintiff's team causing it to run away was the ordinary and usual noise made by steam escaping from the safety valve of a steam engine. *Ford v. Houston & T. C. R. Co.* (Civ. App.) 124 S. W. 715.

Evidence held to sustain a verdict for defendant, in an action against a railroad company for injuries to a person while asleep on the track. *Epperson v. International & G. N. R. Co.* (Civ. App.) 125 S. W. 117.

In an action for injuries to a woman falling on the railroad tracks near a crossing in a faint, evidence held sufficient to show that defendant was negligent in not discovering her earlier, and in not stopping the train in time to prevent the injuries. *Texas Mexican Ry. Co. v. Portales* (Civ. App.) 126 S. W. 609.

Evidence held insufficient to show negligence of the railroad company, where a licensee walking by the side of its track was struck by a loose door of a box car. *Texas & P. Ry. Co. v. Endsley*, 103 T. 434, 129 S. W. 342.

In an action for death of plaintiff's son by being struck by defendant's train, evidence held to authorize a finding of negligence in not keeping a proper lookout for persons on the track. *St. Louis, S. F. & T. Ry. Co. v. Bowen* (Civ. App.) 129 S. W. 860.

In an action against a railroad company for injuries to a child run over by a backing train, evidence held to support the finding that the employes of defendant did not exercise ordinary care to see that the track was clear before backing, and that, had such care been exercised, the child would have been discovered in time to avoid the accident. *Texas & N. O. R. Co. v. Brouillette* (Civ. App.) 130 S. W. 886.

In an action for injury to a pedestrian in a railway yard, evidence held to sustain recovery on the theory of defendant's negligence and plaintiff's freedom from contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Driver* (Civ. App.) 137 S. W. 409.

In an action for death of a trespasser on a railroad track, evidence held to sustain a recovery on the theory of discovered peril. *Ft. Worth & D. C. Ry. Co. v. Broomhead* (Civ. App.) 140 S. W. 820.

In an action against a railroad company for injuries to a child evidence held to show that plaintiff's father knew that the train was moving when he went into the yards. *Ft. Worth & D. C. Ry. Co. v. Winger* (Civ. App.) 141 S. W. 273.

In an action for injuries received while on the property of a railroad company, evidence held to show the relation of licensee existing. *Barker v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 141 S. W. 298.

In an action for an injury to a child crossing a track, evidence held to show negligence of a conductor in charge of the train. *Winger v. Ft. Worth & D. C. Ry. Co.*, 105 T. 56, 143 S. W. 1150.

That those in charge of a train saw one upon the track and realized his danger may be proved by the circumstances in which the injury occurred, and is not required to be shown by direct evidence. *Higginbotham v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 155 S. W. 1025.

103. — Damages.—Mental suffering incident to the frightening of plaintiff's team, which resulted in injury to his property, but not his person, was not an element of actual damages. *Railway Co. v. Trott*, 25 S. W. 419, 86 T. 412, 40 Am. St. Rep. 866.

104. — Questions for Jury.—See notes under Art. 1971.  
 105. — Instructions.—See notes under Art. 1971.  
 106. Notice of claim for damages.—See Art. 5714.

## VIII. INJURIES TO ANIMALS ON OR NEAR TRACKS

See Art. 6603 and notes.

## IX. FIRES

107. Care required and liability as to fires in general.—A railroad company held not liable for fire originating outside of its right of way, where no negligence is shown. *St. Louis S. W. Ry. Co. of Texas v. Knight* (Civ. App.) 41 S. W. 416.

The degree of care which a railway company must use to prevent fire from its locomotive is such care and caution as an ordinarily prudent person would have exercised under the same or similar circumstances. *Railway Co. v. Knight*, 20 C. A. 477, 49 S. W. 250.

A railroad is bound to the use of ordinary care only in keeping in repair its apparatus to prevent the escape of fire. *St. Louis Southwestern Ry. Co. of Texas v. Gentry* (Civ. App.) 74 S. W. 607.

An instruction held not erroneous, as authorizing recovery without requiring a finding that defendant was negligent in respect to the spark arrester used, its repair, and the locomotive's operation. *Missouri, K. & T. Ry. Co. of Texas v. Florence* (Civ. App.) 74 S. W. 802.

An instruction held not open to the objection that it imposed on the company too high a degree of care. *St. Louis Southwestern Ry. Co. v. Crabb* (Civ. App.) 80 S. W. 408; *Same v. Connally*, 93 S. W. 206.

In an action for injuries from fire set by defendant's locomotive, an instruction held not erroneous as imposing too great a burden on defendant. *St. Louis S. W. Ry. Co. of Texas v. Starks* (Civ. App.) 125 S. W. 70.

A railroad company held not liable for the negligent destruction by fire of property placed on its right of way without its consent. *Spring Garden Ins. Co. v. International & G. N. R. Co.* (Civ. App.) 131 S. W. 1147.

In an action for burning plaintiff's barn, a charge requiring defendant to equip its engine with the most approved spark arrester held not to require too high a degree of care. *Houston & T. C. R. Co. v. Ellis* (Civ. App.) 134 S. W. 246.

Railroad company, using ordinary care to equip locomotive with best appliances, held not liable for fires set out. *Texas & N. O. R. Co. v. Commercial Union Assur. Co. of London, Eng.* (Civ. App.) 137 S. W. 401.

In an action against a railroad company for negligently firing plaintiff's property, a charge held erroneous in requiring a higher degree of care than ordinary care. *Trinity & B. V. Ry. Co. v. Gregory* (Civ. App.) 142 S. W. 656; *Same v. Burke*, Id. 658.

A railroad company held not bound to cease operating its trains to prevent the burning of cotton piled along its right of way. *M. H. Wolfe & Co. v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 144 S. W. 347.

In an action against a railroad for destroying plaintiff's property by fires set out by defendant's engine, an instruction held not objectionable as placing too great a burden of proof on defendant by requiring it to use ordinary care under certain circumstances to wet the fuel and to empty the ash pan of its engine. *Freeman v. Nathan* (Civ. App.) 149 S. W. 248; *Same v. Peacock*, Id. 259.

108. Defects in construction of engines.—The degree of care to prevent the escape of fire from locomotives is such care as an ordinarily prudent person would have exercised under the same or similar circumstances. *St. Louis S. W. Ry. Co. of Texas v. Knight*, 20 C. A. 477, 49 S. W. 250.

In an action against a railroad company for damages by fire set by sparks from its locomotives, defendant held, under the evidence, merely required to exercise ordinary care in selecting and using the better of two spark-arresting devices. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 95 T. 461, 68 S. W. 159.

Railroad company held not under absolute duty to use the "most approved appliances" to prevent escape of fire from its locomotives. *St. Louis Southwestern Ry. Co. of Texas v. Goodnight*, 32 C. A. 256, 74 S. W. 583.

Where plaintiff's wood was destroyed by fire starting on track, defendant railroad held only required to show use of most approved spark arrester "in general use." *St. Louis Southwestern Ry. Co. of Texas v. Gentry* (Civ. App.) 74 S. W. 607.

A charge not limiting defendant railroad's duty as to providing appliances for preventing spread of fire to those in general use held erroneous. *Id.*

Railroad is not bound to absolute duty of providing engines with most approved spark arresters. *St. Louis Southwestern Ry. Co. v. Crabb* (Civ. App.) 80 S. W. 408.

An instruction making a railroad company liable for a fire set by its engine, if it was not equipped with the most approved spark arrester in use, held erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Hopkins* (Civ. App.) 80 S. W. 414.

The law does not impose on a railroad company the absolute duty of keeping the spark arresters on its locomotives in good repair. *Missouri, K. & T. Ry. Co. of Texas v. Jordan* (Civ. App.) 82 S. W. 791.

A railroad company is only required to use ordinary care to provide appliances to prevent the escape of fire; the absolute duty to use the most approved spark arresters not being required. *Id.*

A railroad company held not bound to equip its engines with the latest approved appliances to prevent the escape of fire. *Houston & T. C. R. Co. v. Laforge* (Civ. App.) 84 S. W. 1072.

A railroad company sued for setting a fire held bound to prove that it used ordinary care to equip its locomotive with the best appliances in general use, and to keep the same in repair, and that its employes used ordinary care. *St. Louis Southwestern Ry. Co. of Texas v. Connally* (Civ. App.) 93 S. W. 206.

A railroad company held required to equip its engines with the most approved spark arresters, and to exercise ordinary care to keep the same in repair. *Missouri, K. & T. Ry. Co. of Texas v. Neiser*, 54 C. A. 460, 118 S. W. 166.



Statement of duty of railroad as to spark arresters on locomotive. *Texas Cent. R. Co. v. Qualls* (Civ. App.) 124 S. W. 140; *Texas & P. Ry. Co. v. Woodriddle & Hamby*, 126 S. W. 603; *St. Louis Southwestern Ry. Co. of Texas v. Sharp*, 131 S. W. 614.

A railroad must exercise ordinary care to use the best appliances in general use to prevent the escape of sparks. *Freeman v. J. B. Waters & Bro.* (Civ. App.) 136 S. W. 84.

A railroad is only liable for damages from fire set by sparks from its locomotives when it has failed to use ordinary care to properly equip them. *Id.*

A railroad is only required to use ordinary care to equip its engines with appliances to prevent escape of fire. *Missouri, K. & T. Ry. Co. of Texas v. Price* (Civ. App.) 140 S. W. 836; *Trinity & B. V. Ry. Co. v. Gregory*, 142 S. W. 656; *Same v. Burke*, *Id.* 658.

The law held not to impose on a railroad company the absolute duty of equipping its engines with the best and most approved spark arresters. *Lam & Rogers v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 142 S. W. 977.

It is the duty of a railroad company to exercise ordinary care to equip its engines with the most approved spark arresters in use by railroad companies. *Progressive Lumber Co. v. Marshall & E. T. Ry. Co.* (Sup.) 155 S. W. 175.

**109. Management of engines.**—In an action against a railroad company for fire set out, an instruction held erroneous as requiring a greater degree of care than a person of ordinary prudence would have exercised under the same or similar circumstances. *Ft. Worth & R. G. Ry. Co. v. Dial*, 38 C. A. 260, 85 S. W. 22.

Held that railroad company's failure to use oil instead of coal as locomotive fuel might make the company liable for a fire set out. *Loeb Compress Co. v. I. G. Bromberg & Co.* (Civ. App.) 140 S. W. 475.

A railway company held not bound to exercise more than ordinary care in selection of fuel for engines in order to prevent emission of sparks. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

**110. Combustibles on railroad property.**—A railroad company held liable for damages from fire ignited by sparks on its right of way. *International & G. N. R. Co. v. Newman* (Civ. App.) 40 S. W. 854.

An instruction that, if defendant set fire to its right of way overgrown with combustibles, it was liable if the fire spread to plaintiff's pasture, held erroneous. *St. Louis S. W. Ry. Co. of Texas v. Knight* (Civ. App.) 41 S. W. 416.

In an action against a railroad company for setting a fire, whether or not the evidence warranted a finding that nettles on its right of way caught and held combustible corn shucks, etc., held immaterial. *Texas & P. Ry. Co. v. Rutherford*, 28 C. A. 590, 68 S. W. 825.

In an action against a railroad company for fire set out, an instruction as to defendant's duty in keeping its right of way free from combustible material, etc., held erroneous, as requiring too high a degree of care. *Ft. Worth & R. G. Ry. Co. v. Dial*, 38 C. A. 260, 85 S. W. 22.

Where defendant railroad company permitted a tank containing crude oil for use as fuel in its engines to remain on its right of way, it was liable for destruction of plaintiff's property by fire communicated by oil which defendant negligently permitted to leak from such tank, though plaintiff failed to show that defendant ignited the oil. *Texas & N. O. R. Co. v. Bellar*, 51 C. A. 154, 112 S. W. 323.

A railroad which negligently permits dry grass to grow on and incumber its right of way, so that sparks from its engines set fire thereto, which spreads to and destroys another's property, is liable for such damage. *Progressive Lumber Co. v. Marshall & E. T. Ry. Co.* (Sup.) 155 S. W. 175.

**111. Preventing spread of fire.**—The failure to use proper care to prevent the spread of fire lawfully kindled is negligence for which an action will lie if damages result. *Railway Co. v. Platzer*, 73 T. 117, 11 S. W. 160, 3 L. R. A. 639, 15 Am. St. Rep. 771.

A railroad company which negligently suffers fire started on its right of way to escape held liable. *International & G. N. R. Co. v. McIver* (Civ. App.) 40 S. W. 438.

Where grass was set on fire by sparks from a locomotive, it was not negligence for the train crew to fail to leave the train to extinguish the fire. *Galveston, H. & S. A. Ry. Co. v. Chittim*, 31 C. A. 40, 71 S. W. 294.

Employees of a railroad company need not assist in arresting a fire on land adjacent to the railroad right of way, unless the company had set the fire. *Gulf, C. & S. F. Ry. Co. v. Meentzen Bros.*, 52 C. A. 416, 113 S. W. 1000.

The servants of a railroad going to the rescue of property threatened by destruction by fire set by an engine held required to use ordinary care to see that the fire is put out before leaving. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

**112. Contributory negligence of owner of property.**—In general.—Parents are not hampered in the use of their home by its being near a railroad. Hence they are not negligent in placing their child in its cradle in a place where its clothing might be ignited by sparks from a passing engine. *Gulf, C. & S. F. Ry. Co. v. Johnson* (Civ. App.) 51 S. W. 531.

A charge that plaintiff could not recover for the destruction of hay stored in his barn near defendant's right of way, if he placed it there with knowledge that combustible material had been allowed to accumulate on the track, held erroneous. *Rutherford v. Texas & P. Ry. Co.* (Civ. App.) 61 S. W. 422.

An owner of a lot is not negligent in building a house thereon and storing goods in it, though it will be close to a railroad. *St. Louis S. W. Ry. Co. of Texas v. Miller*, 27 C. A. 344, 66 S. W. 139.

The owner of a barn adjoining a railroad right of way held not guilty of contributory negligence in storing hay in the barn. *Texas & P. Ry. Co. v. Rutherford*, 28 C. A. 590, 68 S. W. 825.

A shipper of timber held not guilty of contributory negligence in placing timber, which was consumed by fire set by sparks from defendant's engine, on defendant's right of way. *San Antonio & A. P. Ry. Co. v. Home Ins. Co.* (Civ. App.) 70 S. W. 999.

In action against railroad for destruction of cotton by sparks from defendant's locomotive, a requested instruction that, when the owners placed the cotton on the compress platform, they assumed all risks from fire, held properly refused. *Texas & Pac. Ry. Co. v. Scottish Union Nat. Ins. Co.*, 32 C. A. 82, 73 S. W. 1038.

A railway sectionman, whose goods were burned in a section house, held not guilty of contributory negligence in permitting the goods to remain in the house with knowledge that passing trains might set a fire. *St. Louis Southwestern Ry. Co. of Texas v. Sharp* (Civ. App.) 131 S. W. 614.

It is no defense, in an action for damage by fire caused by sparks from defendant's engines, that the wood burned was not shipped within a reasonable time after being stacked along defendant's road. *Freeman v. J. B. Waters & Bro.* (Civ. App.) 136 S. W. 84.

Under the facts, held any negligence of plaintiffs in placing poles on defendant's right of way to be shipped could not be said as matter of law to be a contributory cause to their destruction by fire set by sparks from defendant's engine. *St. Louis & S. F. R. Co. v. Blocker* (Civ. App.) 138 S. W. 156.

The owner of a frame barn destroyed by fire held not negligent in maintaining and using it at a place adjoining the railroad's right of way after the railroad was constructed. *Freeman v. Nathan* (Civ. App.) 149 S. W. 248; *Same v. Peacock*, Id. 259.

113. — **Combustibles near railroad.**—The owner of property destroyed by fire set by sparks from an engine cannot recover if he places the property near the tracks, without exercising ordinary care. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

That plaintiff permitted shucks and other combustible material to accumulate on his own premises, and that such material was carried by the wind to defendant's right of way and ignited and the fire carried to plaintiff's barn, held not to constitute contributory negligence. *Freeman v. Nathan* (Civ. App.) 149 S. W. 248; *Same v. Peacock*, Id. 259.

114. — **Precautions against communication of fire.**—It is not incumbent on an adjoining property owner to extinguish a fire on a railroad's right of way, unless a man of ordinary prudence would believe it immediately endangered his property. *Texas Pac. Ry. Co. v. Leon & H. Blum Land Co.* (Civ. App.) 49 S. W. 253.

One owning lands adjoining a railroad must take ordinary care of his property to protect it from fire. *St. Louis Southwestern Ry. Co. v. Crabb* (Civ. App.) 80 S. W. 408.

Owner of property adjacent to a railroad need not discontinue the ordinary beneficial use of such property, although such use might increase the hazard from fire. Id.

A railway sectionman, whose goods were burned in a section house, held not guilty of contributory negligence in leaving the doors and windows of the section house open. *St. Louis Southwestern Ry. Co. of Texas v. Sharp* (Civ. App.) 131 S. W. 614.

Owner of warehouse held not bound to so close a window as to exclude sparks from railway engines; and its failure to do so did not defeat a recovery for the railway company's negligence. *Texas & P. Ry. Co. v. New Boston Hardware Co.* (Civ. App.) 157 S. W. 1188.

115. **Proximate cause of injury**—In general.—Where the employes of a railroad company negligently allow sparks from a locomotive to fall on buildings so as to destroy them, the negligence is the proximate cause of the loss of the property. *McFarland v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 88 S. W. 450.

Where a railroad company permitted crude oil which it used as fuel in its locomotives to escape from a tank on its right of way and to saturate the surrounding soil, it was liable for the destruction of property on the adjoining land by fire communicated by the oil, though a flood occurring before the fire had carried a greater quantity of oil to the surrounding land than might have been carried to it if there had been no flood. *Texas & N. O. R. Co. v. Bellar*, 51 C. A. 154, 112 S. W. 323.

Running an engine at excessive speed would not make the company liable for damages from sparks, unless the sparks were caused by the excessive speed. *Missouri, K. & T. Ry. Co. of Texas v. W. A. Morgan & Bros.* (Civ. App.) 146 S. W. 336.

Where a railroad ran many trains at a time when the car windows were open, that it permitted tall grass to grow on its right of way might be found to be a proximate cause of damage to plaintiff's grass from a fire started by a lighted cigar thrown from the train upon the right of way. *St. Louis, B. & M. Ry. Co. v. Maddox* (Civ. App.) 152 S. W. 225.

116. — **Spread of fire.**—Negligence by which a fire was started on a railroad right of way held the proximate cause of damage to property some distance removed, to which the fire spread. *St. Louis Southwestern Ry. Co. of Texas v. Gentry* (Civ. App.) 80 S. W. 844.

Defendant's negligence in permitting fire to escape from its locomotive held the proximate cause of the burning of plaintiff's buildings. *St. Louis Southwestern Ry. Co. of Texas v. Wilbanks* (Civ. App.) 113 S. W. 318.

A fire set by an engine held the proximate cause of the destruction of a building. *Ft. Worth & D. C. Ry. Co. v. Arthur* (Civ. App.) 124 S. W. 213.

A railroad company negligently setting fire to ties piled on its right of way without its consent and then communicated to other property, held not liable for the destruction of the property. *Spring Garden Ins. Co. v. International & G. N. R. Co.* (Civ. App.) 131 S. W. 1147.

Where fire was negligently communicated from defendant's railroad to the buildings of N. and from such buildings to plaintiff's property, which was consumed, plaintiff's right to recover was not affected by N.'s contributory negligence if any. *Freeman v. Nathan* (Civ. App.) 149 S. W. 248; *Same v. Peacock*, Id. 259.

117. **Injury avoidable notwithstanding contributory negligence.**—Defendant railroad company's negligence in doing its switching in such manner as to set fire to plaintiff's cotton after it discovered the danger thereto held the proximate cause of the destruction of the cotton by fire, notwithstanding plaintiff's original negligence. *Furst-Edwards & Co. v. St. Louis S. W. Ry. Co.* (Civ. App.) 146 S. W. 1024.

118. **Property injured or destroyed.**—In an action to recover for a barn and contents destroyed by a fire, a charge that defendant was not liable for the destruction of the fowls and animals in the barn, unless it could reasonably have foreseen that they would be destroyed by burning the barn at that time, held error. *Highland v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 65 S. W. 649.

A railway company is liable for burning of an employe's goods in a section house, caused by a passing locomotive, if it resulted from the company's negligence. *St. Louis Southwestern Ry. Co. of Texas v. Sharp* (Civ. App.) 131 S. W. 614.

119. **Contracts for exemption from liability.**—A contract whereby a warehouseman agreed to save a railroad company harmless from loss of the building or its contents by fire held not to save the company from liability to a third person whose goods were destroyed by fire through the company's negligence. *McAdams v. Missouri, K. & T. Ry. Co.*, 19 C. A. 82, 45 S. W. 936.

Damages caused by sparks from locomotive cannot be recovered from railroad, though negligent, where person whose property was injured held under lease exempting railroad from liability for losses so caused. *Woodward v. Ft. Worth & D. C. Ry. Co.*, 35 C. A. 14, 79 S. W. 896.

An assignee of a lease of a part of a railroad right of way for a coalhouse is bound by a stipulation in the lease that the company shall not be liable for loss by fire communicated from locomotives or otherwise. *J. C. Wooldridge & Son v. Ft. Worth & D. C. Ry. Co.*, 38 C. A. 551, 86 S. W. 942.

A lease of a part of a railroad right of way and a covenant of the lessee therein to assume risk of loss from fire set by locomotives held required to be strictly construed against the railroad company. *W. A. Morgan & Bros. v. Missouri, K. & T. Ry. Co. of Texas*, 50 C. A. 420, 110 S. W. 978.

A railroad company leasing a part of its right of way to a compress company held not entitled to escape liability for loss of cotton of a third person, while in possession of the compress company, caused by fire set by a locomotive of the railroad company. *Id.*

A lease by a railway company of a part of its right of way construed, and held, that the lessee assumed only risks of loss to its own property by fire set by sparks emitted from locomotives of the company. *Id.*

120. **Persons entitled to damages.**—The owner of certain grass burned by defendant railroad company held entitled to recover therefor though he was not the owner of the land. *Texas & P. Ry. Co. v. Pippin* (Civ. App.) 127 S. W. 1153.

121. **Actions for injuries by fire—Rights of action and defenses.**—A railway company cannot avoid liability for negligently burning a section foreman's goods in a section house because he paid no rent. *St. Louis Southwestern Ry. Co. of Texas v. Sharp* (Civ. App.) 131 S. W. 614.

122. — **Presumptions and burden of proof.**—See the preceding notes and also notes under Art. 3687.

123. — **Admissibility of evidence.**—See notes under Art. 3687.

124. — **Sufficiency of evidence.**—Evidence held not sufficient to establish that a fire was set by a locomotive, to warrant reversal of a judgment for defendant on appeal. *Tyler Chair & Furniture Works v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 55 S. W. 350.

Verdict against railroad company for fire set by locomotive held warranted by the evidence. *Texas & P. Ry. Co. v. Rice*, 24 C. A. 374, 59 S. W. 833.

Evidence held to support a finding that a fire near a railroad right of way was set by sparks from a locomotive. *San Antonio & A. P. Ry. Co. v. Adams* (Civ. App.) 66 S. W. 578.

Failure of persons employed by plaintiff for a special purpose to extinguish the fire held not to preclude recovery for resulting damages. *Id.*

Evidence held insufficient to sustain a finding that the fire was communicated by sparks from defendant's engines. *International & G. N. R. Co. v. Morgan*, 28 C. A. 348, 67 S. W. 425.

Evidence held to justify a finding that corn shucks and Spanish nettles were allowed to accumulate and remain on defendant's right of way. *Texas & P. Ry. Co. v. Rutherford*, 28 C. A. 590, 68 S. W. 825.

Evidence in an action for fire set by an engine held sufficient to support a finding that the engine was negligently managed. *Texas & P. Ry. Co. v. Rutherford*, 28 C. A. 590, 68 S. W. 825; *Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co.*, 48 C. A. 443, 106 S. W. 1140; *Same v. McFarland* (Civ. App.) 106 S. W. 1144.

Evidence held to justify a finding that a fire which consumed plaintiff's timber was communicated from defendant's engine, and that the setting thereof was due to defendant's negligence. *San Antonio & A. P. Ry. Co. v. Home Ins. Co.* (Civ. App.) 70 S. W. 999.

In an action for loss of a building by sparks from defendant's engine, evidence held to rebut the prima facie case made. *Smith v. Missouri, K. & T. Ry. Co.* (Civ. App.) 73 S. W. 22.

In an action for the burning of plaintiff's building by sparks from defendant's engine, after proof that the engine had been properly equipped and handled, plaintiff could not recover without further proof of negligence. *Id.*

In an action for the burning of plaintiffs' grass, by fire set by defendant's alleged defective locomotive, evidence held to sustain a verdict for plaintiffs. *Texas & P. Ry. Co. v. Prude*, 39 C. A. 144, 86 S. W. 1046.

Evidence held to warrant an inference that fire was emitted from a passing locomotive. *Gulf, C. & S. F. Ry. Co. v. Blakeney-Stevens-Jackson Co.*, 48 C. A. 443, 106 S. W. 1140; *Same v. McFarland* (Civ. App.) 106 S. W. 1144.

In an action for destruction of property by fire communicated by oil escaping from defendant's oil tank, evidence held sufficient to support a finding that the saturation of the ground with the oil was the proximate cause of the injury. *Texas & N. O. R. Co. v. Bel-lar*, 51 C. A. 154, 112 S. W. 323.

Evidence held sufficient to support a finding that the oil was of an inflammable character. *Id.*

Evidence held sufficient to support a finding that defendant was negligent and that the oil was the means of communicating the fire. *Id.*

In an action for loss of property by fire alleged to have been set by sparks from an engine, evidence held not to authorize a recovery. *Gulf, C. & S. F. Ry. Co. v. Meentzen Bros.*, 52 C. A. 416, 113 S. W. 1000.

Evidence held sufficient to show that plaintiff's property was destroyed by fire through the negligence of defendant's servants. *St. Louis Southwestern Ry. Co. of Texas v. Ross*, 55 C. A. 622, 119 S. W. 725.

In an action against a railroad for destruction of property by fire, a verdict held not supported by the evidence. *Trinity & B. V. Ry. Co. v. Sanders* (Civ. App.) 120 S. W. 272.

In an action for injuries from fire set by defendant's locomotive, evidence held to authorize a finding that the fire was caused by defendant's negligence. *St. Louis S. W. Ry. Co. of Texas v. Starks* (Civ. App.) 125 S. W. 70.

In an action for property destroyed by fire, evidence held not to support a verdict for plaintiff, in that it did not show that the fire caught from defendant's engine. *St. Louis Southwestern Ry. Co. of Texas v. McIntosh & Carlisle* (Civ. App.) 126 S. W. 692.

Evidence, in an action by a section foreman for loss of goods in the section house burned in a fire set by a passing train, held insufficient to show that he negligently left the doors and windows open. *St. Louis Southwestern Ry. Co. of Texas v. Sharp* (Civ. App.) 131 S. W. 614.

In an action against a railroad company, evidence held to warrant a finding that the fires sued on originated on the company's right of way. *Gulf, T. & W. Ry. Co. v. Lowrie* (Civ. App.) 144 S. W. 367.

125. — **Damages.**—Measure of damages for burning grass, see *Railway Co. v. Horne*, 69 T. 643, 9 S. W. 440; *Railway Co. v. Keller*, 11 C. A. 569, 32 S. W. 847; *Railway Co. v. Goode*, 26 S. W. 441, 7 C. A. 245; *Railway Co. v. Wallace*, 74 T. 581, 12 S. W. 227; *Railway Co. v. Hogsett*, 67 T. 685, 4 S. W. 365; *Railway Co. v. Gains* (Civ. App.) 26 S. W. 433.

In action for negligently burning plaintiff's fruit trees, plaintiff may recover their cash value, instead of the lessened value of the land. *Texas & P. Ry. Co. v. Gorman*, 21 S. W. 158, 2 C. A. 144.

For destruction of growing crop. *Railway Co. v. Borsky*, 21 S. W. 1012, 2 C. A. 545.

Where a crop has been wrongfully destroyed, the proper measure of damages is the value of the crop at the time and place of its destruction. *Railway Co. v. Rheiner* (Civ. App.) 25 S. W. 971.

Measure of damages for destruction of sod by fire is the difference in the market value of the land immediately before and after the fire, excluding the value of the grass. *Railway Co. v. Fulmore* (Civ. App.) 29 S. W. 688; *Railway Co. v. Horne*, 69 T. 643, 9 S. W. 440.

Measure of damages for destruction of sod and burning grass held to be the value of the grass and the difference in the value of the land before and after the fire. *International & G. N. R. Co. v. McIver* (Civ. App.) 40 S. W. 438.

Fences being part of the realty, difference in the value of the land caused by their destruction should be considered. *Id.*

In an action for injuries from fire set by a locomotive the company was liable for damages that directly resulted to plaintiff and his family from suffocation and from cold in being compelled to leave the burning building. *Serafina v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 42 S. W. 142.

Damages resulting to plaintiff and his family from sleeping on the floor of a neighbor's house held too remote. *Id.*

Damages resulting from the death of a dog that was shut up in the house were also too remote. *Id.*

Where plaintiff holds grazing land by lease, and the turf is injured by fire, the measure of damage is the value of the grass in such amount as will compensate plaintiff for the injury. *Texas & P. Ry. Co. v. Rice*, 24 C. A. 374, 59 S. W. 833.

A charge that, if the property had no market value, the measure of damages would be the reasonable value of the improvements destroyed, held erroneous. *Tyler S. E. Ry. Co. v. Hitchins*, 26 C. A. 400, 63 S. W. 1069.

Where plaintiff's real estate had no market value, a charge that the measure of damages for negligently burning his barn was the difference between the market value of the real estate immediately before and immediately after the fire was erroneous. *Highland v. Houston, E. & W. T. Ry. Co.* (Civ. App.) 65 S. W. 649.

Rule stated as to measure of damages for the destruction of grass and fences and injury to soil by fire alleged to have been set by defendant's locomotive. *Galveston, H. & S. A. Ry. Co. v. Chittim*, 31 C. A. 40, 71 S. W. 294.

Rule for measure of damage in action against a railroad for damages to plaintiff's grass land from fire originating from sparks from defendant's engine stated. *Jackson v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 78 S. W. 724.

In an action for damages to plaintiffs' turf, by fire set by defendant's locomotive, the measure of damages was the difference in value of the land immediately before and after the fire, not considering the value of the grass, and the market value of the grass, if any; otherwise, its reasonable value. *Texas & P. Ry. Co. v. Prude*, 39 C. A. 144, 86 S. W. 1046.

126. — **Questions for Jury and Instructions.**—See notes under Art. 1971.

127. **Notice of claim for damages.**—See Art. 5714.

## X. INJURIES TO EMPLOYÉS

See Chapter 14 of this title and notes.

## CHAPTER ELEVEN

### COLLECTION OF DEBTS FROM RAILROAD CORPORATIONS

Art.	Art.
6619. Property of company subject to execution.	6626. Jurisdiction, etc.
6620. Notice required in reducing wages.	6627. Sale under deed of trust, where made.
6621. Time of notice and how given.	6628. Judgment, execution, etc.
6622. Penalty, etc.	6629. Unpaid stock, etc.
6623. When wages to be paid discharged employé.	6630. After sale, old directors to be trustees.
6624. Road liable to be sold for debt.	6631. Suit not to abate, when.
6625. New corporation in case of sale.	6632. Not to apply to state loans.

**Article 6619. [4543] Property of company subject to execution.**—The rolling stock and all other movable property belonging to any railroad company or corporation shall be considered personal property, and its real and personal property, or any part thereof, shall be liable to execution and sale in the same manner as the property of individuals, and no such property shall be exempt from execution and sale. [Const., art. 10, sec. 4.]

Cited, *St. Louis S. W. Ry. Co. of Texas v. Griffin* (Civ. App.) 154 S. W. 583.

**To what property applicable.**—The property enumerated in this article that may be sold under execution comprehends all the property of whatsoever nature or character of a railway company or corporation. The property liable to seizure is not restricted to Art. 6628 enumerating railroad property subject to sale, and providing how it shall be sold, etc. *S. A. & G. S. Ry. Co. v. S. A. & G. R. Co.* (Civ. App.) 76 S. W. 785.

**For what debts railroad liable.**—Defendant railroad company held not liable as successor of another company for claims for work performed in construction of road. *Gulf & B. V. Ry. Co. v. Winder*, 26 C. A. 263, 63 S. W. 1043.

A contract for construction work for a railroad construed, and held to make the contractor responsible for the cost of the work done on the credit of the railroad. *United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Civ. App.) 112 S. W. 447.

Held that the debt incurred was a debt of the contractor, and not of the railroad. *Id.* The contract held to create the railroad commission the arbiter to determine what issue of stocks and bonds by the railroad should be compensation for the work. *Id.*

**Art. 6620. [4544] Notice required in reducing wages.**—All persons in the employment of such railway company shall be entitled to receive thirty days' notice from said company before their wages can be reduced by such company; and, in all cases of reduction, the employé shall be entitled to receive from such company wages at his contract price for the full term of thirty days after such notice is given, to be recovered in any court of competent jurisdiction. [Acts 1887, p. 20.]

**Art. 6621. [4545] Service of notice and how given.**—The notice referred to in the preceding article is declared to mean thirty full days immediately prior to the day upon which such reduction is to take effect, and may be given by posting written or printed handbills, specifying the parties whose wages are to be reduced and the amount of such reduction, in at least three conspicuous places in or about each shop, section house, station, depot, train or other places where said employés are at work; provided, such employé shall, within fifteen days from the date of such notice, inform such railway company, by posting like notices as given by such railway company, whether he will or will not accept such reduction; and, if no such information is given such company by such employé, then such employé shall forfeit his right to such notice, and such reduction shall take effect from the date of such notice, instead of at the expiration of thirty days. [*Id.* sec. 2.]

**Art. 6622. [4546] Penalty.**—Any railway company violating or evading any of the provisions of the preceding article shall pay to each employé affected thereby one month's extra wages, to be recovered by such employé in any court of competent jurisdiction. [*Id.* sec. 3.]

**Art. 6623. [4547] When wages to be paid discharged employé.**—Whenever any railroad company shall discharge any employé, or whenever the time of service of any employé of a railroad company shall expire, or whenever any railroad company shall be due and owing any employé, such railroad company, upon such discharge, or upon the termination of the term of such service, or upon the maturity of said indebtedness, shall, within fifteen days after demand therefor upon the nearest station agent of said railroad company, pay to such employé the full amount due and owing him; and in case said railroad company fails or refuses to pay such employé, then it shall be liable and pay to such employé twenty per cent on the amount due him, as damages, in addition to the amount so due, in no case the damages to be less than five nor more than one hundred dollars. [Acts 1887, p. 72.]

**Unconstitutional.**—This article is invalid as class legislation, and is not authorized by Const. Art. 10, § 2, requiring the legislature to adopt laws to correct abuses and prevent unjust discrimination in rates on railroads in the state. *Missouri, K. & T. Ry. Co. of Texas v. Braddy* (Civ. App.) 135 S. W. 1059.

This article is invalid as working a deprivation of property without due process of law contrary to Const. art. 1, § 19. Id.

Lien of railroad laborers.—See Art. 5640.

Recovery of attorney's fees.—See Art. 2178.

**Art. 6624. [4549] Road, etc., liable to be sold for debts.**—In case of the sale of the property and franchises of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, or by a receiver acting under judgments heretofore or to be hereafter rendered by any court of competent jurisdiction, the purchaser or purchasers at such sale and associates, if any, shall acquire full title to such property and franchises, with full power to maintain and operate the railroad and other property incident to it, under the restrictions imposed by law; provided, however, that said purchaser or purchasers and associates, if any, shall not be deemed and taken to be the owners of the charter of the railroad company and corporators under the same, nor vested with the powers, rights, privileges and benefits of such charter ownership as if they were the original corporators of said company, unless the purchaser or purchasers and associates, if any, shall agree to take and hold said property and franchises, charged with and subject to the payment of all subsisting liabilities and claims for death and for personal injuries sustained in the operation of the railroad by the company, and by any receiver thereof, and for loss of and damage to property sustained in the operation of the railroad by the company and by any receiver thereof, and for the current expenses of such operation, including labor, supplies and repairs; provided, that all such subsisting claims and liabilities shall have accrued within two years prior to the beginning of the receivership resulting in the sale of said property and franchises, or within two years prior to the sale, if said property and franchises be sold otherwise than under receivership proceedings, unless suit was pending on such claims and liabilities when the receiver was appointed or when the sale was made, in which event claims and liabilities on which suits were so pending shall be protected hereby as though accruing within the two years; such agreement to be evidenced by an instrument in writing signed and acknowledged by said purchaser or purchasers and associates, if any, and filed in the office of the secretary of state of the state of Texas; and, provided, further, that such charter, together with the powers, rights, privileges and benefits thereof, shall pass to said purchaser or purchasers and associates, if any, subject to the terms, provisions, restrictions and limitations imposed and to be imposed by law; and provided, further, that the amount of stock and bonds which may be held against said property and franchises, after the sale thereof, as well as the manner of issuance of such stock and bonds shall be fixed, determined and regulated by the railroad commission of Texas at its discretion save that the total encumbrance secured by the lien on said property and franchises shall not exceed the amount allowed by article 6718 of the Revised Statutes of Texas. [P. D. 4912. Amended 4 S. S. 1910, p. 120.]

Cited, *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094; *International & G. N. Ry. Co. v. Anderson County*, 150 S. W. 239; *International & G. N. Ry. Co. v. Anderson County* (Sup.) 156 S. W. 499.

**Rights and liabilities of stockholders.**—The stockholders under this article are considered the owners of the road's charter and the original corporators thereunder, invested with all the powers and privileges and entitled to all the benefits in the same manner and to the same extent as if they were the original corporators. But they are not chargeable with nor liable for the contractual obligations of the sold-out company whether expressed or implied. *Williams v. Tex. Midland R. R. Co.*, 22 C. A. 278, 55 S. W. 132.

**Rights and liabilities of purchasers.**—The purchasers of a railroad do not thereby become responsible for its debts. *H. & T. C. R. R. Co. v. Shirley*, 54 T. 125.

Under this article the purchasers of a railroad must in law be considered the owners of the charter of the road which they bought and the original corporators thereunder, and vested with all the rights, powers, privileges and benefits thereof in the same manner and to the same extent as if they were the original corporators of said company. They are not made chargeable with or liable for the contractual obligations of the sold-out company whether express or implied. *Williams v. Railroad Co.*, 22 C. A. 278, 55 S. W. 130.

A purchaser at a foreclosure sale of a railroad company held to have obtained the right to use an unused portion of a right of way in a city street. *Denison & S. Ry. Co. v. St. Louis S. W. Ry. Co.*, 96 T. 233, 72 S. W. 161.

**Capacity of purchasers.**—See, also, notes under Arts. 6625 and 6627.

Every purchaser must be one legally capable, not only of owning the property, but of exercising the rights and powers, and of assuming and performing the duties incident to his ownership. A married woman can become purchaser in another's name and he can act for her in the management of the property as her trustee so far as to give her the returns, and this interest she and her husband can exchange for stock in a company organized to take over the road. *Texas Southern Ry. Co. v. Harle*, 101 T. 170, 105 S. W. 1107.

**Construction of mortgage.**—Land acquired by a railroad company for sale to employes will not pass under a prior mortgage of land to be acquired for railroad purposes. *Aldridge v. Pardee*, 24 C. A. 254, 60 S. W. 789.

Evidence held to sustain a finding that a tract of land was not acquired for railroad purposes, so as to be covered by railroad mortgage. *Id.*

**Power to transfer franchise.**—A railroad corporation has no power except under given conditions and in a prescribed manner to transfer its franchise and other rights to a new company without the consent of the legislature. *Gulf & B. V. Ry. Co. v. Winder*, 26 C. A. 263, 63 S. W. 1045.

**Effect of sale.**—The sale of the entire roadbed, track franchises and charter rights of a railroad is in effect a dissolution of the corporation. *S. A. & G. S. Ry. Co. v. S. A. & G. R. Co.* (Civ. App.) 76 S. W. 786.

**Art. 6625. [4550] New corporation, in case of sale, may be formed, how.**—In case of any sale heretofore or hereafter made of the property and franchises of a railroad company within this state, the purchaser or purchasers thereof and associates, if any, shall be entitled to form a corporation under chapter one of this title, for the purpose of acquiring, owning, maintaining and operating the road so purchased, as if such road were the road intended to be constructed by the corporation; and, when such charter has been filed, the new corporation shall have the powers and privileges then conferred by the laws of this state upon chartered railroads, including the power to construct and extend; provided, that, notwithstanding such incorporation, the property and franchises so purchased shall be charged with and subject to the payment of all subsisting liabilities and claims for death and personal injuries sustained in the operation of the railroad by the sold-out company and by any receiver thereof, and for loss of and damage to property sustained in the operation of the railroad by the sold-out company and by any receiver thereof, and for the current expenses of such operation, including labor, supplies and repairs; provided, that all such subsisting claims and liabilities shall have accrued within two years prior to the beginning of the receivership resulting in the sale of such property and franchises, or within two years prior to the sale, if said property and franchises be sold otherwise than under receivership proceedings, unless suit was pending on such claims and liabilities when the receiver was appointed, or when the sale was made; in which event claims and liabilities on which suits were so pending shall be protected hereby as though accruing within two years; and provided, that by such purchase and organization no right shall be acquired in conflict with the present constitution and laws, in any respect, nor shall the main track of any railroad once constructed and operated be abandoned or moved; and provided, further, that the amount of stock and bonds which may be issued by said new corporation, as well as the manner of their issuance, shall be fixed, determined and regulated by the railroad commission of Texas at its discretion, save that the total encumbrance secured by lien on said property and franchises shall not exceed the amount allowed by article 6718 of the Revised Statutes of Texas. This and the preceding articles shall not be construed to in any wise repeal or impair the provisions of chapter 16 of this title, except in so far as the same may be changed thereby. [Acts 1889, p. 19. Amended 4 S. S. 1910, p. 120.]

Cited, *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

**Extent of liability of new company.**—See, also, notes under Art. 6624.

Only such liabilities, claims and demands as are secured by prior liens on the property can be enforced in the hands of the purchaser at execution sale. *Railway Co. v. Newell*, 73 T. 334, 11 S. W. 342, 15 Am. St. Rep. 788.

Only the portion of the road purchased is subject to the liabilities, claims and demands which existed against it in the hands of the sold-out company. This law does not make the new company liable for anything, but only makes the property subject to certain liabilities, claims and demands. *Williams v. Tex. Midland R. R. Co.*, 22 C. A. 278, 55 S. W. 132.

Where a railroad company was organized under this article for the purchase at foreclosure sale of the property, rights, and franchises of another railroad corporation, and it purchased the same, it took title subject to the liabilities of the original company, and a contract binding the original company to maintain its roundhouses, machine shops, and general offices in a city was binding on the new company. *International & G. N. Ry. Co. v. Anderson County* (Civ. App.) 150 S. W. 239.

In the absence of any statute affecting the liability of a railroad sold under a judicial sale, or under a deed of trust, the purchaser acquires the property and franchises free from all mere personal obligations of the former company. *Id.*

— **Liability of purchaser for negligence of receiver.**—See note under Art. 2151.

Liability of the purchaser of a railroad for injuries caused by the negligence of a receiver. *Railway Co. v. Kelly* (Civ. App.) 35 S. W. 878.

In action against purchaser of railroad at receiver's sale for injuries received while the road was in the hands of a receiver, a deed conveying property to defendant was admissible to show extent of liability. *Houston, E. & W. T. Ry. Co. v. Norris* (Civ. App.) 41 S. W. 708.

**Rights of owner of fee in right of way.**—See notes under Art. 6532.

This article only purports to fix the rights and liabilities of the purchasers of a sold-out railroad, and when the clause, "nor shall the main track of any railroad once constructed and operated be abandoned or removed" is construed with the whole article it cannot by any reasonable intentment be held to restrict the right of a citizen to recover his property from a railroad company that has wrongfully taken possession of same. *Galveston & W. Ry. Co. v. Kinkead* (Civ. App.) 60 S. W. 470.

**When title passes.**—The title to a railroad acquired at a judicial sale does not pass to the new corporation until transferred by the purchaser. *Thayer v. Watham*, 17 C. A. 382, 44 S. W. 906.

**Rights and liabilities after consolidation.**—See notes under Art. 6604.

**Art. 6626. [4551] Jurisdiction, etc.**—No railway company availing itself of any of the privileges herein provided shall claim to be under the jurisdiction of the federal courts by reason thereof; and any railway company which may avail itself of the said privileges which shall claim to be subject to the jurisdiction of the federal courts in pursuance of this article shall ipso facto forfeit its reorganization and be remanded to the same condition as it was prior to said reorganization. [Id. p. 20, sec. 2.]

**Art. 6627. [4552] Sale under deed of trust, when and where made.**—Whenever a sale of the roadbed, track, franchise and chartered rights and privileges of any railroad company is made by virtue of any deed of trust or power the same shall be made at the time and place mentioned in the deed of trust or power and in accordance with the provisions of the same as to notice, and in other respects; and, if the same be not specified, such sale shall be made as hereinafter provided for sales under execution or order of sale. [P. D. 4913.]

**Liability of purchasers.**—See notes under Arts. 6624 and 6625.

**Art. 6628. [4553] Judgment, execution, levy and sale.**—Whenever judgment is rendered against any railroad company, execution shall issue thereon and be levied and collected as in other civil causes, except that when the roadbed, track, franchise and chartered powers and privileges of said railroad company is levied upon, the levy and sale must take place in the county where the principal office of such company is situated, and the entire roadbed, track, franchise and chartered powers and privileges of such company shall be levied upon and sold. The provisions of this article shall be observed so far as they are applicable in all cases where, by any decree of a competent court, a sale of the roadbed, track, franchise and chartered powers and privileges of any railroad company is directed to be made. [P. D. 4914.]

**Art. 6629. [4554] Unpaid stock subscriptions of stockholders of sold-out company.**—The sale of the roadbed, track, franchise and chartered rights, as hereinbefore provided, shall not be held to pass or convey to the purchaser any right or claim to recover from the former stockholders of said company any sums which may remain due upon their subscriptions of stock, but the said stockholders shall continue liable



to pay the same in discharge and liquidation of the debts due by the sold-out company, as hereinafter provided. [P. D. 4915.]

**Art. 6630. [4555] After sale old directors to be trustees.**—Whenever a sale of the roadbed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors or managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and other necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands. [P. D. 4916.]

**Death of one or more directors.**—When one or more of the directors die the survivors take the whole title subject to the trust, and the surviving trustees of the original company are authorized to deal with said property after its dissolution as they deem proper for the best interest of the company. *Aldridge v. Pardee*, 24 C. A. 254, 60 S. W. 791.

**Art. 6631. [4556] Suits not to abate.**—No suit pending for or against any railroad company at the time that the sale may be made of its roadbed, track, franchise and chartered privileges shall abate, but the same shall be continued in the name of the trustees of the sold-out company. [Id.]

**Art. 6632. [4557] This title not to apply to state loans, etc.**—The provisions of this title shall not apply to any debt, execution, or deed of trust held by the state against any railroad company, because of any loan made by the state to any company under the provisions of the act to provide for the investment of the special school fund, or any other law which authorizes the loan of money to railroad companies; nor shall any creditor of any railroad company be allowed to make the state a party to any suit brought for the enforcement of any debt, mortgage or deed of trust or lien on any railroad, or permitted to require the state to foreclose any lien which it may have upon any road, but the lien of the state and its right to enforce the same shall continue as if this title had never been passed, and as if no sale had been made under the provisions of the same. [P. D. 4917.]

**Lien in favor of state.**—The legislature held to have power to provide that the lien given the state by statute against railroads borrowing school funds should not apply to subsequent extensions of such roads. *Houston & T. C. R. Co. v. State* (Civ. App.) 41 S. W. 157.

## CHAPTER TWELVE

### FORFEITURE OF CHARTER

Art.	Art.
6633. Forfeiture for failure to build, etc.	in certain cases; restoration of
6634. Branch lines.	corporate existence, etc.
6635. Relief of, for failure to comply with law.	6635b. Extension of time to build branches; restoration of franchises, etc.
6635a. Extension of time to build and equip	6636. Neglect to make annual report.

**Article 6633. [4558] Forfeiture for failure to build and equip.**—If any railroad corporation organized under this title shall not, within two years after its articles of association shall be filed and recorded as provided in this title, begin the construction of its road, and construct, equip and put in good running order at least ten miles of its proposed road, and, if any such railroad corporation, after the first two years, shall fail

to construct, equip and put in good running order at least twenty additional miles of its road each and every succeeding year until the entire completion of its line, such corporation shall, in either of such cases, forfeit its corporate existence, and its powers shall cease as far as relates to that portion of said road then unfinished, and shall be incapable of resumption by any subsequent act of incorporation. The provisions of this article shall not apply to or in any manner affect railway companies incorporated for the construction and operation of urban, suburban and belt railroads for a distance of less than ten miles, as provided in clause two of article 6408, chapter one, of this title; provided, that all such companies shall, within twelve months from the date of their charter, complete a portion of their road and commence and continue the running of cars thereon. [Acts 1889, p. 17.]

**Effect of article.**—This article is self-executing, but the forfeiture relates only to the unfinished portion of the road. *S. S. & Mt. P. Ry. Co. v. A., T. & S. F. Ry. Co.*, 2 C. A. 650, 22 S. W. 107.

**Effect of forfeiture.**—See Art. 6532.

In case of forfeiture the property rights survive for the benefit of those who may have just claims on the assets. *S. S. & Mt. P. Ry. Co. v. A., T. & S. F. Ry. Co.*, 2 C. A. 650, 22 S. W. 107.

**Failure to use part of railway.**—This article has no application in a case where a railroad has been built to a city in accordance with its grant but has failed to use part of its right of way along a street in said city. *Denison v. S. Ry. Co. v. St. Louis S. W. Ry. Co. of Texas*, 96 T. 233, 72 S. W. 164.

**Forfeiture cannot be claimed in collateral proceedings.**—As a general rule, a forfeiture of the franchises of a corporation cannot be claimed in a collateral proceeding merely because a ground of forfeiture may exist. *Railway Co. v. State*, 81 T. 572, 17 S. W. 67. See, also, *Mayor v. Railway Co.*, 84 T. 581, 19 S. W. 786; *Bywaters v. Railway Co.*, 73 T. 624, 11 S. W. 856.

**Art. 6634.** [4559] **Same as to branch lines.**—The preceding article shall apply as well to branch lines as to main lines of railroads. [Acts 1876, p. 143, sec. 7.]

**Art. 6635. Relief of, for failure to comply with the law.**—Any railway company holding a charter filed in the office of the secretary of state since the first day of January, 1900, of which by amendment to its articles of incorporation filed with the secretary of state of this state since the first day of January, 1900, has provided for the construction of one or more branch lines, and which has since the first day of January, 1906, constructed and put in operation fifty miles of railroad in this state, or thirty miles of railroad in the state of Louisiana, or which since the first day of January, 1906, shall have expended not less than twenty thousand dollars for right of way or terminal facilities within or immediately adjacent to any city in this state with a population of not less than forty thousand, as shown by the last federal census; also any railway company which had been incorporated by articles of incorporation filed in the office of the secretary of state of this state since the first day of January, 1900, and which has since the first day of January, 1902, constructed and put in operation not less than nine miles of railroad within this state, and the length of whose line authorized by its charter does not exceed fifty miles, or which has since January 1, 1906, graded not less than fifty miles of road bed on its line in this state, or which has, in good faith, acquired since January 1, 1907, its right of way for the entire length of its line, and the length of whose line authorized by its charter does not exceed forty miles, or any railroad company which since the first day of January, 1901, and during the first year of its incorporation, did construct and put in operation not less than twenty miles of railroad in this state, shall have two years from the eleventh day of June, 1909, in which to comply, as to its main line or its branch or branches projected by such articles of incorporation or amendments, with the provisions of articles 6422, 6633 and 6634, and each such railway company which shall have forfeited its right to construct, or its corporate existence, as to any part of its said main line, or is about to do so, or any of its said branches, or any part thereof, shall have, and

such corporate existence and right to construct same is hereby restored and preserved to it, and it shall enjoy all of its corporate franchises, property rights and powers held or acquired by it previous to any cause of forfeiture on account of such failure; provided, that no such railway company shall claim or exercise any right or franchise not allowed, granted or permitted to other railway corporations under the laws now in force in this state, and every such railway company shall comply with the laws now in force in this state pertaining to railway corporations. [Acts 1909, p. 227, sec. 1.]

**Art. 6635a. Extension of time to build and equip in certain cases; restoration of corporate existence, etc.**—That the time in which any railway corporation chartered under the laws of the state of Texas since the first day of January, 1892, or the charter of which has been amended since that date, is required to begin the construction of its road, and construct, equip and put in good running order, as required in article 4558 [6633] of the Revised Statutes of the state of Texas of 1895, and the same hereby is, as to any unfinished portion of such road, extended two years from the taking effect of this Act; and any railway company having been chartered since January first, 1892, or the charter to which has been amended since said date, which shall have forfeited its corporate existence or any of its rights and powers, or is about to do so, by reason of the failure to comply with said article 4558 [6633] or any part of said article, shall have restored and preserved to it, its corporate existence, and it shall have and enjoy all of the corporate franchises, property rights and powers held or acquired by it previous to any causes or forfeiture as aforesaid; provided, that no railway company which shall be revived or the time extended by virtue of this Act, shall claim or exercise any franchise not allowed, granted or permitted to other railway corporations under the law now in force in this state. [Acts 1913, p. 116, sec. 1, superseding Acts 1911, p. 43, sec. 1.]

**Art. 6635b. Extension of time to build branches; restoration of franchises, etc.**—Any railway corporation chartered since the first day of January, A. D. 1892, and which by its original charter or by amendment thereto, filed since said first day of January, A. D. 1892, has further provided for the locating, constructing, maintaining, owning and operating of any extension or branch line or lines of railway, and which has failed or is about to fail to complete the same, or any part thereof, within the time required by law, shall, upon payment of all its franchise tax, be and is hereby restored to and granted all and singular the rights, privileges and franchises acquired by its original charter, or by such amendment to its articles of incorporation, as if the same was filed and recorded in the office of the secretary of state on the day of taking effect of this Act, and such corporation shall, upon payment of its franchise tax, be and is hereby authorized to project, complete, construct, own and operate any such extension and branch line or lines of railway under and as provided for in its charter or in any amendment to its articles of incorporation; provided, that such extension and branch line of railway shall be by such corporation completed and put in good running order at the rate of at least ten miles in one year from the taking effect of this act, and twenty additional miles for each and every year thereafter, until all of the branch line or lines of extension as provided for are completed. [Acts 1913, p. 116, sec. 2, superseding Acts 1911, p. 43, sec. 2.]

**Art. 6636. [4560] Neglect to make annual report.**—Any railroad corporation which shall neglect to make the annual report to the comptroller, or governor, required by this title, and which has been notified by the comptroller, or governor, of such failure, and shall still neglect to make such report, within three months after such notice, shall forfeit its charter. [P. D. 4902.]

## CHAPTER THIRTEEN

## TICKET AGENTS—AUTHORITY AND DUTY

Art. 6637. Authorized agent for sale of tickets. Art. 6639. Same.  
6638. Duty of agents.

**Article 6637. [4560a] Authorized agents for the sale of tickets.—** It shall be the duty of all railroad companies doing business in this state, or the receiver of any such railroad company, through their duly authorized officers, to provide each agent who may be authorized to sell tickets, or other evidences, entitling the holder to travel upon any such railroad, with a certificate setting forth the authority of such agent to make such sale. Such certificate shall be duly attested by the corporate seal of such railroad company, or the signature of the receiver, if any there be, of such railroad company, or by the signature of the officer whose name is signed upon the tickets or coupons which such agent may be authorized to sell. [Acts 1893, p. 97.]

**Constitutionality.**—Rejecting that portion of the statute denounced by the Jannin decision (42 Cr. R. 631, 51 S. W. 1126, 96 Am. St. Rep. 821), holding that that part of the statute making the selling of a ticket a misdemeanor and fixing a penalty in the event of a conviction, the remaining portion is complete in itself and is capable of being executed in accordance with the apparent legislative intent and must be upheld. *T. & P. Ry. Co. v. Mahaffey* (Civ. App.) 81 S. W. 1049.

The objection that this statute does not treat all persons of same class alike, and therefore in this respect is unconstitutional, is not tenable. *Id.*

**Authority of ticket agent.**—A ticket agent at A. station authorized plaintiff to pay to the ticket agent at B. station, on the same road, money to pay for an emigrant ticket from Alabama to A. station, and on the receipt of the money he would have a ticket delivered to plaintiff's brother in Alabama. The agent at B. station received the money, giving his receipt therefor, and afterwards absconded without delivering the money to the agent at A. station or the company, and no ticket was purchased for the party in Alabama. Plaintiff was entitled to recover the money so paid, it appearing that such tickets had been furnished under the same circumstances by the agents of the defendant before. *I. & G. N. R. R. Co. v. Johnson*, 1 App. C. C. § 354.

A contract by a station agent is binding upon the company in whose employ he is, and the company is liable for actual damage. *McCarty v. Railway Co.*, 79 T. 33, 15 S. W. 164.

When notice is given at the place where the overcharge is claimed to have been demanded or received, it must be given to the agent who demanded or received it. If not so given, notice may be given to a general agent of the company, but not to a station agent who did not demand or receive it. *Railway Co. v. Cruse*, 83 T. 460, 18 S. W. 755.

A station agent may contract to furnish cars at his own station, but not at another. *Railway Co. v. Hodge*, 10 C. A. 543, 30 S. W. 829.

Where a person is in a ticket office and sells tickets to another person, this is sufficient to show that he was defendant's agent to whom the ticket was presented in a suit to recover penalty for failure to redeem an unused ticket. *T. & P. Ry. Co. v. Mahaffey* (Civ. App.) 81 S. W. 1048.

**Matters relating to tickets.**—See notes under Art. 707.

**Art. 6638. [4560c] Duty of agent.**—It shall be the duty of every agent who shall be authorized to sell tickets, or parts of tickets, or other evidence of the holder's right to travel over any railroad within this state, upon demand, to exhibit to any person desiring to purchase a ticket, or to any officer of the law who may request it, the certificate of his authority to sell, and to keep said certificate posted in a conspicuous place in his office for the information of travelers. [Amended Acts 1903, p. 162.]

**Art. 6639. Same.**—It shall be also the duty of every such railroad agent at stations having telegraph communication with the train dispatcher of the railroad, to ascertain one hour before the schedule time of the arrival of passenger trains, if such train is on time, and if on time, to bulletin that fact on a board provided by the company and placed in some conspicuous place at the passenger station. And if the train is late, he shall bulletin how late, and the last telegraph station passed by such train. If later than one hour, said agent shall thereafter ascertain the latest news from such train dispatcher, or some other reliable source, every hour, and bulletin such information and the time of probable ar-

rival of such train. If any such agent shall fail or refuse to perform the duties required of him by this article, he shall be deemed guilty of a misdemeanor, for each time he fails or refuses to perform the duties required of him by this article, and upon conviction shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense. [Acts 1903, p. 162. Acts 1913, p. 350, sec. 1, amending Art. 6639, Rev. St. 1911.]

## CHAPTER FOURTEEN

### LIABLE FOR INJURIES TO EMPLOYÉS

Art.		Art.	
6640.	Liabie for injuries to fellow-servants. Who are vice-principals.	6647.	Double-header trains, no assumed risk by employés.
6642.	"Fellow servants" defined.	6648.	Liabie for injury or death of employé.
6643.	Contract limiting liability void.	6649.	Contributory negligence, rule as to.
6644.	Contributory negligence a defense, except, etc.	6650.	Assumed risk, rule as to.
6645.	When assumed risk not available as a defense.	6651.	Contract changing liability void.
6646.	No assumed risk where safety appliance not provided.	6652.	Articles of this chapter construed.

**Article 6640. Liabie for injury to fellow-servant.**—Every person, receiver, or corporation operating a railroad or street railway, the line of which shall be situated in whole or in part in this state, shall be liabie for all damages sustained by any servant or employé thereof while engaged in the work of operating the cars, locomotives or trains of such person, receiver, or corporation, by reason of the negligence of any other servant or employé of such person, receiver or corporation, and the fact that such servants or employés were fellow-servants with each other shall not impair or destroy such liabie. [Acts 1897, S. S., p. 14, sec. 1.]

Cited, *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

**Constitutionality.**—Constitutionality of the law. *Campbell v. Cook*, 26 S. W. 486, 86 T. 630; *People v. Rodgers*, 11 C. A. 447, 32 S. W. 798; *Railway Co. v. Leighty* (Civ. App.) 32 S. W. 799; *Railway Co. v. Hohn*, 21 S. W. 942, 1 C. A. 36.

The fellow-servants act (Acts 23d Gen. Assem. p. 120) held not unconstitutional, as having more than one subject in the title. *Missouri, K. & T. Ry. Co. of Texas v. Hannig* (Civ. App.) 41 S. W. 196.

This law is not unconstitutional. It affects all classes of railway corporations alike. *Railroad Co. v. Gibson* (Civ. App.) 54 S. W. 779.

The liabie imposed by this and subsequent articles does not impose a burden on interstate commerce within the meaning of the commerce clause of the constitution of the United States. *M., K. & T. Ry. Co. v. Nelson*, 39 C. A. 269, 87 S. W. 707.

This law is not unconstitutional. It is not limited in its application to railroads alone. It applies to every person, receiver or corporation that owns or operates a railroad, and affects alike the employés of all corporations or persons owning or operating a railroad brought under its influence under the same condition. *Missouri, K. & T. Ry. Co. v. Smith*, 45 C. A. 128, 99 S. W. 745.

The state may make appropriate regulations for the protection of the lives of passengers or the safety of railroad employés, and may declare under what circumstances the fellow-servant or assumed risk doctrine shall apply in actions between the company and its employés. *Missouri, K. & T. R. Co. of Texas v. Bailey*, 53 C. A. 275, 115 S. W. 601.

**Change of law.**—A street railway was not within the provisions of former law. *Riley v. Galveston City R. Co.*, 13 C. A. 247, 35 S. W. 826.

An action for damages for injuries inflicted while the act of 1891 was in force could be maintained after that act was repealed by the act of 1893. *Culpepper v. I. & G. N., Ry. Co.*, 90 T. 627, 40 S. W. 386.

**Effect of statute.**—The word "while" places a time limit against this protection (against the negligence of fellow servants) and means during the time such employé may be engaged in the work of operating the locomotive. Work as used in this statute is synonymous with act and in its connection means the doing of those things which constitute operating the locomotive, etc., and the person so engaged is protected against the negligence of any other employé during the time he is engaged in operating the machinery. The effect of this article is to suspend the law of fellow servants as to persons employed to operate cars, locomotives or trains while they are actually engaged in the work; but it does not affect their relations to other employés beyond the time of their active employment in the work. *G., C. & S. F. Ry. Co. v. Howard*, 97 T. 513, 80 S. W. 230.

Under the statute the fellow-servant rule is not applicable as a defense, where persons are injured while engaged in operating the cars, locomotives, or trains of a railroad. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

What constitutes railroad.—See note under Art. 6642.

Where the track was a short and temporary affair, and a private corporation for its own private use, and not for the use of the public, was operating an engine and logging cars on it hauling logs from the woods to its saw mills, and used the engine to take box cars loaded with its lumber from the mills to the main line of a railroad, it was "operating a railroad" within the meaning of this article. *Lodwick Lumber Co. v. Taylor*, 39 C. A. 302, 87 S. W. 359.

See note to Art. 4694.

A railroad owned and used by a corporation solely in its private business of manufacturing and not as a common carrier comes within the terms and meaning of this article. *Cunningham v. Neal*, 101 T. 338, 107 S. W. 539, 15 L. R. A. (N. S.) 479.

Where a corporation operates a standard gauge railroad in connection with its manufacturing business, renting a locomotive to handle cars in its yards, it is a railroad within the meaning of this article and is liable for injuries to an employé caused by the negligence of his coemployés. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 457.

The word "railroad" as used in this article includes a tram railway belonging to a sawmill company on which it operates cars carrying its own lumber from the woods to its mill. *Keystone Mills Co. v. Chambers* (Civ. App.) 118 S. W. 178.

What constitutes operating cars, etc.—A railroad company held not estopped to deny that the act of an employé in running a hand car without its consent was a part of the operation of the road. *Branch v. International & G. N. R. Co.*, 92 T. 288, 47 S. W. 974, 71 Am. St. Rep. 844.

This article embraces all the employés of the company engaged in operating its locomotives and cars in the yards, as well as on the road and embraces those handling locomotives and cars in making up trains to be sent out on the road. *M., K. & T. Ry. Co. v. Baker* (Civ. App.) 53 S. W. 965.

Where one is killed by the sudden stopping of a hand car by a fellow-servant, an instruction that if the brake (which stopped the car) was not applied by the direction of the foreman plaintiff cannot recover, is erroneous, because one can recover when injury is caused by a fellow-servant. *Perez v. San Antonio & A. P. Ry. Co.*, 28 C. A. 255, 67 S. W. 139.

A push car eight or ten feet long and three or four feet high which is used for transporting broken rock from a quarry down an inclined switch track of the usual kind to a rock crusher, is a car within the meaning of this article. *Texas & P. Ry. Co. v. Webb*, 31 C. A. 498, 72 S. W. 1045.

Loading such push car with rock and guiding and managing it to and fro between the rock quarry and the rock crusher along the tracks built for the purpose is "operating" the car within the meaning of this article. *Id.*

Employés taking rails from a car and laying them on the ties and heeling them ready for the splikers were not operating a car and hence were within the follow servants' rule. *Lakey v. T. & P. Ry. Co.*, 33 C. A. 44, 75 S. W. 567.

This statute applies to employés operating locomotives in yards at stations, round-houses or coal chutes. *G., C. & S. F. Ry. Co. v. Howard*, 96 T. 532, 75 S. W. 805.

Employés who were transporting ballast on a push car for repair of the track, and had to remove the car between trips, when replacing it on the tracks they were operating a car within the meaning of this article making a railway company liable for injuries to a servant through negligence of another servant. *Seery v. G., C. & S. F. Ry. Co.*, 34 C. A. 89, 77 S. W. 951.

Servants engaged in loading a train of flat cars and hauling the same to make a fill on a railroad, the cars being loaded with a steam shovel, were engaged in operating a train within the meaning of the statute. *Texas Cent. R. Co. v. Pelfrey*, 35 C. A. 501, 80 S. W. 1036.

A section crew, placing a hand car on the track, is engaged in the operation of the car, within the statute. *Houston & T. C. R. Co. v. Jennings*, 36 C. A. 375, 81 S. W. 822.

The operation of a hand car and a push car is within the purview of this article. Plaintiff cannot be held to have assumed the risk of injury from the negligence of a foreman of a bridge gang, even if it should be held that they were fellow-servants, and a fortiori it cannot be so held when he was acting under the orders and directions of the foreman. *S. A. & A. P. Ry. Co. v. Stevens*, 37 C. A. 80, 83 S. W. 236.

The operation of a hand car is the operation of a railroad within the meaning of this article. *G., H. & S. A. Ry. Co. v. Perry*, 38 C. A. 81, 85 S. W. 64.

The carrying a hand car from the track to a place to be kept for the night, by employés of the railroad company is operating a car within the meaning of this article. *Texas & P. Ry. Co. v. Hervey* (Civ. App.) 89 S. W. 1096.

A fireman, struck while returning from the pilot of his engine to the cab by lumber projecting from a passing car held engaged in operating the road within the statute. *St. Louis & S. F. R. Co. v. Bussong*, 40 C. A. 476, 90 S. W. 73.

The foreman of defendant's construction crew held not engaged at the time of the accident in the operation and management of the train, with absolute control of the movements thereof, so as to render his negligent failure to warn deceased of his danger imputable to defendant. *Forge v. Houston & T. C. R. Co.*, 41 C. A. 81, 90 S. W. 1118.

An employé of a sawmill company operating a private railroad, who is injured while telephone poles are being transported along the track for construction of telephone lines by negligence of a fellow servant, is engaged in the work of operating the cars and can recover under this article. *Mounce v. Lodwick Lumber Co.* (Civ. App.) 91 S. W. 240.

Where a clerk and warehouseman at a railroad station who had nothing to do with operating the trains was injured while he was preparing the chute at the cattle pens for unloading cattle from the cars, he was not at the time engaged in the work of operating the cars, locomotives or trains within the meaning of this article. *Galveston, H. & S. A. Ry. Co. v. Morhmann* (Civ. App.) 93 S. W. 1090.

The lifting and removing a hand car from the track, and the lifting and moving it back again on the track is operating the car within the meaning of this article, and a servant injured by the negligence of a fellow-servant while so lifting and moving such hand car can recover. *Texas & N. O. Ry. Co. v. McCraw*, 43 C. A. 247, 95 S. W. 84.

An employé of a railroad held engaged in the operation of a car within the meaning of the statute. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 45 C. A. 123, 99 S. W. 743.

Employés under the direction of a foreman engaged in unloading cross-ties along the track, the employés doing the work while the foreman directs them and also the engineer by giving signals to the latter to move and to stop, are engaged in operating cars within the meaning of this law. *St. Louis & S. W. Ry. Co. v. Thornton*, 46 C. A. 649, 103 S. W. 438.

A railroad trackman, engaged with coemployés in "turning steel" at the time he was injured by his fellow-servants dropping the rail they were carrying without warning, held not within the statute exempting persons engaged in operating cars on the railroad from the fellow-servant rule. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 47 C. A. 74, 103 S. W. 447.

An engineer and fireman of a switch engine are, while the engineer is oiling parts of the engine, and the fireman is occupied in opening the blow-off cock to clean out the boiler, after the engine has been stopped for the purpose of taking water, engaged in operating the engine within the meaning of this article, and come within the exemption of the fellow-servant rule. *Texas & N. O. Ry. Co. v. Walton*, 47 C. A. 43, 104 S. W. 415.

A railroad employé held not engaged in the operation of a locomotive within the statute. *Galveston, H. & N. Ry. Co. v. Cochran*, 49 C. A. 591, 109 S. W. 261.

Plaintiff and other employés held to have been "operating a car" within the statutory exceptions to the fellow-servant rule. *Texarkana & Ft. S. Ry. Co. v. Anderson* (Civ. App.) 111 S. W. 173.

One Maurice had contract with railway company to build all trestles, roadway buildings, cattle guards, fences, etc., along defendant's line of railroad and defendant was to furnish material for the work to be delivered at site of station either on cars or by wagons, and at time of accident the deceased, an employé of Maurice with his coemployés was engaged in unloading from a car of defendant some heavy timbers furnished for the work. He was not an employé of defendant and was not "engaged in the work of operating the cars, locomotives, or trains" of defendant and the defendant was not liable for his death. *Walker v. Texas & N. O. Ry. Co.*, 51 C. A. 391, 112 S. W. 432.

A hand car is a "car" within the meaning of the fellow-servant statutes. *M., K. & T. Ry. Co. v. Bailey*, 53 C. A. 295, 115 S. W. 605.

Plaintiff and other section men were engaged in laying a temporary track in defendant's yards. They used a push car to bring rails to place where they were to be laid. Plaintiff and several others were carrying one end of a rail from the car to the place where it was to be laid, when the others let go and the rail fell on plaintiff's foot and injured him. He and his coemployés were not operating a car within the meaning of this statute, and he could not recover for the injury. *Texarkana & Ft. S. Ry. Co. v. Anderson*, 102 T. 402, 118 S. W. 127.

Where one employé was engaged in removing a block of wood from in front of the car wheel (put there to "scotch" the car) so that the train of cars could be moved, and another in the same grade of employment was on top of the car signaling the engineer to go ahead, they were engaged in operating cars, within the meaning of this article. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 118 S. W. 1118.

Plaintiff held injured while engaged in operating a car within the meaning of the statute. *Freeman v. Shaw* (Civ. App.) 126 S. W. 53.

Where a railroad section foreman was injured while assisting his collaborators in loading rails onto a flat car composing part of a train, while the train was at rest, he having no duty to perform with reference to the movement of the train, he was not engaged in operating a car, locomotive, or train within this article. *St. Louis Southwestern Ry. Co. of Texas v. McGee* (Civ. App.) 141 S. W. 1054.

— **Missouri statute.**—A servant of a railroad company injured in a collision held to have been at the time engaged in the work of operating the railroad within a statute of Missouri rendering railroads liable for injuries to servants engaged in such work. *St. Louis & S. F. R. Co. v. Smith* (Civ. App.) 90 S. W. 926.

What constitutes negligence.—See also notes under Art. 6648.

See *Texas & P. Ry. Co. v. Johnson*, 90 T. 304, 38 S. W. 520; *Kenney v. Lane*, 9 C. A. 150, 36 S. W. 1063; *G., C. & S. F. Ry. Co. v. Mayo*, 14 C. A. 253, 37 S. W. 659; *G., C. & S. F. Ry. Co. v. Knott*, 14 C. A. 158, 36 S. W. 491; *H. & T. C. Ry. Co. v. Suers*, 14 C. A. 384, 37 S. W. 378; *Tex. & Pac. Ry. Co. v. Gale* (Civ. App.) 35 S. W. 802; *M., K. & T. Ry. Co. v. Ferch* (Civ. App.) 36 S. W. 487.

As a general rule a court is not warranted in saying that an act constitutes negligence unless it is contrary to a statute. *Railway Co. v. Greenlee*, 70 T. 553, 8 S. W. 129; *Railway Co. v. Sweeney*, 14 C. A. 216, 36 S. W. 800.

Negligence defined. *Trinity Lumber Co. v. Denham*, 85 T. 56, 19 S. W. 1012.

High degree of care required when. *Railway Co. v. Gormleef* (Civ. App.) 27 S. W. 1051.

The violation of a city ordinance regulating the speed of trains is negligence per se. *Railway Co. v. Pendery*, 14 C. A. 60, 36 S. W. 793.

In a charge under this article it is proper to submit to the jury as a test of the negligence of a fellow-servant alleged as the proximate cause of the injury, whether or not an ordinarily prudent man would have done under the same or similar circumstances what the fellow-servant is alleged to have done. *M., K. & T. Ry. Co. v. Keaveney* (Civ. App.) 80 S. W. 338.

If the defect, whereby plaintiff was injured, was caused by negligence of fellow-servants, the company was liable although it used ordinary care to discover and remedy the defect; but if the defect was caused before the car in which it was came into possession of company and it used ordinary care to discover and remedy the same, then the company is not liable. *St. L. S. W. Ry. Co. v. Corrigan* (Civ. App.) 81 S. W. 556.

In making a coupling, facts held to show a locomotive engineer negligent toward a fireman on the running board of the engine, though the coupling be made with no unusual or improper jar. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374.

**Incompetent fellow-servant.**—See, also, notes under Art. 6642.

Sufficient allegation of negligence in employing an incompetent servant. *Galveston Rope & Twine Co. v. Burkett*, 21 S. W. 958, 2 C. A. 303.

As to general reputation of incompetency of a fellow-servant, see *Railway Co. v. Johnson*, 89 T. 519, 35 S. W. 1042.

**Assumption of risk.**—See notes under Art. 6645.

**Contributory negligence.**—See notes under Arts. 6644 and 6649.

**Comparative negligence.**—See notes under Art. 6649.

**Interstate commerce.**—See, also, notes under "Constitutionality," ante.

The question of whether the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65), instead of the state law on the same subject, governs in a particular case, will not be considered where it is raised for the first time in the appellant's brief on appeal; the trial having been had in accordance with the state law. *Chicago, R. I. & G. Ry. Co. v. Rogers* (Civ. App.) 150 S. W. 281.

Testimony that the caboose on which a car repairer was working when injured came from Liberal for repairs, without anything to show where Liberal was located, was insufficient to show that the car repairer was engaged in interstate commerce, and that hence the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65), instead of the state law, applied. *Id.*

Where the petition in an action by a widow for herself and her children to recover for her husband's negligent death alleged a cause of action under the state statutes, proof that the carrier was engaged in interstate commerce at the time would not support the petition. *Kansas City, M. & O. Ry. Co. of Texas v. Pope* (Civ. App.) 153 S. W. 163.

The federal employers' liability act of April 22, 1908, c. 149, 35 Stat. 65, supersedes state legislation and is paramount and exclusive as to the right of recovery for the death of a railroad employé, where the company at the time and place of the accident was engaged in interstate commerce. *Eastern Ry. Co. of New Mexico v. Ellis* (Civ. App.) 153 S. W. 701.

**Art. 6641. Who are vice-principals.**—All persons engaged in the service of any person, receiver, or corporation controlling or operating a railroad or street railway, the line of which shall be situated in whole or in part in this state who are intrusted by such person, receiver, or corporation with the authority of superintendence, control or command of the other servants or employés of such person, receiver, or corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such person, receiver, or corporation, and are not fellow-servants with their co-employés. [Id. sec. 2.]

Cited, *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

**Historical.**—The acts of 1891 and 1893 read as follows:

"All persons engaged in the service of any railway corporations, foreign or domestic, doing business in this state, who are entrusted by such corporation with the authority of superintendence, control or command of other persons in the employ or service of such corporation, or with the authority to direct any other employé in the performance of any duty of such employé, are vice-principals of such corporation, and are not fellow-servants with such employé." [Acts 1891, p. 25, § 1.]

"All persons engaged in the service of any railway corporation, foreign or domestic, doing business in this state, or in the service of a receiver, manager, or of any person controlling or operating such corporation, who are entrusted by such corporation, receiver, or person in control thereof, with the authority of superintendence, control, or command of other persons in the employment of such corporation, or receiver, manager, or person in control of such corporation, or with the authority to direct any other employé in the performance of the duty of such employé, are vice-principals of such corporation, receiver, manager, or person controlling the same, and are not fellow-servants of such employé." [Acts 1893, p. 120, § 1.]

**Constitutionality.**—See, also, notes under Art. 6640.

This article is not violative of the equal protection clause of Const. U. S. Amend. 14. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

**Not repealed.**—This article was not repealed by implication by Acts 1909 (1st Ex. Sess.) c. 10, referred to as the "Texas employers' liability act" (Arts. 6648-6652). *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

**Who are vice-principals—In general.**—Principal and vice-principal, who are. *Nix v. Railway Co.*, 82 T. 475, 18 S. W. 571, 27 Am. St. Rep. 897; 23 S. W. 328; *Railway Co. v. Sasse* (Civ. App.) 22 S. W. 187; *Railway Co. v. Frazier* (Civ. App.) 34 S. W. 664.

**Passive consent by employer to employé to direct another held not to fix liability on principal for negligent directions.** *Texas & P. Coal Co. v. Manning*, 34 C. A. 322, 78 S. W. 545.

In an action against a railway company for injuries to an employé while unloading lumber from a car in a yard, evidence held to authorize a finding that a third person was the company's vice-principal. *Galveston, H. & S. A. Ry. Co. v. Burns* (Civ. App.) 91 S. W. 618.

The common-law doctrine of fellow-servant under decisions of United States supreme court and the supreme court of this state makes an employé charged with the duty of keeping a safe place to work a vice-principal of the master. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

The test as to whether the relation of fellow-servants exists between employés of any person or railway corporation is whether one is entrusted by such person or corporation with authority of superintendence, control, or command of the others, or has



authority to direct the others in the performance of their duties. If so then the employé who has such authority is a vice-principal and not a fellow-servant of his coemployés. *M., K. & T. Ry. Co. v. Bailey*, 53 C. A. 295, 115 S. W. 605.

Under this article a boiler maker and his helper, the former having authority to direct and superintend the latter in the work they were doing, though he did not have power to hire and discharge, were not fellow-servants. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

— **Foremen.**—A section foreman having authority to employ and discharge his men is as to them a vice-principal. *Missouri, K. & T. Ry. Co. of Texas v. Hannig* (Civ. App.) 41 S. W. 196.

A foreman who has no power to employ or discharge held to be a fellow-servant. *Maughmer v. Bering*, 19 C. A. 299, 46 S. W. 917.

A railroad bridge foreman, exercising control over other employés, and regarded by them as their foreman, is the vice-principal of the company. *San Antonio & A. P. Ry. Co. v. Weigers*, 22 C. A. 344, 54 S. W. 910.

A railroad foreman held not to have lost his status as vice-principal of plaintiff. *Missouri, K. & T. Ry. of Texas v. Smith*, 31 C. A. 332, 72 S. W. 418.

In a servant's action for injuries sustained by his foreman's negligence, evidence held to show that the master had given to the foreman authority to control plaintiff in the performance of his work, so that the foreman was a vice-principal. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

Under this article an assistant foreman of a railway bridge gang was not a vice-principal, where he merely led in the work under the foreman's direction. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

— **Inspectors.**—An employé charged with the duty to inspect an engine held a vice-principal. *Missouri, K. & T. Ry. Co. of Texas v. Ferch*, 18 C. A. 46, 44 S. W. 317.

Employés charged with the duty of keeping a place to work and machinery in a safe condition, and of inspecting the same, are vice-principals of the employer. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

An employé charged with the duty of making an inspection of cars and couplings, held a vice-principal, and not a fellow-servant. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 60 C. A. 141, 109 S. W. 995.

— **Yard master.**—A yard master, having power to discharge employés in the yard, is the vice-principal of the railroad company. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

— **Engineers.**—Evidence held to show that an engineer was the vice-principal of a trainman. *Texas & N. O. Ry. Co. v. Bingle*, 16 C. A. 653, 41 S. W. 90.

Howard was in the employ of defendant (railway company) as hostler. His duties were to take charge of, operate and handle all engines in and about the roundhouse, coal chute, and cinder pit. He had two assistants—Hoherd and Langford; but in the absence of specific authority neither of them was authorized to take charge of and move engines. Their duties were to assist in coaling, removing cinders, switching, etc. One night two engines coupled together—called a double-header—were left in the yard. They were taken charge of by Hoherd and Langford, placed at the coal chute where one was loaded. They were then started back to the roundhouse—moving backward—and ran over Howard, who was going towards them from the roundhouse, and so injured him that he died in about 30 minutes without giving any explanation as to how the accident occurred. Held, that Howard was vice-principal of Hoherd and Langford, because he had authority over them. He was not their fellow-servant in performing that work; that is, if either of them had been injured through his negligence the railroad company would have been liable. *G., C. & S. F. Ry. Co. v. Howard*, 97 T. 513, 80 S. W. 230.

An engineer, operating an engine used by a railroad company in removing an obstruction from a well, held a vice-principal as to the others employed on the work. *Galveston, H. & S. A. Ry. Co. v. Roth*, 37 C. A. 610, 84 S. W. 1112.

Liability for negligence of vice-principal.—See notes under Art. 6648.

**Art. 6642. "Fellow-servants" defined.**—All persons who are engaged in the common service of such person, receiver, or corporation controlling or operating a railroad or street railway, and who while so employed are in the same grade of employment and are doing the same character of work or service, and are working together at the same time and place, and at the same piece of work and to a common purpose, are fellow-servants with each other. Employés who do not come within the provisions of this article shall not be considered fellow-servants. [Id. sec. 3.]

Cited, *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223.

Historical.—The acts of 1891 and 1893 read as follows:

"All persons who are engaged in the common service of such railway corporations and who, while so engaged are working together at the same time and place to a common purpose, of same grade, neither of such persons being entrusted by such corporations, with any superintendence or control over their fellow-employés, are fellow-servants with each other; provided, that nothing herein contained shall be so construed as to make employés of such corporation, in the service of such corporation, fellow-servants, with other employés of such corporation, engaged in any other department or service of such corporation. Employés who do not come within the provisions of this section shall not be considered fellow-servants." [Acts 1891, p. 25, § 2.]

"All persons who are engaged in the common service of such railway corporation, receiver, manager, or person in control thereof, and who, while so employed, are in the same grade of employment and are working together at the same time and place, and to a common purpose, neither of such persons being entrusted by such corporation, re-

ceiver, manager, or person in control thereof, with any superintendence or control over their fellow-employees, or with the authority to direct any other employé in the performance of any duty of such employé, are fellow-servants with each other: Provided, that nothing herein contained shall be so construed as to make employés of such corporation, receiver, manager, or person in control thereof, fellow-servants with other employés engaged in any other department or service of such corporation, receiver, manager, or person in control thereof. Employés who do not come within the provisions of this section shall not be considered fellow-servants." [Acts 1893, p. 120, § 2.]

**Constitutionality.**—See notes under Art. 6640.

**What constitutes operating railroad.**—See, also, notes under Art. 6640.

A contractor to furnish logs to a sawmill over a logging railroad, to which spurs were connected and on which a log skidder was operated solely to haul logs to a point where they could be loaded on cars and transported to the mill, was a person "operating a railroad" within this article. *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

**Who are fellow-servants—Term defined.**—The term "fellow-servants," in connection with evidence in an action for injuries to a switchman, defined. *Southern Pac. Co. v. Allen*, 48 C. A. 66, 106 S. W. 441.

All persons who are in the employment of the same master engaged in the same common enterprise, and are employed to perform duties and services tending to accomplish the same general purpose, are fellow-servants. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

— **Existence of relation of master and servant.**—The fact that a person injured on a railroad track was at the place of injury in consequence of his previous service with the railroad company did not render him an employé of the company at the time and a fellow-servant of other employés of the railroad company so as to exempt the company from liability for their negligence which resulted in his injury. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

Superintendent of a compress plant, who was injured by the negligence of employés of the compress works in letting a railroad car down on defendant's switch which ran to the works, held not a fellow-servant of such employés, though he directed them to let the car down. *Gulf, C. & S. F. Ry. Co. v. Gaskill* (Civ. App.) 120 S. W. 557.

Where certain servants of a compress company were engaged temporarily in moving cars on a switch for defendant railroad company, and in so doing injured another servant of the compress company, they were not fellow-servants of the injured person. *Gulf, C. & S. F. Ry. Co. v. Gaskill*, 103 T. 441, 129 S. W. 345.

— **Operation of railroad.**—The statute on the subject of fellow-servants, relating to railway employés, held not applicable to the case of an injury to a sawmill employé by a co-employé. *Quinn v. Glenn Lumber Co.* (Civ. App.) 118 S. W. 733.

Defendant, pursuant to a contract to furnish logs for a mill, used a logging railroad and certain extra spur tracks to which the logs were hauled by means of a steam skidder. Plaintiff and B., by whose negligence plaintiff was injured, were employed to take logs as they were hauled by two disconnected engines and skid cables to the edge of the spur track. Neither plaintiff nor B. had anything to do with the movement of the skidder. Plaintiff was injured by being struck by a log negligently moved by the orders of B. Held that, since the employment of both plaintiff and B. had nothing to do with the operation of the railroad, they were not "fellow-servants" of a railroad within this article. *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

— **Same grade of employment.**—An employé engaged in taking rails from a car and laying them upon the track is a fellow-servant with another employé who at the foreman's direction gives signals which control the work, but who exercises no control over the men engaged in the work. *Lahey v. T. & P. Ry. Co.*, 33 C. A. 44, 75 S. W. 567.

Plaintiff's superior servant held not a fellow-servant, so as to preclude plaintiff from recovering for injuries resulting from the latter's negligence. *Galveston, H. & S. A. Ry. Co. v. Whisenhunt*, 36 C. A. 135, 81 S. W. 332.

Servants not in the same grades of employment are not fellow-servants. *El Paso & S. W. Ry. Co. v. Kelly* (Civ. App.) 83 S. W. 855.

Negligence of plaintiff's superior in operating an engine in a railroad yard held the negligence of plaintiff's fellow-servant, under the common law of Arkansas in force in Indian Territory, as provided by 26 Stat. 94, c. 182, § 31. *St. Louis & S. F. R. Co. v. Arnett*, 37 C. A. 523, 84 S. W. 599.

Franks was foreman of a gang of laborers in a railroad yard. This gang was under his direction and control. He received orders to move a heavy box. He and five men, including plaintiff, were carrying the box with sticks, three on a side, when Franks let down his end suddenly and plaintiff was injured. While doing this work Franks was not a fellow-servant of plaintiff, but remained the representative of the company (the defendant). *Missouri, K. & T. Ry. Co. v. Dean* (Civ. App.) 89 S. W. 798.

Plaintiff, a minor, was a helper in defendant's machine shops. He was to do anything he was called on to do. The foreman directed him to aid an operative to place a heavy piece of iron on a machine called a turning lathe, and while doing this work he was injured internally. In sending the boy to aid the operative the foreman placed the boy under the direction, control and command of McCarthy (the operative) and the boy and McCarthy were not fellow-servants under these articles, and the company was liable to the same extent as it would be if the foreman had been present and had given orders and directions which McCarthy gave the boy. *Sherman v. Texas & N. O. Ry. Co.*, 99 T. 571, 91 S. W. 562.

A clerk and warehouseman working under the orders of station agent, and a brakeman working under the orders of a conductor, are not fellow-servants because they are not in the same grade of employment. *Galveston, H. & S. A. Ry. Co. v. Mohrmann*, 42 C. A. 374, 93 S. W. 1092.

An employé was injured by the negligence of the foreman. The employé was a helper of the foreman and under his control and direction in the work that he did. The foreman and employé (injured) were not in the same grade of employment and therefore not fellow-servants within the meaning of this article. *M., K. & T. Ry. Co. v. Bailey*, 53 C. A. 295, 115 S. W. 605.

A boiler maker and his helper, the former having authority to superintend the latter in the work they were doing, though he did not have power to hire and discharge, were not fellow-servants. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

— **Same character of work.**—The employés must be doing the same character of work, and they must be working at the same piece of work. Two section men, belonging to same gang, one engaged in carrying tools to toolhouse in his hand, and the other operating a hand car carrying tools to same toolhouse, are engaged in different "character of work" and are not fellow-servants within the meaning of this article. *Long v. Chicago, R. I. & T. Ry. Co.*, 94 T. 53, 57 S. W. 802.

— **Working at same time and place.**—A day crew employed in handling ties were not fellow-servants of a night crew. *T. & N. O. R. Co. v. Echols*, 17 C. A. 677, 41 S. W. 488.

Where railway employé under inside roundhouse foreman is injured by negligence of employé under outside foreman, rule as to fellow-servants does not apply. *Texas & P. Ry. Co. v. Scruggs*, 23 C. A. 712, 58 S. W. 186.

Where men are employed by a railroad company to load cars, and each man is paid according to the work done and each worked separately and independently of the others in different places, and had no control over the work, they are not fellow-servants, although they are employed in the same grade and character of the work. *Missouri, K. & T. Ry. Co. of Texas v. Romans*, 103 T. 4, 121 S. W. 1104.

— **Same piece of work.**—To be fellow-servants the employés must be working at the same piece of work. *Long v. Chicago, R. I. & T. Ry. Co.*, 94 T. 53, 57 S. W. 802.

When employés are engaged in cleaning and preparing an engine, they need not be in actual bodily contact with each other, or engaged in cleaning the same wheel or piece, or each know exactly what the other is doing in order to constitute them fellow-servants. *G., H. & S. A. Ry. Co. v. Cloyd* (Civ. App.) 78 S. W. 44.

A gang of five men, under a foreman, was engaged in moving cotton bales from one platform to another. The foreman divided the gang into two parties of two and three men and required each party to move one bale at a time. The three men moving one bale injured one of the two men moving at the same time and place another bale. Held, that the parties moving one bale were not fellow-servants of the parties moving the other bale because the work was separable and the two parties were not engaged in the same piece of work. *I. & G. N. Ry. Co. v. Still*, 40 C. A. 22, 88 S. W. 258.

When a bridge gang was repairing a depot platform of the railway it became necessary to remove some bales of cotton from a platform not repaired to that part which had been repaired. Five men belonging to the gang were engaged in moving the cotton. Appellant and one man were rolling one bale, and the three other men were rolling another bale just behind them. While so engaged the three behind rolled their bale on the appellant and injured him. Held, that the five men (all under one foreman) were engaged at the same time and place on the "same piece of work" and hence were fellow-servants within the meaning of this statute. *International & G. N. Ry. Co. v. Still*, 100 T. 499, 101 S. W. 444, 445.

Where the employé injured was engaged in examining a stationary switch engine to see if it had been properly wiped, and the employé whose negligence caused the injury was engaged in firing up or putting steam in a stationary switch engine standing on an adjacent track, they were not fellow-servants under this article. The work that one was doing had nothing to do with the work the other was doing. *G., H. & N. Ry. Co. v. Cochran*, 49 C. A. 591, 109 S. W. 263.

Defendant operated a steam log skidder, consisting of a flat car, on each end of which were disconnected engines operating separate skidding cables. Plaintiff, who was employed as a decker in the crew attached to one of the cables, was injured by being struck by a log negligently moved by the order of the decker connected with the other cable. Held, that plaintiff and such other decker were not engaged at the same piece of work at the time of the injury, and were therefore not "fellow-servants" within this article. *Hampton v. Woolsey* (Civ. App.) 139 S. W. 888.

— **Members of same train crew.**—A conductor, having general superintendence of a train and command of all employés, except in case of danger, when the engineer is authorized to act on his own judgment, is not a fellow-servant with the engineer. *Culpeper v. International & G. N. Ry. Co.*, 90 T. 627, 40 S. W. 386.

The engineer and brakeman of a freight train held fellow-servants. *International & G. N. R. Co. v. Moore*, 16 C. A. 51, 41 S. W. 70.

The question whether a fireman and engineer are fellow-servants held one for the jury. *Galveston, H. & S. A. Ry. Co. v. Ford* (Civ. App.) 46 S. W. 77.

Where a fireman is injured in a collision, an instruction that defendant was liable if the injury was caused by negligence of the engineer, unless he was a fellow-servant, is not objectionable. *Houston & T. C. R. Co. v. Stuart* (Civ. App.) 48 S. W. 799.

An engineer held not a fellow-servant of a fireman. *Id.*

A railroad brakeman and a conductor are not fellow-servants, so as to preclude the former from recovering from the company for injuries caused by the latter's negligence. *Galveston, H. & S. A. Ry. Co. v. Robinett* (Civ. App.) 54 S. W. 263.

Conductor and engineer of same train held not fellow-servants. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 59 S. W. 930.

A brakeman held not the fellow-servant of an engineer. *St. Louis S. W. Ry. Co. v. Kelton*, 28 C. A. 137, 66 S. W. 887.

— **Members of separate train or yard crews.**—Where a brakeman was examining the couplings of his train while still in the yard, and was struck and injured by a switch engine, which was performing no service in making up the train, it was held that the doctrine of fellow-servant did not apply under the act of 1893. The burden was on the company to show that the brakeman was a fellow-servant with the persons operating the switch engine. *Patterson v. H. & T. C. R. Co.* (Civ. App.) 40 S. W. 442.

Engineer of a road engine and foreman and members of a yard crew held not fellow-servants. *Missouri, K. & T. Ry. Co. v. Whitlock*, 16 C. A. 176, 41 S. W. 407.

A brakeman in a freight train and the foreman of the switch engine in making up a train in Las Vegas, N. M., are fellow-servants under the common law which is in force

in New Mexico and the railroad is not responsible for an injury happening to the brakeman from the negligence of the foreman. *Sanner v. A., T. & S. F. Ry. Co.*, 17 C. A. 337, 43 S. W. 533.

The engineer of an engine by which the brakeman of another train of the same company is injured and the brakeman are not fellow-servants. *Houston & T. C. R. Co. v. Patterson*, 20 C. A. 255, 48 S. W. 747.

A switchman on one engine is not a fellow-servant of a switchman on another engine, though in the same yards, where each belongs to a separate crew, under direction of its own foreman. *Galveston, H. & S. A. Ry. Co. v. Masterson (Civ. App.)* 51 S. W. 1091.

— **Members of train crew and other employés.**—A section foreman and men operating a train not fellow-servants. *Railway Co. v. Ryan (Civ. App.)* 29 S. W. 527.

A station agent is not a fellow-servant with a train crew. *Railway Co. v. Bowles (Civ. App.)* 30 S. W. 89; *Railway Co. v. Calvert*, 11 C. A. 297, 32 S. W. 246.

A conductor of a train used to transport bridge materials held not the fellow-servant of bridge men while directing them about unloading bridge materials. *Missouri, K. & T. Ry. Co. of Texas v. Hines (Civ. App.)* 40 S. W. 152.

A workman, employed to unload ties from the front car of a construction train, is a fellow-servant of the engineer. *Overton v. McCabe & Steen*, 35 C. A. 133, 79 S. W. 861.

Evidence, in action by station porter against railroad company for injuries, held to show facts not constituting brakeman his fellow-servant. *Gulf, C. & S. F. Ry. Co. v. Elmore*, 35 C. A. 56, 79 S. W. 891.

An employé of an elevator company, killed by the negligence of other employés of such company in operating cars on a switch track within the elevator, held a fellow-servant. *Sauls v. Chicago, R. I. & T. Ry. Co.*, 36 C. A. 155, 81 S. W. 89.

A roadmaster of a railroad, in discharging his duties of seeing that a portion of the tracks were clear of clinkers, was not a fellow-servant with a brakeman. *Missouri, K. & T. Ry. Co. of Texas v. Keefe*, 37 C. A. 588, 84 S. W. 679.

The relation of fellow-servant does not exist as to employés operating the cars, locomotives, or trains of a railroad and those not so engaged. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

A roadmaster of a railway, when caring for the track, was not a fellow-servant with a locomotive fireman. *Chicago, R. I. & P. Ry. Co. v. Birk*, 44 C. A. 615, 99 S. W. 753.

Neither a roundhouse inspector nor a section foreman and his men are fellow-servants of a brakeman. *Missouri, K. & T. Ry. Co. v. Wise (Civ. App.)* 106 S. W. 465.

One employed by a lumber company to cut and scale timber was not a fellow-servant of employés operating a logging train. *Keystone Mills Co. v. Chambers (Civ. App.)* 118 S. W. 178.

Railroad employé riding on gravel train to unload gravel held not a fellow-servant of the train crew. *Trinity & B. V. Ry. Co. v. Geary (Civ. App.)* 144 S. W. 1045.

— **Other employés held fellow-servants.**—Fellow-servants, who are. *Railway Co. v. Schwabbe*, 21 S. W. 706, 1 C. A. 573; *Railway Co. v. Whitaker*, 11 C. A. 668, 33 S. W. 716; *Railway Co. v. Ewing*, 21 S. W. 700, 1 C. A. 531; *Railway Co. v. Saunders (Civ. App.)* 26 S. W. 128; *Railway Co. v. Tatman*, 10 C. A. 434, 31 S. W. 333; *Railway Co. v. Harding*, 11 C. A. 497, 33 S. W. 374; *Railway Co. v. Frazier*, 90 T. 33, 36 S. W. 432; *M., K. & T. Ry. Co. v. Edwards (Civ. App.)* 32 S. W. 815; *Id.*, 90 T. 65, 36 S. W. 430, 32 L. R. A. 825; *Railway Co. v. Warner*, 89 T. 475, 35 S. W. 364.

A guard, employed to ride on an express car and protect it from robbers, is a fellow-servant of the express messenger. *Wells, Fargo & Co. v. Page*, 29 C. A. 489, 63 S. W. 523.

Howard was in employ of defendant (railway company) as hostler. His duties were to take charge, operate and handle all engines in and about the roundhouse, coal chute and cinder pit. He had two assistants—Hoherd and Langford; but in the absence of specific authority neither of them was authorized to take charge of and move engines. Their duties were to assist in coaling, removing cinders, switching, etc. One night two engines coupled together—called a double-header—were left in the yard. They were taken charge of by Hoherd and Langford, and placed at the coal chute, where one was loaded. They were then started back to the roundhouse—moving backward—and ran over Howard, who was going towards them from the roundhouse, and so injured him that he died within about 30 minutes without having given any explanation as to how the accident occurred. Held that Hoherd and Langford were fellow-servants with Howard. The three were doing the same character of work or service, working together at the same time and place, at the same piece of work and to the common purpose of taking locomotives into the roundhouse. Howard if living could not recover under this article. Therefore plaintiffs cannot recover (on account of his death) unless it be by virtue of Art. 6640. *G., C. & S. F. Ry. Co. v. Howard*, 97 T. 513, 80 S. W. 230.

Servants engaged in cleaning engine held fellow-servants. *Cloyd v. Galveston, H. & S. A. Ry. Co.*, 37 C. A. 506, 84 S. W. 408.

In an action for personal injuries, evidence held to warrant a verdict for defendant, on the theory that plaintiff was defendant's servant and a fellow-servant of the one guilty of the negligence resulting in the injury. *Walker v. El Paso Electric Ry. Co. (Civ. App.)* 118 S. W. 554.

A car repairer and a helper held fellow-servants. *International & G. N. R. Co. v. Schubert (Civ. App.)* 130 S. W. 708.

— **Other employés held not fellow-servants.**—Fellow-servants, who are not. *Railway Co. v. Sipole (Civ. App.)* 29 S. W. 686; *Railway Co. v. Harding*, 11 C. A. 497, 33 S. W. 373; *Railway Co. v. Worthy (Civ. App.)* 32 S. W. 557; *Railway Co. v. Easton*, 21 S. W. 575, 2 C. A. 378; *Railway Co. v. Kizziah*, 22 S. W. 110, 4 C. A. 356; *Railway Co. v. Bond*, 20 S. W. 930, 2 C. A. 104; *Railway Co. v. Putnam*, 1 C. A. 142, 20 S. W. 1002; *Bonner v. Bryant*, 21 S. W. 549, 1 C. A. 269; *Railway Co. v. Scott*, 71 T. 704, 10 S. W. 298, 10 Am. St. Rep. 804; *Railway Co. v. Frazier (Civ. App.)* 34 S. W. 664; *Moore v. Jones*, 15 C. A. 391, 39 S. W. 593.

An employé charged with the duty of keeping machinery in repair stands in the master's place, and is not a mere fellow-servant as to other employés. The injury having occurred from defective appliances, negligence of a fellow-servant concurring is not a defense. *M., K. & T. Ry. Co. v. Ferch*, 18 C. A. 46, 44 S. W. 317.

Testimony held to show that an employé was not a fellow servant with other employes. *Galveston, H. & S. A. Ry. Co. v. Butshek*, 34 C. A. 194, 78 S. W. 740.

A truckman (or, in the language of the witnesses, a "trucker"), whose duty it is to haul freight to and from cars on a truck, is not a fellow-servant of a "cleator" or "sealer," whose duty it is to inspect the doors of freight cars and the fastenings thereon and to prepare the cars for truckmen to work in, to repair the doors if they were out of fix, to fasten the inside doors to tops of the cars, and see that the fastenings were secure, etc. *M., K. & T. Ry. Co. v. Hutchens*, 35 C. A. 343, 80 S. W. 416.

A "breaker," one whose duty it is to load freight in the car on the truck when the "trucker" has brought it into the car, is not a fellow-servant of the "trucker," while he is fastening the door which fell and caused the injury to the latter; but, if he had been, recovery was not precluded in this case, because the proximate cause of the injury was not the negligence of the one who fastened the door, but the defective fastening itself. *Id.*

Certain employes held not fellow-servants within the fellow-servant act. *Texas & P. Ry. Co. v. Nichols*, 41 C. A. 119, 92 S. W. 411.

An employé in a railroad shop and a machinist in charge of a machine in the shops held not fellow-servants. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 99 S. W. 738.

A railroad section foreman and an employé in a roundhouse held not fellow-servants of a brakeman by the common law in force in Indian Territory. *Missouri, K. & T. Ry. Co. of Texas v. Wise*, 101 T. 459, 109 S. W. 112.

See this case for verdict of \$25,000 awarded for injuries received on account of negligence of fellow employes, who were not fellow-servants within the meaning of the fellow-servant act. *Texas & N. O. Ry. Co. v. Barwick* (Civ. App.) 110 S. W. 955.

Persons employed in loading cars held not fellow-servants. *Missouri, K. & T. Ry. Co. of Texas v. Romans* (Civ. App.) 114 S. W. 157; *Id.*, 103 T. 4, 121 S. W. 1104.

Negligence of fellow-servants.—See notes under Art. 6643.

**Art. 6643. Contract limiting liability void.**—No contract made between the employer and employé based upon the contingency of death or injury of the employé and limiting the liability of the employer under the preceding articles of this chapter, or fixing damages to be recovered, shall be valid or binding. [Id. sec. 4.]

Constitutionality.—See notes Art. 6640.

What contracts are invalid.—Under this article and Art. 6640, a stipulation in a contract of employment by a railroad that, if the employé should suffer personal injury, his failure to give notice of his claim against the company within 90 days should be a bar to the institution of any suit on account of the injuries, was invalid, being a limitation of a railroad's liability, and not merely affecting the question of remedy. *Missouri, K. & T. Ry. Co. of Texas v. Hudgins* (Civ. App.) 127 S. W. 1183.

A contract binding an employé of the Pullman Company to waive all damages inflicted by a railroad company, is invalid under this article. *San Antonio & A. P. Ry. Co. v. Tracy* (Civ. App.) 130 S. W. 639.

Exemptions from liability under the act of 1909.—See Art. 6651 and notes.

**Art. 6644. Contributory negligence a defense, except, etc.**—Nothing in the preceding articles of this chapter shall be held to impair or diminish the defense of contributory negligence when the injury of the servant or employé is caused proximately by his own contributory negligence, except as otherwise provided in this chapter. [Id. sec. 5.]

See *Gregory v. Pecos & N. T. Ry. Co.* (Civ. App.) 155 S. W. 648.

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|---------------------------------------------------------------------------------------|-----------------------------------------------------------------------------|
| 1. Application of the doctrine of contributory negligence in general.                 | 20. Precautions against known or apparent dangers—In general.               |
| 2. Where carrier violates safety appliance act.                                       | 21. — Reliance on care of master or coemployes.                             |
| 3. Where carrier violates statutes for protection of employes.                        | 22. — Avoidance of injury from defective or dangerous appliances or places. |
| 4. Comparative negligence.                                                            | 23. — Avoidance of injury from dangerous operations or methods of work.     |
| 5. Care required of servant.                                                          | 24. Dangerous operations and methods of work—In general.                    |
| 6. Inexperienced or youthful employé.                                                 | 25. — Adoption of dangerous method of work.                                 |
| 7. Reliance on care of master.                                                        | 26. — Excessive speed.                                                      |
| 8. Scope of employment.                                                               | 27. — Persons inspecting or repairing cars.                                 |
| 9. Tools, machinery, appliances or places for work.                                   | 28. — Riding on trains, cars or locomotives.                                |
| 10. Knowledge of defects or dangers—Necessity and effect in general.                  | 29. — Coupling or uncoupling cars.                                          |
| 11. — Extent of knowledge.                                                            | 30. — Switching cars.                                                       |
| 12. — Constructive notice.                                                            | 31. Disobedience of rules or orders—In general.                             |
| 13. — Continuing work with knowledge.                                                 | 32. — What constitutes disobedience.                                        |
| 14. Duty to discover or remedy defects or dangers—Duty to observe defects or dangers. | 33. — Excuses for disobedience.                                             |
| 15. — Reliance on care of master or fellow employes.                                  | 34. — Effect of customary violation.                                        |
| 16. — Duty to examine or inspect appliances or places.                                | 35. — Warnings, signals and lookouts.                                       |
| 17. — Duty to obtain or use appliances.                                               | 36. Disregarding warnings or signals.                                       |
| 18. — Obvious or latent defects or dangers.                                           | 37. Compliance with commands or threats.                                    |
| 19. — Opportunity to discover or remedy defect or danger.                             | 38. Acts in emergencies.                                                    |
|                                                                                       | 39. Proximate cause of injury.                                              |

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| 40. Injury avoidable by care of master.                          | 48. — Duty to discover or remedy defect or danger.               |
| 41. Willful injury by master.                                    | 49. — Precautions against known dangers.                         |
| 42. Pleading.                                                    | 50. — Dangerous operations and methods of work.                  |
| 43. Presumptions, burden of proof and admissibility of evidence. | 51. — Disobedience of rules or orders and disregard of warnings. |
| 44. Sufficiency of evidence.—In general.                         | 52. — Compliance with commands.                                  |
| 45. — Contributory negligence shown.                             | 53. Questions for jury and instructions.                         |
| 46. — Contributory negligence not shown.                         |                                                                  |
| 47. — Knowledge of defect or danger.                             |                                                                  |

1. Application of the doctrine of contributory negligence in general.—Contributory negligence defined. *Railway Co. v. Bell*, 5 C. A. 23, 23 S. W. 922.

Contributory negligence of a servant. See *Railway Co. v. Smith* (Civ. App.) 38 S. W. 51.

A charge which in effect states that, "if both plaintiff and defendant were guilty of negligence and the defendant's negligence was the proximate cause of the damage, plaintiff was entitled to recover" is erroneous. Wherever damages are sought to be recovered on the ground of negligence, contributory negligence is a complete defense. If the charge had required the jury to find that the negligence of the plaintiff was not proximate, and therefore did not contribute to the injury, the principle of law announced would have been sound. *Railroad Co. v. Ricketts*, 22 C. A. 515, 54 S. W. 1090.

Though defendant was negligent, plaintiff could not recover if his own negligence contributed to the injury. *Texas & P. Ry. Co. v. Maupin*, 26 C. A. 385, 63 S. W. 346.

Railroad engineer, injured in collision caused by his exhausted condition from 31 hours' continuous service, held guilty of contributory negligence in making the run. *Smith v. Atchison. T. & S. F. Ry. Co.*, 39 C. A. 468, 87 S. W. 1052.

A servant held not guilty of contributory negligence. *International & G. N. R. Co. v. Wray*, 43 C. A. 380, 96 S. W. 74.

A person so afflicted as to make it extrahazardous for him to engage in lifting weights, who engages in such work without notifying the foreman of his employer of his condition, is guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Bonn*, 44 C. A. 631, 99 S. W. 413.

In an action to recover for injuries received while crossing the tracks on which switching was being done, held, that plaintiff was not guilty of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Balliet*, 48 C. A. 641, 107 S. W. 906.

An employé sustaining injuries from his own negligence cannot recover. *Anderson v. St. Louis, Southwestern Ry. Co. of Texas*, 104 T. 340, 134 S. W. 1175.

A brakeman is not free from contributory negligence, because he acts as brakemen ordinarily and customarily do. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

Where a train porter was required by his conductor to alight at night and go forward to the engineer, when the train stopped for water, and, it having stopped over a trestle, the porter alighted and was injured, the question of the manner of his alighting was one of contributory negligence, and not of assumed risk. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley* (Civ. App.) 153 S. W. 937.

Contributory negligence of a servant is based on misconduct, and hence a servant's violation of a rule of the master constitutes contributory negligence, and not assumption of risk. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

2. Where carrier violates safety appliance act.—See Art. 6646 and notes.

3. Where carrier violates statutes for protection of employes.—See Art. 6649.

4. Comparative negligence.—See, also, Art. 6649 and notes.

Rule as to comparative negligence, see *Railway Co. v. Rodgers* (Civ. App.) 35 S. W. 412.

5. Care required of servant.—When one is injured by the negligence of another, the exercise of ordinary caution to avoid the danger is all that the law requires, in order that he may be protected against the consequences of having contributory negligence imputed to him. *Hays v. Railway Co.*, 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

An employé, in order to recover damages for injuries received in the course of his employment, must show that the defendant was negligent and that plaintiff used ordinary care, such as a prudent person similarly situated would have used to avoid the injury. *Railway Co. v. Hester*, 72 T. 40, 11 S. W. 1041; *Railway Co. v. Doyle*, 49 T. 190; *Railway Co. v. Oram*, 49 T. 345; *Rogers v. Railway Co.*, 76 T. 502, 13 S. W. 540; *Railway Co. v. Brentford*, 79 T. 619, 15 S. W. 561, 23 Am. St. Rep. 377; *Railway Co. v. Lemon*, 83 T. 143, 18 S. W. 331.

Contributory negligence defined. *Texas & P. Ry. Co. v. Urteaga* (Civ. App.) 25 S. W. 1035.

Proof of ordinary, and not gross, negligence held to be sufficient for a cause of action or defense. *Louisiana Extension Ry. Co. v. Carstens*, 19 C. A. 190, 47 S. W. 36.

It is the duty of a switchman to exercise ordinary care to avoid injury to himself. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 118 S. W. 1113.

6. Inexperienced or youthful employé.—The fact that an injured servant was a minor held not to exempt him from the results of his own negligence. *St. Louis Southwestern Ry. Co. of Texas v. Johnson*, 50 C. A. 147, 109 S. W. 486.

A servant held not negligent in continuing to work in a railroad gravel pit under a dangerous ledge at a point where he was directed to work by his foreman. *St. Louis Southwestern Ry. Co. of Texas v. Marshall* (Civ. App.) 120 S. W. 512.

In an action by an inexperienced servant, injured while performing a dangerous operation, of which he was ignorant, the issue of contributory negligence held not to arise. *Texarkana & Ft. S. Ry. Co. v. Brandon* (Civ. App.) 126 S. W. 703.

Where the danger incurred by an inexperienced servant is not an obvious one in complying with the foreman's instruction he is not guilty of contributory negligence. *Id.*

7. Reliance on care of master.—An employé has the right to assume that machinery is in order, unless the defect is such that a person of ordinary care would have no-

ticed it. *Railway Co. v. Hohl* (Civ. App.) 29 S. W. 1131; *Gulf, C. & S. F. Ry. Co. v. Kelly* (Civ. App.) 34 S. W. 140.

The duty of exercising ordinary prudence to ascertain the danger incident to the work he is assigned to, and whether it is directed to be done so as to avoid such danger, is not imposed upon a servant. *Missouri, K. & T. Ry. Co. of Texas v. Hannig*, 91 T. 347, 43 S. W. 508.

A railway employé need not exercise care to ascertain whether the company has established proper rules to afford its servants protection, since he has a right to presume that it has done so. *Texas & P. Ry. Co. v. Eberheart*, 91 T. 321, 43 S. W. 510.

Railroad switchman held not guilty of contributory negligence in failing to keep a lookout or give signals. *Missouri, K. & T. Ry. Co. of Texas v. Kellerman*, 39 C. A. 274, 87 S. W. 401.

In an action for injuries to a railroad brakeman by falling between certain cars negligently left uncoupled on a grade siding in violation of a rule, plaintiff held not guilty of contributory negligence in failing to inspect the cars, or in assuming that they were coupled. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

A switchman who has signaled the engineer not to move cars while he is between them attempting to uncouple them has the right to act on the assumption that his signal will be obeyed. *Southern Pac. Co. v. Allen*, 48 C. A. 66, 106 S. W. 441.

Plaintiff, a brakeman, held entitled to assume that the company had exercised ordinary care to furnish reasonably safe and necessary appliances for its cars, so as to enable him to perform his duties with a reasonable degree of safety, and not required while engaged as a brakeman to inspect the cars and appliances to ascertain their condition. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 50 C. A. 141, 109 S. W. 995.

An employé may assume that the employer has performed its duty of furnishing reasonably safe appliances. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

In a servant's action for injuries sustained while removing the nipple from the bottom of an oil tank car, by the oil rushing into his eyes, by reason of the valve inside the tank not having been closed, plaintiff held not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Sanchez*, 57 C. A. 87, 122 S. W. 44.

An employé held entitled to assume that his employer has properly performed his duties. *Anderson v. St. Louis, Southwestern Ry. Co. of Texas*, 104 T. 340, 134 S. W. 1175.

One on a hand car injured by running into an open switch held not guilty of contributory negligence, as matter of law, in not observing the target, which would have shown it was open, relying on observance of the rule of the company that, when a train passes through a switch from the main track, the switch shall be closed or a man stationed there. *Anderson v. St. Louis Southwestern Ry. Co. of Texas*, 104 T. 340, 138 S. W. 107.

Where an employer furnished to his employé a number of chisels, an employé using a defective one was not guilty of contributory negligence, as a matter of law, because he could have procured a safe chisel at another place, but failed to do so. *Pope v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 155 S. W. 1175.

8. **Scope of employment.**—An instruction treating plaintiff as a trespasser, when injured while working on a car on the main track with the consent of the agent and conductor, held erroneous, though plaintiff was employed to work under the agent, who had supervision of the side track only. *Dewalt v. Houston, E. & W. T. Ry. Co.*, 22 C. A. 403, 55 S. W. 534.

9. **Tools, machinery, appliances or places for work.**—A brakeman held not chargeable with contributory negligence because at the time of injury he was riding in the cab of the engine. *Texas & P. Ry. Co. v. Magrill*, 15 C. A. 353, 40 S. W. 188.

Independent of contract, railroad company held liable for death of employé caused by defective apparatus of independent contractor. *Gulf, C. & S. F. Ry. Co. v. Delaney*, 22 C. A. 427, 55 S. W. 538.

Employer held not liable where plaintiff was injured by his own negligence or that of a fellow servant. *Galveston, H. & S. A. Ry. Co. v. Butchek* (Civ. App.) 66 S. W. 335.

Railroad brakeman, going to sleep in caboose, which is moved during the night, so as to be struck by a passing train, held not guilty of contributory negligence. *Houston & T. C. R. Co. v. McGowan* (Civ. App.) 74 S. W. 339.

In an action for injuries to plaintiff by being thrown from defendant's log train, plaintiff held guilty of contributory negligence as a matter of law in voluntarily taking an insecure position on the pilot of the engine. *Burns v. Chronister Lumber Co.* (Civ. App.) 87 S. W. 163.

Railroad held bound to use ordinary care to furnish a foreman safe appliances and he may rely on the assumption that such duty has been performed. *Texas Cent. R. Co. v. George*, 40 C. A. 267, 89 S. W. 1091.

Where an employé, who was engaged at night in filling a tender with fuel oil, in passing from the tender in the usual way stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell, he was not guilty of contributory negligence. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

A servant injured while attempting to use a defective ladder in accordance with directions of his superior, held not negligent. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Facts held to show that a switchman suing for injuries in a collision was not negligent. *International & G. N. R. Co. v. Owens* (Civ. App.) 124 S. W. 210.

In an action against a railway company for injuries received by a servant while underneath a car repairing it, the servant held not guilty of contributory negligence as a matter of law. *Trinity & B. V. Ry. Co. v. Ketchey* (Civ. App.) 131 S. W. 1188.

A servant held not entitled to recover for injury from defective tool of his own selection. *Pope v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 135 S. W. 1066.

Where it was customary in a railroad repair yard to raise cars by means of jacks, and timbers were needed for rests, held, that a servant was not negligent in using any apparently sound timber; the railroad having furnished them for that use. *Gulf, C. & S. F. Ry. Co. v. Kennedy* (Civ. App.) 139 S. W. 1009.

10. **Knowledge of defects or dangers—Necessity and effect in general.**—Evidence held sufficient to establish such knowledge on part of defendant's servant of defects in the

fence inclosing defendant's track as to preclude recovery. *Houston & T. C. R. Co. v. Quill* (Civ. App.) 55 S. W. 1126.

Plaintiff held not guilty of contributory negligence. *International & G. N. R. Co. v. Bayne*, 28 C. A. 392, 67 S. W. 443; *Texas & N. O. R. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 953.

In an action for injuries to a switchman, a finding that plaintiff did not assume the risk incident to the use of defendant's premises in its unsafe condition held justified. *Texarkana & Ft. S. Ry. Co. v. Toliver*, 37 C. A. 437, 84 S. W. 375.

Before a servant can be held to have assumed the risk of injury from defective appliances, it must be shown that he knew of the defects and the danger incident thereto. *Missouri, K. & T. Ry. Co. of Texas v. Dumas* (Civ. App.) 93 S. W. 493.

In action for injuries to a railroad engineer, charge held not erroneous in making plaintiff's negligence depend on his knowledge that the other train was just ahead. *International & G. N. R. Co. v. Brice* (Civ. App.) 95 S. W. 660.

A railroad trackman injured by certain of his fellow servants falling over concealed rails in a railroad yard held not guilty of contributory negligence. *Texas & P. Ry. Co. v. Tuck* (Civ. App.) 116 S. W. 620.

An injured servant held not guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527.

The rule that a servant is negligent who selects a dangerous way when a safe one is open to him applies only when the way chosen is obviously unsafe, or the danger is known to the servant. *Missouri, K. & T. Ry. Co. of Texas v. Hawley* (Civ. App.) 123 S. W. 726.

A brakeman, injured by the pulling out of a defective handhold, held not charged with notice thereof, unless he had actual knowledge thereof, or must have obtained such knowledge in the ordinary course of his duty. *Id.*

Assumed risk and contributory negligence distinguished. *Galveston, H. & S. A. Ry. Co. v. Hanson* (Civ. App.) 125 S. W. 635.

A railroad engineer held not negligent in exposing his body to injury from a cattle guard negligently built too near the track. *Atchison, T. & S. F. Ry. Co. v. Tack* (Civ. App.) 130 S. W. 596.

Where a railroad employé while unloading ties in the ordinary manner permitted one to slip from his hands by reason of it being wet with creosote, which condition he did not know until the tie slipped, and as a result creosote was spattered in his eye, he was not chargeable with contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Smith* (Civ.) 148 S. W. 820.

11. — **Extent of knowledge.**—Mere knowledge of switchman that frogs were unblocked does not preclude recovery for his death, he not having known the danger thereof. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 22 C. A. 134, 54 S. W. 264.

12. — **Constructive notice.**—A brakeman on a train is not chargeable by reason of his employment with notice of the defective condition of the track over which he runs. *Texas & P. Ry. Co. v. Magrill*, 15 C. A. 353, 40 S. W. 188.

In an action for damages for death, the fact that deceased, while in defendant's employ as a locomotive engineer, was an experienced engineer, did not charge him with knowledge of his employer's failure to use proper care to furnish a safe engine. *Galveston, H. & S. A. Ry. Co. v. Smith*, 24 C. A. 127, 57 S. W. 999.

Facts held not to show knowledge by brakeman of the defective condition of the side track, by reason of which he was subsequently killed. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

A stipulation in a railroad employé's application for service as to track obstructions held too indefinite to justify an instruction based thereon. *Gulf, C. & S. F. Ry. Co. v. Darby*, 28 C. A. 413, 67 S. W. 446.

Freight brakeman is presumed to know of increased danger of working on train not equipped with air brakes. *Texas, S. V. & N. W. Ry. Co. v. Peden*, 32 C. A. 315, 74 S. W. 932.

Fact that an employé of a railroad, engaged in wheeling goods from a freight car that was being unloaded, saw that a grain door was fastened to the top of the car by wire, held not sufficient to put him on notice that the door was not securely fastened. *Missouri, K. & T. Ry. Co. v. Hutchens*, 35 C. A. 343, 80 S. W. 415.

Where a brakeman was injured while walking over cars left uncoupled in violation of a rule, that another string had been left uncoupled on the same siding was not notice that cars in the string on which he was walking were uncoupled. *St. Louis Southwestern Ry. Co. of Texas v. Pope* (Civ. App.) 82 S. W. 360.

In an action by a railroad employé for personal injuries through falling into a pit in a stall in a roundhouse, plaintiff held put on notice that all stalls had pits. *Galveston, H. & S. A. Ry. Co. v. Walker*, 38 C. A. 76, 85 S. W. 28.

An employé is not charged with knowledge of defects in machinery because the use of ordinary care would disclose them. *Texas & N. O. R. Co. v. Geiger*, 55 C. A. 1, 118 S. W. 179.

A street car conductor must use that care for his safety while engaged in his work which a person of ordinary prudence would use under similar circumstances, and is chargeable with knowledge of what he could have learned by such care. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

Where an employé in charge of a hand car fails to see an open switch in time to avert derailment, when he could have seen the same by the exercise of ordinary care, he is guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 124 S. W. 1002.

13. — **Continuing work with knowledge.**—A fireman injured in consequence of defects in the apron bridging the space between the engine and tender held not guilty of contributory negligence in failing to abandon the engine after the discovery of the defects. *Missouri, K. & T. Ry. Co. of Texas v. Dumas* (Civ. App.) 93 S. W. 493.

The rule as to contributory negligence notwithstanding complaints and promises to repair defects stated. *St. Louis Southwestern Ry. Co. v. Kern* (Civ. App.) 100 S. W. 971.

14. **Duty to discover or remedy defects or dangers—Duty to observe defects or dangers.**—A servant is under no obligation to ascertain defects in the place furnished by the



master for him to work in. He is only bound to exercise ordinary care in prosecuting his work there. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

An engineer held not guilty of contributory negligence in failing to notice the defective fastening of a step, by the turning of which he was injured. *San Antonio & A. P. Ry. Co. v. Lindsey*, 27 C. A. 316, 65 S. W. 668.

Railroad company held entitled to assume that a machinist, injured while using a worn-out goose-neck wrench, would discover the defect and refuse to use the same. *O'Brien v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 528, 82 S. W. 319.

A servant is not required to use ordinary care to ascertain whether appliances and instrumentalities furnished by a master are reasonably safe, and that the business is conducted in a reasonably safe manner. *Galveston, H. & S. A. Ry. Co. v. Udalle* (Civ. App.) 91 S. W. 330.

It is not incumbent on a servant to use any diligence to discover a defect in a pinch bar furnished him by the master for immediate use. *St. Louis Southwestern Ry. Co. of Texas v. Schuler*, 46 C. A. 356, 102 S. W. 783.

A street car conductor was not negligent as a matter of law by stepping down onto the running board without looking to see whether he was in danger from a railroad car standing on a switch within twelve inches of the perpendicular handles of the street car. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

A servant required to oil machinery is not charged with the duty of discovering defects in a window sill customarily used in performing the work. *Williams v. Hennefeld*, 57 C. A. 54, 120 S. W. 567.

An instruction that, in the event of defendant's negligence in leaving a switch set to a side track, plaintiff was not bound to use ordinary care to discover the condition of the switch held error. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 124 S. W. 1002.

A fence gang foreman held negligent in failing to keep a lookout for an open switch. *Anderson v. St. Louis Southwestern Ry. Co. of Texas*, 104 T. 340, 134 S. W. 1175.

15. — **Reliance on care of master or fellow employes.**—It is the duty of the master to exercise ordinary care to furnish the servant a safe place in which to work, and the servant may assume that the master has performed such duty. *San Antonio & A. P. Ry. Co. v. Brooking* (Civ. App.) 51 S. W. 537.

An employe of a railroad company has a right to presume that the company will furnish a safe track for him to work on. *Texas & P. Ry. Co. v. Kenna* (Civ. App.) 52 S. W. 555.

Servant held entitled to assume that the place where he was put to work was reasonably safe. *Gulf, C. & S. F. Ry. Co. v. Warner*, 22 C. A. 167, 54 S. W. 1064.

An engineer, injured by striking a mail crane, while looking out of the cab window in the performance of his duty, held not guilty of contributory negligence. *International & G. N. R. Co. v. Stephenson*, 22 C. A. 220, 54 S. W. 1086.

An instruction making it plaintiff's duty to use ordinary care to discover the increased danger resulting from an act of defendant's foreman is erroneous, for he can assume that the foreman will do his duty. *Jackson v. Missouri, K. & T. Ry. Co. of Texas*, 23 C. A. 319, 55 S. W. 376.

A servant had a right to presume that an appliance was safe for use, where the defect was not patent, and he had used due diligence to discover defects. *Missouri, K. & T. Ry. Co. of Texas v. Crowder* (Civ. App.) 55 S. W. 380.

The fact that a railroad company had no car inspector in a large town does not deprive an employe of his right to presume that safe machinery would be furnished. *Id.*

A brakeman is entitled to assume that the company will take that degree of care of a switch commensurate with the increased danger of its location on a grade and curve in its track. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

An engineer held to have right to assume that his master had exercised proper care to ascertain that the locomotive was free from defects in construction and reasonably safe. *Galveston, H. & S. A. Ry. Co. v. Smith*, 24 C. A. 127, 57 S. W. 999.

An engineer held not bound, for the purpose of personal safety, to watch the track to see whether the company had done its duty in keeping it in repair. *Gulf, C. & S. F. Ry. Co. v. Moore*, 28 C. A. 603, 68 S. W. 559.

Where plaintiff's injuries resulted from alleged negligence of the railroad in loading a car, the fact that he assisted in the loading held not to release the railroad from liability. *El Paso & N. W. Ry. Co. v. McComas* (Civ. App.) 72 S. W. 629.

A fireman held not guilty of contributory negligence in using a defective step. *Gulf, C. & S. F. Ry. Co. v. Garren* (Civ. App.) 72 S. W. 1028.

An engineer held to have a right to assume that a locomotive furnished him was in a reasonably safe condition and would remain so until inspected. *Texas & Ft. S. R. Co. v. Hartnett*, 33 C. A. 103, 75 S. W. 809.

The fact that certain stalls in a roundhouse were unlighted at night held not to have warranted servant in assuming that they contained no pits. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.) 76 S. W. 228.

An employe of a railroad, injured by a grain door of a car falling on him, held not to have been bound to use even ordinary care to see that the door was properly fastened. *Missouri, K. & T. Ry. Co. v. Hutchens*, 35 C. A. 343, 80 S. W. 415.

An engineer held to have no duty to exercise care to discover defects in the track. *Southern Kansas Ry. Co. of Texas v. Sage* (Civ. App.) 80 S. W. 1038.

A brakeman, passing along the roofs of cars, held not guilty of contributory negligence in assuming that the cars were coupled as they appeared to be. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 98 T. 535, 86 S. W. 5.

An injury to a railroad employe held to have resulted from his contributory negligence, or to have been within the risks assumed by him. *Texas & P. Ry. Co. v. Hemphill*, 33 C. A. 435, 86 S. W. 350.

An employe has the right to assume that the master has furnished reasonably safe appliances with which to work. *Hynson v. St. Louis Southwestern Ry. Co.*, 39 C. A. 43, 86 S. W. 928.

A fireman has the right to assume that the company has used ordinary care to provide him with a reasonably safe engine. *Missouri, K. & T. Ry. Co. of Texas v. Lynch*, 40 C. A. 543, 90 S. W. 511.

Servants are entitled only to assume that the master has exercised ordinary care to make appliances safe. *International & G. N. R. Co. v. Von Hoesen* (Civ. App.) 91 S. W. 604.

A servant has a right to presume that the machinery, tools, and appliances with which he is furnished are reasonably safe. *Galveston, H. & S. A. Ry. Co. v. Smith* (Civ. App.) 93 S. W. 184.

A section foreman riding on a hand car held entitled to assume that trainmen would obey rules respecting the placing of torpedoes on track. *Galveston, H. & N. Ry. Co. v. Murphy*, 52 C. A. 420, 114 S. W. 443.

An engineer held not bound to anticipate the construction of a cattle guard too near the track, nor to look out therefor. *Atchison, T. & S. F. Ry. Co. v. Tack* (Civ. App.) 130 S. W. 596.

An engineer in charge of a train closely following another held entitled to assume that the first train, if detained, will be protected by proper signals. *Missouri, K. & T. Ry. Co. of Texas v. Rothenberg* (Civ. App.) 131 S. W. 1157.

Unless a locomotive engineer knew, or must have necessarily acquired knowledge, that the company had not inspected the yard for obstructions, he could presume that it was safe, and need not look for obstructions along the track, which might trip him. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Sup.) 155 S. W. 183.

16. — **Duty to examine or inspect appliances or places.**—There being an inspector to investigate the safety of appliances, other servants were not required to investigate for themselves. *International & G. N. R. Co. v. Elkins* (Civ. App.) 54 S. W. 931.

A brakeman on a freight train is not required to inspect the drawhead fastenings of the cars. *Missouri, K. & T. Ry. Co. of Texas v. Cox* (Civ. App.) 55 S. W. 354.

Where a railway brakeman did not know of the defective condition of a switch, the fact that he might have gained such knowledge by inspecting it is no defense in an action for his death. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

An engineer is not charged with the duty of inspecting his engine for dangerous defects, though furnished with tools to make repairs during trips. *San Antonio & A. P. Ry. Co. v. Lindsey*, 27 C. A. 316, 65 S. W. 668.

In an action for injuries to a brakeman by being struck by a warehouse, an instruction on contributory negligence, proceeding on the theory that it was the plaintiff's duty to inquire into the condition of defendant's premises, held properly refused. *Galveston, H. & S. A. Ry. Co. v. Mortson*, 31 C. A. 142, 71 S. W. 770.

A servant is not required to use ordinary care to ascertain the safety of the appliances furnished. *Texas & Ft. S. R. Co. v. Hartnett*, 33 C. A. 103, 75 S. W. 809.

A brakeman, injured by striking a post in dangerous proximity to the track while riding on a freight car, held not bound to inspect the premises and discover the dangerous position of the post. *Galveston, H. & S. A. Ry. Co. v. Brown*, 33 C. A. 539, 77 S. W. 832.

An employé, injured in falling into a pit under the tracks in a railroad machine shop, held not guilty of contributory negligence as a matter of law, by reason of rules requiring employés to inspect appliances and premises. *Galveston, H. & S. A. Ry. Co. v. Butshek*, 34 C. A. 194, 78 S. W. 740.

An instruction that a brakeman, injured by a defective handhold, was not required to inspect the same, held proper. *Missouri, K. & T. Ry. Co. v. Hoskins*, 34 C. A. 627, 79 S. W. 369.

A brakeman, injured by the parting of two cars, negligently left on the siding uncoupled in violation of a rule, held not guilty of negligence in failing to inspect them before attempting to walk over them. *St. Louis Southwestern Ry. Co. of Texas v. Pope* (Civ. App.) 82 S. W. 360.

A servant held entitled to assume that appliances are reasonably safe. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 82 S. W. 787.

A brakeman is under no duty to inspect a car on which he is working in order to ascertain whether parts thereof, such as hand rails, are unsafe for his use. *El Paso & S. W. Ry. Co. v. Vizard*, 39 C. A. 534, 88 S. W. 457.

An employé is under no obligation to his employer to inspect appliances furnished. *Texas Short Line Ry. Co. v. Waymire* (Civ. App.) 89 S. W. 452.

Servant held not required to inspect trucks or platform to see if express company had furnished him reasonably safe tools and place to work. *Wells Fargo & Co. Express v. Boyle* (Civ. App.) 98 S. W. 441.

An employé of a railway, engaged in the operation of trains, is not bound to inspect the track himself. *Chicago, R. I. & P. Ry. Co. v. Birk*, 44 C. A. 615, 99 S. W. 753.

A servant, without knowledge of notices requiring inspection of tools, held, not required to make such inspection. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Generally, an employé need not inspect the premises on which he works, but he may not ignore obvious dangers or those ordinarily incident to his employment. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

It is not the duty of an employé of a railroad company to inspect the floor of a car furnished him as a place for work. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

A licensee company's servant could assume that the yard was in a safe condition, and need not inspect the premises for obstructions along the track. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Sup.) 155 S. W. 183.

17. — **Duty to obtain or use appliances.**—The refusal to instruct that a servant, injured while attempting to carry a log, was negligent if he failed to use appliances provided by the master, held not erroneous under the evidence and pleadings. *Galveston, H. & S. A. Ry. Co. v. Sherwood* (Civ. App.) 67 S. W. 776.

Employé neglecting precautions in loading cotton on car held guilty of contributory negligence. *St. Louis S. W. Ry. Co. of Texas v. Barrett* (Civ. App.) 72 S. W. 884.

18. — **Obvious or latent defects or dangers.**—Where rotten timbers in a railway car platform, covered with paint, appeared safe, defendant's servant had a right to assume they were so. *Galveston, H. & S. A. Ry. Co. v. Adams* (Civ. App.) 55 S. W. 803.

Defective fastening of a locomotive step, by which the engineer was injured, held not sufficiently obvious to work an assumption of risk. *San Antonio & A. P. Ry. Co. v. Lindsey*, 27 C. A. 316, 65 S. W. 668.

Locomotive fireman, having right to assume that company would furnish safe lantern, held not bound to inspect it for hidden defects. *Gulf, C. & S. F. Ry. Co. v. Larkin* (Civ. App.) 80 S. W. 94.

19. — **Opportunity to discover or remedy defect or danger.**—A charge, in an action by an engineer for injuries, as to his duties to make repairs, held properly refused as contrary to law and on the weight of the evidence. *Texas & Ft. S. R. Co. v. Hartnett*, 33 C. A. 103, 75 S. W. 809.

The fact that a railroad switchman could have known of the presence of a car, with which the car he was on collided, held not to defeat a recovery by him for injuries. *International & G. N. Ry. Co. v. Reeves*, 35 C. A. 162, 79 S. W. 1099.

That an injured servant was placed in a position where he might have gained knowledge of the danger held not to preclude his recovery for injury therefrom as a matter of law. *Atchison, T. & S. F. Ry. Co. v. Tack* (Civ. App.) 130 S. W. 596.

Since train employes have but slight opportunity to inspect tracks for obstructions or defects, they are only required to take notice of such defects as are obvious in the discharge of their duties. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Sup.) 155 S. W. 183.

20. **Precautions against known or apparent dangers—In general.**—Engineer held guilty of contributory negligence as a matter of law. *Galveston, H. & S. A. Ry. Co. v. Brown*, 95 T. 2, 63 S. W. 305.

A charge on contributory negligence held proper. *Texas Cent. Ry. Co. v. Yarbrow*, 32 C. A. 246, 74 S. W. 357; *Galveston, H. & S. A. Ry. Co. v. Manns*, 37 C. A. 356, 84 S. W. 254.

A section hand who saw an approaching train held not entitled to recover for injuries to his eye from flying cinders. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

Evidence held to show such contributory negligence as to justify a direction of the verdict for defendant. *Santis v. St. Louis, Southwestern Ry. Co. of Texas* (Civ. App.) 126 S. W. 903.

An employe of an electric railway company employed to repair wires held not guilty of contributory negligence. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 133 S. W. 188.

21. — **Reliance on care of master or coemployes.**—An engineer is not negligent in not stopping at station to inquire as to whereabouts of a train ahead, the signals being there displayed of no orders and a clear track. *Houston & T. C. R. Co. v. Higgins*, 22 C. A. 430, 55 S. W. 744.

A brakeman engaged in coupling cars in switching had a right to act on the presumption that the engine would not be moved without a signal. *Galveston, H. & S. A. Ry. Co. v. Courtney*, 30 C. A. 544, 71 S. W. 307.

Bridge watchman held not guilty of contributory negligence in relying on the running of trains at ordinary speed, giving of signals, etc. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

An employe held guilty of contributory negligence in not getting out from under a car, after being aware of the foreman's negligence exposing him to danger; but not in not looking and listening to discover if the foreman was negligent. *International & G. N. R. Co. v. Royall*, 37 C. A. 261, 83 S. W. 713.

An employe held entitled to rely on observance of a rule of the employment. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

22. — **Avoidance of injury from defective or dangerous appliances or places.**—Where a headlight cleaner knew that an engine step was greasy, or would have known it by the exercise of ordinary care, he could not recover for injuries received by slipping therefrom. *Bookrum v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 57 S. W. 919.

Servant, injured by falling into an open lye vat on defendant's premises, held guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Barnes*, 37 C. A. 645, 85 S. W. 1006.

Servant engaged in oiling machinery held guilty of contributory negligence. *El Paso & S. W. Ry. Co. v. Kelley*, 99 T. 87, 87 S. W. 660.

That a conductor could have discovered by investigation the dangerous proximity of a coal car to the street car track held not to prevent his recovery for injuries sustained from coming in contact with it, unless the danger was obvious. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543; 118 S. W. 838.

23. — **Avoidance of injury from dangerous operations or methods of work.**—An employe, injured by cars being thrown by a flying switch, held not guilty of contributory negligence, though he saw them approaching on the main track. *Galveston, H. & S. A. Ry. Co. v. Hynes*, 21 C. A. 34, 50 S. W. 624.

A section hand, who was standing near the track while a train passed and was injured by being struck by a piece of coal, held not guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.) 63 S. W. 164.

In an action for injuries to a trackman by being struck by a hand car, plaintiff held not guilty of contributory negligence. *Chicago, R. I. & T. Ry. Co. v. Long*, 32 C. A. 40, 74 S. W. 59.

Evidence held not to show plaintiff guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 33 C. A. 319, 77 S. W. 263.

A servant of a railroad company, killed while crossing a switch track in the yards of the company, held guilty of contributory negligence as a matter of law. *Bennett v. St. Louis Southwestern Ry. Co. of Texas*, 36 C. A. 459, 82 S. W. 333.

A trackman, engaged in laying new rails, held not bound to keep a constant lookout for trains by which he might be injured. *International & G. N. R. Co. v. Villareal*, 36 C. A. 532, 82 S. W. 1063.

In an action for death of a brakeman while adjusting a coupler, deceased held not guilty of contributory negligence. *Ft. Worth & R. G. Ry. Co. v. Caskey*, 37 C. A. 463, 84 S. W. 264.

A member of a hand car crew injured by a train coming from behind held guilty of contributory negligence in not keeping a lookout. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.

**24. Dangerous operations and methods of work—In general.**—Injuries to employé held to be the result of his own negligence. *Gulf, B. & K. C. Ry. Co. v. Hernandez* (Civ. App.) 45 S. W. 197.

Evidence held not to show as a matter of law that decedent, a conductor in charge of a train, was guilty of contributory negligence. *International & G. N. Ry. Co. v. Vinson*, 28 C. A. 247, 66 S. W. 800.

An engineer running a passenger train is bound only to exercise ordinary care and prudence for his own safety. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

A failure of an engineer to keep a proper lookout held contributory negligence. *International & G. N. R. Co. v. Brice*, 100 T. 203, 97 S. W. 461.

Whether plaintiff was guilty of contributory negligence barring recovery for injuries received while working in a car through other cars colliding with it must be determined by what a man of ordinary prudence would have done in like circumstances. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 101 S. W. 453.

A brakeman, injured by being thrown from a log train, held not negligent. *Gulf, B. & K. C. Ry. Co. v. Harrison* (Civ. App.) 104 S. W. 399.

A fireman on the running board of an engine held not guilty of contributory negligence in not holding or being able to grasp, in an unexpected jar of the engine, a hand rail considerably above him. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374.

Facts held to show that a brakeman injured by stepping on a rotten tie while flagging a train was guilty of contributory negligence. *International & G. N. Ry. Co. v. Reiden*, 48 C. A. 401, 107 S. W. 661.

Plaintiff, who was crushed between a post and a moving freight train, held not to have assumed the risk of the failure of the operatives of the switch engine to conform to a rule previously observed not to move the cars without signal from plaintiff. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 455.

A fireman, who was run over when the engine and tender separated because a king pin used in coupling the same worked out, and he was thrown to the track in front of the tender, held not guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Snow*, 53 C. A. 784, 115 S. W. 631.

In an action for injuries to a servant, plaintiff held guilty of contributory negligence in attempting to move a timber without more assistance. *Turner v. Missouri, K. & T. Ry. Co. of Texas*, 45 C. A. 650, 119 S. W. 719.

An employer held not liable for injury to an employé, while unloading a heavy object, by pulling it off a truck, caused by it falling on him. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

**25. — Adoption of dangerous method of work.**—A servant held not guilty of contributory negligence merely because choosing the more dangerous way of doing the work. *St. Louis & S. F. Ry. Co. v. Vestal*, 38 C. A. 554, 86 S. W. 790.

Evidence, in an action by a switchman for injuries received while attempting to open the knuckle on one of defendant's cars, held not to show, as a matter of law, that the method adopted by him to open the knuckle was contributory negligence. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

The selection by a servant of the more dangerous of two or more ways of doing a given act held not as a matter of law to constitute contributory negligence. *Lewis v. Texas & P. Ry. Co.*, 57 C. A. 585, 122 S. W. 605.

The rule that a servant is negligent, as a matter of law, if he chose a dangerous way and was injured, when a safe way was open to him, does not apply to a middle swing freight brakeman, injured by a defective handhold while traversing the train from his station to the caboose. *Missouri, K. & T. Ry. Co. of Texas v. Hawley* (Civ. App.) 123 S. W. 726.

A brakeman injured by stumbling over a clinker while walking by a moving car to couple it with an engine in railroad yards held entitled to recover as against the claim that he chose a dangerous way though he might have walked between the rails or on another track. *Freeman v. Kennerly* (Civ. App.) 151 S. W. 580.

**26. — Excessive speed.**—Engineer cannot recover for injuries due to his running his locomotive faster than allowed by ordinance. *Missouri, K. & T. Ry. Co. of Texas v. Roberts* (Civ. App.) 46 S. W. 270.

If an engineer ran his locomotive at a speed of 50 or 60 miles an hour at the time it left the track on a curve, and such speed proximately contributed to the derailment, no recovery may be had for his death. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 C. A. 56, 106 S. W. 707.

**27. — Persons inspecting or repairing cars.**—Acts of engineer in going under an engine to attend to a hot box held not necessarily to show want of ordinary care. *International & G. N. R. Co. v. Culpepper*, 19 C. A. 182, 46 S. W. 922.

In an action against a railroad company for the death of a car inspector, evidence held insufficient as a matter of law to show that deceased was guilty of contributory negligence and assumed the risk. *International & G. N. R. Co. v. Bearden*, 31 C. A. 58, 71 S. W. 558.

A car repairer held entitled to rely on observance of a rule forbidding a flying switch, and not required to look and listen for cars, cut loose from an engine in a flying switch, on the track he was about to cross. *Galveston, H. & S. A. Ry. Co. v. Conuteson*, 51 C. A. 1, 111 S. W. 187.

In an action by a car repairer for injuries sustained by an engine backing against the cars under which he was at work, plaintiff held not guilty of contributory negligence as a matter of law. *Houston & T. C. R. Co. v. Ravanelli* (Civ. App.) 123 S. W. 208.

28. — **Riding on trains, cars or locomotives.**—Evidence, in an action for injuries sustained by plaintiff by a fall from a hand car, alleged to have been caused by the negligence of a fellow servant, held insufficient to show negligence on defendant's part. *Gulf, C. & S. F. Ry. Co. v. Hubert* (Civ. App.) 54 S. W. 1074.

A brakeman, injured by being struck by a warehouse while he was hanging onto the side of a car, in performance of his duties, held not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Mortson*, 31 C. A. 142, 71 S. W. 770.

Where servants of a railroad company are accustomed to ride to and from their work on a hand car, it is the duty of the railroad to furnish a safe track for their use. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

Where plaintiff was injured while riding on the footboard of an engine, the speed of which he could have checked by a signal to the engineer, the excessiveness of the speed was not an issue for the jury. *St. Louis Southwestern Ry. Co. of Texas v. Arnold*, 39 C. A. 161, 87 S. W. 173.

A brakeman on a logging train held not guilty of negligence in riding on a stringer on a car in the train. *Ragley Lumber Co. v. Parks*, 46 C. A. 539, 103 S. W. 424.

It is negligence for a switchman to attempt to ride on the break beam of an approaching car, instead of using the steps on the side. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 118 S. W. 1113.

29. — **Coupling or uncoupling cars.**—Evidence held to show that a switchman injured in coupling cars was not guilty of contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Civ. App.) 43 S. W. 1078.

A brakeman who made a coupling by placing the bar on his knee, and who allowed it to remain there until the car was pushed three feet, was not negligent, as a matter of law. *Texas & P. Ry. Co. v. McCoy*, 17 C. A. 494, 44 S. W. 25.

In action for injuries received while coupling cars, held error to charge that if plaintiff, when he went to make the coupling, placed himself in a customary position, he would be entitled to recover. *Missouri, K. & T. Ry. Co. of Texas v. Baker* (Civ. App.) 58 S. W. 964.

In an action against a railroad for injuries to a brakeman while coupling cars, evidence held sufficient to show that plaintiff was not guilty of contributory negligence. *St. Louis & S. F. R. Co. v. Ames* (Civ. App.) 94 S. W. 1112.

In an action for injuries to a railway brakeman while endeavoring to couple certain cars, plaintiff held not guilty of contributory negligence as a matter of law. *Texas & N. O. Ry. Co. v. Conway*, 44 C. A. 68, 98 S. W. 1070.

A switchman killed by being crushed between an engine and car held not negligent in standing where he did to adjust the knuckle on the coupler of the engine. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

30. — **Switching cars.**—In an action for an injury resulting in the death of defendant's servant, held that deceased was guilty of contributory negligence. *Wagnon v. Houston & T. C. R. Co.*, 40 C. A. 467, 89 S. W. 1112.

For a brakeman to be on the track to get on the engine in switching, held not negligence as a matter of law. *St. Louis Southwestern Ry. Co. of Texas v. Ford*, 56 C. A. 521, 121 S. W. 709.

A switchman, injured by a defective car, held not negligent as a matter of law. *Galveston, H. & S. A. Ry. Co. v. Hanson* (Civ. App.) 125 S. W. 63.

31. **Disobedience of rules or orders.**—In general.—A railway company is not liable in damages to an employé for an injury caused by his wilful act of disobedience of a reasonable rule of the company established for his safety, and which is known to him, and when the act of disobedience is the proximate cause of the injury, unless the act is done under the influence of fear produced by the appearance of sudden danger. *Railway Co. v. Ryan*, 69 T. 665, 7 S. W. 83.

In an action for damages for death caused through alleged negligence of deceased's employer, it was not error to refuse to instruct that under the rules of the company it was the duty of deceased to have inspected the engine he was operating before using it. *Galveston, H. & S. A. Ry. Co. v. Smith*, 24 C. A. 127, 57 S. W. 999.

Instruction as to effect of a violation of rules of a master by employé reviewed, and held erroneous. *Texas & P. Ry. Co. v. Maupin*, 26 C. A. 385, 63 S. W. 346.

An employé's violation of the rule of his employer is not negligence per se. *Missouri, K. & T. Ry. Co. of Texas v. Pawkett*, 28 C. A. 583, 68 S. W. 323; *Same v. Bodie*, 32 C. A. 168, 74 S. W. 100; *Same v. Jones* (Civ. App.) 75 S. W. 53; *Texas Cent. R. Co. v. Bender*, 32 C. A. 568, 74 S. W. 561; *Missouri, K. & T. Ry. Co. of Texas v. Parrott*, 43 C. A. 325, 96 S. W. 950; *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

Violation of rules regulating the manner in which railroad cars should be coupled by brakemen does not constitute negligence per se. *Texas Cent. Ry. Co. v. Yarbrow*, 32 C. A. 246, 74 S. W. 357.

A switchman cannot recover for injuries caused by his failure to exercise ordinary care in consequence of his use of liquor. *Worcester v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 91 S. W. 339.

The breach of an employer's rule is not negligence per se, unless it is an act so opposed to the dictates of common prudence that no careful person would commit it. *Galveston, H. & S. A. Ry. Co. v. Cherry*, 44 C. A. 344, 98 S. W. 898; *Galveston, H. & S. A. Ry. Co. v. Still*, 45 C. A. 169, 100 S. W. 176.

A violation by a servant of his master's rules is not negligence per se, and whether the servant is negligent is for the jury. *Southern Pac. Co. v. Allen*, 48 C. A. 66, 106 S. W. 441.

Where the collision by which plaintiff was injured was caused by him having run his train into a station before it was due at a dangerously high speed, in violation of rules, he assumed the risk of injury, and was negligent as a matter of law. *International & G. N. R. Co. v. Brice* (Civ. App.) 111 S. W. 1094.

The violation by a servant of a railroad company's rule forbidding a servant from going between moving cars to couple them, etc., held not of itself to preclude recovery for resultant injuries. *Texas & N. O. R. Co. v. Jackson*, 51 C. A. 646, 113 S. W. 628.

Locomotive engineer injured by derailment of a train held not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

In an action for injuries to an engineer in a collision, plaintiff held as a matter of law not negligent in leaving a siding and colliding with an approaching train. *Galveston, H. & S. A. Ry. Co. v. Lobit* (Civ. App.) 132 S. W. 102.

Evidence held to show railroad employé guilty of contributory negligence in failing to exhibit blue signals required by railroad rule. *Houston & T. C. R. Co. v. Ravanelli* (Sup.) 133 S. W. 424.

A fireman, killed in a collision between his train and a passenger train, held guilty of contributory negligence. *Freeman v. Jamison* (Civ. App.) 138 S. W. 1097.

A servant's violation of a rule of the master constitutes contributory negligence. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

**32. — What constitutes disobedience.**—An engineer is not prohibited from running at a greater rate than 25 miles an hour by an order to make 25 miles on the trip, including stops. *Houston & T. C. R. Co. v. Higgins*, 22 C. A. 430, 55 S. W. 744.

Recoupling a train having defective couplers, which has been temporarily separated en route, is not a violation of a rule against placing cars with defective couplers in a train, or contributory negligence on the part of a brakeman killed thereby. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

Fireman held not to have violated rule requiring him to report to his immediate superior any infringement of the employé's rules by other employés. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 28 C. A. 615, 68 S. W. 805.

A rule with reference to coupling cars on grade sidings held to require cars apparently in contact with each other to be coupled, but not to prohibit the leaving of an open space between two sets of cars on the same siding. *St. Louis Southwestern Ry. Co. of Texas v. Pope* (Civ. App.) 82 S. W. 360.

In an action for injuries to a brakeman by a railroad rule requiring cars left on grade sidings to be coupled together held free from ambiguity and not open to construction. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

A rule warning employés not to attempt to get on the end of an approaching car held not to apply to an attempt to get up the side of a moving car. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

A rule governing work in a yard held to apply only to car inspectors and car repairers while engaged in the duty of their employment. *El Paso & S. W. R. Co. v. Welter* (Civ. App.) 125 S. W. 45.

**33. — Excuses for disobedience.**—Where a servant of a street railroad company was killed while riding on a car which the company provided for its servants to ride on, the fact that a rule of the company prohibited the workmen from so riding was no defense to an action for negligence causing the death. *Beaumont Traction Co. v. Dilworth* (Civ. App.) 94 S. W. 352.

A brakeman, who violated the master's rules, is not guilty of contributory negligence, as a matter of law, in all cases, for circumstances may create an emergency which will excuse the servant's disregard of the rule. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

**34. — Effect of customary violation.**—A railroad employé is not bound by the terms of a rule shown to have been varied and abrogated by the officers of the road. *Galveston, H. & S. A. Ry. Co. v. Collins*, 24 C. A. 143, 57 S. W. 884.

Where a railroad company knowingly permits the nonobservance of a rule, it cannot rely on it to show contributory negligence on the part of an engineer running in violation thereof. *Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 C. A. 477, 68 S. W. 807.

The disregard of a rule which the company does not enforce, and which is generally disregarded, held not negligence on the part of the employé, as between him and the company. *Galveston, H. & S. A. Ry. Co. v. Collins*, 31 C. A. 70, 71 S. W. 560.

A brakeman held not guilty of contributory negligence in making a coupling with his hands, in violation of a rule uniformly disregarded. *Texas Cent. Ry. Co. v. Yarbro*, 32 C. A. 246, 74 S. W. 357.

In an action for injuries to a switchman, a rule of the company held inapplicable. *Worcester v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 91 S. W. 339.

An employé is not negligent in failing to comply with a rule of his employer which has not been enforced. *El Paso & S. R. Co. v. Darr* (Civ. App.) 93 S. W. 166.

The violation by a brakeman of a rule forbidding employés to uncouple cars by hand held not to conclusively constitute contributory negligence. *Chicago, R. I. & P. Ry. Co. v. Thompson*, 41 C. A. 459, 93 S. W. 702.

Habitual violation of a rule with the superintending foreman's knowledge and consent held to warrant an employé in deeming the rule abrogated. *St. Louis & S. F. R. Co. v. Arms* (Civ. App.) 136 S. W. 1164.

**35. — Warnings, signals and lookouts.**—In an action for the negligent killing of a brakeman, deceased held guilty of contributory negligence. *Texas & N. O. R. Co. v. Fields*, 32 C. A. 414, 74 S. W. 930.

In action against railroad for injuries to servant, refusal to charge on a rule of the company forbidding employés to put themselves in a dangerous position until they know the engineer has seen and obeyed a signal held proper. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 33 C. A. 319, 77 S. W. 263.

**36. Disregarding warnings or signals.**—In action for injury to engineer in collision with forward section of his train charge that, if plaintiff "by the proper use of his sight" could have seen red light on a semaphore, he could not recover, held erroneous. *Quinn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 84 S. W. 395.

Plaintiff, a railroad bridge workman, injured by the falling of a bridge upon him as it was being lowered after having been jacked up, held guilty of contributory negligence precluding recovery. *Ft. Worth & R. G. Ry. Co. v. Robinson*, 37 C. A. 465, 84 S. W. 410.

One of a gang employed in repairing a bridge, injured by the lowering of it after it had been jacked up, held guilty of contributory negligence. *Robinson v. Ft. Worth & R. G. Ry. Co.*, 99 T. 110, 87 S. W. 667.

In action for injuries to railroad engineer, instruction that if preceding train had a right to remain at station till 7:11 without putting out a flagman or torpedo, and plaintiff's train ran into the station before that time, he could not recover, held properly refused. *International & G. N. R. Co. v. Brice* (Civ. App.) 95 S. W. 660.

**37. Compliance with commands or threats.**—Where a brakeman was ordered into danger, between cars, held that, if he discovered or should have discovered his danger in time to have gotten out, no recovery could be had for his death. *Louisiana Extension Ry. Co. v. Carstens*, 19 C. A. 190, 47 S. W. 36.

Evidence that an employé was injured by obeying an order to jump from a train going five or six miles an hour held not to show contributory negligence per se. *Galveston, H. & S. A. Ry. Co. v. Sanchez* (Civ. App.) 65 S. W. 893.

An order of a superior is a fact pertinent to go to the jury on the question of whether a subordinate servant, acting in obedience to such order, was guilty of contributory negligence. *Texas & N. O. R. Co. v. Kelly*, 98 T. 123, 80 S. W. 79.

A car inspector, injured while connecting the chains between a locomotive and the baggage car of a train, held entitled to assume that defendant would furnish him with a safe place to work and safe appliances, in the absence of knowledge or means of knowledge to the contrary. *St. Louis Southwestern Ry. Co. of Texas v. Rea* (Civ. App.) 84 S. W. 428.

An act done by a servant in obedience to an order of his foreman held not negligence, unless the danger of obeying the order was so obvious that no prudent man would have undertaken it. *International & G. N. R. Co. v. Wray*, 43 C. A. 380, 96 S. W. 74.

When the master gives a servant an order which it is the latter's duty to obey, his act of obedience will not be regarded as negligence per se, unless the danger of obeying the order is so glaring that no prudent man would have undertaken it. *St. Louis Southwestern Ry. Co. of Texas v. Schuler*, 46 C. A. 356, 102 S. W. 733.

The act of a servant in obeying the command of his superior held not negligence per se where the danger is not patent. *Houston & T. C. R. Co. v. Malloy*, 54 C. A. 490, 118 S. W. 721.

An employé held not guilty of contributory negligence in tying a rope to a brace for the purpose of moving it in the manner directed by the master's foreman. *Houston & T. C. R. Co. v. Johnson* (Civ. App.) 118 S. W. 1150.

**38. Acts in emergencies.**—An employé who was injured by jumping in front of hand car on which he was riding, to avoid approaching train, held entitled to recover. *Houston & T. C. R. Co. v. Rodican*, 15 C. A. 556, 40 S. W. 535.

Acts of a servant in endeavoring to save himself from injury, whether well judged or not, held not contributory negligence, where he was placed in danger by the master's negligence. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

The direction by one of a switching crew, fastened between a car and a platform, to have the car backed, thereby causing his death, is to be considered in determining whether the crew were negligent in following his direction. *Id.*

The fact that an employé's acts, in connection with others occasioned threatened danger to the employer's property, held not to preclude a recovery for death caused in his attempt to ward off the danger. *Houston & T. C. Ry. Co. v. Smith* (Civ. App.) 51 S. W. 506.

In an action for injuries to conductor in a collision, while his train was taking the side track, evidence held to sustain a finding that he was not negligent in remaining in the caboose for the purpose of adjusting the switches. *Missouri, K. & T. Ry. Co. of Texas v. Pawkett*, 28 C. A. 583, 68 S. W. 323.

Brakeman, attempting to flag approaching train, held not guilty of contributory negligence. *Texas & N. O. R. Co. v. Scott*, 30 C. A. 496, 71 S. W. 26.

A flagman, killed while endeavoring to warn pedestrians crossing the track of their danger, held not guilty of contributory negligence, barring recovery. *Missouri, K. & T. Ry. Co. of Texas v. Goss*, 31 C. A. 300, 72 S. W. 94.

The negligence of an engineer, whereby a brakeman is placed in immediate danger and is injured, is the proximate cause of the resulting injury. *San Antonio & A. P. Ry. Co. v. Ankerson*, 31 C. A. 327, 72 S. W. 219.

Section foreman, injured in collision while riding on hand car, held not precluded from recovery because he attempted to remove car from track after discovering the train. *Texas Cent. R. Co. v. Bender*, 32 C. A. 568, 75 S. W. 561.

Employé of a railroad company held not justified in going upon the track before an approaching train to remove from the track a bar which he thought dangerous to the train, unless his apprehension of danger was reasonable. *Gulf, C. & S. F. Ry. Co. v. Roane*, 33 C. A. 299, 76 S. W. 771.

Railroad section foreman held not negligent in exposing himself to danger in attempting to remove a push car from the track in front of a passenger train, in order to prevent accident to the train. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

Where an employé is placed in danger by the negligence of the master's foreman, and is injured in trying to escape, the master is not relieved from liability for the injury by the fact that the employé might have escaped injury, had he acted more cautiously. *San Antonio & A. P. Ry. Co. v. Stevens*, 37 C. A. 80, 83 S. W. 235.

Servant in a position of danger held not guilty of contributory negligence in making a wrongful choice of a means of escape. *El Paso & S. W. Ry. Co. v. Kelly* (Civ. App.) 83 S. W. 855.

The act of defendant's superintendent in calling a warning to prevent an injury, though not an act of negligence, held proper to be considered in determining whether plaintiff was warranted in jumping from a car which caused the injuries complained of. *Mounce v. Lodwick Lumber Co.* (Civ. App.) 91 S. W. 240.

The rule that acts done in an emergency on an impulse are not negligence as a matter of law applies to the protection of life as well as where the duty devolves on one

to protect his employer's property. *Trinity & B. V. Ry. Co. v. Elgin*, 56 C. A. 573, 121 S. W. 577.

Where an engineer endeavored to prevent a collision with cars on the track, negligence could not be ascribed to him because he did not leave the engine before the collision. *Missouri, K. & T. Ry. Co. of Texas v. Richardson* (Civ. App.) 125 S. W. 623.

**39. Proximate cause of injury.**—An instruction to find for defendant if acts of deceased were negligent and were the proximate cause of the injury, and to find for plaintiff if they were not the proximate cause, held correct. *International & G. N. R. Co. v. Culppeper*, 19 C. A. 182, 46 S. W. 922.

Failure of a yard master to properly make up a train and inspect cars held not the proximate cause of injuries received by an employé while assisting in rearranging the train. *St. Louis & S. F. R. Co. v. Nelson*, 20 C. A. 536, 49 S. W. 710.

Failure of a conductor to comply with order requiring particular arrangements of the cars of his train held not the proximate cause of injuries received in subsequently making up the train. *Id.*

Where servant's negligence caused the injury, defendant is not required to show that his negligence did not contribute thereto. *Texas & P. Ry. Co. v. Maupin*, 26 C. A. 385, 63 S. W. 346.

Evidence held to show that the proximate cause was the act of a fellow servant, to which plaintiff's own negligence contributed. *Southern Pac. Co. v. Wellington*, 27 C. A. 309, 65 S. W. 219.

An instruction that contributory negligence, to defeat a recovery, must have proximately contributed to the injury, held proper. *Galveston, H. & S. A. Ry. Co. v. Pendleton*, 30 C. A. 431, 70 S. W. 996.

The making of a "cut" in certain cars, which were being switched, without the knowledge of the switchman, was the proximate cause of his injury. *Missouri, K. & T. Ry. Co. of Texas v. Schilling*, 32 C. A. 417, 75 S. W. 64.

An instruction that contributory negligence was a defense, though it was not the proximate cause of the death of plaintiff's husband, held properly refused. *Houston & T. C. R. Co. v. Turner*, 34 C. A. 397, 78 S. W. 712.

Intoxication of servant held not to preclude recovery for injuries to him, unless it proximately caused or contributed to the injuries. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 35 C. A. 584, 80 S. W. 852.

That a brakeman had knowledge that the lower rung of a car ladder was absent held no defense to an action for injuries sustained by reason of other defects therein, unless he acted imprudently in using the ladder under all the circumstances. *El Paso Northeastern R. Co. v. Ryan*, 36 C. A. 190, 81 S. W. 563.

In an action for injuries to a brakeman by derailment of a locomotive, an instruction that if the engineer was negligent in falling to slow up or stop as he approached a derailing switch, and such negligence was the proximate cause of plaintiff's injury, he could recover, held error. *St. Louis Southwestern Ry. Co. of Texas v. Arnold*, 39 C. A. 161, 87 S. W. 173.

Negligence of a servant which proximately contributes to his injury precludes a recovery, notwithstanding negligence of the master also contributing thereto. *St. Louis Southwestern Ry. Co. of Texas v. Rea*, 99 T. 53, 87 S. W. 324.

In an action by a railroad engineer for injuries resulting from the derailment of the locomotive, held that his knowledge that the headlight was defective did not bar recovery, if other acts of negligence of defendant concurred in producing the result. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

In an action by a fireman for injuries caused by the giving away of a defectively fastened handhold on a locomotive, evidence that at the time of the injury plaintiff was in a dangerous position held irrelevant. *Galveston, H. & S. A. Ry. Co. v. Smith* (Civ. App.) 93 S. W. 184.

Where acts of brakeman were negligent and the negligence was a proximate cause of his injury, he was not entitled to recover therefor. *Galveston, H. & S. A. Ry. Co. v. Worcester*, 45 C. A. 501, 100 S. W. 990.

Where a brakeman is injured in attempting to flag a coming train by stepping on a rotten tie, which caused him to fall, and while unconscious he was struck by the coming train, the proximate cause of his injury was not the existence of the rotten tie, but his failure to follow the rules of the company. *International & G. N. Ry. Co. v. Reiden*, 48 C. A. 401, 107 S. W. 661.

Evidence held to show, as a matter of law, that the proximate cause of plaintiff's injury was his unnecessary choice of a dangerous way to perform his duty. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

Any negligence of a brakeman in taking a position on the railroad in front of an engine, held not to preclude recovery for accident which would not have happened but for his foot getting caught between the ties. *St. Louis Southwestern Ry. Co. of Texas v. Ford*, 56 C. A. 521, 121 S. W. 709.

Any negligence by decedent railroad engineer in running at a high speed after the headlight had failed held not to have proximately contributed to a derailment. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

In an action by a brakeman injured by an open car door while making a switch, the fact that it was a flying switch, contrary to the master's rules, is not a defense where the mode of making the switch was not the proximate cause of the injury. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

**40. Injury avoidable by care of master.**—Though the negligence of one who has been injured by another may have contributed to the injury, yet if the person inflicting it discover the peril of the other in time, by the reasonable exercise of the means at hand, to prevent the injury, the failure to use such means must be regarded as the proximate cause of the injury. *Hays v. Railway Co.*, 70 T. 602, 8 S. W. 491, 8 Am. St. Rep. 624.

A person guilty of contributory negligence, and exposing himself to danger, may recover damages for personal injury, if defendant discovered his danger in time to have avoided the injury. *Int. & G. N. R. Co. v. Tabor*, 12 C. A. 283, 33 S. W. 894, and cases cited.



Negligence of one of a switching crew held no bar to a recovery for his death. *White v. Houston & T. C. R. Co.* (Civ. App.) 46 S. W. 382.

The question of contributory negligence held properly submitted to the jury, with an instruction that the employé could recover if the master acted negligently, knowing the danger of the employé. *St. Louis & S. F. Ry. Co. v. Vestal*, 38 C. A. 554, 86 S. W. 790.

In an action for injuries to a servant by being thrown from the pilot of defendant's log engine, evidence held insufficient to raise the issue of discovered peril. *Burns v. Chronister Lumber Co.* (Civ. App.) 87 S. W. 163.

Evidence of failure of brakeman to place lights on train held not to require finding of contributory negligence, where the proper signals were given on approaching the train. *Houston & T. C. R. Co. v. Fanning*, 40 C. A. 422, 91 S. W. 344.

Where a servant was injured after his peril had been discovered, it was immaterial whether the injury was due to another servant's failure to make proper efforts to avoid the danger or his failure to prevent the injury through incompetency. *Pecos & N. T. Ry. Co. v. Blasengame*, 42 C. A. 66, 93 S. W. 187.

Where a minor employé was injured by his master's failure to avoid the same after discovering him in a perilous position, it was immaterial that the minor's parent consented to his employment at a hazardous duty. *Id.*

A railway company held not liable for injury to employé struck by a train while on the track, where the injured person has not exercised reasonable care for his own safety. *Houston & T. C. R. Co. v. Burnett*, 49 C. A. 244, 108 S. W. 404.

A servant's right to recover for injuries on the ground of discovered peril is not affected by his contributory negligence. *International & G. N. Ry. Co. v. Aleman*, 52 C. A. 565, 115 S. W. 73.

Negligence of the engineer of a passenger train in failing to take steps to stop his train in the presence of danger of a collision with another train until it was too late held the proximate cause of the death of the fireman of such other train, for which defendant was liable. *Freeman v. Jamison* (Civ. App.) 138 S. W. 1097.

A railroad company held not liable, on the ground of discovered peril, for injury to a member of a hand car crew by a train coming from the rear while he was hastily attempting to remove the car. *Chicago, R. I. & G. Ry. Co. v. Mitchum* (Civ. App.) 140 S. W. 811.

In order to impose the duty on the crew of a switch engine which struck another employé on the track to take steps to avoid killing him, it was not necessary that it appear that he could not, or would not, extricate himself from his dangerous position. *Pecos & N. T. Ry. Co. v. Rosenbloom* (Civ. App.) 141 S. W. 175.

41. **Willful injury by master.**—Contributory negligence of a railroad employé in attempting to board a moving engine was no defense to an action for injuries, based on the intentional act of the engineer in increasing the speed of the engine, with knowledge that plaintiff was about to board it. *Texas & P. Ry. Co. v. Wiley* (Civ. App.) 155 S. W. 356.

42. **Pleading.**—See notes under Art. 1827.

43. **Presumptions, burden of proof and admissibility of evidence.**—See notes under Art. 3687.

44. **Sufficiency of evidence—In general.**—Evidence held sufficient to show that injury to railroad employé was caused by defective frog. *International & G. N. R. Co. v. Turner* (Civ. App.) 43 S. W. 560.

Evidence in an action for injuries to an engineer caused by the turning of the engine step held to justify a finding that negligent inspection was the cause of the injury. *San Antonio & A. P. Ry. Co. v. Lindsey*, 27 C. A. 316, 65 S. W. 668.

Evidence in an action to recover for injuries from falling into a pit in a railroad machine shop held sufficient to show that a board used as a bridge across the pit was over the "dug-out" at the time in question. *Galveston, H. & S. A. Ry. Co. v. Butshek*, 34 C. A. 194, 78 S. W. 740.

Evidence held to show that the act plaintiff was doing at the time of his injury was a necessary one and done in the discharge of his duty. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

45. — **Contributory negligence shown.**—Contributory negligence shown in the following cases: *Taylor, B. & H. Ry. Co. v. Taylor*, 79 T. 104, 14 S. W. 918, 23 Am. St. Rep. 316; *St. Louis & S. F. Ry. Co. v. Traweck*, 84 T. 65, 19 S. W. 30; *Texas & P. Ry. Co. v. Geiger*, 79 T. 13, 15 S. W. 214; *Bonner v. Glenn*, 79 T. 531, 15 S. W. 572.

In an action for negligent death of a brakeman, deceased held guilty of contributory negligence. *Texas & N. O. R. Co. v. Stewart*, 30 C. A. 408, 71 S. W. 330; *Gulf, C. & S. F. Ry. Co. v. Powell*, 37 C. A. 470, 84 S. W. 670.

Evidence held sufficient to support a verdict for defendant on the ground of plaintiff's contributory negligence. *Bell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 81 S. W. 134.

In action for injuries to servant, defenses of contributory negligence and assumption of risk held available to the master under the evidence. *Reeves v. Galveston, H. & S. A. Ry. Co.*, 44 C. A. 352, 98 S. W. 929.

Evidence held to conclusively establish contributory negligence of injured employé. *St. Louis Southwestern Ry. Co. of Texas v. Anderson* (Civ. App.) 124 S. W. 1002.

46. — **Contributory negligence not shown.**—Evidence held to warrant a finding that plaintiff, who was injured in loading railroad ties, was not guilty of contributory negligence. *Sherman, S. & S. W. Ry. Co. v. Payne* (Civ. App.) 40 S. W. 43.

Evidence held to justify a finding that deceased was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Eberhart* (Civ. App.) 40 S. W. 1060; *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

Evidence held not to show an engineer killed in a collision negligent as matter of law. *Galveston, H. & S. A. Ry. Co. v. Brown* (Civ. App.) 59 S. W. 930.

In an action by engineer for injuries, evidence held to warrant finding of no contributory negligence. *Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 C. A. 477, 68 S. W. 807.

In an action for injuries to a section hand by a collision between a train and a hand car, evidence held sufficient to justify a jury finding that plaintiff was not guilty of contributory negligence. *Texas & P. Ry. Co. v. Carter* (Civ. App.) 73 S. W. 50.

Evidence held not to make out a prima facie case of contributory negligence. *International & G. N. R. Co. v. Pina*, 33 C. A. 680, 77 S. W. 979.

In an action for the death of a bridge watchman, killed while riding his velocipede over the bridge, evidence held sufficient to authorize the conclusion that deceased was not guilty of contributory negligence. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

In an action for injuries to plaintiff from steam escaping from a railroad pumping station, facts held insufficient to show that plaintiff was guilty of contributory negligence as a matter of law. *Houston & T. C. R. Co. v. Bulger*, 35 C. A. 478, 80 S. W. 557.

In an action for injuries to a servant while riding on a hand car, evidence held sufficient to sustain a finding that plaintiff was not guilty of contributory negligence. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

In an action for injuries sustained by an engineer, who ran his train into cars standing on the main track, evidence held sufficient to warrant a finding that he was not guilty of contributory negligence. *International & G. N. R. Co. v. Vanlandingham*, 38 C. A. 206, 85 S. W. 847.

Evidence held to show that a railroad brakeman was not guilty of contributory negligence in attempting to set a brake. *Texas Cent. R. Co. v. Powell*, 38 C. A. 157, 86 S. W. 21.

In an action for injuries to a servant, run over by a train in defendant's yard, evidence held sufficient to sustain a finding that plaintiff was not guilty of contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Melville* (Civ. App.) 87 S. W. 863.

In an action for injuries to a servant injured by the raising of the hammer of a pile driver, evidence held sufficient to warrant a finding of freedom from contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Huyett* (Civ. App.) 89 S. W. 1118.

A railroad switchman run down and killed by cars kicked along the track at night held not negligent. *Galveston, H. & S. A. Ry. Co. v. Berry*, 47 C. A. 327, 105 S. W. 1019.

In an action for injuries to a servant caused by a sliver flying off from a defective chisel or hammer and striking plaintiff in the eye, evidence held to support a finding that plaintiff was not guilty of contributory negligence and did not assume the risk of the danger. *Texas Mexican Ry. Co. v. Trijerina*, 51 C. A. 100, 111 S. W. 239.

Evidence held to show that a railway fireman was not guilty of contributory negligence respecting injury received through explosion of a locomotive boiler. *Taylor v. White* (Civ. App.) 113 S. W. 554.

Evidence held to warrant a finding that a railway brakeman, injured by a sack of ice thrown from a passing caboose, was not guilty of contributory negligence. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 115 S. W. 57.

In an action for injuries sustained while blocking up the end of a turntable by the negligence of defendant's foreman in releasing a push car which was on the table, evidence held not to show any contributory negligence of plaintiff. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

Evidence held insufficient to show that plaintiff, a switchman, was guilty of contributory negligence. *Ft. Worth & R. G. Ry. Co. v. Day*, 55 C. A. 24, 118 S. W. 739.

Evidence in an action for injury to an employé, held sufficient to justify a finding that plaintiff was not negligent. *Houston & T. C. R. Co. v. Johnson* (Civ. App.) 118 S. W. 1150.

Evidence, in an action by a section hand for injuries, held not to conclusively show that plaintiff was guilty of contributory negligence. *Pollock v. Houston & T. C. R. Co.*, 103 T. 69, 123 S. W. 408.

Evidence held to justify a finding that an engineer injured in a collision with cars on a side track too near the main track was not guilty of contributory negligence. *Houston & T. C. R. Co. v. Bryan* (Civ. App.) 125 S. W. 82.

In an action for injuries to a servant falling into the manhole on a locomotive tender, evidence held to justify a finding that he was free from contributory negligence. *International & G. N. R. Co. v. Meehan* (Civ. App.) 129 S. W. 190.

Evidence held insufficient to show that a section foreman was guilty of contributory negligence. *Chicago, R. I. & Gulf Ry. Co. v. Evans* (Civ. App.) 143 S. W. 966.

In an action for the death of a crossing flagman struck by a switch engine, evidence held to support jury's findings that he was not guilty of such negligence, contributing to his death, as would defeat a recovery. *Pecos & N. T. Ry. Co. v. Suitor* (Civ. App.) 153 S. W. 185.

47. — **Knowledge of defect or danger.**—The fact that a brakeman knew that a side track was soft, and that such condition was productive of low joints, was not conclusive evidence that he knew of a specific low joint. *Texas & P. Ry. Co. v. McCoy*, 17 C. A. 494, 44 S. W. 25.

Evidence held to support a verdict that an employé injured by the breaking of a rubber hose did not know of the defective condition thereof, and was not required to either inspect or repair it. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

Evidence held to sustain a finding that a servant did not know of the approach of a train. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

In an action for a fireman's death by a collision caused by his engine sideswiping box cars on a connecting switch, evidence held not to show that decedent saw the box cars before the collision. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

48. — **Duty to discover or remedy defect or danger.**—Evidence held to support a verdict on issue of servant's duty to discover defects. *Gulf, C. & S. F. Ry. Co. v. Warner*, 22 C. A. 167, 54 S. W. 1064.

Evidence held not tending to prove it was plaintiff's duty to inspect appliances used by him. *Gulf, C. & S. F. Ry. Co. v. Davis*, 35 C. A. 285, 80 S. W. 253.

In a conductor's action for injuries by striking a railroad car on a switch near the street car track, evidence held to show that plaintiff was not negligent in not discovering

the dangerous proximity of the car. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

49. — **Precautions against known dangers.**—Evidence held to justify a finding that a section foreman was not negligent in going upon the track with his section crew, or in attempting to cross a bridge with a push car and a load of ties, after learning that a train was approaching. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

50. — **Dangerous operations and methods of work.**—In an action for injuries to a railroad brakeman, owing to his having stumbled over a clinker on the track while between cars, endeavoring to uncouple them, held that the evidence warranted a finding that he was not guilty of contributory negligence in going between the cars. *Missouri, K. & T. Ry. Co. of Texas v. Keefe*, 37 C. A. 588, 84 S. W. 679.

Evidence held sufficient to show that an employé of a railroad company, injured by a violent coupling with a caboose, was not guilty of contributory negligence. *Ft. Worth & R. G. Ry. Co. v. Finley*, 50 C. A. 291, 110 S. W. 531.

In an action for the death of a switchman while attempting to adjust a coupler on a car, evidence held to justify a finding that he was free from contributory negligence. *Paris & G. N. R. Co. v. Boston* (Civ. App.) 142 S. W. 944.

In an action by a switchman for injuries caused by his foot slipping under the wheels of the engine because of a defective brake beam, evidence held to warrant a finding that such switchman was not guilty of contributory negligence in riding on the brake beams. *Freeman v. Gerretts* (Civ. App.) 153 S. W. 1163.

Evidence held to show that riding on the brake beams of switch engines was a custom approved by the defendant. *Id.*

51. — **Disobedience of rules or orders and disregard of warnings.**—In an action for injury to a brakeman while coupling cars, held, that the jury were justified in finding that a rule requiring cars to be brought to a full stop before coupling was not enforced, and that plaintiff was not guilty of contributory negligence. *Sugarland Ry. Co. v. Archer* (Civ. App.) 69 S. W. 430.

In action for death of employé in collision of hand car and freight train, finding that rule of defendant had been abrogated by long custom held sustained by the evidence. *International & G. N. R. Co. v. Jacobs*, 37 C. A. 390, 84 S. W. 238.

In an action for injuries received by a collision of plaintiff's train with another at a station, the evidence held to show that plaintiff ran his train into the station before it was due, and at a dangerously high speed, in violation of rules. *International & G. N. R. Co. v. Brice* (Civ. App.) 111 S. W. 1094.

In an action for injuries to a car repairer by backing an engine against cars under which he was working, where defendant claimed that plaintiff was negligent in not conforming to the rules, evidence held not to support a finding that plaintiff did not know of the existence of such rules, and that compliance therewith by him might have protected him from injury. *Houston & T. C. R. Co. v. Ravenelli* (Civ. App.) 123 S. W. 208.

52. — **Compliance with commands.**—In an action by an engineer for injuries caused by the derailment of his train, evidence held to show that plaintiff was compelled to run at the speed he did, and that it was not excessive. *Galveston, H. & S. A. Ry. Co. v. Worth*, 53 C. A. 351, 116 S. W. 365.

53. **Questions for jury and instructions.**—See notes under Art. 1971.

**Art. 6645. When assumed risk not available as defense.**—In any suit against a person, corporation, or receiver, operating a railroad or street railway, for damages for the death or personal injury of an employé or servant, caused by the wrong or negligence of such person, corporation, or receiver, that the plea of assumed risk of the deceased or injured employé where the ground of the plea is knowledge or means of knowledge of the defect and danger which caused the injury or death, shall not be available in the following cases:

First. Where such employé had an opportunity before being injured or killed to inform the employer, or a superior entrusted by the employer with the authority to remedy or cause to be remedied the defect, and does notify, or cause to be notified, the employer, or superior thereof, within a reasonable time; provided, it shall not be necessary to give such information where the employer, or such superior thereof, already knows of the defect.

Second. Where a person of ordinary care would have continued in the service with the knowledge of the defect and danger, and in such case it shall not be necessary that the servant or employé give notice of the defect as provided in subdivision one of this article. [Acts 1905, p. 386, sec. 1.]

See *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148; *Kansas City, M. & O. Ry. Co. of Texas v. Hall* (Civ. App.) 152 S. W. 445.

1. Constitutionality.
2. What law governs.
3. Construction and application of statute.
4. — Assumed risk merged in contributory negligence.
5. — Risks assumed in general.
6. — Knowledge or means of knowledge of servant.
7. — Notice to or knowledge of employer.
8. — Prudence in continuing work.
9. No assumption of risk where safety appliance act is violated.

10. No assumption of risk where carrier violates statutes for protection of employes.
11. Nature and extent of risks assumed in general.
12. Reliance on care of master—In general.
13. — Incompetency or negligence of fellow servants.
14. — Representations or assurances by master.
15. Dangers incident to nature of work.
16. Defective or dangerous tools, machinery, appliances or places—In general.
17. — Cars and locomotives.
18. — Tracks and roadbeds.
19. — Obstructions or erections on, over or near tracks.
20. Dangerous operations and methods of work—In general.
21. — Operation of trains.
22. — Coupling cars.
23. Insufficient force for work.
24. Incompetency or negligence of fellow servants—In general.
25. — Superior servants.
26. — Nature of common service.
27. — Methods of work.
28. — Limitations on fellow servant doctrine.
29. Knowledge by servant of defect or danger—Necessity and effect in general.
30. — Extent of knowledge.
31. — Comparative knowledge of master and servant.
32. — Constructive notice.
33. — Continuing work with knowledge of danger.
34. — Defective or dangerous appliances or places in general.
35. — Cars and locomotives.
36. — Tracks and roadbeds.
37. — Obstructions or erections on, over, or near tracks.
38. — Dangerous operations and methods of work.
39. — Insufficient force for work.
40. — Incompetency or negligence of fellow servants.
41. Inexperienced or youthful employe.
42. Obvious or latent dangers.
43. Notice to or knowledge of master.
44. Promise to remedy defect or remove danger.
45. Compliance with commands.
46. Risk outside scope of employment—Voluntary act of servant.
47. — Compliance with commands or threats.
48. Concurrent negligence of master—In general.
49. — Knowledge by servant of defect or danger.
50. — Master and fellow servant.
51. Pleading.
52. Presumptions, burden of proof and admissibility of evidence.
53. Sufficiency of evidence—Knowledge of servant.
54. — Assumption of risk shown.
55. — Assumption of risk not shown.
56. Questions for jury and instructions.

1. **Constitutionality.**—The state may make appropriate regulations for the protection of the lives of passengers or the safety of railroad employes, and may declare under what circumstances the fellow-servant or assumed risk doctrine shall apply in actions between the company and its employes. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

This article does not deny the equal protection of the law; it applying to all of a class. *Ft. Worth & D. C. Ry. Co. v. Drew* (Civ. App.) 140 S. W. 810.

This article is constitutional. *Marshall & E. T. Ry. Co. v. Blackburn* (Civ. App.) 155 S. W. 625.

2. **What law governs.**—An employe of an intrastate railroad company, engaged in preparing ice for use in passenger cars carrying interstate passengers, was engaged in interstate commerce; and hence the company's liability to him for personal injuries received in the work is governed by Act Cong. April 22, 1908, c. 149, § 4, 35 Stat. 66 under which assumption of risk is available, unless the injury was caused by the employer's violation of a statute enacted for the safety of employes, and not by this article. *Freeman v. Powell* (Civ. App.) 144 S. W. 1033.

3. **Construction and application of statute.**—This statute does not relate merely to defective machinery, but relates also to a case where the injury was caused by one slipping in a hole while coupling cars and falling under the train, the alleged negligence consisting in permitting the hole to be and remain near the railroad track. *Gulf, C. & S. F. Ry. Co. v. Dickens*, 54 C. A. 637, 118 S. W. 618.

4. — **Assumed risk merged in contributory negligence.**—This act does not encroach on the law of contributory negligence, but practically abolishes the defense of assumed risk by making the question one of contributory negligence in every case. *Texas & N. O. Ry. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 956.

This article covers the entire field of those defects and dangers to which persons engaged in operating a railroad are exposed, and applies the same rule as obtains in applying the law as to contributory negligence, and whether a servant assumed a risk must be judged by the standard of ordinary care, and the act applies in an action for the death of an employe on a logging train caused by the derailment of the train operated with the engine towards its center. *Rice & Lyon v. Lewis* (Civ. App.) 125 S. W. 961.

The distinction between assumption of risk and contributory negligence in the case of injury to an employe of the operator of a railroad, where the ground of the defense is knowledge or means of knowledge of the defect and danger which caused the injury, being practically abolished, and the defense of assumption of risk merged in that of contributory negligence by this article, a requested instruction that if the coupling which caused his injury was being done in the usual and customary manner, and he knew the usual manner, the risk was an assumed one, preventing recovery, was properly refused; contributory negligence in such a case under Art. 6649, not being a bar to recovery, but only matter for reduction of damages. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

This article merges assumed risk arising from knowledge of the defect and danger into a question of contributory negligence, and hence in view of Art. 6649 assumption of risk arising from knowledge does not bar a recovery, but is available only in mitigation of damages. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678.

5. — **Risks assumed in general.**—An instruction held to sufficiently present the law of assumed risk as modified by this article. *International & G. N. R. Co. v. Clark* (Civ. App.) 125 S. W. 959.

Whether an employé on a logging train, killed by the derailment of the train, operated with the engine near its center, assumed the risk under this article, held, under the evidence, for the jury. *Rice & Lyon v. Lewis* (Civ. App.) 125 S. W. 961.

Under this article, a brakeman who knew that clinkers and rocks were scattered over a railroad yard and along the tracks, and that such condition rendered it dangerous to make couplings in the ordinary manner, did not assume the risk of injury by stumbling over a clinker while walking by a moving car, where the yardmaster, whose duty it was to keep the track clean, knew that rocks and clinkers were scattered over the yard and along the track, and that such condition rendered it dangerous for employés, and where it could reasonably be inferred that a person of ordinary care would have continued in the service, notwithstanding knowledge of the danger. *Freeman v. Kennerly* (Civ. App.) 151 S. W. 580.

**6. — Knowledge or means of knowledge of servant.**—Under this article and Art. 6649, a railroad company is liable for injuries to a brakeman caused by defects in the stirrup to a car, where the defective condition was the result of negligence, and the brakeman knew nothing thereof and was not guilty of contributory negligence in failing to know, and he was in the discharge of a duty to his master and exercised the care of a reasonably prudent employé similarly situated. *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148.

Under this article, continuation in the service with both knowledge of the defect and danger is essential to charge a servant with the risk. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678.

**7. — Notice to or knowledge of employer.**—This statute where it speaks of the employer's or supervisor's knowledge means actual knowledge. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

Under this article an instruction that the verdict should be for plaintiff if he gave the notice mentioned in the statute was erroneous, where there was no evidence that he had given any notice. *Chicago, R. I. & G. Ry. Co. v. Forrester* (Civ. App.) 137 S. W. 162.

Under this article, an instruction that if the engine of which plaintiff was engineer was defective, and "at the first opportunity" plaintiff notified the railroad company of the defect, there was no assumption of risk, is erroneous, as it leaves the jury to conclude that a notice given by the engineer at the end of his run and after the injury could be considered. *Id.*

The risk from such proximity of a railroad's coal bin to the track as not to leave space between it and the side of the tender of an engine for a brakeman, known to the company, as shown by one of its rules, is not an ordinary risk, which would be assumed by the brakeman, but one arising from the negligence of the company, within the provision of this article that assumption of risk shall be no defense where the employer knew of the defect. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Civ. App.) 146 S. W. 667.

In an employé's action for injuries caused by a defect in an anvil, where the only notice of the defect testified to was given to a foreman, who was not shown to have any authority to remedy it, the submission of the question whether notice had been given to defendant was error, since under this article it must be shown that the person to whom notice was given was a vice principal with authority to remedy the defect. *Kansas City, M. & O. Ry. Co. of Texas v. Meakin* (Civ. App.) 146 S. W. 1057.

Under the express provision of this article, the plea of assumed risk is not available on the ground of the servant's knowledge, or means of knowledge, of the defect or danger, where the master knew of such defect. *Marshall & E. T. Ry. Co. v. Blackburn* (Civ. App.) 155 S. W. 625.

**8. — Prudence in continuing work.**—A charge which fails to state that an employé does not assume the risk of a defect or danger known to him, "Where a person of ordinary care would have continued in the service with knowledge of the defect or danger" is erroneous. *Currie v. M., K. & T. Ry.*, 101 T. 478, 108 S. W. 1170.

The rule is changed so that an employé of a railway company does not now as a matter of law in every case assume the risk of a defect and danger which he knows of, but whether he does or not depends on whether or not his proceeding with the work is reconcilable with ordinary care. *Texas Mex. Ry. Co. v. Trijerina* (Civ. App.) 111 S. W. 240.

The effect of this law is to deny to the railroad company the defense of assumed risk in case the "defect or danger" which caused the injury was such that a person of ordinary prudence under like circumstances "would have continued in the service." *Houston & T. C. Ry. Co. v. Alexander*, 102 T. 497, 119 S. W. 1138.

An instruction in an action for injuries to a section hand while operating a defective hand car under the orders of the foreman that if plaintiff knew of the defective condition of the car, and had an opportunity to notify a superior officer, whose duty it was to remedy the defect, and the officer did not know of the defect from any other source, plaintiff assumed the risk and could not recover, was properly refused because it ignored the provision of this article that it shall not be necessary to give notice where a person of ordinary prudence would continue in the service. *Missouri, K. & T. Ry. Co. of Texas v. Swearingen* (Civ. App.) 127 S. W. 1192.

An instruction that, if plaintiff knowingly used a defective car, he assumed the risks, and could not recover, unless a person of ordinary prudence would have continued in the service with knowledge of the defect and danger, substantially conformed to this article, though the instruction omitted the word "danger" in connection with knowledge of the defective condition of the car. *Id.*

"Assumption of risk" is the risk which is ordinarily incident to the service in which a servant is engaged, not arising out of the negligence of the master, unless the danger is obvious or known to the servant or would be known to him by the exercise of ordinary care, and under this article, a servant engaged in railway service does not assume the risk of a defect and danger arising out of the negligence of the railroad though known to him, where a person of ordinary care would continue in the service with knowledge thereof. *International & G. N. R. Co. v. Schubert* (Civ. App.) 130 S. W. 708.

Under this article, though plaintiff's alleged employment was disputed, the court properly modified a requested charge on assumed risk by stating that if the jury believed that a person of ordinary care, under all circumstances and situated as plaintiff was, would have continued to operate plaintiff's pump with knowledge of the danger he thereby incurred, plaintiff should recover; the charge as modified being the only phase of assumed risk that could arise in the case. *Ft. Worth & D. C. Ry. Co. v. Lynch* (Civ. App.) 136 S. W. 580.

Under the direct provisions of this article, an employé of a railroad company does not assume the risk of a known danger, where a person of ordinary care would have continued in the service with knowledge of the defect and danger, and hence, where an employé was killed as the result of an apparent risk, and the evidence was conflicting whether an ordinarily prudent man would have continued at work, knowing the risk, that qualification was properly submitted in the charge upon assumption of risk. *Gulf, C. & S. F. Ry. Co. v. Kennedy* (Civ. App.) 139 S. W. 1009.

Under this article, recovery by a servant who assumed a risk of the mode of performing a service is expressly made to depend on whether an ordinarily prudent servant would have so performed the service, and a special charge failing to so state the law is properly refused. *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148.

A requested instruction in an action for the crushing of a brakeman between the side of the tender of the engine, where he was riding, and the side of the railroad company's coal bin, to find for defendant if the jury believed the coal chutes, coal bins and tracks were defective, and that such defects were so open and obvious that plaintiff knew thereof, is bad, as ignoring the provision of this article that assumption of risk shall not be available where a person of ordinary care would have continued in the service. *Chicago, R. I. & G. Ry. Co. v. De Bord* (Civ. App.) 146 S. W. 667.

Under this article a servant assumes only the ordinary risk incident to his employment, and is not required to quit his employment if under like conditions an ordinarily prudent person would continue in the work. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

Under this article a railroad company negligently furnishing a defective appliance cannot defeat an action for injury to an employé caused thereby, on the ground of assumption of risk, unless a man of ordinary prudence would not have used the appliance. *Pope v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 155 S. W. 1175.

9. No assumption of risk where safety appliance act is violated.—See Art. 6646 and notes.

10. No assumption of risk where carrier violates statutes for protection of employés.—See Art. 6650 and notes.

11. Nature and extent of risks assumed in general.—An instruction relative to assumption of risk held erroneous. *Galveston, H. & S. A. Ry. Co. v. Perry*, 36 C. A. 414, 82 S. W. 343.

A servant who is injured by one act of negligence is not precluded from recovering therefor by reason of his assumption of risk of another act of negligence which is not a proximate cause of his injury. *Galveston, H. & S. A. Ry. Co. v. Manns*, 37 C. A. 356, 84 S. W. 254.

Injured servant held to have assumed the risk under certain contingencies. *St. Louis Southwestern Ry. Co. v. Demsey*, 40 C. A. 398, 89 S. W. 786.

The risk assumed by an employé as incident to his employment held to preclude negligence of the master. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200.

A railway employé unloading a car on a side track held not to assume the risk of a negligent, unnecessary, and unusual jolt caused by a train being backed against the car. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 101 S. W. 453.

A rear-end collision of trains held to have occurred through the negligence of employés on the preceding train. *Galveston, H. & S. A. Ry. Co. v. Quinn* (Civ. App.) 104 S. W. 397.

In an action by an engineer for injuries caused by collision with a preceding train, an issue of assumed risk is not raised by evidence that he violated rules of the company. *Id.*

The words "assumed risk," as used in rule of law exempting master in such a case from liability for injury to servant, construed. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

The nature of the defenses of assumed risk and contributory negligence defined. *Southern Pac. Co. v. Allen*, 48 C. A. 66, 106 S. W. 441.

An employé is not bound to anticipate a negligent act of another. *Galveston, H. & S. A. Ry. Co. v. Mitchell*, 48 C. A. 381, 107 S. W. 374.

Rule as to risks of injury assumed by an employé stated. *Texas & N. O. R. Co. v. Davidson*, 49 C. A. 85, 107 S. W. 949.

Plaintiff held not to have assumed the risk of injury from the cause by which he was injured. *Texas & N. O. R. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 953.

Under the evidence in an action for injuries received by a servant, the question of assumption of risk held for the jury. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

A servant held not to assume the risk from the master's negligence in failing to discharge the duty it owes him. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 434.

In an action for injuries to a servant while attempting to lift and move an engine spring, plaintiff held not to have assumed the risk as a matter of law. *St. Louis & S. F. R. Co. v. Wilkinson* (Civ. App.) 136 S. W. 92.

The rule as to assuming the risk of dangers ordinarily incident to an employé's work refers to the work done, in view of the conditions surrounding it. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

A servant assumes the risk usual and incident to work of the employment. *Missouri, K. & T. Ry. Co. of Texas v. Reno* (Civ. App.) 146 S. W. 207.

As assumption of risk is founded on the consent of the servant to take the chance of injury from the dangers incident to the employment, the violation of a rule of the master is an act of misconduct which constitutes contributory negligence, and the

doctrine of assumption of risk does not apply. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

12. **Reliance on care of master—In general.**—A servant does not assume the risk of negligence on the part of the master. *Railway Co. v. Hamilton* (Civ. App.) 30 S. W. 679.

An instruction that an engineer may presume that the company will furnish a reasonably safe track, and does not assume risks brought about by its negligence, held proper. *Texas & P. Ry. Co. v. McClane*, 24 C. A. 321, 62 S. W. 565.

A servant has the right to assume, in the absence of knowledge to the contrary, that the tools furnished him by his master for use in doing specific work are reasonably safe and suitable therefor. *Smith v. Gulf, W. T. & P. Ry. Co.* (Civ. App.) 65 S. W. 83.

A freight brakeman, ordered to brake on a passenger train having cars with mismatched couplers, held not to have assumed the risk of such defective appliances. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

A railroad company must exercise ordinary care to see that an engine is reasonably safe. *Texas & Ft. S. R. Co. v. Hartnett*, 33 C. A. 103, 75 S. W. 809.

There is no presumption of law that the steps to a locomotive cab were in a proper condition where the locomotive was delivered to an engineer for his run. *Id.*

An employé, working on the track, may assume that the railroad has exercised ordinary care to make it a reasonably safe place for him to work. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

A railroad employé does not assume risks from the dangerous condition of tracks resulting from the company's negligence. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

A servant may rely on the assumption that the master will do his duty in furnishing appliances, and not merely that the master will endeavor to do his duty. *Southern Pac. Co. v. Godfrey*, 48 C. A. 616, 107 S. W. 1135.

It is not the duty of a railroad employé to inspect a car step or stirrup before using it, and he may rely on the railroad company having exercised care to have the step in a safe condition for use. *El Paso & S. W. R. Co. v. O'Keefe*, 50 C. A. 579, 110 S. W. 1002.

A section man, ordered onto a strange section to assist in work there, was entitled to assume that the railroad's right of way in the yards contained no hidden obstructions which might interfere with the safe performance of the work. *Texas & P. Ry. Co. v. Tuck* (Civ. App.) 116 S. W. 620.

An inexperienced fireman could assume that a locomotive would not move automatically while he was at work under it. *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852.

In servant's action for injuries sustained while removing the nipple from the bottom of an oil tank car, by the oil rushing into his eyes, by reason of the valve inside the tank not having been closed, plaintiff held not to have assumed the risk of injury from such cause. *Galveston, H. & S. A. Ry. Co. v. Sanchez*, 57 C. A. 87, 122 S. W. 44.

A servant, when entering the employment, held not to assume risks arising from a failure of a master to provide reasonably safe appliances and a reasonably safe place. *Wirtz v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 132 S. W. 510.

A servant may assume that the master has furnished reasonably safe appliances for him to use, and he need not inspect them before using them. *St. Louis, S. F. & T. R. Co. v. Taylor* (Civ. App.) 134 S. W. 819.

A servant, while in the performance of his duties under the terms of his contract, has a right to assume that the master has discharged his duty to provide a safe place for work, except when he knows, or in the exercise of ordinary care should know, that it has not been done. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

13. — **Incompetency or negligence of fellow servants.**—An employé has a right to assume that his employer has employed competent servants. *International & G. N. R. Co. v. Cook*, 16 C. A. 386, 41 S. W. 665.

A switchman on the footboard of the engine has a right to assume that the vice principal in the engine will use due care. *Ft. Worth & D. C. Ry. Co. v. Wrenn*, 20 C. A. 628, 50 S. W. 210.

A servant injured through the incompetency of a fellow servant, held not precluded from recovering by the fact that he could have known of such incompetency by ordinary care. *Lawrence v. Texas Cent. Ry. Co.*, 25 C. A. 293, 61 S. W. 342.

14. — **Representations or assurances by master.**—A brakeman held to have assumed the risk in going between cars against his superior's orders, or without them, or assurance of protection, but not so if by orders and assurance that he would be protected against injury from the movement of the train. *Louisiana Western Extension Ry. Co. v. Carstens*, 19 C. A. 190, 47 S. W. 36.

A railroad employé relying on the company's representation as to the condition of the track held not to have assumed the risk of injury from defects in the track. *Missouri, K. & T. Ry. Co. of Texas v. Poole* (Civ. App.) 123 S. W. 1176.

15. **Dangers incident to nature of work.**—A servant assumes all the risks ordinarily incident to the business, and where he has equal facilities with the master for ascertaining the danger incident to labor in which he is engaged he takes the risk upon himself. *Railway Co. v. Lempe*, 59 T. 19; *Railway Co. v. French*, 86 T. 96, 23 S. W. 642; *Jones v. Railway Co.*, 11 C. A. 39, 31 S. W. 706; *Missouri, K. & T. Ry. Co. v. Spellman* (Civ. App.) 34 S. W. 298.

An employé on a railroad assumes the ordinary risks, but does not assume the increased risk resulting from a defective track. *N. Y., T. & M. Ry. Co. v. Green* (Civ. App.) 36 S. W. 812.

A railway employé does not assume more than the ordinary risks pertaining to the service. *Texas & P. Ry. Co. v. Eberhart*, 91 T. 321, 43 S. W. 510.

There was no error in charging that a servant assumes all risk "naturally" incident to his employment. *Missouri, K. & T. Ry. Co. of Texas v. St. Clair*, 21 C. A. 345, 51 S. W. 666.

A section hand injured while standing near the track by a piece of coal, which flew off of a passing train did not assume the risk as an incident of his employment. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.) 63 S. W. 164.

A risk, ordinarily incident to the employment of a railroad employé is a risk of injury that does not arise or grow out of an act of negligence on the part of the railroad or its servants. *Texas & N. O. R. Co. v. Kelly*, 98 T. 123, 80 S. W. 79.

Servant does not assume the risks of his master's negligence, but assumes ordinary risks incident to his work, and risks of obvious dangers. *St. Louis Southwestern Ry. Co. v. Demsey*, 40 C. A. 398, 89 S. W. 786.

In an action for injuries to a railroad employé held error to refuse an instruction on the assumption of risk. *St. Louis Southwestern Ry. Co. of Texas v. Brisco*, 42 C. A. 321, 100 S. W. 989.

An employer is not liable for injuries from dangers incident to the employment. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

The risks assumed by a servant stated. *Myers v. Texas & P. Ry. Co.* (Civ. App.) 134 S. W. 814.

16. **Defective or dangerous tools, machinery, appliances or places**—In general.—A railroad switchman does not absolutely assume the risk of open and visible defects in cars, tracks, and premises. *International & G. N. Ry. Co. v. Reeves*, 35 C. A. 162, 79 S. W. 1099.

The liability of a chisel bar to slip and cause injury to a servant using the same for lining rails on a railroad bridge held an obvious danger, which such servant assumed. *Gulf, W. T. & P. Ry. Co. v. Smith*, 37 C. A. 183, 83 S. W. 719.

Servant held not to assume the risk of an unknown danger. *Drake v. San Antonio & A. P. Ry. Co.*, 99 T. 240, 89 S. W. 407.

In furnishing a tool of any kind a master is bound to use ordinary care for the safety of the servant who uses it. *Id.*

A switchman, though assuming the risk of injury resulting from an open frog while going between cars to uncouple them, does not assume the risk of injuries occasioned by the negligence of the engineer in failing to obey signals for the movement of the cars. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200.

The general rule of assumption of risk held to apply to a locomotive engineer. *Texas & N. O. R. Co. v. Middleton*, 46 C. A. 497, 103 S. W. 203.

Decedent, a railroad switchman, held not to have assumed the risk of injury by being struck by cars negligently operated in the yards at night. *Galveston, H. & S. A. Ry. Co. v. Berry*, 47 C. A. 327, 105 S. W. 1019.

In an action for injuries to a servant, evidence held to show plaintiff to have assumed the risk of injury as a matter of law. *St. Louis & S. F. R. Co. v. Mathis*, 101 T. 342, 107 S. W. 530.

An employé whose duties required him to pass through defendant's yards held not to have assumed the risk of being struck by cars. *Missouri, K. & T. Ry. Co. of Texas v. Ballet*, 48 C. A. 641, 107 S. W. 906.

A servant does not assume the risk arising from the master's failure to have the machinery, tools, and appliances reasonably safe, unless the servant knows of the master's failure. *Turner v. Missouri, K. & T. Ry. Co. of Texas*, 45 C. A. 650, 119 S. W. 719.

A servant held not to have assumed the risk of his injuries. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527.

A railway employé does not assume the risk of the negligence of the railway company in the operation of a train. *Trinity & B. V. Ry. Co. v. Elgin*, 56 C. A. 573, 121 S. W. 577.

Facts held to show that a switchman injured by a collision did not assume the risk. *International & G. N. R. Co. v. Owens* (Civ. App.) 124 S. W. 210.

In an action for the death of a switchman by being thrown from a cut of cars and onto the track, decedent held not to have assumed the risk. *Houston, E. & W. T. Ry. Co. v. Boone* (Civ. App.) 131 S. W. 616.

17. — **Cars and locomotives**.—Brakeman on a freight train does not assume risks incident to negligent inspection of cars. *Missouri, K. & T. Ry. Co. of Texas v. Chambers*, 17 C. A. 487, 43 S. W. 1090.

The danger to a railroad section man in throwing ties from the door of a box car held an assumed risk. *St. Louis S. W. Ry. Co. of Texas v. Austin* (Civ. App.) 72 S. W. 212.

In an action for injuries to an employé of a railroad, owing to a grain door falling on him from the top of a car, held, that there was no question of assumed risk. *Missouri, K. & T. Ry. Co. v. Hutchens*, 35 C. A. 343, 80 S. W. 415.

Plaintiff held not chargeable with assumption of risk, nor defendant with negligence in the use of a certain kind of fastening on a handhold on a box car. *Galveston, H. & S. A. Ry. Co. v. Perry*, 36 C. A. 414, 82 S. W. 343.

A railroad employé does not assume the risk arising from a defective coupling apparatus and the failure of a brakeman to use ordinary care to uncouple cars. *Missouri, K. & T. Ry. Co. of Texas v. Barnes*, 42 C. A. 626, 95 S. W. 714.

A brakeman held as a matter of law not to have assumed the risk of injury from a defective drawhead of a car which he was endeavoring to couple. *Texas & N. O. Ry. Co. v. Conway*, 44 C. A. 68, 98 S. W. 1070.

A fireman, who was run over and killed when the engine and tender separated because a king pin used in coupling the same worked out, and he was thrown to the track in front of the tender, held not to have assumed the risk. *Missouri, K. & T. Ry. Co. of Texas v. Snow*, 53 C. A. 184, 115 S. W. 631.

A section hand held not to assume the risk of injury from a defective hand car. *St. Louis Southwestern Ry. Co. of Texas v. Browning*, 54 C. A. 521, 118 S. W. 245.

An employé whose duty it was to fill engine tenders with fuel oil, and who, in descending from a tender in the usual way after filling it, stepped on the top of a slanting fuel box which was covered with grease, and slipped and fell, held not to have assumed the risk of injury. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

A brakeman thrown from a train by a defective handhold, held not to have assumed the risk, where he did not know of the defect and attendant risk, and, in the ordinary discharge of his own duty, would not necessarily have acquired knowledge thereof. *Missouri, K. & T. Ry. Co. of Texas v. Hawley* (Civ. App.) 123 S. W. 726.

A servant engaged in winding up doors of ballast cars rented by his master for use in his business does not assume a risk of injury caused by the breaking of a chain. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.



18. — **Tracks and roadbeds.**—An employé of a railroad does not assume the increased risk resulting from a defective track. *N. Y., T. & M. Ry. Co. v. Green* (Civ. App.) 36 S. W. 812.

The rule that an engineer assumes the risk from cattle on a track fenced, but not supplied with cattle guards, does not apply where cattle are on the track because of un-repaired fences. *Houston & T. C. R. Co. v. Quill*, 92 T. 335, 48 S. W. 168.

A brakeman does not assume the risk of danger from an open switch which it is the company's duty to keep closed. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

A railroad brakeman held, under the circumstances, not to have assumed the risk of an injury caused by his stumbling over a clinker on the track. *Missouri, K. & T. Ry. Co. of Texas v. Keefe*, 37 C. A. 588, 84 S. W. 679.

A railroad brakeman does not assume a risk of injury arising from the master's failure to use ordinary care to provide a reasonably safe track, unless he knew of such failure in the discharge of his duties. *Id.*

An experienced railroad man, who worked as switchman in a yard for over seven months, assumed the risk arising from the fact that a majority of the switches in the yard were not blocked. *Hynson v. St. Louis Southwestern Ry. Co.*, 39 C. A. 48, 86 S. W. 928.

Facts held to show that a railroad company was not liable for the injury to a brakeman caused by stepping on a rotten tie; the brakeman having assumed the risk. *International & G. N. Ry. Co. v. Reiden*, 48 C. A. 401, 107 S. W. 661.

A railroad engineer killed by striking cattle which escaped onto the right of way where a part of the fence was down, held not to have assumed the risk of injury from that cause as a matter of law. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

19. — **Obstructions or erections on, over or near tracks.**—A brakeman does not absolutely assume the risk of a low bridge, so as to relieve the company of a liability for failure to warn him. *Ft. Worth & R. G. Ry. Co. v. Kime*, 21 C. A. 271, 51 S. W. 553.

An engineer, injured by striking a mail crane, while looking out of the cab window in the performance of his duty, held not to have assumed the risk of such injury. *International & G. N. R. Co. v. Stephenson*, 22 C. A. 220, 54 S. W. 1086.

A railroad employé owes no duty of inspection to discover track obstructions due to the company's negligence, and does not by his service contract necessarily assume the risk of them, though they are permanent and existing when he enters the service. *Gulf, C. & S. F. Ry. Co. v. Darby*, 28 C. A. 413, 67 S. W. 446.

A railroad employé held not to have assumed the risk of injury from obstructions across the track. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

Where plaintiff was injured by an engine striking timber lying on the track, which was left there by plaintiff and others engaged in moving a heavy boiler between two tracks, leaving the timber lying on the rails was not a risk ordinarily incident to the employment, and was not assumed. *Ray v. Pecos & N. T. Ry. Co.*, 40 C. A. 99, 88 S. W. 466.

20. **Dangerous operations and methods of work—In general.**—In an action for injuries to a servant, plaintiff held not to have assumed the risk. *Houston & T. C. R. Co. v. Malloy*, 54 C. A. 490, 118 S. W. 721.

A member of a railroad bridge crew held to assume the ordinary risks incident to removing hand cars from the track in front of approaching trains. *Texas & P. Ry. Co. v. Myers* (Civ. App.) 125 S. W. 49.

In a brakeman's action for personal injuries, held, that, under the circumstances, he was not required to quit the work, or to assume the risk. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

21. — **Operation of trains.**—The fact that the engineer was running his train in violation of the company's rules did not necessarily charge the fireman with having assumed the risk of running into an open switch. *Missouri, K. & T. Ry. Co. of Texas v. Follin*, 29 C. A. 512, 68 S. W. 810.

Brakeman, climbing on caboose to secure light to flag approaching train, held not to have assumed risk of collision. *Texas & N. O. R. Co. v. Scott*, 30 C. A. 496, 71 S. W. 26.

A flagman, killed at a railroad grade crossing, held not to have assumed the risk of the negligent operation of the train by which he was killed. *Missouri, K. & T. Ry. Co. of Texas v. Goss*, 31 C. A. 300, 72 S. W. 94.

Railway conductor held not to have assumed the risk of being injured through the negligence of the railroad company. *St. Louis Southwestern Ry. Co. of Texas v. McDowell* (Civ. App.) 73 S. W. 974.

Bridge watchman held not to assume risk of trains running at unusual speed without warning, and without engineer's keeping reasonable lookout. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

A servant held not to have assumed the risk of his injury. *Texas Cent. R. Co. v. Pelfrey*, 35 C. A. 501, 80 S. W. 1036.

A switchman held not to assume the risk arising from a jolt of the train occasioned by the want of due care on the part of the operators of the train. *Worcester v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 91 S. W. 339.

In action for death of track foreman, deceased held not to have assumed risk of operation of cars on track at a greater speed than six miles per hour. *Houston & T. C. R. Co. v. Turner*, 99 T. 547, 91 S. W. 562; *Id.* (Civ. App.) 92 S. W. 1074.

In an action for injuries to a railroad brakeman, an instruction that plaintiff assumed the risk of the manner in which the cars were stopped, etc., held proper. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

It being a rule in railroad yards to bring trains to a sudden standstill by making a service stop, a brakeman assumes the risk of a train being stopped in that manner; but he is not bound to anticipate that it will be stopped by an emergency stop when no signal is given therefor. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 56 C. A. 246, 120 S. W. 553.

A railway employé does not assume the risk of the negligence of the company in the operation of a train. *Trinity & B. V. Ry. Co. v. Elgin*, 56 C. A. 573, 121 S. W. 577.

The risk of injury to a brakeman by falling between cars while switching is a risk incident to the service, and the master is not liable for an injury so sustained. *International & G. N. R. Co. v. Temple* (Civ. App.) 130 S. W. 850.

22. — **Coupling cars.**—An instruction on assumption of risk, in action for injury to a brakeman while uncoupling cars, held inapplicable to the facts. *International & G. N. R. Co. v. Hoyt*, 30 C. A. 518, 70 S. W. 1012.

A switchman, going between two moving cars to uncouple them, held to have assumed the risk. *Hynson v. St. Louis Southwestern Ry. Co.*, 39 C. A. 48, 86 S. W. 928.

In an action for injuries to a servant while coupling cars, held proper to refuse an instruction that, if the method adopted by plaintiff was not the safest, he assumed all increased risks attendant on the method adopted by him. *Denison & P. Suburban Ry. Co. v. Binkley*, 33 C. A. 633, 87 S. W. 386.

A railway switchman held to have assumed the risk of injury received while walking between moving cars to uncouple them. *St. Louis Southwestern Ry. Co. of Texas v. Hynson*, 101 T. 543, 109 S. W. 929.

23. **Insufficient force for work.**—In an action for injuries to a servant, held, that he had assumed the risk. *Parish v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 76 S. W. 234.

An employé engaged in assisting in the carrying of rails held not to assume the risk of injury due to the failure to employ a sufficient number of men to do the work in safety. *Galveston, H. & S. A. Ry. Co. v. Bonn*, 44 C. A. 631, 99 S. W. 413.

24. **Incompetency or negligence of fellow servants—In general.**—As to risks assumed by fellow servants. *Railway Co. v. Watts*, 63 T. 549; *Railway Co. v. Callbreath*, 66 T. 526, 1 S. W. 622; *Rogers v. Railway Co.*, 76 T. 502, 13 S. W. 540; *Railway Co. v. Brentford*, 79 T. 619, 15 S. W. 561, 23 Am. St. Rep. 377; *Railway Co. v. Kizziah*, 86 T. 81, 23 S. W. 578; *Railway Co. v. Harris*, 2 C. A. 540, 22 S. W. 237; *Railway Co. v. Turner*, 3 C. A. 487, 23 S. W. 146; *Railway Co. v. Lempe*, 59 T. 19; *Railway Co. v. French*, 86 T. 96, 23 S. W. 642; *Jones v. Railway Co.*, 11 C. A. 39, 31 S. W. 706; *Railway Co. v. Spellman* (Civ. App.) 34 S. W. 298; *Railway Co. v. Thompson*, 11 C. A. 658, 33 S. W. 718.

While a brakeman assumes the ordinary risks of his employment, he may recover damages resulting from the negligence of the engineer. *Railway Co. v. Hester*, 64 T. 401; *Railway Co. v. Dillard*, 70 T. 62, 8 S. W. 113; *Railway Co. v. Silliphant*, 70 T. 624, 8 S. W. 673; *Railway Co. v. Frazier* (Civ. App.) 34 S. W. 664.

Assumed risks, resulting from the negligence of a fellow servant do not include hazards which flow from the master's negligence, unless he is apprised of the existence of such hazard and continues to expose himself. *Railroad Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

A guard, employed to ride on an express car, assumes the risk of injury resulting from the negligence of fellow servants in the usual course of operation of the company's business. *Wells Fargo & Co. v. Page*, 29 C. A. 489, 68 S. W. 528.

A servant of a railroad company does not assume the risk of injury caused by the negligence of other servants in the operation and control of trains. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

An employé in railroad shops held not to assume the risk of an injury while assisting a machinist in drilling a hole in a vise. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 99 S. W. 738.

A locomotive engineer held not to assume the risk of injury resulting from the fireman opening the valve in the boiler without being previously directed so to do, and causing steam to escape. *Texas & N. O. R. Co. v. Walton*, 47 C. A. 43, 104 S. W. 415.

A railway brakeman did not assume the risk of injury caused by a fellow brakeman negligently throwing a sack of ice from a passing caboose. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 115 S. W. 57.

25. — **Superior servants.**—Evidence of the negligence of defendant's foreman, resulting in plaintiff's injury, held to support a verdict against the master. *Missouri, K. & T. Ry. Co. of Texas v. Walden*, 27 C. A. 567, 66 S. W. 584.

A servant assisting in removing a shaft from a pulley held not to assume, as a matter of law, the risk of injury resulting from a fellow servant striking the shaft with a scantling pursuant to the order of the foreman. *Texas & P. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 434.

26. — **Nature of common service.**—Negligence of engineer is not a risk assumed by employé loading coal into tender of engine. *Missouri, K. & T. Ry. Co. of Texas v. Felts* (Civ. App.) 50 S. W. 1031.

A stone mason working on the side wall of a railroad culvert, and not with a pile driver crew, engaged on a near-by trestle, held not to have assumed the risk resulting from the negligence of a member of such crew in removing a plank of the scaffolding used by them. *International & G. N. R. Co. v. Muschamp*, 40 C. A. 358, 90 S. W. 706.

In action for death of track foreman, deceased held not to have assumed risk of negligent manner in which members of switching crew did their work. *Houston & T. C. R. Co. v. Turner*, 99 T. 547, 91 S. W. 562; *Id.* (Civ. App.) 92 S. W. 1074.

27. — **Methods of work.**—A brakeman, killed while assisting in running cars onto a coal chute, had a right to rely on the observance of the signals and stopping of the train by the engineer, and in no event did he assume any risk due to the negligence of his co-employés. *Missouri, K. & T. Ry. Co. of Texas v. O'Connor* (Civ. App.) 78 S. W. 374.

A railroad brakeman did not assume the risk of a violation by other employés of a rule requiring cars standing on a grade siding to be coupled together. *St. Louis, Southwestern Ry. Co. of Texas v. Pope*, 98 T. 535, 86 S. W. 5.

A switchman caught and killed between an engine and car, by the car being moved by a switching crew at the opposite end of the switch track, held not to have assumed the risk of his foreman's negligence in failing to warn him or stop such crew, or of their negligence in using the track as they did. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

A fireman on a switch engine in railroad yards does not assume the risk of injury in a collision with a train due to the neglect of the foreman to send a flagman to protect the engine. *Galveston, H. & S. A. Ry. Co. v. Sample* (Civ. App.) 145 S. W. 1057.

28. — **Limitations on fellow servant doctrine.**—See Arts. 6640-6643 and notes.

29. **Knowledge by servant of defect or danger—Necessity and effect in general.**—The doctrine of assumed risk has no application to a case where the servant first discovered the defect at the time of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Milam*, 20 C. A. 688, 50 S. W. 417.

Assumed risk does not exist, unless the servant knows of the negligence and of the danger, or the circumstances are such that he must be taken to have necessarily known of the same in the prosecution of his work. *International & G. N. R. Co. v. Shaughnessy* (Civ. App.) 81 S. W. 1026.

To assume the risk of a danger, it must be known, or be so obvious to the injured party that he must necessarily have known it. *Galveston, H. & S. A. Ry. Co. v. McAdams*, 37 C. A. 575, 84 S. W. 1076.

A locomotive fireman assumes the risks ordinarily incident to his employment and those of which he had knowledge. *Chicago, R. I. & P. Ry. Co. v. Birk*, 44 C. A. 615, 99 S. W. 753.

A servant held to have assumed the risk of his injury. *Currie v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 106 S. W. 1149.

Rule respecting assumption of risk by servants stated. *St. Louis Southwestern Ry. Co. of Texas v. Hynson*, 101 T. 543, 109 S. W. 929.

Facts held not to necessarily show an assumption of risk. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

A section hand held to have assumed the risk of injury to his eyes by cinders from passing engines. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

Risks not assumed by a servant, stated. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527; *International & G. N. R. Co. v. Clark* (Civ. App.) 125 S. W. 959.

While a fireman assumed the ordinary risks of his employment and all extraordinary risks of which he knew or should have known, he did not assume risks of which he had no knowledge due to the company's failure to exercise reasonable care. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

A servant held not to assume the risk of his master's negligence, unless he is chargeable with notice thereof, and can reasonably anticipate its danger. *El Paso & S. W. R. Co. v. Welter* (Civ. App.) 125 S. W. 45.

Assumed risk and contributory negligence distinguished. *Galveston, H. & S. A. Ry. Co. v. Hanson* (Civ. App.) 125 S. W. 63.

Assumed risk does not apply, unless the servant knew, or by the exercise of ordinary care could have known, of the risks to which he was exposed. *Id.*

In an action for injuries to a servant, the issue whether he assumed the risk held not to arise. *Texarkana & Ft. S. Ry. Co. v. Brandon* (Civ. App.) 126 S. W. 703.

A servant does not assume the risk of danger from the negligence of the master, his agent or employés, unless he knows of such negligence, or by ordinary care could have known thereof. *Missouri, K. & T. Ry. Co. of Texas v. Neaves* (Civ. App.) 127 S. W. 1090.

An employer is not liable for injuries from dangers of which the employé knows or by using ordinary circumspection could know. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

A servant of a railroad company, engaged in removing old ties, did not assume the risk of injury resulting from splintering his pick in striking the steel rails, where he had never known of such an occurrence, although he had oftentimes seen rails struck. *Freeman v. Wilson* (Civ. App.) 149 S. W. 413.

Assumption of risk is founded on knowledge by the servant, either actual or constructive, of the hazards to be encountered, and his consent to take the chance of danger. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

30. — **Extent of knowledge.**—Railroad employé held not to have assumed the risk of the "possible" injury from cattle guard. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561, 65 S. W. 68.

An instruction that, if deceased knew the character of the inspection given by defendant to its cars and remained in its employ after acquiring such knowledge, then he assumed the risk, held properly refused. *Galveston, H. & S. A. Ry. Co. v. Davis*, 27 C. A. 279, 65 S. W. 217.

Brakeman would not assume risk incident to the working loose of a nut on a bolt, and the consequent slipping of the stirrup used by him in mounting a car, if he did not know that proper precautions had not been taken to prevent its working loose. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 28 C. A. 609, 68 S. W. 803.

Instruction, in an action by a servant for injuries, that if the plaintiff was "entirely" familiar with all the conditions then he assumed the risk or was guilty of contributory negligence, held improper. *Consumers' Cotton Oil Co. v. Jonte*, 36 C. A. 18, 80 S. W. 847.

Where a brakeman was injured by the failure of other employés to comply with a rule of the company, he did not assume the risk because he knew that other employés occasionally violated the rule. *St. Louis Southwestern Ry. Co. of Texas v. Pope* (Civ. App.) 82 S. W. 360.

In order to charge a servant with assumption of risk of contact with a shovel, he must be shown to have anticipated that the shovel lay in the very place where it was, and with the scoop up, so as to render his stepping on it dangerous. *Galveston, H. & S. A. Ry. Co. v. Manns*, 37 C. A. 356, 84 S. W. 254.

In an action for injuries to a bridge workman by the fall of a bridge, plaintiff held to have assumed the risk. *Ft. Worth & R. G. Ry. Co. v. Robinson*, 37 C. A. 465, 84 S. W. 410.

The mere knowledge by a servant of a danger does not charge him with the assumption of the risk thereof, unless he understood and appreciated such risk. *El Paso & S. W. Ry. Co. v. Vizard*, 39 C. A. 534, 88 S. W. 457.

Where premises about which a servant is employed are known by him to be defective, but the danger is not apparent and he has no knowledge thereof, he does not assume the risk. *Marshall v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 107 S. W. 883.

A servant does not assume the risk incident to incompetence of another employé or defect in an appliance because of the knowledge of the incompetence or defect, unless he knew or should have known of the danger incident thereto. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

Where a servant was injured by the breaking of a defective ladder, an instruction that he did not assume the risk, unless he knew of the defect at the very time he was injured, held proper. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

A servant engaged in throwing rails off a flat car will not be deemed to have knowledge of the danger from a defective drawhead because he has knowledge that it is defective. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678.

31. — **Comparative knowledge of master and servant.**—The rule that a servant cannot recover for injuries received, if he had equal facilities with the master for ascertaining the dangers of the employment, is not applicable to an injury received through an incompetent fellow servant. *Lawrence v. Texas Cent. Ry. Co.*, 25 C. A. 293, 61 S. W. 342.

An instruction that, if the danger or risk was as open to the observation or knowledge of deceased as to defendant, plaintiff could not recover, was proper. *Ramm v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 92 S. W. 426

32. — **Constructive notice.**—A locomotive engineer's knowledge that his employer sometimes sent out brakeman who needed rest held insufficient to charge him with assumption of the risk of a brakeman going to sleep and leaving open a switch which it was his duty to close. *St. Louis S. W. Ry. Co. v. Kelton*, 28 C. A. 137, 66 S. W. 887.

A cleaner and sweeper in a roundhouse held to have no duty of inspection, and therefore not to assume risk of a defect of which he was ignorant. *Gulf, C. & S. F. Ry. Co. v. Davis*, 35 C. A. 285, 80 S. W. 253.

In order to charge a servant with contributory negligence, or with assumption of risk of injury from an obstacle left around the premises, such obstacle must have been habitually left in the place where the servant encountered it. *Galveston, H. & S. A. Ry. Co. v. Manns*, 37 C. A. 356, 84 S. W. 254.

In an action for injuries to a switchman, a finding that he was not guilty of contributory negligence held justified. *Texarkana & Ft. S. Ry. Co. v. Toliver*, 37 C. A. 437, 84 S. W. 375.

A section hand held to have assumed the risk of an injury from using a rail hook, the point of which had become straightened, worn, and too small to retain its hold when inserted in the bolt holes of the rails. *San Antonio & A. P. Ry. Co. v. Drake* (Civ. App.) 85 S. W. 447.

A fireman, because he knew his engine was equipped with an oil burner, held not charged as a matter of law with knowledge of the danger of operating the engine because of difficulty in seeing switch targets. *Missouri, K. & T. Ry. Co. of Texas v. McDuffey*, 50 C. A. 202, 109 S. W. 1104.

A brakeman, assuming the risks ordinarily incident to his employment, is not bound to inspect his place of work. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

In general, a servant assumes the risk of injury from all defects and dangers of which he knows and those which he should, by the exercise of ordinary circumspection, ascertain in the course of his employment. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

33. — **Continuing work with knowledge of danger.**—A servant who remains in the employment without objection assumes the risk of known defects. *Texas M. R. R. v. Taylor* (Civ. App.) 44 S. W. 892.

In order to avoid an assumption of risk, a servant is not obliged to quit his master's employ, on discovering a defect in the machinery he uses, where no danger is apparent therefrom. *Missouri, K. & T. Ry. Co. of Texas v. Crum*, 35 C. A. 609, 81 S. W. 72.

A brakeman who uses a defective coupling device for a year with knowledge of the defect held to assume the risk incident to its use. *Trinity & B. V. Ry. Co. v. Perdue*, 45 C. A. 659, 101 S. W. 485.

Whether or not a risk is assumed depends on whether the servant's continuation with his work is reconcilable with ordinary care. *Texas Mex. Ry. Co. v. Trijerina* (Civ. App.) 111 S. W. 240.

34. — **Defective or dangerous appliances or places in general.**—If a servant knows of a defect, and with such knowledge uses an implement, he assumes the risk. *Railway Co. v. Bradford*, 66 T. 732, 2 S. W. 595, 59 Am. Rep. 639; *Railway Co. v. Somers*, 78 T. 439, 14 S. W. 779; *Railway Co. v. Wood* (Civ. App.) 35 S. W. 879.

Facts held insufficient to establish that plaintiff assumed the risk of injury from a flying splinter from a brass punch, which he was directed by his superior to use. *Gulf, H. & S. A. Ry. Co. v. Whisenhunt*, 36 C. A. 135, 81 S. W. 332.

Plaintiff, having knowledge of defendant's custom in furnishing a ratchet jack for bridge work, held to have assumed the risk of the use of such jack for that purpose. *Ft. Worth & R. G. Ry. Co. v. Robinson*, 37 C. A. 465, 84 S. W. 410.

An employé held to have assumed the risk of rocks falling from a derrick by reason of the points of the "dogs" being dull. *Day v. Houston & T. C. Ry. Co.*, 46 C. A. 156, 101 S. W. 1044.

A servant held to have assumed the risk arising from the use of a defective scraper. *International & G. N. R. Co. v. Hall*, 46 C. A. 493, 102 S. W. 740.

A servant held not to have assumed the risk of dangers from defective appliances, though a sense of danger occurred to his mind in connection with the work. *Texas Mexican Ry. Co. v. Trijerina*, 51 C. A. 100, 111 S. W. 239.

In an injury action by a servant against the master, where it was not shown that the servant knew or should have known that the appliance which caused the injury was defective, there was no evidence to sustain the defense of assumed risk. *Texas & N. O. R. Co. v. Jackson*, 51 C. A. 646, 113 S. W. 628.

A servant does not assume the risk of injury from a defective appliance unless he has knowledge of the defect and the danger incident thereto. *Missouri, K. & T. Ry. Co. of Texas v. Adams*, 42 C. A. 274, 114 S. W. 453.

A fireman injured by a defective water crane held not to have assumed the risk of the effect of water pressure upon the action of the lever. *Missouri, K. & T. Ry. Co. of Texas v. Bush*, 56 C. A. 69, 120 S. W. 224.

A servant injured while using a defective ladder, of which defect he had no knowledge, held not to have assumed the risk. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

A train porter, injured by falling from a trestle at night as he alighted on the wrong side of the train without warning, to obey a command of the conductor, in the absence of knowledge of the dangerous condition of the place, did not assume the risk, as a matter of law. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley* (Civ. App.) 153 S. W. 937.

35. — **Cars and locomotives.**—A brakeman coupling cars held to have assumed the risk by which he was injured. *Ely v. San Antonio & A. P. Ry. Co.*, 15 C. A. 511, 40 S. W. 174.

Plaintiff held not to have assumed the risk incident to the use of a defective brake on a hand car operated by himself and fellow servant. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 40 S. W. 191.

Where a railroad employé was injured by reason of a defect in a car, an instruction was properly refused which excluded recovery if he knew the car had been inspected in the same manner as the cars on other roads, regardless of the sufficiency of the inspection. *Galveston, H. & S. A. Ry. Co. v. Nass* (Civ. App.) 57 S. W. 910.

Where plaintiff slipped from a greasy engine step while cleaning a headlight, it was error to instruct that he assumed all risk of injury incident to his employment. *Bookrum v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 57 S. W. 919.

Where a freight brakeman knew that the engine operating the train on which he worked was not supplied with air brakes, he assumed the risk of any injury caused by the absence of such brakes. *Texas, S. V. & N. W. Ry. Co. v. Peden*, 32 C. A. 315, 74 S. W. 932.

Car inspector, who knew that brake shoes were not set, held to assume the risk arising from that fact. *St. Louis Southwestern Ry. Co. of Texas v. Rea*, 99 T. 58, 87 S. W. 324.

Injured servant held not to have assumed the risk under certain contingencies. *St. Louis Southwestern Ry. Co. v. Demsey*, 40 C. A. 398, 89 S. W. 786.

A switchman, injured by a defect in a car he was ordered to assist in moving at night, of which he had neither knowledge nor notice, held not to have assumed the risk. *Galveston, H. & S. A. Ry. Co. v. Hanson* (Civ. App.) 125 S. W. 63.

36. — **Tracks and roadbeds.**—A brakeman held not to assume the danger of being tripped by a sliver detached from a rail. *San Antonio & A. P. Ry. Co. v. Williams* (Civ. App.) 52 S. W. 89.

A railroad company, operating on a fenced track, held liable for the death of a servant resulting from collision with stock entering through a defective fence, in the absence of any knowledge by the servant of such defect. *Houston & T. C. Ry. Co. v. Quill* (Civ. App.) 55 S. W. 1126.

Where an engineer on the defendant road was killed in a collision with stock, and it was shown that he knew the defendant's fences were not kept in repair, he assumed the risk occasioned by stock getting on the track. *Quill v. Houston & T. C. Ry. Co.*, 93 T. 616, 55 S. W. 1126, 57 S. W. 948.

In an action by a switchman for injuries sustained by stumbling over a ground switch, held error to charge that plaintiff did not assume any risk unless he must necessarily have known of defendant's method of conducting his business by the exercise of ordinary care. *Galveston, H. & S. A. Ry. Co. v. English* (Civ. App.) 59 S. W. 626.

Railroad employé killed while loading cotton on car held to have assumed risk. *St. Louis S. W. Ry. Co. of Texas v. Barrett* (Civ. App.) 72 S. W. 884.

A servant employed in a railroad roundhouse held as a matter of law to have assumed the risk arising from the existence of pits in the stalls. *Galveston, H. & S. A. Ry. Co. v. Walker* (Civ. App.) 76 S. W. 228.

In an action against a railroad for injuries to a brakeman while coupling cars, evidence held sufficient to show that plaintiff did not assume the risk. *St. Louis & S. F. R. Co. v. Ames* (Civ. App.) 94 S. W. 1112.

A switchman working in railroad yards who knows of defects in the tracks or who, in the exercise of ordinary care, in doing his work, must have known thereof, and who knows of the attendant dangers, assumes the risk. *Wirtz v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 132 S. W. 510.

37. — **Obstructions or erections on, over or near tracks.**—Yard master held not to assume risk of switch engine, on which he is riding, striking rock on track. *Galveston, H. R. Co. v. Bohan* (Civ. App.) 47 S. W. 1050.

Railroad employé, operating defective hand car, held not to assume risk of defects on track. *Texas & N. O. R. Co. v. Kelly*, 98 T. 123, 80 S. W. 79.

A railroad engineer injured by striking a cattle guard negligently built too near the track held not to have assumed the risk. *Atchison, T. & S. F. Ry. Co. v. Tack* (Civ. App.) 130 S. W. 596.

38. — **Dangerous operations and methods of work.**—An instruction that, if a section hand was injured by his foreman's negligence, he could recover from the railroad, was error, where such hand knew of the danger in time to have escaped. *Ft. Worth & D. C. Ry. Co. v. Gilstrap*, 25 C. A. 304, 61 S. W. 351.

Facts held to show that a section foreman, injured while unloading ties from a moving train, had assumed the risk. *Webb v. Gulf, C. & S. F. Ry. Co.*, 27 C. A. 75, 65 S. W. 684.

A requested instruction, that, if defendant switched in the customary manner a car which struck plaintiff, plaintiff assumed the risk, held properly refused. *Galveston, H. & S. A. Ry. Co. v. Pendleton*, 30 C. A. 431, 70 S. W. 996.

A freight brakeman, injured by falling while attempting to step from one car of a string on a side track to another, held to have assumed the risk of the cars being uncoupled. *Texas, S. V. & N. W. Ry. Co. v. Peden*, 32 C. A. 315, 74 S. W. 932.

Where plaintiff was injured while assisting in removing from the track, on the approach of a train, a hand car which had been running by direction of the foreman after

the train was due, he cannot be said to have assumed the risk. *San Antonio & A. P. Ry. Co. v. Stevens*, 37 C. A. 80, 83 S. W. 235.

A railroad employé, while assuming the risks of the usual dangers of his employment and of such dangers and risks as are obvious, does not assume those caused by negligence. *Ft. Worth & D. C. Ry. Co. v. Smith*, 39 C. A. 92, 87 S. W. 371.

Statement of when an employé assumes the risk of danger brought about by negligence of the master. *Gulf, C. & S. F. Ry. Co. v. Huyett*, 99 T. 630, 92 S. W. 454, 5 L. R. A. (N. S.) 669.

An employé injured while assisting to replace on a tram railroad track a derailed tram car held not to assume the risk of injury. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 45 C. A. 128, 99 S. W. 743.

One engaged in the performance of work in a manner well known to him held to assume the risks of danger involved in the performance of the work in that way. *St. Louis Southwestern Ry. Co. of Texas v. Brisco*, 100 T. 354, 99 S. W. 1020.

A brakeman, injured by being thrown from a log train by a sudden acceleration of the speed without notice, held not to have assumed the risk thereof. *Gulf, B. & K. C. Ry. Co. v. Harrison* (Civ. App.) 104 S. W. 399.

A fireman who knows that the engine is running backward over a new and rough track does not assume the risk of injury therefrom unless the danger is known or apparent to him. *Missouri, K. & T. Ry. Co. of Texas v. Poole* (Civ. App.) 123 S. W. 1176.

A switchman on entering a railroad company's employ did not assume to understand the established customs and usages of the company in operating its locomotives in a particular yard. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

39. — **Insufficient force for work.**—A servant, knowing the weight of a wooden beam and the number of men required to handle it, held to assume the risks arising from inadequate assistance. *San Antonio Traction Co. v. De Rodriguez* (Civ. App.) 77 S. W. 420.

An employé of an elevator company, killed by the operation of cars on a switch track within the elevator building, held to have assumed the risk of the operation of the cars in the usual manner. *Sauls v. Chicago, R. I. & T. Ry. Co.*, 36 C. A. 155, 81 S. W. 89.

Plaintiff, ordered by his foreman to assist a third person in moving a railroad tie, held to have assumed the risk from two men attempting to move it. *Texas & P. Ry. Co. v. Miller*, 36 C. A. 240, 81 S. W. 535.

40. — **Incompetency or negligence of fellow servants.**—Fireman of railroad company held not estopped from complaining of his engineer's negligence, because he had learned of this negligent habit. *Missouri, K. & T. Ry. Co. of Texas v. Williams*, 28 C. A. 615, 68 S. W. 805.

In an action for injuries to a brakeman by falling between certain cars negligently left uncoupled on a grade siding, and caused to separate through the negligence of the engineer in suddenly stopping the train, plaintiff held not to have assumed the risk of walking along the tops of the cars so left uncoupled. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

A railroad employé assumes such risks as are ordinarily incident to the service he engages to perform, and such others, including negligence of the company's servants chargeable to it, as he knows of or must necessarily have known of in the ordinary discharge of his duties. *Texas & N. O. R. Co. v. Jackson*, 51 C. A. 646, 113 S. W. 628.

41. **Inexperienced or youthful employé.**—Failure of defendant's foreman to warn an inexperienced servant of the dangers attendant on operating an engine held to render defendant liable for injuries to servant. *Gulf, C. & S. F. Ry. Co. v. Newman*, 27 C. A. 77, 64 S. W. 790.

Instructions in action for injury to railroad employé by jumping from moving car reviewed. *Galveston, H. & S. A. Ry. Co. v. Sanchez* (Civ. App.) 65 S. W. 893.

Instruction that, if the servant knows or ought to know how the business is conducted, he assumes the risk, held properly refused. *Waxahachie Cotton Oil Co. v. McLain*, 27 C. A. 334, 66 S. W. 226.

Servant held not to have assumed a certain risk. *Texas & N. O. R. Co. v. Gardner*, 29 C. A. 90, 69 S. W. 217.

A master held not liable for injuries to a servant in lifting a weight. *Texas & N. O. R. Co. v. Sherman* (Civ. App.) 87 S. W. 887.

In an action for injuries to a servant, question of servant's mental capacity, etc., may be considered on the issues of assumed risk and contributory negligence. *Drake v. San Antonio & A. P. Ry. Co.*, 99 T. 240, 89 S. W. 407.

An infant does not assume the risk of injury unless, in addition to the knowledge of defects in the appliances, he knows the nature and extent of the danger, and has the discretion to properly weigh his liability to injury therefrom. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 45 C. A. 128, 99 S. W. 743.

Evidence concerning the work of a servant in a gravel pit held to show that he did not assume the risk from the falling in of an excavation. *Marshall v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 107 S. W. 883.

Facts considered, and held to show that it was the duty of a foreman who had directed a servant to unload a gravel car by standing on top of the gravel to warn him of the danger incident to the work. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 49 C. A. 573, 109 S. W. 478.

An employé does not assume the risk which his ignorance and inexperience prevent him from knowing. *Texas & N. O. R. Co. v. McCoy*, 54 C. A. 278, 117 S. W. 446.

A servant injured by the caving of an overhanging ledge in a gravel pit held not to have assumed the risk. *St. Louis Southwestern Ry. Co. of Texas v. Marshall* (Civ. App.) 120 S. W. 512.

A minor servant does not assume the risk unless he not only knows the danger, but is aware of its extent, and has sufficient discretion to comprehend the risk. *Texas & N. O. R. Co. v. Plummer*, 57 C. A. 563, 122 S. W. 942.

The rule is not affected by the fact that the contract of employment was made by his parents. *Id.*

**42. Obvious or latent dangers.**—Duty of brakeman to inspect loads on cars does not charge him with knowledge of latent defects in loading. *Galveston, H. & S. A. Ry. Co. v. McCray* (Civ. App.) 43 S. W. 275.

Definition of "obvious defect" in an instruction as to duties of railroad employé held proper. *Missouri, K. & T. Ry. Co. of Texas v. Chambers*, 17 C. A. 487, 43 S. W. 1090.

If an employé has knowledge of a defect in machinery he is operating, or is charged with knowledge of it, because obvious, but is ignorant of the danger, he is not precluded from recovering damages caused by reason of the defect. *Galveston, H. & S. A. Ry. Co. v. Smith*, 24 C. A. 127, 57 S. W. 999.

In an action for damages for death caused by derailment of a locomotive of which deceased was engineer, held not error to refuse to charge that if the jury believed that the engine was top-heavy or unequally balanced, that the boiler was unduly elevated above the rails, that such condition of the engine was the proximate cause of deceased's death, and that the defective condition was open for observation, they should find for defendant. *Id.*

Injuries received by plaintiff held not to have been the result of an assumed risk. *International & G. N. R. Co. v. Newburn* (Civ. App.) 58 S. W. 542.

The condition of a car being hauled by a train to the repair shop held obvious to a brakeman who was injured in going upon the car. *International & G. N. R. Co. v. Story*, 26 C. A. 23, 62 S. W. 130.

Evidence held to show the assumption of risk by a servant of the danger which resulted in his injury. *Houston & T. C. R. Co. v. Scott* (Civ. App.) 62 S. W. 1077.

Where a fireman was injured, while standing on the side of the engine tender, by being crushed against a coal bin standing near the track, an instruction denying recovery for the assumption of risk of an obvious defect was properly omitted, since a trainman assumes only the risks of which he has knowledge. *Gulf, C. & S. F. Ry. Co. v. Gray*, 25 C. A. 99, 63 S. W. 927.

A servant, in doing an act resulting in his injury, held only to have assumed the apparent or known dangers connected therewith, and not dangers resulting from the negligence of his foreman. *Missouri, K. & T. Ry. Co. of Texas v. Walden*, 27 C. A. 567, 66 S. W. 584.

A railroad section foreman held not to have assumed the risk of injury from the derailment of a defective hand car, where the defect was not obvious to common observation, and the accident was not incident to the character of his employment. *Missouri, K. & T. Ry. Co. of Texas v. Blackman*, 32 C. A. 200, 74 S. W. 74.

Section foreman held to have assumed the risk of injury from operating a push car with the assistance of too few men. *Seery v. Gulf, C. & S. F. Ry. Co.*, 34 C. A. 89, 77 S. W. 950.

An employé held to assume the risk from attempting with only one other man to load a heavy piece of iron on a car. *International & G. N. R. Co. v. Figures*, 40 C. A. 255, 89 S. W. 780.

In an action for injuries to a fireman on an engine, alleged to have been caused by the negligent omission of a wheel and nut from the brake staff, held that, the condition of the brake staff being obvious, plaintiff assumed the risk. *Missouri, K. & T. Ry. Co. of Texas v. Hanson* (Civ. App.) 90 S. W. 1122.

Rule as to when a servant assumes the risk of his employment stated. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 49 C. A. 573, 109 S. W. 478.

A railway switchman held to have assumed the risk of injury caused by getting his foot caught in an unblocked guard rail. *St. Louis Southwestern Ry. Co. of Texas v. Hynson*, 101 T. 543, 109 S. W. 929.

A railroad trackman injured while assisting to carry a tie by one of his co-employés falling over rails concealed by grass and weeds held not to have assumed the risk. *Texas & P. Ry. Co. v. Tuck* (Civ. App.) 116 S. W. 620.

A switchman held not to have assumed the risk of injury from the use of a defective oil box as a step in mounting a freight car. *Ft. Worth & R. G. Ry. Co. v. Day*, 55 C. A. 24, 118 S. W. 739.

Where a street car conductor did not have actual knowledge of the dangerous proximity of a railroad car, which struck him as his street car passed it, he did not assume the risk of injury, unless its nearness to the street car track was so obvious that he could have seen it by reasonable observation. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

An experienced member of railway bridge gang injured by the falling of timbers held not entitled to recover for the injury; the danger being obvious. *Cato v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 119 S. W. 132.

**43. Notice to or knowledge of master.**—A servant with knowledge of danger and risk of a defect, continuing in service without notice of danger to master, assumes the risk. *T. & P. Ry. Co. v. Bryant*, 27 S. W. 825, 8 C. A. 134.

Where a servant, injured while carrying a heavy piece of timber with his fellow servants, had knowledge of the danger, he assumed the risk, notwithstanding the assurance of his foreman. *Haywood v. Galveston, H. & S. A. Ry. Co.*, 38 C. A. 101, 85 S. W. 433.

Employer held not guilty of negligence rendering it liable for injury to employé from piece of plank breaking off ladder. *Graham v. Chicago, R. I. & G. R. Co.*, 99 T. 589, 91 S. W. 1081.

The questions as to whether the employé has an opportunity to notify his employer and does or does not notify him, and as to a person of ordinary care remaining in service of the employer with knowledge of the defect, are questions of fact and are to be submitted to the jury under proper instructions. *El Paso & S. W. Ry. Co. v. Foth*, 101 T. 133, 100 S. W. 172.

The defense of assumed risk based on the ground that the injured employé knew of the defect and danger, is not available to the railway company where it is shown that its superior employé, whose duty it was to repair also knew of the defect and danger before the accident. *M., K. & T. Ry. Co. v. Bailey*, 53 C. A. 295, 115 S. W. 606, 607.

A servant having knowledge of a defect held not to have assumed the risk, where

the master also had knowledge of the defect. *International & G. N. R. Co. v. Clark* (Civ. App.) 125 S. W. 959.

44. **Promise to remedy defect or remove danger.**—A servant does not assume the risk who continues in his master's employ, after the discovery of a defect which the master promises to repair. *T. & N. O. R. Co. v. Bingle*, 91 T. 287, 42 S. W. 971.

Where employer has promised to repair machinery, employé held not required to inspect the same, where there was nothing in its apparent condition which would lead a prudent man so to do. *Missouri, K. & T. Ry. Co. of Texas v. Nordell*, 20 C. A. 362, 50 S. W. 601.

Where employer promised to repair, and employé was injured after repairs were to be made, held proper to refuse an instruction that he must have relied on the promise in remaining in the employment. *Id.*

An engineer's promise to a fireman to have a defective step on the engine repaired was the promise of the company, on which the fireman was entitled to rely. *Gulf, C. & S. F. Ry. Co. v. Garren* (Civ. App.) 72 S. W. 1028.

Whether plaintiff was justified in believing that the step had been repaired was for the jury. *Id.*

Evidence that he supposed that it was repaired at an intervening station held competent. *Id.*

Where plaintiff did not know that the step had not been repaired at an intervening station, he did not assume the risk of injury in subsequently using it. *Id.*

Statement of locomotive engineer that he would have defective engine step repaired held not to amount to a promise of the master to repair, relieving fireman from assumption of risk. *Gulf, C. & S. F. Ry. Co. v. Garren*, 96 T. 605, 74 S. W. 897, 97 Am. St. Rep. 939.

It is not necessary, in order to relieve a servant from the assumption of the risk from a defective place in which to work, that the master's promise to repair should have fixed any definite time for performance, or that the repairs should in fact be made within any specified time. *Missouri, K. & T. Ry. Co. of Texas v. Baker*, 35 C. A. 542, 81 S. W. 67.

An employé held to have assumed a risk, notwithstanding his complaint of snow and the master's promise to remove it. *Texas & P. Ry. Co. v. Nichols*, 41 C. A. 119, 92 S. W. 411.

An instruction that, if plaintiff knew that his torch was defective and the light insufficient, he assumed the risk, was objectionable, as omitting the qualification that, if plaintiff was negligent in continuing in the service after the promise of the master to remedy the defect, he did not assume the risk where the evidence warranted such qualification. *Ft. Worth & D. C. Ry. Co. v. McCrummen* (Civ. App.) 133 S. W. 899.

45. **Compliance with commands.**—A servant does not assume risks growing out of the negligence of the master, whom it is his duty to obey. *Ft. Worth & D. C. Ry. Co. v. Wrenn*, 20 C. A. 628, 50 S. W. 210.

Evidence held to show that an employé, injured by a steel chip from a chisel, assumed the risk. *Ft. Worth & D. C. Ry. Co. v. Ramp*, 30 C. A. 483, 70 S. W. 568.

An employé, in going under a car at command of the foreman, held to assume the risk of its falling from the position in which the foreman had negligently placed the jacks, on which it was partly raised. *International & G. N. R. Co. v. Royall*, 37 C. A. 261, 83 S. W. 713.

A servant ordered by a foreman to perform a particular work has the right to assume that he will not be exposed to unnecessary peril, and to rely on the implied assurance that there is no danger. *Marshall v. St. Louis Southwestern Ry. Co. of Texas* (Civ. App.) 107 S. W. 883.

46. **Risk outside scope of employment—Voluntary act of servant.**—Where a workman, at the request of his foreman, voluntarily assists in replacing a derailed car, the fact that he so went voluntarily does not release the company's foreman from the duty of giving warning as to any hazards. *Texas & P. Ry. Co. v. Utley* (Civ. App.) 66 S. W. 311.

Call-boy riding on freight trains held mere licensee, riding at his own risk. *St. Louis Southwestern Ry. Co. of Texas v. Spivey*, 97 T. 143, 76 S. W. 748.

An employé, whose duties do not call upon him to ride on freight trains, is not authorized so to do by constructive abandonment by company of a rule forbidding employés to so ride. *Id.*

Railroad section foreman held not chargeable with assumption of risk in exposing himself to danger in attempting to remove a push car from the track in front of a passenger train, in order to prevent accident to the train. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

A servant, going outside of the duties of his employment, and attempting to fix a defective latch on a scraper, held to have assumed the risk of injuries resulting from so doing. *International & G. N. R. Co. v. Hall*, 46 C. A. 493, 102 S. W. 740.

When a servant employed in one line of work voluntarily undertakes to perform services for his master in a different department, he assumes all the risks that attend a bare licensee, notwithstanding that what he is doing may result in benefit to his master. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

47. — **Compliance with commands or threats.**—A railway company cannot evade liability to a plaintiff who was injured in its employment by the incompetency of another employé, by showing that the plaintiff, at the time of his injury, was not acting in the line of his employment, provided it was customary for the company's employés to do work other than the regular duty when ordered so to do, and that he was obeying such an order when he was injured. *Railway Co. v. Scott*, 68 T. 694, 5 S. W. 501.

A servant doing, by the order of his master, an act not in the line of his duty, does not assume a risk of which he has no knowledge. *Ft. Worth & D. C. Ry. Co. v. Wrenn*, 20 C. A. 628, 50 S. W. 210.

Where a fireman is directed to take charge of a stationary engine, the operating of which is outside of and more hazardous than his regular employment, he does not assume the risk. *Gulf, C. & S. F. Ry. Co. v. Newman*, 27 C. A. 77, 64 S. W. 790.



A section hand held not to have assumed the risk from assisting in throwing off rails from a car. *International & G. N. R. Co. v. Gaitanes* (Civ. App.) 70 S. W. 101.

A servant assumes risks incident to the service he contracts to perform, but not those of a service not embraced within the scope of his contract. *Brandon v. Texarkana & Ft. Smith Ry. Co.* (Civ. App.) 113 S. W. 968.

**48. Concurrent negligence of master—In general.**—Employé of railroad assumes ordinary risks, but not risks arising from negligence of master, unless he knows it. *San Antonio & A. P. Ry. Co. v. Engelhorn*, 24 C. A. 324, 62 S. W. 561, 65 S. W. 68.

One entering the service of a railroad company held not to assume the risk arising from the company's negligence. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

An employé held not to assume the risk of the master's negligence. *St. Louis & S. F. Ry. Co. v. Vestal*, 38 C. A. 554, 86 S. W. 790; *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

Assumption of one risk by servant does not preclude a recovery for injuries resulting from other negligence of the master. *St. Louis Southwestern Ry. Co. of Texas v. Rea*, 99 T. 58, 87 S. W. 324.

A servant assumes ordinary risks incident to the business of the master, but not those arising from the latter's negligence. *Galveston, H. & S. A. Ry. Co. v. Udalle* (Civ. App.) 91 S. W. 330.

In general, an employé does not assume the risk of injury by the habitual negligence of his employer, or those for whom the employer is responsible. *Houston & T. C. R. Co. v. Turner*, 99 T. 547, 91 S. W. 562.

A master held liable for an accident occasioned by its negligence, concurrently with a defect, the risk of which the employé had assumed. *International & G. N. Ry. Co. v. Elder*, 44 C. A. 605, 99 S. W. 856.

A switchman held entitled to recover for injuries caused by the negligence of defendant's engineer, concurring with defects in the cars, the risk of which plaintiff assumed, so that charges exempting defendant from liability because of such defects were properly refused. *Texas & N. O. R. Co. v. Powell*, 51 C. A. 409, 112 S. W. 697.

The negligence of a master is not a risk assumed by the servant as one ordinarily incident to the service. *International & G. N. R. Co. v. Meehan* (Civ. App.) 129 S. W. 190.

A servant does not assume risks arising from the master's failure to do his duty unless he knows of it and the attendant risks or must have acquired such knowledge. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

**49. — Knowledge by servant of defect or danger.**—The assumption by a switchman of the risk of working on a switch engine without a fireman will not prevent recovery for an injury not caused by the absence of a fireman. *Ft. Worth & D. C. Ry. Co. v. Wrenn*, 20 C. A. 628, 50 S. W. 210.

Section foreman, injured in collision while riding on hand car, held to have assumed risk of defective brakes, but not of failure of trainmen to whistle. *Texas Cent. R. Co. v. Bender*, 32 C. A. 568, 75 S. W. 561.

Fact that section foreman, injured in collision while riding on hand car, assumed risk of injury from defective brake, and that that concurred with other negligence of the company in causing the collision, held not to preclude recovery. *Id.*

Where an engineer accepted, without protest, a defective headlight, he did not thereby assume the risk of injuries from the company's negligence in misplacing a switch. *International & G. N. R. Co. v. Moynahan*, 33 C. A. 302, 76 S. W. 803.

In action against railroad for injuries to servant, held, that he had not assumed the risk by remaining in service of defendant after discovering defect in a coupler. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 33 C. A. 319, 77 S. W. 263.

A switchman, injured by defendant's negligence in "cornering" certain cars on a switch track against cars between which plaintiff was working on a defective coupling, held not to have assumed the risk, though he had knowledge that the coupling was out of repair. *Missouri, K. & T. Ry. Co. of Texas v. Gearheart* (Civ. App.) 81 S. W. 325.

An engineer who takes a locomotive out with a defective headlight held not to assume the danger from defendant's negligence in placing an incompetent flagman near a washout. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 83 S. W. 406.

A servant does not assume the risk of injuries from the negligent acts and practices of the master or his representatives of which he knew before the happening of the act complained of. *International & G. N. R. Co. v. Garcia*, 54 C. A. 59, 117 S. W. 206.

A servant may assume that appliances are reasonably safe and the manner of conducting the business reasonably safe. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

**50. — Master and fellow servant.**—Danger to section foreman in removing push car from the track in front of a passenger train held not so great as to render the foreman chargeable with assumption of risk. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

A push car on a railroad track in front of an approaching passenger train is an obstruction so apt to cause the derailment of a train as to justify a section foreman in so regarding it and attempting to remove it, in order to prevent accident to the train. *Id.*

**51. Pleading.**—See notes under article 1910.

**52. Presumptions, burden of proof and admissibility of evidence.**—See notes under Art. 3687.

**53. Sufficiency of evidence—Knowledge of servant.**—Facts held to support a finding that M. did not know the dangerous condition of a bridge built by his employers, by the giving way of which he was injured, so as to preclude recovery on the ground of assumption of risk. *St. Louis S. W. Ry. Co. of Texas v. Mayfield*, 25 C. A. 207, 60 S. W. 896.

A printed book of rules, warning a brakeman of the danger in standing erect while passing under a certain bridge, held insufficient as a matter of law to show that a brakeman assumed such risk. *Gulf, C. & S. F. Ry. Co. v. Knox*, 25 C. A. 450, 61 S. W. 969.

Evidence held to justify a finding that an employé did not know of the defect in a machine which he was operating, and never assumed the risk, and that the owner was

negligent in failing to find the defect. *Gulf, C. & S. F. Ry. Co. v. Hayden*, 29 C. A. 280, 68 S. W. 530.

In an action by an engineer for personal injuries resulting from the defective condition of defendant's railroad track, evidence held insufficient to show that he knew of the defect and assumed the risk. *Galveston, H. & S. A. Ry. Co. v. Fitzpatrick* (Civ. App.) 91 S. W. 355.

Evidence, in an action for the death of an employé in consequence of a defective railroad track in a lumber yard, held not to show that the defects in the track were so obvious to decedent as to give him notice of the danger in riding over the track on an engine. *Kirby Lumber Co. v. Chambers*, 41 C. A. 632, 95 S. W. 607.

Evidence held to justify jury in finding that servant did not know of defect in truck, that the defect in truck was not obvious and patent, and that he did not assume the risk of injury. *Wells, Fargo & Co. Express v. Boyle* (Civ. App.) 93 S. W. 441.

Evidence held to show that deceased employé knew of the danger from the electric wire and assumed the risk. *Texas Traction Co. v. George* (Civ. App.) 149 S. W. 438.

54. — **Assumption of risk shown.**—Evidence in an action by a servant for personal injury resulting from a defective appliance held to show an assumption of risk. *Rio Grande & E. P. Ry. Co. v. Lynch* (Civ. App.) 66 S. W. 712.

Evidence held sufficient to support a verdict for defendant on the ground that plaintiff assumed the risk. *Bell v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 81 S. W. 134.

In an action by a section foreman for injuries received while helping unload timbers from a coal car, evidence held to show that plaintiff had assumed the risk. *Bryan v. International & G. N. R. Co.* (Civ. App.) 90 S. W. 693.

55. — **Assumption of risk not shown.**—Evidence held insufficient to show that a switchman who had complained of the incompetency of a fireman, identified him, when afterwards recognizing signals given by him. *Galveston, H. & S. A. Ry. Co. v. Eckles*, 25 C. A. 179, 60 S. W. 830.

Evidence held not to show that decedent, the conductor in charge of a train, assumed the risk. *International & G. N. Ry. Co. v. Vinson*, 28 C. A. 247, 66 S. W. 800.

Evidence in an action by a railroad fireman for personal injuries considered, and held, that he did not assume the risk incident to the accident. *Missouri, K. & T. Ry. Co. of Texas v. Follin*, 29 C. A. 512, 68 S. W. 810.

Testimony, in an action by an employé to recover for injuries, held not to admit holding that plaintiff assumed the risk as a matter of law. *Galveston, H. & S. A. Ry. Co. v. Butshek*, 34 C. A. 194, 78 S. W. 740.

In an action for injuries to a servant injured by the raising of the hammer of a pile driver, evidence held sufficient to warrant a finding that he had not assumed the risk. *Gulf, C. & S. F. Ry. Co. v. Huyett* (Civ. App.) 89 S. W. 1118.

In an action by a servant for injuries received while attempting to set a defective brake, evidence examined, and held insufficient to show that he assumed the risk. *Gulf, C. & S. F. Ry. Co. v. Griggs* (Civ. App.) 101 S. W. 473.

Evidence in an action for a brakeman's death, due to the defective condition of defendant's railroad track, held to support a finding that he did not assume the risk arising from such defective condition. *Galveston, H. & N. Ry. Co. v. Wallis*, 47 C. A. 120, 104 S. W. 418.

Evidence held to justify finding that decedent's injury was not a result of assumed risk. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

In an action for injuries resulting from the breaking of a defective belt on a machine which plaintiff was operating, the evidence held insufficient to show that plaintiff assumed the risk. *P. E. Schow & Bros. v. McCloskey* (Civ. App.) 109 S. W. 386.

Evidence, in an action by a switchman for injuries, held not to show, as a matter of law, that he assumed the risk of injury. *El Paso & S. W. Ry. Co. v. Alexander* (Civ. App.) 117 S. W. 927.

In a conductor's action for injuries sustained by striking a railroad car on a switch near the street car track, evidence held to show that plaintiff did not assume the risk of injury. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 338.

In an action for injuries to a servant falling into the manhole on a locomotive tender, evidence held to justify a finding that he did not assume the risk of injury. *International & G. N. R. Co. v. Meehan* (Civ. App.) 129 S. W. 190.

56. **Questions for jury and instructions.**—See notes under Art. 1971.

### Art. 6646. No assumed risk where safety appliance not provided.

—Any employé of any common carrier engaged in any intrastate commerce, as provided in articles 6640 and 6641 of this title, who may be injured or killed shall not be held to have assumed the risk of his employment, or to have been guilty of contributory negligence, if the violation of such carrier of any of the provisions of said articles contributed to the injury or death of such employé. [Acts 1909, p. 64, sec. 7.]

**Explanatory.**—This article was a part of the safety appliance act (Acts 1909, p. 64, § 7), the first six sections of which appear herein as Articles 6709-6714, and in its original form it referred to the other sections of that act rather than to Articles 6640, 6641, as in the Revised Civil Statutes of 1911, which are followed in this work.

**Constitutionality.**—The legislature had power to enact the safety appliance act (Arts. 6709-6714, 6646) providing that any employé of a common carrier shall not be held to assume the risk of his employment or to have been guilty of contributory negligence if the carrier's violation of any provision of the act contributed to his injury. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

The safety appliance act (Arts. 6709-6714, 6646), which required all cars used in intrastate traffic to be equipped with automatic couplers, and providing that no employé of a common carrier who may be injured shall be held to assume all risks of his employment, or to have been guilty of contributory negligence, if the carrier's violation of any

provision of the act contributed to the injury, does not contravene Const. U. S. Amend. 14, relating to equal protection of law. *Id.*

**Failure to provide secure handholds.**—Under Art. 6713, making it unlawful for a railroad company to use in intrastate commerce a car not provided with sufficient and secure handholds, and this article, denying it the defenses of contributory negligence and assumption of risk, where its violation of the act contributed to an employé's injury, it is not enough for the company to exercise ordinary care to have and maintain secure handholds, but it must do all things possible to that end. *Galveston, H. & S. A. Ry. Co. v. Kurtz* (Civ. App.) 147 S. W. 658.

The defenses of assumption of risk and contributory negligence are expressly denied a railroad company by Art. 6713 and this article where its employé is injured by its using in intrastate commerce a car with an insecure handhold, as they are denied it by the safety appliance act of congress, enacted in 1893 (Act March 2, 1893, c. 196, 27 Stat. 531) and amended in 1896 (Act April 1, 1896, c. 87, 29 Stat. 85) and U. S. Comp. St. Supp. 1909, pp. 1172, 1173, where the accident occurs while the car is being used in interstate commerce. *Id.*

**Art. 6647. Double-header trains; no assumed risk by employés.**—Employés of railway companies employed by said companies in the operation of trains within this state, propelled by two or more engines, shall not be held to assume the risk, if any there be, incident to their employment; provided, they be injured while engaged in operation of such trains; and provided, further, that such injury was occasioned by reason of the operation of two or more engines on such train instead of one. [Acts 1900, S. S., p. 15, sec. 3a.]

**Art. 6648. Liable for injury or death of employé.**—Every corporation, receiver, or other person, operating any railroad in this state, shall be liable in damages to any person suffering injury while he is employed by such carrier operating such railroad, or in case of the death of such employé, to his or her personal representative for the benefit of the surviving widow and children, or husband and children, and mother and father of the deceased, and, if none, then of the next kin dependent upon such employé for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier; or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment; provided, the amount recovered shall not be liable for the debts of deceased and shall be divided among the persons entitled to the benefit of the action or such of them as shall be alive, in such shares as the jury, or court trying the case without a jury, shall deem proper; and provided, in case of the death of such employé, the action may be brought without administration by all the parties entitled thereto, or by any one or more of them for the benefit of all, and, if all parties be not before the court, the action may proceed for the benefit of such of said parties as are before the court. [Acts 1909, 1 S. S., p. 279, sec. 1.]

See *Rivera v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 149 S. W. 223; *St. Louis S. W. Ry. Co. of Texas v. Griffin*, 154 S. W. 583.

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| <p><b>I. Constitutionality, construction, application and effect of statute.</b></p> <ol style="list-style-type: none"> <li>1. Constitutionality.</li> <li>2. Construction, application and effect—Art. 6641 not repealed.</li> <li>3. — Pending litigation.</li> <li>4. — To what employés applicable.</li> <li>5. — Personal representative.</li> </ol> <p><b>II. Nature and extent of liability in general.</b></p> <ol style="list-style-type: none"> <li>6. What law governs.</li> <li>7. Relation of parties—In general.</li> <li>8. — Definition of servant.</li> <li>9. — Independent contractors and employés.</li> <li>10. — Volunteers in general.</li> <li>11. — Acts done under employment or by invitation of master's servants.</li> <li>12. — Agreement between railroads for joint use of yard.</li> </ol> | <ol style="list-style-type: none"> <li>13. — Commencement, suspension or termination of relation.</li> <li>14. Scope of employment—In general.</li> <li>15. — Customary acts.</li> <li>16. Care required in general.</li> <li>17. Care required as to inexperienced or minor servant.</li> <li>18. Medical attendance on injured employé.</li> <li>19. Cause of injury—In general.</li> <li>20. — Acts or omissions of third persons.</li> <li>21. Accidental or improbable injury—In general.</li> <li>22. — Anticipation of consequences.</li> <li>23. Joint liability of employers and others.</li> <li>24. — Indemnity from joint tort-feasor.</li> <li>25. Contracts limiting or releasing liability.</li> </ol> |
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## III. Appliances and places for work.

26. Nature of master's duty and liability and care required in general.
27. — Appliances.
28. — Places for work.
29. — Not an absolute duty.
30. — Care proportionate to risk.
31. — Care exercised by other railroads.
32. — Care dependent on servant's knowledge.
33. Delegation of duty.
34. Failure to furnish tools or appliances.
35. Custom and usage.
36. Appliances or places owned, controlled or provided by third persons.
37. Defects in tools, appliances and places for work in general.
38. Defective or dangerous machinery.
39. Locomotives.
40. Cars—In general.
41. — Hand cars.
42. — Improper loading.
43. Tracks and roadbeds—In general.
44. — Inequalities and other defects in surface.
45. — Switches and side tracks.
46. — Fences.
47. — Bridges.
48. Obstructions or erections on, over, or near railroad tracks.
49. Platforms and ladders.
50. Gravel pits.
51. Latent defects.
52. Inspection and test—Duty to make in general.
53. — Care required in inspecting.
54. — Things to be inspected.
55. — Foreign cars.
56. — Inspection of air brakes.
57. — Time and opportunity for making.
58. — Delegation of duty.
59. — Obvious or latent defects.
60. — Operation and effect.
61. Knowledge by master of defect or danger.
62. Repairs.
63. Proximate cause of injury—In general.
64. — Appliances in general.
65. — Locomotives.
66. — Cars.
67. — Tracks and roadbeds.

## IV. Methods of work, rules and orders.

68. Methods of work and duty to protect servant in general.
69. Statutory signals.
70. Care required of master.
71. Precautions against injury in general.
72. Customary methods.
73. Knowledge of danger.
74. Care required in operating locomotives, trains and cars—In general.
75. — Employés riding on locomotives, trains, or cars.
76. — Employés on or near tracks.
77. — Employés working under locomotives.
78. — Coupling or switching cars.
79. — Collision.

80. Proximate cause of injury.
81. Rules—Duty to promulgate.
82. — Notice to servant.
83. — Customary violation.
84. — Construction and operation.
85. — Duty to enforce obedience and effect of disobedience.
86. Orders.
87. — Negligence in giving.

## V. Warning and instructing servant.

88. Duty to warn and instruct in general.
89. — Movement of locomotives, trains or cars.
90. Statutory signals.
91. Duties of dispatcher.
92. Inexperienced or youthful employé.
93. Dangers known to employé.
94. Obvious or latent dangers.
95. Dangers from extraneous sources.
96. Sufficiency of warnings.
97. Proximate cause of injury.

## VI. Fellow servants.

98. Who are fellow servants.
99. Nature and application of doctrine in general.
100. Duty to provide adequate number.
101. Competency—Duty and liability in general.
102. — Care required of master.
103. — Master's knowledge of incompetency.
104. — Habits and reputation.
105. Negligence as ground of recovery.
106. Statutory provisions limiting doctrine.
107. Nature of act and performance of duties of master—In general.
108. — Scope of employment.
109. — Inspection and repair.
110. Vice principals and other representatives of master—Who are vice principals.
111. — Nature of act or omission and performance of duties of master.
112. Concurrent negligence of master and fellow servant—In general.
113. — Vice principal and fellow servant.
114. — Operation of locomotives, trains, and cars.
115. — Defects in appliances and places for work.
116. — Number and competency of fellow servants.
117. Willful acts and gross negligence of fellow servants.

## VII. Assumption of risk.

118. When assumed risk a defense.
119. Where safety appliance act is violated.
120. Where statutes for protection of employés are violated.

## VIII. Contributory negligence.

121. When contributory negligence a defense.
122. Where safety appliance act is violated.
123. Rules as to comparative negligence.

## IX. Actions.

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| <p>124. Notice of claim for damages.</p> <p>125. Release of claims.</p> <p>126. Parties entitled to recover.</p> <p>127. Pleading.</p> <p>128. Presumptions, burden of proof and admissibility of evidence.</p> <p>129. Weight and sufficiency of evidence in general.</p> <p>130. — Existence of relation.</p> <p>131. — Scope of employment.</p> <p>132. — As to particular facts.</p> <p>133. Evidence as to cause of injury—In general.</p> <p>134. — Defective or dangerous appliances.</p> <p>135. — Defects in cars and locomotives.</p> <p>136. — Obstructions on, over or near tracks.</p> <p>137. — Operation of trains, cars and locomotives.</p> <p>138. — Warnings and signals.</p> <p>139. Evidence as to master's negligence—In general.</p> <p>140. — Inexperienced or youthful employé.</p> | <p>141. — Defective tools and appliances.</p> <p>142. — Defective or dangerous places.</p> <p>143. — Cars and locomotives.</p> <p>144. — Tracks and roadbeds.</p> <p>145. — Operation of trains, cars and locomotives.</p> <p>146. — Negligence in giving orders.</p> <p>147. — Knowledge by master of defect or danger.</p> <p>148. — Inspection and repair.</p> <p>149. — Warnings and instructions.</p> <p>150. Evidence as to incompetency or negligence of fellow servant—Incompetency.</p> <p>151. — Negligence.</p> <p>152. — Willful injuries.</p> <p>153. — Vice principals.</p> <p>154. Evidence as to assumption of risk.</p> <p>155. Evidence as to contributory negligence.</p> <p>156. Damages.</p> <p>157. Questions for jury and instructions.</p> <p>158. Excessiveness of verdict.</p> |
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## I. CONSTITUTIONALITY, CONSTRUCTION, APPLICATION AND EFFECT OF STATUTE

1. **Constitutionality.**—See, also, notes under Art. 6649.

This act is not violative of the equal protection clause of Const. U. S. Amend. 14. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

This act is not an invalid interference with interstate commerce, being a subject relative to which the states may act until congress has acted, but is inoperative in so far as it affects interstate commerce while the federal statute remains in force. *Houston & T. C. R. Co. v. Bright* (Civ. App.) 156 S. W. 304.

This article, construed to apply to all employés of railroad companies whether engaged in operating trains or cars or not, does not deny such companies the equal protection of the laws in violation of Const. U. S. Amend. 14. *Id.*

2. **Construction, application and effect**—Art. 6641 not repealed.—This act does not repeal by implication Art. 6641. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

3. — **Pending litigation.**—Under Art. 6652 the provision of this article regarding procedure where all parties are not before the court does not apply to case pending when the statute was enacted. *International & G. N. R. Co. v. White*, 103 T. 567, 131 S. W. 811.

4. — **To what employés applicable.**—This article applies to all employés of railroad companies, and not to those only who are actually engaged in the operation of railway trains or cars, since the words "operating any railroad" apply to the word "carrier" and not to the word "employed," and hence in an action for injuries to an employé of a railroad company sustained while working on a railroad bridge the court properly charged as provided in Art. 6649 that contributory negligence would merely reduce and not defeat a recovery. *Houston & T. C. R. Co. v. Bright* (Civ. App.) 156 S. W. 304.

5. — **Personal representative.**—The term "personal representative," as used in this article, means executor or administrator. *Rivera v. Atchison, T. & S. F. Ry. Co.* (Civ. App.) 149 S. W. 223.

## II. NATURE AND EXTENT OF LIABILITY IN GENERAL

6. **What law governs.**—Where an employé's injuries, received in Texas, resulted from negligence of a railroad in loading a car loaded in New Mexico, its liability must be determined by the laws of the former state. *El Paso & N. W. Ry. Co. v. McComas* (Civ. App.) 72 S. W. 629.

Where a car was negligently loaded in New Mexico, causing injuries to plaintiff in Texas, the laws of New Mexico are immaterial, in determining the rights of the parties, in an action brought in Texas to recover for the injuries. *El Paso & N. W. Ry. Co. v. McComas*, 36 C. A. 170, 81 S. W. 760.

Where, in an action against a railroad company for negligent death, the evidence showed that decedent was an agent of an express company, employed and paid by it, and entitled to ride on defendant's trains, under contract between the two companies, and that he was killed by the negligence of the employés in charge of the train, the railroad company, engaged in interstate commerce, must show that plaintiff's claim was unfounded, and that decedent was in its employ to avail itself of the federal employers' liability act; and, on failure to do so, the state laws govern the right to recover. *Missouri, K. & T. Ry. Co. of Texas v. Blalack*, 105 T. 296, 147 S. W. 559.

Evidence held insufficient to show that a car repairer suing for injuries was engaged in interstate commerce, and that therefore the federal employers' liability act, instead of the state law, applied. *Chicago, R. I. & G. Ry. Co. v. Rogers* (Civ. App.) 150 S. W. 281.

Where neither the pleadings nor the evidence disclosed that the railroad company was engaged in interstate commerce, the federal employers' liability act had no application in fixing the liability of the company. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

7. **Relation of parties—In general.**—The mere fact that a minor, eighteen years of age, was employed without the consent of his parents, does not defeat, between him and his employers, the relation of master and servant, with the rights, duties and liabilities which attach to the relation. *T. & P. Ry. Co. v. Carlton*, 60 T. 397; *T. & N. O. Ry. Co. v. Crowder*, 61 T. 262.

An express contract held not necessary to create the relation of master and servant between a railroad and one acting as baggageman. *Missouri, K. & T. Ry. Co. of Texas v. Reasor*, 28 C. A. 302, 68 S. W. 332.

In an action for injuries to a brakeman, it was no defense that plaintiff obtained his employment by falsely stating that he had never had any litigation with any railway company. *Galveston, H. & S. A. Ry. Co. v. Harris*, 48 C. A. 434, 107 S. W. 108.

A person injured on a railroad held not an employé at the time of injury. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

Employés of a compress company of which plaintiff was superintendent held to be acting in the service of defendant railroad company in letting down a car on the spur track which ran to the compress works, so that defendant was liable for injuries caused to plaintiff by their negligence in doing so. *Gulf, C. & S. F. Ry. Co. v. Gaskill* (Civ. App.) 120 S. W. 557, reversed in 103 T. 441, 129 S. W. 345.

Where a railroad company controlled the operation of cars on a compress company's switch, the railroad would be liable for injuries to a servant of the compress company caused by the negligence of its other general servants temporarily engaged in moving the cars for the railroad company. *Gulf, C. & S. F. Ry. Co. v. Gaskill*, 103 T. 441, 129 S. W. 345.

That defendant on former occasions had permitted plaintiff to operate its pump in place of defendant's father held insufficient to establish the relation of master and servant between plaintiff and defendant. *Ft. Worth & D. C. Ry. Co. v. Lynch* (Civ. App.) 136 S. W. 580.

A master's duty to provide his servants a safe place to work arises out of the contract made by him with them for the performance of some service, and hence is due only to those persons who sustain toward him such contractual relations. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

8. — **Definition of servant.**—The word "servant" in a legal sense has a broad significance embracing all persons of whatever rank or position who are in the employ and subject to the direction or control of another in any department of labor or business, and is ordinarily synonymous with "employé." *Texas Life Ins. Co. v. Roberts*, 55 C. A. 217, 119 S. W. 926.

9. — **Independent contractors and employés.**—An employé of a subcontractor engaged in the construction of a railroad track injured in consequence of being struck by a construction train held entitled to recover from the railway company for the injuries received. *Choctaw, O. & T. Ry. Co. v. McLaughlin*, 43 C. A. 523, 96 S. W. 1091.

A contract between M. and defendant railroad company for the construction of right of way buildings, bridges, trestles, etc., held an independent contract, and not to make M. and his employés servants of the railroad company. *Walker v. Texas & N. O. R. Co.*, 51 C. A. 391, 112 S. W. 430.

One who is paid for the amount of work that he does, but has no control over the work aside from the amount that he does, is not an independent contractor. *Missouri, K. & T. Ry. Co. of Texas v. Romans* (Civ. App.) 114 S. W. 157.

Where a railroad contractor agreed with the railroad company to discharge any incompetent employé on request of the company, that the employés were engaged by the company did not make them the servants of the company, where they were paid by the contractor, subject to his exclusive control and to discharge by him. *Beaumont, S. L. & W. Ry. Co. v. Manning* (Civ. App.) 146 S. W. 227.

10. — **Volunteers in general.**—As to liability to and risk of one who volunteers to perform a service, see *Eason v. Railway Co.*, 65 T. 577, 57 Am. Rep. 606; *Bonner v. Bryant*, 1 C. A. 269, 21 S. W. 549.

One engaging at the request or with the permission of a railroad servant in a transaction of interest to himself, as well as to the railroad, while a volunteer and not a servant of the railroad, has a right to be protected against the negligence of its servants, and to recover of the road if he is injured thereby. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

A person who volunteers to assist the servant of another takes things as he finds them, and assumes all the risks of the situation, and, in case of injury, cannot recover unless such injury would create a liability as to a trespasser or bare licensee. *Id.*

11. — **Acts done under employment or by invitation of master's servants.**—Where a section foreman was directed by the division superintendent to assist in unloading cattle guard timbers from a car, the foreman while so engaged was not a servant of the railroad company. *Bryan v. International & G. N. R. Co.* (Civ. App.) 90 S. W. 693.

A traction company is not liable to plaintiff injured while employed by or assisting its servant in cleaning electrical machinery, where the plaintiff looked to the servant for his pay. *Blalack v. Texas Traction Co.* (Civ. App.) 149 S. W. 1086.

While a servant may in some cases confer upon a stranger the privilege or license of entering upon the premises of his employer, yet, without authority to do so, he cannot clothe the stranger with that protection which can only arise from a contract of employment. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

12. — **Agreement between railroads for joint use of yard.**—A railroad company, which permitted its yard to be used under agreement by another company, owed to the latter's servants the same duty of providing a safe place to work as it owed to its own servants. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Civ. App.) 155 S. W. 183.

13. — **Commencement, suspension or termination of relation.**—Liability of master to employé does not cease where the work is done for a third person, the employé not knowing of the change. *Missouri, K. & T. Ry. Co. of Texas v. Ferch*, 18 C. A. 46, 44 S. W. 317.

Fact that a person hired by the day who missed the work train on which he was employed was at the time of injury on his way to get a pass to catch up with the train

held not to make him an employé of the railroad. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

In an action for injuries to plaintiff's intestate while in the employment of defendant railroad, the act of deceased in stepping behind the car by which he was run over held, under the circumstances, not to sever the relation of master and servant, so as to relieve defendant of liability for its employé's negligence. *Missouri, K. & T. Ry. Co. of Texas v. Pennewell*, 50 C. A. 541, 110 S. W. 758.

A servant voluntarily and for his own convenience stepping outside the line of his duty into a position where it is not necessary or proper that he should be in going to or returning from his services thereby suspends the relation of master and servant as between his master and himself. *Lynch v. Texas & P. Ry. Co.* (Civ. App.) 133 S. W. 522.

In an action by the plaintiff, a hostler in a railroad yard, for injuries received while riding on a freight car across the yard, held, that the plaintiff's rights against his employer were those of a licensee. *Id.*

14. **Scope of employment**—In general.—Brakeman on freight train, killed by defective apparatus of independent contractor, held to have been in line of his duty at time of accident. *Gulf, C. & S. F. Ry. Co. v. Delaney*, 22 C. A. 427, 55 S. W. 538.

A section foreman, killed while crossing one of defendant's tracks in returning to his work after having answered a call of nature, held not a trespasser. *Houston & T. C. R. Co. v. Turner*, 99 T. 547, 91 S. W. 562.

Employés engaged in switching cars held bound to use ordinary care to protect from injury another employé on the track. *Houston & T. C. R. Co. v. Turner* (Civ. App.) 92 S. W. 1074.

A foreman of a switch crew when operating a brake held entitled to the same protection as to the safety of the brake as any other switchman. *Sanders v. Houston & T. C. R. Co.* (Civ. App.) 93 S. W. 139.

The law of respondeat superior is that the master is liable for the negligent acts of his servants if done in obedience to the master's orders, or within the scope of the servants' employment or line of their duty. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 99 S. W. 884.

The fact that a servant was not in the active performance of the duties of his employment at the exact time the accident occurred held not to relieve the company from liability therefor. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

Plaintiff held not a trespasser or a licensee, though his regular duties were not to be performed in and about the yards where he was injured. *Missouri, K. & T. Ry. Co. of Texas v. Baillet*, 48 C. A. 641, 107 S. W. 906.

A car checker in a railroad yard, who rode a train for his own convenience, held a mere licensee. *Houston Belt & Terminal Ry. Co. v. Stephens* (Civ. App.) 155 S. W. 703.

15. — **Customary acts**.—Where deceased was killed while engaged in an act outside the scope of his employment, evidence that such act was customary is erroneously admitted. *Texas M. R. R. v. Taylor* (Civ. App.) 44 S. W. 892.

16. **Care required in general**.—Negligence imputed to street railway, when. *Rogers v. Galveston City R. Co.*, 76 T. 502, 13 S. W. 540.

It is negligent for the master to subject his servant to a risk not ordinarily incident to the employment, unless the extraordinary hazard be obvious to the servant or he in some manner be apprised of it. *Bonnet v. Railway Co.*, 89 T. 72, 33 S. W. 334.

No act of human conduct, in the absence of a statute, can be declared to be negligence, unless all the facts and circumstances are either admitted or indisputable. *Irvin v. G., C. & S. F. Ry. Co.* (Civ. App.) 42 S. W. 661.

Railroad company held bound to exercise ordinary care to prevent injury to its servant. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

The test of negligence, in an action for injuries to a servant, stated. *International & G. N. R. Co. v. Garcia*, 54 C. A. 59, 117 S. W. 206.

Employers must exercise ordinary care in conducting their business for the safety of their employés. *Houston & T. C. R. Co. v. Alexander*, 103 T. 594, 132 S. W. 119.

To authorize a recovery for personal injuries to a servant, held only necessary to show that a reasonably prudent man would have anticipated some like injury. *St. Louis, S. F. & T. R. Co. v. Taylor* (Civ. App.) 134 S. W. 819.

17. **Care required as to inexperienced or minor servant**.—While the duty of the employer in reference to such a minor employé increases in proportion to his want of capacity, the fact of his being fatally injured in his employment does not, per se, render the company liable to the parent for such injury. *T. & P. Ry. Co. v. Carlton*, 60 T. 397; *T. & N. O. Ry. Co. v. Crowder*, 61 T. 262; *Id.*, 63 T. 502.

18. **Medical attendance on injured employé**.—A railroad company, undertaking as a charity to furnish medical treatment to sick and injured employés, held required only to exercise due care in employment of a physician. *Zumwalt v. Texas Cent. R. Co.*, 56 C. A. 567, 121 S. W. 1133.

In a suit against a railroad for negligence in providing an injured employé with medical attention, the duty of defendant in respect to sending plaintiff to the place where the company's nearest local surgeon resided stated. *Missouri, K. & T. Ry. Co. of Texas v. Graves*, 57 C. A. 395, 122 S. W. 458.

Liability of employer for malpractice by a physician in treating an injured employé determined with reference to the evidence as to the employment of the physician. *Texas & Pacific Coal Co. v. McWain*, 57 C. A. 512, 124 S. W. 202.

A railroad company inaugurating a plan of creating a fund for care of its sick and injured employés by deducting each month 50 cents from the wages of each employé, and in execution of the trust contracting with a doctor to treat in its hospital all such sick and injured in consideration of the fund so collected, held not liable for malpractice of the doctor, in the absence of evidence that it was promoting its own business through such charity. *Texas Cent. R. Co. v. Zumwalt*, 103 T. 603, 132 S. W. 113, 30 L. R. A. (N. S.) 1206.

19. **Cause of injury**—In general.—That unsafe condition of appliances was caused either by decay or otherwise held not to relieve the master from liability for injury to his servant occasioned thereby. *International & G. N. R. Co. v. Elkins* (Civ. App.) 54 S. W. 931.

In an action for injuries to a servant, held, that the mere fact that plaintiff's physical condition was such as to render him susceptible to the injury did not preclude recovery for the master's negligence. *Texas & N. O. R. Co. v. Lee*, 32 C. A. 23, 74 S. W. 345.

A railroad is liable for the death of a servant, occasioned by the concurrence of its negligence with an act of God. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

In an action for personal injuries, where the negligence by which plaintiff was injured was imputable to defendant, it was immaterial that defendant could not have foreseen the negligent acts of its employés by which plaintiff was injured. *Texas & N. O. R. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 953.

To authorize a recovery for injuries to an employé, the negligence of the employer must have proximately caused the injury. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Civ. App.) 129 S. W. 394.

20. — **Acts or omissions of third persons.**—Railroad companies cannot presume that there will be no unlawful interference with their tracks and switches, and the degree of care they are required to exercise to avoid injuries to employés therefrom must be determined by the possibility and probability of harm likely to result. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

A railroad company, calling another company's engine to its assistance, held liable for accident to its servant resulting from the common negligence of the engineers of both companies. *Galveston, H. & S. A. Ry. Co. v. Adams* (Civ. App.) 55 S. W. 803.

Railroad company held liable for death of a servant occasioned by not properly braking and blocking a freight car on a side track, which, escaping to the main track, caused a collision, though the proximate cause of the car's moving may have been interference with the brakes by some person unknown. *Galveston, H. & S. A. Ry. Co. v. Johnson*, 24 C. A. 180, 53 S. W. 622.

Railroad company held liable to one of its employés for injuries sustained by timber thrown from one of its regular freight trains by the servants of an independent contractor. *St. Louis & S. W. Ry. Co. of Texas v. Arnold*, 32 C. A. 272, 74 S. W. 819.

A railroad held liable for injuries to an employé resulting from the negligence of another road to whom it gave the right to use its yards and tracks. *Ft. Worth & D. C. Ry. Co. v. Smith*, 39 C. A. 92, 87 S. W. 371.

Where defendant was negligent in maintaining a mail crane too near the track and in allowing the track near the crane to remain in a defective condition, it is no defense to an action for the death of an engineer by striking the crane that the postmaster was also negligent in placing the crane in position at an improper time. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 117 S. W. 1043.

21. **Accidental or improbable injury—In general.**—Where a piece of coal flew off of a passing train and injured a section hand, who was standing near the track, it cannot be contended that the company was not liable because the injuries resulted from an inevitable accident. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.) 63 S. W. 164.

A railway carpenter held not entitled to recover for injury caused by the falling of lumber while he was unloading a car. *Texas & P. Ry. Co. v. Flowers*, 47 C. A. 206, 104 S. W. 1070.

In an action for injuries while in defendant's employ by car doors falling on plaintiff, the facts stated under which plaintiff's injury would be an unavoidable accident. *Texas & N. O. R. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 953.

The foreman of a bridge crew need not anticipate that a member of the crew will become confused in removing hand cars from the track in front of approaching trains. *Texas & P. Ry. Co. v. Myers* (Civ. App.) 125 S. W. 49.

22. — **Anticipation of consequences.**—Where a piece of coal flew off of a passing train and injured a section hand, who was standing near the track, it cannot be contended that the company was not liable because the injury was not such as might reasonably have been anticipated from the company's negligence. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.) 63 S. W. 164.

Where a railroad's negligence in loading a car is shown to be the proximate cause of a servant's injuries, its liability is established, though it might not have foreseen that the injury would occur. *El Paso & N. W. Ry. Co. v. McComas* (Civ. App.) 72 S. W. 629.

Where the manner of loading the car was likely to cause injury in a way that might be foreseen, the fact that it happened to cause the injury in a manner so unusual that it was not to be expected does not deprive the manner of loading the car of its negligent character. *El Paso & N. W. Ry. Co. v. McComas*, 36 C. A. 170, 81 S. W. 760.

Certain proof in an action against a railway company for injuries received by a conductor held sufficient to authorize a recovery. *Galveston, H. & S. A. Ry. Co. v. King*, 41 C. A. 433, 91 S. W. 622.

Where a tie being unloaded by an employé had been soaked with creosote, injury to the employé's eye from the tie slipping and spattering creosote was a result such as could reasonably have been anticipated by the company. *Gulf, C. & S. F. Ry. Co. v. Smith* (Civ. App.) 148 S. W. 820.

23. **Joint liability of employers and others.**—The negligence of either of two employers constituting a partnership held to inure to the benefit of an employé injured thereby. *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148.

24. — **Indemnity from joint tort-feasor.**—The fact that a servant's injuries are caused by the concurring negligence of the master and a third person confers no right of action on the master as against such person. *Gulf, C. & S. F. Ry. Co. v. Powell*, 25 C. A. 91, 60 S. W. 979.

An independent contractor held not liable over to a railroad company for injuries to a servant of the railroad company through the joint negligence of the latter and such contractor. *St. Louis & S. W. Ry. Co. of Texas v. Arnold*, 32 C. A. 272, 74 S. W. 819.

The rule that there can be no contribution or indemnity as between wrongdoers held subject to exception. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

25. **Contracts limiting or releasing liability.**—See Art. 6651 and notes.



## III. APPLIANCES AND PLACES FOR WORK

26. **Nature of master's duty and liability and care required in general.**—A railroad company, as a duty to its employes, is required to use only ordinary care in erecting and maintaining its structures and appliances in a safe condition. *Galveston, H. & S. A. Ry. Co. v. Gormley*, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

The duty of the master with reference to furnishing the servant with a place to work and with appliances only requires him to furnish a reasonably safe place and appliances. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 86 S. W. 350.

Where an employe was at the place of duty ready to begin work when called on, the employer owed him the duty of exercising ordinary care. *Texas & P. Ry. Co. v. Johnson*, 48 C. A. 135, 106 S. W. 773.

It is the master's duty to use ordinary care to provide reasonably safe tools and appliances and places to work, and he is liable for failure to do so if contributory negligence or assumption of risk do not intervene. *Missouri, K. & T. Ry. Co. of Texas v. Snow*, 53 C. A. 184, 115 S. W. 631.

The duty of railroad companies to guard employes against the hazard of the employment must be performed in a reasonable manner. *Missouri, K. & T. Ry. Co. of Texas v. Beasley* (Civ. App.) 155 S. W. 183.

27. — **Appliances.**—A railway company must furnish safe machinery and appliances for use by its employes in operating its road. If ordinary and reasonable care is not exercised by the company to do this, it is responsible for injuries to its servants caused by such neglect. *I. & G. N. Ry. Co. v. Kernan*, 78 T. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52.

A railway company, in furnishing appliances to work with, is only required to use such care and caution as an ordinarily prudent man would use under like circumstances. *G., C. & S. F. Ry. Co. v. Schwabbe*, 1 C. A. 573, 21 S. W. 706.

The test of diligence in maintaining proper appliances for protection of employes is the exercise of ordinary care. *Railway Co. v. Goodwin* (Civ. App.) 26 S. W. 1007; *Railway Co. v. Bell*, 75 T. 51, 12 S. W. 321; *Railway Co. v. Beatty*, 73 T. 592, 11 S. W. 858; *Railway Co. v. Lyde*, 57 T. 509; *Railway Co. v. Oram*, 49 T. 341.

It is the duty of the master to exercise ordinary care in furnishing safe appliances, but there is no implied provision that he will do more than exercise such care. *Railway Co. v. King*, 14 C. A. 290, 37 S. W. 34.

A master is only required to use ordinary care to furnish the servant a reasonably safe instrument with which to do his work. *St. Louis Southwestern Ry. Co. of Texas v. Kern* (Civ. App.) 100 S. W. 971.

A master must use ordinary care to furnish a servant with instrumentalities with which to do his work that are reasonably safe. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

Rule for determining a master's duty to furnish suitable machinery defined. *Currie v. Missouri, K. & T. Ry. Co. of Texas*, 101 T. 473, 108 S. W. 1167.

A railroad company held bound to use ordinary care to provide for use by an employe reasonably safe and suitable instrumentalities. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

A master, failing to furnish a reasonably safe appliance for his servant, is liable for injuries to the servant caused thereby. *Faulkner v. Texas & N. O. Ry. Co.* (Civ. App.) 113 S. W. 765.

A brakeman injured by slipping from a loose stirrup on a box car cannot hold the railroad company liable, unless the company had not used ordinary care. *St. Louis Southwestern Ry. Co. of Texas v. Neef* (Civ. App.) 138 S. W. 1168.

28. — **Places for work.**—The rule that a railroad company must furnish its employe a safe place to work is not applicable where plaintiff's injuries resulted from the dangerous method of doing the work on which he was engaged. *San Antonio & A. P. Ry. Co. v. Weigers*, 22 C. A. 344, 54 S. W. 910.

Railroad owes a servant the duty of exercising ordinary care to supply a reasonably safe place for the particular work in hand. *Texas Cent. R. Co. v. George*, 40 C. A. 267, 89 S. W. 1091.

Rule respecting the duty of a railway company to exercise ordinary care to keep places where its servants are employed in a reasonably safe condition stated. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

Master held required to furnish servant with reasonably safe place in which to work. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 116 S. W. 106.

The degree of care required of a master in furnishing a safe place for work depends on the character of the place and of the service to be performed. *Texas & P. Ry. Co. v. Tuck*, 103 T. 72, 123 S. W. 406.

It is the duty of the employer to exercise ordinary care to furnish his employe a reasonably safe place in which to work. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Civ. App.) 129 S. W. 394.

An instruction requiring a railroad company to keep its depot platform in a safe condition held to require too high a degree of care. *Houston, E. & W. T. Ry. Co. v. Eddings* (Civ. App.) 139 S. W. 902.

The master's duty to furnish his servants a safe place for work, while not a part of the stipulation usually embraced in contracts of employment, is implied in all such agreements, and is treated in law as incidental to the relation. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

29. — **Not an absolute duty.**—It is the duty of a railway company to furnish its servants and employes reasonably safe and suitable machinery and appliances for the work they are employed to do, and to keep the same in reasonably safe and good repair for the transaction of its business, and in doing so to use a degree of care proportioned to the hazard or danger which might reasonably be anticipated as consequent upon its negligence in selecting or repairing the same. The railway company is not bound to furnish absolutely safe machinery or to keep them absolutely safe, but it is required to use reasonable diligence to provide reasonably safe machinery, and after having done so

to keep the same in reasonably safe condition as above prescribed; and if the company fails in either of these respects, and injury is occasioned thereby to one of its employes, then the company is guilty of negligence. *Ry. Co. v. McClain*, 80 T. 85, 15 S. W. 789.

It is not the absolute duty of the master to furnish reasonably safe appliances; he is bound only to exercise ordinary care in furnishing same. *Bryan v. International & G. N. R. Co.* (Civ. App.) 90 S. W. 693.

A railway company must use ordinary care to keep an engine's throttle in a reasonably safe condition; but is not absolutely bound to keep it in such condition. *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 C. A. 349, 108 S. W. 480.

Railroads held not to be insurers of the safety of their employes. *International & G. N. R. Co. v. Schubert* (Civ. App.) 130 S. W. 708.

30. — **Care proportionate to risk.**—It is the duty of railroad companies to use reasonable care, proportioned to the risk, in selecting and furnishing to their employes implements and appliances with which the latter are to perform their duties, to see that such implements are safe and appropriate ones to be used. The care which they are bound to use is such as ordinarily prudent persons would employ in such matters. *Railway Co. v. Crenshaw*, 71 T. 340, 9 S. W. 262.

The degree of care required by a railroad company towards a servant is not dependent upon what the injured party would be expected to do under the circumstances. *Galveston, H. & S. A. Ry. Co. v. Gornley*, 91 T. 393, 43 S. W. 877, 66 Am. St. Rep. 894.

It is not required to use a greater degree of care towards an employe in danger than towards one who is not in such danger. *Id.*

Ordinary care, as applied to a railroad's obligation to furnish reasonably safe appliances with which servants are required to perform their duties, may require a very high degree of diligence in accordance with the circumstances surrounding the situation. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

Diligence which will amount to ordinary care on the part of an employer to furnish reasonably safe appliances for his employes must be measured by the circumstances of each particular case. *Houston & T. C. R. Co. v. Patrick*, 50 C. A. 491, 109 S. W. 1097.

The same degree of care required of a master does not necessarily require the same quantum of diligence to be used; ordinary care in some instances requiring the exercise of great diligence, while in other cases the exercise of the same degree of care demands but slight diligence. *Houston & T. C. R. Co. v. Alexander*, 102 T. 497, 119 S. W. 1135.

A master is bound only to exercise ordinary care to furnish reasonably safe and suitable appliances for work, hence a charge that it was the duty of a railroad company to furnish its employes with reasonably safe and suitable appliances and, in doing so, to use a degree of care proportioned to the hazard imposes too high a degree of care. *Ft. Worth Belt Ry. Co. v. Turney* (Civ. App.) 157 S. W. 274.

31. — **Care exercised by other railroads.**—See, also, § 35, post.

A railroad company is required only to exercise reasonable and ordinary care in furnishing safe appliances for the use of their employes. No obligation rests upon them to furnish appliances and machinery as safe as that used by railroads generally. *G., C. & S. F. R. Co. v. Beall* (Civ. App.) 43 S. W. 605.

The degree of care required of railroad companies to prevent injuries to their employes is not such as is ordinarily used by railroad companies. *International & G. N. R. Co. v. Hawes* (Civ. App.) 54 S. W. 325.

32. — **Care dependent on servant's knowledge.**—A master is liable for failure to exercise ordinary care in supplying to servants a safe place in which to work, unless it be shown that the servant knew of the master's failure to perform such duty, and knew the risk attending the ordinary performance of his duty, or must necessarily have acquired such knowledge. *Galveston, H. & S. A. Ry. Co. v. Udalle* (Civ. App.) 91 S. W. 330.

33. **Delegation of duty.**—If the agent employed to furnish implements and appliances fails to discharge his duty, the master is liable to an employe who suffers injury through such neglect. *Railway Co. v. McElyea*, 71 T. 386, 9 S. W. 313, 1 L. R. A. 411, 10 Am. St. Rep. 749.

The company cannot relieve itself of the duty of furnishing safe machinery and appliances by charging its servants with its performance. The neglect of the servant is the neglect of the company. *I. & G. N. Ry. Co. v. Kernan*, 78 T. 294, 14 S. W. 668, 9 L. R. A. 703, 22 Am. St. Rep. 52.

The facts that a railway company enunciated a rule that its employes must examine personally all appliances before trusting them did not excuse it from its duty to inspect engine steps to see that they were free from grease. *Bookrum v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 57 S. W. 919.

An express company held not relieved from liability for injuries to an employe resulting from defective premises, by reason of a contract between defendant and a railroad company, under which the latter was charged with the duty of keeping the premises in repair. *Pacific Express Co. v. Shivers*, 41 C. A. 291, 92 S. W. 46.

The duty of a railroad company to see that a rule requiring cars left on a grade siding should be coupled together was complied with, so as to make the cars a reasonably safe place for brakemen to work, held nondelegable. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

A railroad company held not entitled to delegate to its section foreman its duty of furnishing a safe track and keeping the same in repair. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

A railway company must furnish reasonably safe tracks and machinery, and is responsible to its servants for a neglect of this duty by such servants or agents as it may intrust with its performance. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

The master's duty to furnish his servant with a reasonably safe place in which to work cannot be delegated. *Galveston, H. & S. A. Ry. Co. v. Thompson* (Civ. App.) 116 S. W. 106.

34. **Failure to furnish tools or appliances.**—A sugar mill company operating a railroad on its plantation held not required to carry jack screws upon the engine for use in

putting it back upon the track, if derailed. *Arcola Sugar Mills Co. v. Luckey* (Civ. App.) 144 S. W. 1148.

**35. Custom and usage.**—The test of duty of a railroad company in furnishing machinery is not what railroads do generally, but whether the road in question was reasonably careful. *Gulf, C. & S. F. Ry. Co. v. Beall* (Civ. App.) 43 S. W. 605.

The degree of care required is not such as is ordinarily used by railroad companies. *International & G. N. R. Co. v. Hawes* (Civ. App.) 54 S. W. 325.

In an action for injuries caused by a defective stirrup on a box car, it is no defense that most of the railroad's cars had defective stirrups. *St. Louis Southwestern Ry. Co. of Texas v. Neef* (Civ. App.) 138 S. W. 1168.

**36. Appliances or places owned, controlled or provided by third persons.**—Evidence held to establish liability of railroad company for death of employé caused by defective apparatus of independent contractor. *Gulf, C. & S. F. Ry. Co. v. Delaney*, 22 C. A. 427, 55 S. W. 538.

Under provisions of contract, railroad company held liable for death of employé caused by defective apparatus of independent contractor. *Id.*

Where a railroad company permits a locomotive of another company to be brought into its yard and used by its servants, it must exercise reasonable care to see that it is in a reasonably safe condition. *Houston & T. C. R. Co. v. Milam* (Civ. App.) 58 S. W. 735.

In an action for injuries sustained by an employé in consequence of a defective stirrup on a foreign car, the proof held not to show that the company knew of the particular defect. *Galveston, H. & S. A. Ry. Co. v. Parish* (Civ. App.) 93 S. W. 682.

A railroad company requiring its servants to handle foreign cars held bound to exercise reasonable care to ascertain if they are defective, and, if so, to warn its servants of the danger. *Texas & N. O. Ry. Co. v. Conway*, 44 C. A. 68, 98 S. W. 1070.

A railroad for which a bridge was being constructed by an independent contractor held not liable under the circumstances for injuries caused by the contractor's negligence. *Missouri Valley Bridge & Iron Co. v. Ballard*, 53 C. A. 110, 116 S. W. 93.

A master who rents ballast cars for use in his business held required to use ordinary care to furnish reasonably safe cars and maintain them in such condition. *Texas Traction Co. v. Morrow* (Civ. App.) 145 S. W. 1069.

**37. Defects in tools, appliances and places for work in general.**—An employé is entitled to damages for injury received from imperfect implements furnished by a railway company. *Railway Co. v. Scott*, 71 T. 703, 10 S. W. 298, 10 Am. St. Rep. 804.

In action by a drawbridge tender, injured by the breaking of the wrench furnished for turning the draw, a finding that the company was negligent held justified. *Galveston, H. & N. Ry. Co. v. Newport*, 26 C. A. 583, 65 S. W. 657.

Railroad company held not guilty of negligence in leaving a defective wrench on the roundhouse floor, within reach, so that it might be used and cause injury to an employé. *O'Brien v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 528, 82 S. W. 319.

Where a master puts into the hands of his servant an implement, which he ought to know is in a dangerous condition, for such immediate and hurried use that the servant is likely to use it without opportunity to see the defect and the attending danger and to receive injury, the master is liable for any injury resulting therefrom. *Gulf, C. & S. F. Ry. Co. v. Griggs*, 101 T. 145, 105 S. W. 486.

An employer is not liable for an injury to a servant not caused by any defect in the place which affected its safety when used in the ordinary way and for the purpose it was intended. *International & G. N. Ry. Co. v. Reiden*, 48 C. A. 401, 107 S. W. 661.

A ladder maintained by defendant by which plaintiff was expected to reach one of the manheads at the rear of one of the boilers in defendant's cerosote plant held a "place" within the rule requiring the master to furnish a reasonably safe place to work. *Missouri, K. & T. Ry. Co. of Texas v. Steele*, 50 C. A. 634, 110 S. W. 171.

Facts held insufficient to warrant an inference that timber used by a railway bridge gang was negligently stacked. *Cato v. St. Louis S. W. Ry. Co. of Texas* (Civ. App.) 119 S. W. 132.

In determining the proper condition of premises, as affecting their safety to employés, the character of the work, situation of the premises, and working conditions should be considered. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

A lumber company's teamster held a mere licensee in passing along a logging railroad track to his work as affecting the company's liability for injury caused by a passing train. *Hopkins v. Garrison-Norton Lumber Co.* (Civ. App.) 144 S. W. 310.

A railroad company which uses oil for fuel is guilty of negligence in furnishing its servants open flame lanterns to use around the reservoirs, where light is necessary to enable them to fill the engine tanks. *Houston Beit & Terminal Ry. Co. v. Woods* (Civ. App.) 149 S. W. 372.

Where a railroad company furnished its servants with picks with which to remove old ties, and it was impossible for the servants to avoid striking the rails with the picks, it was the duty of the company to furnish properly tempered picks which would not splinter when coming in contact with the steel rails. *Freeman v. Wilson* (Civ. App.) 149 S. W. 413.

**38. Defective or dangerous machinery.**—In the selection of a device for the protection of a servant, a master is required to use ordinary care only. *El Paso & S. W. R. Co. v. Foth*, 101 T. 133, 105 S. W. 322.

The right of an employé to recover for damages arising from defective machinery stated. *Texas & N. O. R. Co. v. Geiger*, 55 C. A. 1, 118 S. W. 179.

**39. Locomotives.**—A master held required to use ordinary care to have its engine in reasonably safe condition for an employé engaged in doing mere manual labor on it. *Missouri, K. & T. Ry. Co. of Texas v. Quarles*, 22 C. A. 83, 54 S. W. 251.

The fact that deceased was an experienced locomotive engineer did not relieve the railroad company by whom he was employed of its duty to use ordinary care to furnish him a safe engine and to use ordinary care in the construction and maintenance of its road. *Galveston, H. & S. A. Ry. Co. v. Smith*, 24 C. A. 127, 57 S. W. 999.

It is the duty of a railroad company to use ordinary care to provide its locomotives with the best appliances and improvements for the protection of its servants. *El Paso & S. W. R. Co. v. Foth*, 101 T. 133, 100 S. W. 171.

A railroad company failing to use ordinary care to discover the defective condition of the standing place on the pilot of its locomotives and remedy the same held negligent. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

In an action against a railroad company for injuries to a locomotive fireman by the explosion of the boiler, the happening of the accident did not raise a presumption of negligence on the part of the railroad company. *Galveston, H. & S. A. Ry. Co. v. Garven*, 50 C. A. 245, 109 S. W. 426.

An instruction held not erroneous as making it defendant railway receiver's absolute duty to furnish a fireman a reasonably safe engine. *Taylor v. White* (Civ. App.) 113 S. W. 554.

A railroad company held negligent in not having a key through a king pin used in coupling a tender and engine, the absence of which permitted the pin to work out, causing the death of a fireman. *Missouri, K. & T. Ry. Co. of Texas v. Snow*, 53 C. A. 184, 116 S. W. 631.

A railway company was negligent toward a fireman in furnishing an engine with such defects that it would move automatically. *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852.

Defendant railroad company was negligent in permitting oil and grease to accumulate upon the top of an oil box on an engine which was slanting, and upon which an employé in performance of his duty slipped and was injured. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

A railroad company held not negligent in not having a clean tool box on the tender; the danger of slipping upon stepping thereon being a risk ordinarily incident to work on the tender. *Houston & T. C. R. Co. v. Alexander*, 103 T. 594, 132 S. W. 119.

It was not the duty of a railroad company to remove splinters from cordwood used in firing its locomotives. *Fort Worth & D. C. Ry. Co. v. McCrummen* (Civ. App.) 133 S. W. 899.

Railroad company held bound only to exercise ordinary care to keep running board of engine free from grease or dirt, and hence was not liable for injuries caused thereby, where it was not responsible for the condition. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 146 S. W. 711.

40. **Cars**—In general.—Evidence held to show that a switchman was injured by negligence of defendant in not providing suitable coupling pins. *Missouri, K. & T. Ry. Co. of Texas v. Hauer* (Civ. App.) 43 S. W. 1078.

The placing of brake beams on railroad cars so low that a man falling was caught thereby and crushed to death held not negligence. *Texas Cent. R. Co. v. Waller*, 28 C. A. 4, 66 S. W. 466.

It is negligence for a railroad company to start a train over its road containing cars with coupling appliances so mismatched that those on one car may slip past those on the other, letting the cars together, so as to endanger the life of a brakeman while attending to the coupling. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

In action against a railroad by a servant, protrusion of a bolt from top of box car held negligence on part of defendant. *International & G. N. R. Co. v. Bayne*, 28 C. A. 392, 67 S. W. 443.

In action for injury to servant alleged to be owing in part to the use of a car with defective wheels, the evidence held not to warrant submission of issue whether the wheels were defective. *El Paso & N. W. Ry. Co. v. McComas* (Civ. App.) 72 S. W. 629.

In an action by an employé of a railroad company for injuries, from being struck by cars being switched held that defendant was guilty of negligence. *Missouri, K. & T. Ry. Co. of Texas v. Balliet*, 48 C. A. 641, 107 S. W. 906.

Duty of railroad company to keep in repair oil boxes on freight cars, so that they may be safely used as a step in mounting the car, stated. *Ft. Worth & R. G. Ry. Co. v. Day*, 55 C. A. 24, 118 S. W. 739.

A fact held not to relieve an electric company from liability for injuries to an employé. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

It is the duty of a railway company to exercise care to equip its cars with attachments for keeping the doors closed to guard against injuries to employés. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

A freight car, which a brakeman was required to handle in the ordinary operation of trains, is an appliance when considered with reference to the master's duty to furnish safe implements and appliances. *Id.*

41. — **Hand cars**.—A railroad hand car held not to come within the rule imposing on the master the duty of "consummate care" in the custody of things dangerous in themselves. *Branch v. International & G. N. R. Co.*, 92 T. 238, 47 S. W. 974, 71 Am. St. Rep. 844.

The furnishing of a defective hand car to sectionmen held negligence. *St. Louis Southwestern Ry. Co. of Texas v. Browning*, 54 C. A. 521, 118 S. W. 245.

42. — **Improper loading**.—See, also, §§ 21, 22, ante.  
Where a piece of coal flew off of a passing train and injured a section hand standing near the track, the company was guilty of negligence. *Gulf, C. & S. F. Ry. Co. v. Wood* (Civ. App.) 63 S. W. 164.

43. **Tracks and roadbeds**—In general.—A railway company is responsible to an employé for negligence in failing to keep its track in order. *Railway Co. v. Geiger*, 79 T. 13, 15 S. W. 214.

It being the duty of a railroad company to use ordinary care to furnish a reasonably safe track, a brakeman has a right to assume that such duty has been performed. *Texas & P. Ry. Co. v. McCoy*, 17 C. A. 494, 44 S. W. 25.

Construction of railroad with double curve at foot of two grades may be a defect. *Galveston, H. & S. A. Ry. Co. v. Ford* (Civ. App.) 46 S. W. 77.

Railroads have no right to assume that no one will unlawfully interfere with their tracks, it being a fact of common knowledge that railroad tracks are sometimes,

without warning tampered with by evil-disposed persons; and the true rule in determining the question of liability is: Did the company exercise the proper care and vigilance to guard against such interference? And the degree of care and vigilance must be in proportion to the degree of probability of such interference and the harm likely to result therefrom. *Railway Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

In an action for injuries to a brakeman, instructions on defendant's duty to keep its tracks and roadbed in repair held proper. *St. Louis & S. F. R. Co. v. Smith* (Civ. App.) 90 S. W. 926.

A railway owes a duty to its employes to use ordinary care to see that its track is in a reasonably safe condition. *Chicago, R. I. & P. Ry. Co. v. Birk*, 44 C. A. 615, 99 S. W. 753.

Whether a railroad company was negligent in backing an engine over a certain track without a switchman on the rear thereof to keep a lookout held not dependent on the existence of any rule requiring a switchman to be so stationed. *Galveston, H. & S. A. Ry. Co. v. Wafer*, 48 C. A. 279, 106 S. W. 897.

A street car company's duty to exercise care to have its track in proper condition for use by its employes, and make necessary inspection thereof, stated. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

A railroad company held bound to use ordinary care in the way of inspection to provide its conductor with a reasonably safe place for work. *Beaumont, S. L. & W. R. Co. v. Olmstead*, 56 C. A. 96, 120 S. W. 596.

It was the duty of a railroad company to use ordinary care to keep its track in a reasonably safe condition for the protection of a fireman. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

A railroad need not make every part of its tracks alike safe for getting off or on moving trains; and it is bound only to ordinary care to make those places safe at which it may reasonably anticipate use by its servants in boarding and alighting from trains. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

44. — **Inequalities and other defects in surface.**—In action for personal injuries to employe, a railroad company was held chargeable with negligence in leaving between the rails, when ballasting with gravel, stones eight or ten inches in diameter. *Galveston, H. & S. A. Ry. Co. v. Pitts* (Civ. App.) 42 S. W. 255.

In an action against a railway company for the death of an engineer in a derailment, an instruction held not objectionable as requiring the company to furnish rails in a reasonably safe condition. *Galveston, H. & S. A. Ry. Co. v. Gillespie*, 48 C. A. 56, 106 S. W. 707.

Grass growing on railroad track and obscuring unfilled space into which a brakeman stepped could operate as a cause to make omission to fill space negligence. *St. Louis Southwestern Ry. Co. of Texas v. Ford*, 56 C. A. 521, 121 S. W. 709.

Defendant railroad, in permitting grass to grow up around rails and conceal them from view, was liable for injuries to a section hand falling over them while carrying ties. *Texas & P. Ry. Co. v. Tuck*, 103 T. 72, 123 S. W. 406.

45. — **Switches and side tracks.**—Where there were depressions in the tracks at a coal chute, which caused an engine to move back suddenly and injure an employe, it is proper to refuse to charge that the condition of the tracks generally is the standard by which to determine what their condition should be at coal chutes. *Missouri, K. & T. Ry. Co. of Texas v. Felts* (Civ. App.) 50 S. W. 1031.

A railroad company's negligence cannot be predicated on its location of a switch on a grade and curve in its track, if, with proper care, its road may be operated as safely with the switch there as elsewhere. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

Where a railroad company locates a switch on a grade and curve in its track, increasing the danger to its employes, it must exercise a commensurate degree of care for the safety of its track there. *Id.*

It was the duty of a railroad engineer operating his engine on a switch to use ordinary care to discover that the track on which his engine was, was not obstructed by cars on the other track which were not within clearance distance. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

46. — **Fences.**—A railroad company's failure to maintain a right of way fence, permitting cattle to get on the track, resulting in a derailment, killing an engineer, held actionable negligence. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

47. — **Bridges.**—A master, whether a common carrier or not, is only required to exercise ordinary and reasonable care for protection of his servants. This rule is applicable to the duty of a railway company in constructing and maintaining bridges upon its line, in a suit for damages for death of an employe. *Railway Co. v. Daniels*, 1 C. A. 695, 20 S. W. 955.

48. **Obstructions or erections on, over or near railroad tracks.**—The track on which a switchman was killed held "obstructed," within the allegations of the petition, whether the car which was run into was left overhanging the track, or was left clear and rolled onto the track. *Ft. Worth & D. C. Ry. Co. v. Wrenn*, 20 C. A. 628, 50 S. W. 210.

An employer held liable for the death of its servant killed by striking a defective bridge, of which defects the servant had no knowledge. *Texas M. R. R. v. Taylor* (Civ. App.) 53 S. W. 362.

The maintenance of a railroad bridge having one overhead beam lower than the other beams, and so low that it may strike employes standing on top of cars, held negligence. *Gulf, C. & S. F. Ry. Co. v. Knox*, 25 C. A. 450, 61 S. W. 969.

In an action for injuries to a brakeman by being struck by a warehouse located near the track, instructions as to defendant's negligence held proper. *Galveston, H. & S. A. Ry. Co. v. Mortson*, 31 C. A. 142, 71 S. W. 770.

The maintenance of a post so close to a railroad track that a brakeman could be struck thereby while riding on the side of a car in the performance of his duties held negligence, entitling a brakeman so injured to recover. *Galveston, H. & S. A. Ry. Co. v. Brown*, 33 C. A. 589, 77 S. W. 832.

A railroad company must use reasonable care to have its roadbed free of obstructions calculated to injure its employes. *Ft. Worth & D. C. Ry. Co. v. Anderson* (Civ. App.) 118 S. W. 1113.

49. **Platforms and ladders.**—Duty of a railway company acquiescing in a custom of its conductors to alight from moving trains at a particular station in performing a duty, stated. *Missouri, K. & T. Ry. Co. of Texas v. Kennedy*, 51 C. A. 466, 112 S. W. 339.

A master held negligent in furnishing plaintiff a defective ladder which negligence was the proximate cause of plaintiff's injury. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

Evidence held insufficient to show negligence of employer resulting in injury to employe. *Gulf, C. & S. F. Ry. Co. v. Rogers* (Civ. App.) 138 S. W. 1064.

50. **Gravel pits.**—A railroad foreman held negligent in requiring plaintiff to work in a dangerous gravel pit without warning him of the danger. *St. Louis Southwestern Ry. Co. of Texas v. Marshall* (Civ. App.) 120 S. W. 512.

The duty to direct and look after the protective work of removing the overlying strata of dirt and rock as they project from removal by employes of gravel from the bottom of the gravel pit devolves on the master. *Chicago, R. I. & E. P. Ry. Co. v. Easley* (Civ. App.) 149 S. W. 785.

51. **Latent defects.**—Railroad company held not liable for injury sustained by employe by breaking of turntable lever while he was endeavoring to move the table. *Pippin v. Sherman, S. & S. Ry. Co.* (Civ. App.) 58 S. W. 961.

An employe of a railroad company, injured by the dropping of a brake rod, cannot recover if the defect existing in the appliance was latent, and could not have been discovered by the company by the use of ordinary care. *Galveston, H. & S. A. Ry. Co. v. Buch*, 27 C. A. 283, 65 S. W. 681.

If an injury results to a railroad employe by reason of negligence in the construction of the track, it is no defense for the company to say that the defect was so hidden and concealed that it could not have been discovered by the exercise of ordinary care. *Galveston, H. & S. A. Ry. Co. v. Roberts* (Civ. App.) 91 S. W. 375.

52. **Inspection and test.**—Duty to make in general.—In an action for injuries to a servant caused by a coal gate giving way, evidence held sufficient to establish defendant's negligence. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 73 S. W. 571.

Evidence held to justify finding that railway company was negligent in furnishing defective lantern globe to fireman. *Gulf, C. & S. F. Ry. Co. v. Larkin* (Civ. App.) 80 S. W. 94.

Where inspectors fail to properly inspect railroad tracks, the company is liable for injuries resulting therefrom, notwithstanding a man of ordinary care would reasonably have believed the track was safe. *Missouri, K. & T. Ry. Co. of Texas v. Hagan*, 42 C. A. 133, 93 S. W. 1014.

In an action by a fireman for personal injuries, evidence held not conclusive as to defendant's performance of duty to inspect. *Galveston, H. & S. A. Ry. Co. v. Garrett*, 44 C. A. 406, 98 S. W. 932.

It is a railroad company's duty to make such a careful and proper inspection of its cars and coupling appliances as an ordinarily prudent person would make under similar circumstances. *Missouri, K. & T. Ry. Co. of Texas v. Blachley*, 50 C. A. 141, 109 S. W. 995.

Statement of master's duty to brakemen to inspect brakebeams of cars. *St. Louis Southwestern Ry. Co. of Texas v. Keith* (Civ. App.) 124 S. W. 695.

Where the duty of a master to inspect machinery or implements arises stated. *Ft. Worth & D. C. Ry. Co. v. McCrummen* (Civ. App.) 133 S. W. 899.

53. — **Care required in inspecting.**—When, by the use of ordinary care in testing the strength of machinery or tools placed in the hands of an employe of a railway company with which to labor, its weakness and dangerous character for the work to be done could have been ascertained, and injury results to such employe from such defect, the company will be chargeable with notice of the defect and consequent liability, in damages for the injury. *Railway Co. v. Silliphant*, 70 T. 623, 8 S. W. 673.

In an action by a railroad employe for injuries from a defective appliance, a finding that no sufficient inspection was made held sustained by the evidence. *Galveston, H. & S. A. Ry. Co. v. Buch*, 27 C. A. 283, 65 S. W. 681.

Inspection to relieve from liability held required to be made carefully and by a competent inspector. *Southern Kansas Ry. Co. of Texas v. Sage*, 98 T. 433, 84 S. W. 814.

The failure of a master to use ordinary care in inspecting appliances furnished an employe held negligence per se. *Texas Short Line Ry. Co. v. Waymire* (Civ. App.) 89 S. W. 452.

Evidence that a railroad tested but one out of every fifty wheels purchased held not to show negligence in respect to an injured servant. *Hover v. Chicago, R. I. & G. Ry. Co.*, 40 C. A. 280, 89 S. W. 1084.

A railroad company held bound to use ordinary care in the way of inspection to provide its conductor with a reasonably safe place for work. *Beaumont, S. L. & W. R. Co. v. Olmstead*, 56 C. A. 96, 120 S. W. 596.

A railroad company owed a brakeman no other duty than to exercise ordinary care to discover defects in a hand brake, and was not liable for failure to discover such defect, if it discharged such duty. *St. Louis Southwestern Ry. Co. of Texas v. Downs* (Civ. App.) 153 S. W. 714.

54. — **Things to be inspected.**—A railroad company held not bound to inspect a wrench by which one of its employes was injured. *O'Brien v. Missouri, K. & T. Ry. Co. of Texas*, 36 C. A. 528, 82 S. W. 319.

Lantern globe held not to require inspection, so that a railroad company was not liable to a fireman for injury caused by a defective globe, merely because it could not prove that it had inspected it. *Gulf, C. & S. F. Ry. Co. v. Larkin*, 98 T. 225, 82 S. W. 1026, 1 L. R. A. (N. S.) 944.

It is not the duty of the master to inspect ordinary cordwood for splinters, knots, or other protuberances. *Ft. Worth & D. C. Ry. Co. v. McCrummen* (Civ. App.) 133 S. W. 899.

It is the duty of a railroad to inspect the floor of a car as being a place furnished the employé for work. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

A jack used to raise and lower railroad cars held not a simple or common tool as to which the master was not required to make inspection. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

An employé is under no duty to inspect during use common tools and appliances with which every one is conversant. *Id.*

Where a railroad had acquiesced and approved the custom of switchmen in riding on the brake beam of the engine, it owes the duty to inspect the same, and not allow them to become so loose as to swing to the side when stepped on. *Freeman v. Gerretts* (Civ. App.) 153 S. W. 1163.

55. — **Foreign cars.**—A railroad company is bound to inspect foreign cars coming into its trains the same as its own. *Jones v. Shaw*, 16 C. A. 290, 41 S. W. 690.

It is the duty of a railway company to inspect as it does its own cars the cars of other companies used by it and failing to do so, it is liable to an injured employé for any defect in said cars causing him the injury. *M., K. & T. Ry. Co. v. Chambers*, 17 C. A. 487, 43 S. W. 1090.

An employé of a railroad company was entitled to recover from the employer for injuries caused by a defect in a car which a proper inspection would have discovered, though the car belonged to another road. *Galveston, H. & S. A. Ry. Co. v. Nass* (Civ. App.) 57 S. W. 910.

When cars with coupling appliances so defective or mismatched as to be dangerous to the trainmen are tendered to a railroad company for transportation over its road, the defect being discernible on inspection, it must remedy the defect or refuse to take the cars. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

A railway company receiving a foreign car owes to its employés only the duty of reasonable inspection to determine whether the same is safe. *Galveston, H. & S. A. Ry. Co. v. Parish* (Civ. App.) 93 S. W. 682.

Duty of railway companies to brakemen with reference to safety of appliances on foreign cars stated. *Gulf, C. & S. F. Ry. Co. v. Sliker* (Civ. App.) 100 S. W. 957.

A railroad company held to owe to a trainman the duty to inspect cars of other companies in its train. *Missouri, K. & T. Ry. Co. of Texas v. Harris*, 45 C. A. 542, 101 S. W. 506.

56. — **Inspection of air brakes.**—See Arts. 6571a-6571c.

57. — **Time and opportunity for making.**—It is the duty of a railway company to its employees operating its trains to make frequent and thorough inspection of its line of road and bridges; and in case of violent storms it should make such inspection with great promptitude and thoroughness. *Railway Co. v. George*, 85 T. 153, 19 S. W. 1036.

Evidence held to show an injury to one employed on a freight train to have been caused by the negligence of the company in inspection of car. *Missouri, K. & T. Ry. Co. of Texas v. Miller*, 25 C. A. 460, 61 S. W. 978.

A railroad company does not show freedom from negligence, as matter of law, in not inspecting, during the night, a switch, from a defect in which a train was derailed, killing the engineer, by evidence that it was not its custom or that of other railroads to inspect their tracks at such time. *Gulf, C. & S. F. R. Co. v. McGinnis* (Civ. App.) 147 S. W. 1188.

58. — **Delegation of duty.**—Ordinarily, the duty of inspection of appliances is on the employer, and, if he may shift the duty by rules, the employés must have knowledge thereof. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

59. — **Obvious or latent defects.**—A defect in a tool which develops while it is being used is not an obvious one. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

60. — **Operation and effect.**—An inspection of a car by a competent inspector held not to show conclusively a proper inspection, precluding a recovery by a brakeman for injuries caused by defects in the car. *International & G. N. R. Co. v. Hawes* (Civ. App.) 54 S. W. 325.

61. **Knowledge by master of defect or danger.**—Where a master knows, or could know by the use of ordinary diligence, that the tools provided for the servant are unsafe, and the servant without contributory fault suffers injury thereby, the master is liable. *Smith v. Gulf, W. T. & P. Ry. Co.* (Civ. App.) 65 S. W. 83.

In an action by a servant for injuries from an originally defective appliance, the fact that the defects could not be discovered by inspection held no defense. *Galveston, H. & S. A. Ry. Co. v. Smith* (Civ. App.) 93 S. W. 184.

Where an employé was injured by defectively fastened hand rail on a locomotive, he was entitled to recover if the employer had notice at any time before the accident of the defective condition. *Id.*

The liability of a master does not depend upon its actual knowledge of the existence of a danger, but it is liable if, by the exercise of care, it could have had its premises reasonably safe. *Missouri, K. & T. Ry. Co. of Texas v. Romans* (Civ. App.) 114 S. W. 157.

It was a street car company's duty to exercise ordinary care to discover a railroad car dangerously near its track, and remove it, and it could not escape liability for injuries to employés caused by the proximity of the car, on the ground that it had no actual notice thereof, and could not control the movement of the railroad car. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, the facts necessary to show negligence of defendant stated. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 103 T. 187, 125 S. W. 309.

To recover of an employer for an injury, it must appear that the defect causing the injury was of such character that ordinary care on the part of the employer would have discovered and remedied it. *St. Louis, S. F. & T. Ry. Co. v. Cason* (Civ. App.) 129 S. W. 394.

Where the sagging condition of overhanging telephone wires, by which a railroad brakeman was injured, was due to the act of a stranger, the lapse of an hour and a

half or two hours did not charge the company with notice of such condition. *Southern Kansas Ry. Co. of Texas v. Shinn* (Civ. App.) 153 S. W. 636.

Where an unusual condition is created by the act of a stranger, an employer is not liable for injuries therefrom unless notice is shown either by some circumstance or by a sufficient length of time intervening. *Id.*

That an unusual condition, by which an employé was injured, was caused by a third person does not relieve the employer of liability if, just before and at the time of the accident, another employé, in the discharge of a particular duty owed to the master, might or could have discovered the condition, and failed to do so. *Id.*

**62. Repairs.**—In an action for injuries to a servant, an instruction that defendant was bound to furnish appliance that was in a reasonably safe condition, and to keep it in such condition, held erroneous. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 82 S. W. 787.

A railroad which either knew of a defect in a coupling pin, or in the exercise of ordinary care would have known of such defect, and failed to take reasonable steps to remedy it, was guilty of negligence. *San Antonio & A. P. Ry. Co. v. Hahl* (Civ. App.) 83 S. W. 27.

In an action for injuries sustained while engaged in blocking up a defective turntable, the company held negligent in failing to repair the table. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

**63. Proximate cause of injury—In general.**—In an action for injuries to a servant, defendant's failure to keep the door of a coal bin in repair held not the proximate cause of the accident. *Chicago, R. I. & T. Ry. Co. v. Jackson*, 40 C. A. 273, 89 S. W. 1117.

Where the mud on a rail was a concurring cause with the defective condition of the wheel and axle of a motor car and of excessive speed of the car in producing its derailment, injuring a servant, the presence of the mud on the rail did not defeat an action for the injury. *Morgan's L. & T. R. & S. S. Co. v. Street*, 57 C. A. 194, 122 S. W. 270.

That a switchman injured in coupling a car saw the defect before he was injured would not prevent it from being the proximate cause of his injury. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

The negligence of a railroad company held not the proximate cause of an injury to an employé. *Ft. Worth Belt Ry. Co. v. McKinney* (Civ. App.) 145 S. W. 666.

An employé suing for a personal injury must prove negligence proximately causing the injury. *Id.*

**64. — Appliances in general.**—Railway company held liable for injury resulting from failure to use ordinary care in furnishing appliances, though other negligence concurred. *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852.

A master's negligence in furnishing plaintiff a defective ladder, held to be the proximate cause of plaintiff's injury. *Gulf, C. & S. F. Ry. Co. v. Adams* (Civ. App.) 121 S. W. 876.

**65. — Locomotives.**—A defect in an engine was not the proximate cause of the moving of the engine and injury to a fireman at work under an attached engine, where the engineer was able to control the engine notwithstanding the defect. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 44 C. A. 534, 98 S. W. 892.

Where an employé who was putting fuel oil in defendant's engine stepped upon the top of an oil box which was covered with grease, and slipped and fell, defendant's negligence in permitting the box to be covered with grease was the proximate cause of his injuries, caused by the fall. *Houston & T. C. R. Co. v. Alexander* (Civ. App.) 121 S. W. 602.

The defective condition of a locomotive in allowing steam to escape into the cylinder without opening the throttle held the proximate cause of injury to a fireman. *Atchison, T. & S. F. Ry. Co. v. Seeger* (Civ. App.) 126 S. W. 1170.

**66. — Cars.**—A bolt negligently allowed to protrude from top of box car held proximate cause of injury to servant. *International & G. N. R. Co. v. Bayne*, 28 C. A. 392, 67 S. W. 443.

In an action for injuries to a railroad brakeman, the fact that plaintiff's foot caught in a guard rail in attempting to couple the car does not render the negligence of defendant in having a defective coupler and in failing to inspect the car too remote to be considered. *Hynson v. St. Louis Southwestern Ry. Co.* (Civ. App.) 107 S. W. 625.

**67. — Tracks and roadbeds.**—If a derailment by which an engineer was killed occurred through defects in the track due to the company's negligence, it was liable, though a contributing cause was running into an animal. *Texas & P. Ry. Co. v. McClane*, 24 C. A. 321, 62 S. W. 565.

In an action against a railroad for injuries to a brakeman while coupling cars, evidence held sufficient to support a judgment for plaintiff. *St. Louis & S. F. R. Co. v. Ames* (Civ. App.) 94 S. W. 1112.

In an action for death of a railroad engineer, it was no defense that the derailment resulted from the acts of wreckers, if defendant was negligent in failing to properly inspect the track. *Thompson v. Galveston, H. & S. A. Ry. Co.*, 48 C. A. 284, 106 S. W. 910.

In an action for injuries to a railroad freight brakeman, who was thrown from the top of a car by a sudden jerk of the train and fell on a pile of clinkers beside the track, an instruction permitting a recovery if defendant's negligence in maintaining the pile of clinkers directly contributed to the injury held properly refused. *Ayers v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 116 S. W. 612.

A railroad company held not liable for injuries to a brakeman after his fall from the top of a moving car, where he ran along the track until he stepped into a hole and was run over. *Atchison, T. & S. F. Ry. Co. v. Wiley* (Civ. App.) 118 S. W. 1127.

Negligence of railroad company in providing insufficient number of men to keep the track, being merely a remote incident and not the proximate cause of injury to decedent by being struck by a lump of coal from a passing tender, held not ground for recovery. *Missouri, K. & T. Ry. Co. of Texas v. Smith* (Civ. App.) 133 S. W. 482.



## IV. METHODS OF WORK, RULES AND ORDERS

68. **Methods of work and duty to protect servant in general.**—A servant of a railway company held not entitled to recover for injuries, where he was familiar with the work, and the risk was patent, and arose from natural causes, and not from defective appliances. *Houston & T. C. R. Co. v. Martin*, 21 C. A. 207, 51 S. W. 641.

Where railroad yards are used as a thoroughfare by employes of a road, it is the duty of the employers when switching to use due care that those in the yard are not injured. *Missouri, K. & T. Ry. Co. of Texas v. Balliet*, 48 C. A. 641, 107 S. W. 906.

69. **Statutory signals.**—See Art. 6564 and "For whose benefit duty imposed," under that article.

70. **Care required of master.**—Ordinary care and "reasonable care," as applied to the duty of a master to provide rules for the regulation of his activities, held ordinarily convertible terms. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

71. **Precautions against injury in general.**—In an action for injuries occasioned by falling into an unguarded excavation, evidence held not to entitle defendant to an instruction that, though street lights near by were not sufficient to make the excavation obvious, it was not negligent, if a prudent person would have left it unguarded.—*Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 67 S. W. 769.

In an action by an engineer of a rear train for personal injuries, failure to obey the rule requiring ten minutes between trains held contributory negligence. *International & G. N. R. Co. v. Brice*, 100 T. 203, 97 S. W. 461.

72. **Customary methods.**—That a switching crew, by the activities of which decedent, a member of another crew, was injured, acted according to the usual custom at the time did not necessarily relieve it of the charge of negligence. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

73. **Knowledge of danger.**—Where a brakeman was injured while uncoupling cars by the engineer backing without a signal, it was not necessary that the engineer should have known that the brakeman was between the cars to make his moving the engine negligence. *Galveston, H. & S. A. Ry. Co. v. Courtney*, 30 C. A. 544, 71 S. W. 307.

74. **Care required in operating locomotives, trains and cars—In general.**—In an action by an employe against a railroad for injuries, certain conduct of a foreman in charge of and assisting in moving a hand car held to show negligence. *Missouri, K. & T. Ry. Co. of Texas v. Smith*, 31 C. A. 332, 72 S. W. 418.

Evidence of slipping of fellow servant's feet in placing push car on track held insufficient to show negligence. *Seery v. Gulf, C. & S. F. Ry. Co.*, 34 C. A. 89, 77 S. W. 950.

Failure to maintain a flagman at the point where torpedoes had been set, to protect the rear end of a train, held not negligence justifying a recovery for injuries to a trackman by the explosion of a torpedo by a hand car on which he was riding. *Murphy v. Galveston, H. & N. Ry. Co.* (Civ. App.) 96 S. W. 940.

Trainmen in charge of a freight train who knew that it was the duty of a brakeman to board the train while in motion must run it at a rate of speed which would enable him to board it with reasonable safety. *Galveston, H. & S. A. Ry. Co. v. Sullivan*, 53 C. A. 394, 115 S. W. 615.

75. — **Employes riding on locomotives, trains or cars.**—Where plaintiffs' deceased, the foreman of a crew operating a hand car, saw an obstruction on the track and directed the men to stop the car, it was their duty to use all the means at hand for that purpose. *Galveston, H. & S. A. Ry. Co. v. Perry*, 38 C. A. 81, 85 S. W. 62.

It was negligence for a locomotive engineer to suddenly and violently stop a train, when a brakeman was passing along the roofs of the cars. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 98 T. 535, 86 S. W. 5.

Fact that locomotive engineer knew that the conductor was riding on the pilot held not to require him to keep watch of the conductor, to the neglect of other duties, so as to guard against the emergency of his falling. *Cardwell v. Gulf, B. & G. N. Ry. Co.*, 40 C. A. 67, 88 S. W. 422.

In action for injuries to brakeman, evidence held to justify a finding of negligence of the railroad company authorizing a recovery by the brakeman. *Houston & T. C. R. Co. v. Fanning*, 40 C. A. 422, 91 S. W. 344.

In an action for injuries to a locomotive fireman held that it was the duty of the engineer to so handle the engine as to avoid injuring plaintiff. *Galveston, H. & S. A. Ry. Co. v. Cade* (Civ. App.) 93 S. W. 124.

A railway company is liable for injury to a brakeman proximately caused by running its train at a dangerous rate of speed, though such speed be not unlawful. *Missouri, K. & T. Ry. Co. of Texas v. Lasater*, 53 C. A. 51, 115 S. W. 103.

76. — **Employes on or near tracks.**—The duty of one in charge of a passing railway train to stop its progress on account of the proximity to the track of one in advance of his train does not arise until it becomes manifest that such person intends to go upon the track in front of the train. *Railway Co. v. Kuehn*, 70 T. 583, 8 S. W. 484.

The fact that one killed by the negligent running of a train at a greater speed than allowed by law was an employe held not to relieve the company from liability. *Houston, E. & W. T. Ry. Co. v. Powell* (Civ. App.) 41 S. W. 695.

Servants in charge of a railroad train held to be required to exercise ordinary care to make use of appliances of a train to stop it on seeing another servant on the track. *St. Louis S. W. Ry. Co. v. Jacobson*, 28 C. A. 150, 66 S. W. 1111.

Injuries to a railroad trackman by being struck by a hand car held the result of the negligence of defendant's employes in charge of the car. *Chicago, R. I. & T. Ry. Co. v. Long*, 32 C. A. 40, 74 S. W. 59.

Workman on a railroad bridge, injured by a passing train, held entitled to recover against the railroad company. *Gulf, C. & S. F. Ry. Co. v. Roane* (Civ. App.) 75 S. W. 845.

In an action against a railroad company for negligence, causing the death of a section foreman, the engineer of the train which killed deceased held not entitled to presume that a push car would be removed before the train reached it. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

A railroad company held liable for injuries sustained in consequence of the act of a fireman wrongfully opening the valve in a locomotive boiler, causing steam to escape and injure another. *Texas & N. O. R. Co. v. Walton*, 47 C. A. 43, 104 S. W. 415.

Locomotive engineers must keep a lookout for persons rightfully on the track. *Houston & T. C. R. Co. v. Burnett*, 49 C. A. 244, 108 S. W. 404.

In an action for death of a servant, an instruction requiring that the engineer should have used all the means at his command to have stopped the engine after being notified of deceased's perilous situation held not objectionable as imposing too high a degree of care. *San Antonio & A. P. Ry. Co. v. Hodges*, 54 C. A. 364, 118 S. W. 767.

Where a train is behind its schedule and will not naturally be expected, the engineer owes other servants of the company a duty to exercise ordinary care to discover them if on the track. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 132 S. W. 95.

The operatives of a train may assume that a servant walking on the track will get out of the way, in the absence of something definitely indicating otherwise. *Texas & P. Ry. Co. v. Hope* (Civ. App.) 149 S. W. 1077.

77. — **Employés working under locomotives.**—A railway company held liable for the act of a switchman in moving an engine out of his way, resulting in the killing of an employé who was thereunder, cleaning it. *Galveston, H. & S. A. Ry. Co. v. Masterson* (Civ. App.) 51 S. W. 1091.

A railway company held liable for injuries resulting from an engineer's failure to prevent an engine from moving while a fireman is under it. *Atchison, T. & S. F. Ry. Co. v. Mills*, 49 C. A. 349, 108 S. W. 480.

78. — **Coupling or switching cars.**—The fact that a railroad company did not know that a brakeman charged with tending a switch was in need of rest would not relieve it from liability for an accident caused by such brakeman going to sleep and leaving the switch open. *St. Louis S. W. Ry. Co. v. Kelton*, 28 C. A. 137, 66 S. W. 887.

A railroad company is liable to an employé making a coupling for the negligence of the servant in charge of the engine. *Gulf, C. & S. F. Ry. Co. v. Wilder*, 33 C. A. 72, 75 S. W. 546.

Conduct of locomotive engineer in suddenly stopping a train while switching, not negligence in itself, held not made such because certain cars were uncoupled, which was unknown to him. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 98 T. 535, 86 S. W. 5.

Employés engaged in switching held bound to exercise ordinary care to prevent injury to a section foreman while lawfully crossing the switch tracks. *Houston & T. C. R. Co. v. Turner*, 99 T. 547, 91 S. W. 562.

Plaintiff held not negligent in going between a freight car and a post to arrange automatic couplers for coupling at the time he was injured by a movement of the switch engine contrary to custom without signal from plaintiff. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 455.

In an action for injuries to plaintiff's intestate while employed as a switchman, the engineer held to have been negligent. *Missouri, K. & T. Ry. Co. of Texas v. Pennewell*, 50 C. A. 541, 110 S. W. 758.

In an action for death of a switchman, decedent's foreman held negligent in failing to stop another crew before moving the cars on the switch by which decedent would be endangered. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

Trainmen must look out for a switchman required to set the brakes on a loose car to stop it, before they run cars against such car. *Missouri, K. & T. Ry. Co. of Texas v. Reno* (Civ. App.) 146 S. W. 207.

Employés directing the movement of cars are required to exercise ordinary care to prevent injury to a switchman required to set the brakes on a loose car. *Id.*

Where a switchman, in his required work of setting the brakes on a car after it is kicked onto a switch, had his back to cars following, the railroad company owed him the duty of exercising ordinary care in switching a following cut of cars. *Houston E. & W. T. Ry. Co. v. Boone*, 105 T. 188, 146 S. W. 533.

79. — **Collision.**—Where a train is stopped, failure of conductor to send out flagman held to authorize a finding of negligence. *International & G. N. R. Co. v. Culpepper*, 19 C. A. 182, 46 S. W. 922.

Railroad held liable for death of employé in collision of hand car and freight train. *International & G. N. R. Co. v. Jacobs*, 37 C. A. 390, 84 S. W. 288.

The failure of a standing train to display lights in the cupola of its caboose renders the railroad liable for injuries to a brakeman of a following train proximately caused by such failure. *San Antonio & A. P. Ry. Co. v. Lester* (Civ. App.) 84 S. W. 401.

The foreman of a crew in riding on a hand car, held required, on discovering the approach of a freight train, to remove the car to avoid a collision. *Texas & P. Ry. Co. v. Myers* (Civ. App.) 125 S. W. 49.

80. **Proximate cause of injury.**—A collision of two trains held caused by the negligence of the conductor in failing to send out a flagman. *International & G. N. R. Co. v. Culpepper*, 19 C. A. 182, 46 S. W. 922.

Where a division superintendent and conductor did all that was incumbent on them to stop the train, the movement of which caused a brakeman's death, held, that no recovery could be had therefor. *Louisiana Western Extension Ry. Co. v. Carstens*, 19 C. A. 190, 47 S. W. 36.

Railroad held liable for injuries to an engineer, caused by disobedience of rule by another train, although such disobedience was not the sole cause of the injury, but merely a concurring cause. *San Antonio & A. P. Ry. Co. v. Lester* (Civ. App.) 84 S. W. 401.

Negligence of a locomotive engineer held the proximate cause of injuries to a fireman. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527.

In a servant's action for injuries sustained while removing the nipple on the bottom of an oil tank car by the oil rushing out into his eyes, negligence of plaintiff's foreman in directing that the nipple be removed without having closed the valve inside the tank held to have caused plaintiff's injury. *Galveston, H. & S. A. Ry. Co. v. Sanchez*, 57 C. A. 87, 122 S. W. 44.

81. **Rules—Duty to promulgate.**—Railroad company held negligent in not providing rules for protection of car repairer working under cars. *Texas & F. Ry. Co. v. Cumpston*, 15 C. A. 493, 40 S. W. 546.

Necessity of a master to provide rules for protection of his employes determined. *Sanner v. Atchison, T. & S. F. Ry. Co.*, 17 C. A. 337, 43 S. W. 533.

Where from the nature of the business in which the servant is engaged it appeared that in the exercise of ordinary care the master should have foreseen the necessity of making a rule for the protection of the servant, his failure so to do is negligence. *St. Louis & S. F. R. Co. v. Ames* (Civ. App.) 94 S. W. 1112.

A railroad company held under a substantive duty to establish and promulgate reasonable rules to protect switchmen engaged in an extensive railroad yard. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

Railroads held required to adopt reasonable rules for the safety of their employes while in the discharge of duties exposing them to extraordinary dangers. *International & G. N. R. Co. v. Schubert* (Civ. App.) 130 S. W. 708.

It is the duty of a railroad to make and enforce proper rules for the safety of its employes. *Gulf, C. & S. F. Ry. Co. v. Brooks* (Civ. App.) 132 S. W. 95.

A railway company held bound to use ordinary care to bring a rule governing the method of doing work to employes' attention. *St. Louis & S. F. R. Co. v. Arms* (Civ. App.) 136 S. W. 1164.

82. — **Notice to servant.**—Rule governing duty of employe to obey the employer's rules affecting his safety stated. *Adams v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 106 S. W. 526.

83. — **Customary violation.**—Rules made by a railway company for its own ends may be considered as abandoned where permitted to be violated without objection, but rules made solely for the safety of servants will not be deemed abandoned unless the company insists on their disregard in order to hasten the work. *Texas & N. O. Ry. Co. v. Conway*, 44 C. A. 68, 98 S. W. 1070.

In an action for injuries to a brakeman, evidence that it was a custom of defendant's employes to ride on the pilots of its engines while engaged in switching in defendant's yards held admissible without proof of defendant's knowledge. *Atchison, T. & S. F. Ry. Co. v. Sowers* (Civ. App.) 99 S. W. 190.

Failure of employes on some occasions to observe rules promulgated by the master does not show their abandonment or suspension. *Houston & T. C. R. Co. v. Ravanelli* (Civ. App.) 123 S. W. 208.

The rule of a master may be waived by habitual disregard of it with knowledge and acquiescence of servants given the power and authority to enforce it. *Houston Belt & Terminal Ry. Co. v. Woods* (Civ. App.) 149 S. W. 372.

84. — **Construction and operation.**—Though on stopping a train the engineer should have signaled to send out flagman, it was the duty of the conductor to send one out. *International & G. N. R. Co. v. Culpepper*, 19 C. A. 182, 46 S. W. 922.

Presence of a brakeman at a crossing held not a compliance with the rule for a lookout or flagman. *Missouri, K. & T. Ry. Co. of Texas v. Jones* (Civ. App.) 75 S. W. 53.

Rule governing section foremen held to apply to heavy rainstorms, by which injury may be done to the track. *Gulf, C. & S. F. Ry. Co. v. Boyce*, 39 C. A. 195, 87 S. W. 395.

Rule for the prevention of rear-end collisions held applicable to stops at, as well as between, stations. *Galveston, H. & S. A. Ry. Co. v. Quinn* (Civ. App.) 104 S. W. 397.

Engineer, having continued in service with full knowledge of the company's rules, impliedly agreed to obey and enforce them, and was bound by them until they were abrogated by the company's consent. *International & G. N. R. Co. v. Brice* (Civ. App.) 111 S. W. 1094.

A rule held to apply where a train stops at any place on the track while it is closely followed by another train. *Missouri, K. & T. Ry. Co. of Texas v. Rothenberg* (Civ. App.) 131 S. W. 1157.

A rule of an electric railway company held applicable to an emergency wagon standing on the track to permit an employe to repair the wires. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

85. — **Duty to enforce obedience and effect of disobedience.**—In an action for the killing of a flagman at a highway crossing, evidence held to justify a finding of negligence on the part of the railroad company. *Missouri, K. & T. Ry. Co. of Texas v. Goss*, 31 C. A. 300, 72 S. W. 94.

A railway company held not relieved from liability for an injury arising from an employe's failure to flag a train, though the rules established by the company were safe. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

A railroad company held liable for injuries to a trackman caused by a conductor's violation of a rule requiring the flagman of a standing train to remain out with torpedoes which he had placed on the rail until he was recalled. *Murphy v. Galveston, H. & N. R. Co.*, 100 T. 490, 101 S. W. 439, 9 L. R. A. (N. S.) 762.

It is one thing to fail to adopt reasonable rules to protect employes, as alleged by an employe suing for injuries, and another to be negligent in their enforcement, or in failing to furnish signals required thereby as he testified. *Southern Kansas Ry. Co. of Texas v. McSwain*, 55 C. A. 317, 118 S. W. 874.

A failure to observe the rules of a railroad for the control of its servants held not always negligence per se. *Missouri, K. & T. Ry. Co. of Texas v. Richardson* (Civ. App.) 125 S. W. 623.

In an action for injuries to an engineer in a rear-end collision, the evidence held to show the negligence of the operators of the forward train. *International & G. N. R. Co. v. Bricq* (Civ. App.) 126 S. W. 613.

86. **Orders.**—In action by railroad employe for injuries, an instruction as to responsibility of defendant for injuries during obedience to orders held error. *Houston, E. & W. T. Ry. Co. v. De Walt*, 96 T. 121, 70 S. W. 531, 97 Am. St. Rep. 877.

Consent for one employe to direct another, being merely an inference from the evidence, held not to support further inference of authority to make such directions. *Texas & F. Coal Co. v. Manning*, 34 C. A. 322, 78 S. W. 545.

87. — **Negligence in giving.**—If defendant knew of the danger in sending an employé under an oil tank car to unscrew the nipple of the pipe when the valve was open, so as to permit the oil to rush out when the nipple was removed, but the servant did not know of the danger and could not discover it, defendant would be liable for resulting injuries. *Galveston, H. & S. A. Ry. Co. v. Sanchez*, 57 C. A. 87, 122 S. W. 44.

The foreman of a bridge crew held to have had a right to assume that a member of the crew would conduct himself as an ordinarily prudent person would. *Myers v. Texas & P. Ry. Co. (Civ. App.)* 134 S. W. 814.

#### V. WARNING AND INSTRUCTING SERVANT

88. **Duty to warn and instruct in general.**—A railway company is responsible for injuries resulting to an employé from the neglect of the superintendent to instruct him as to his duties. *Railway Co. v. Ewing*, 21 S. W. 700, 1 C. A. 531; *Railway Co. v. Kizziah*, 23 S. W. 578, 86 T. 81; *Railway Co. v. Beatty*, 6 C. A. 650, 24 S. W. 934; *Campbell v. Cook*, 86 T. 630, 26 S. W. 486, 40 Am. St. Rep. 878; *Railway Co. v. Peters*, 87 T. 222, 27 S. W. 257; *Hogan v. Railway Co.*, 88 T. 679, 32 S. W. 1038; *Connor v. Saunders*, 9 C. A. 56, 29 S. W. 1140.

Railroad company held negligent in failing to warn a call boy in a switchyard of the danger of being struck by certain scales while riding on the side of a freight car. *St. Louis Southwestern Ry. Co. of Texas v. Spivey (Civ. App.)* 73 S. W. 973.

The hazard to which plaintiff was exposed held not such as required the master to warn him of the danger. *Parish v. Missouri, K. & T. Ry. Co. of Texas (Civ. App.)* 76 S. W. 234.

It is a master's duty to exercise ordinary care to see that the premises where the servant works are kept reasonably safe, and to warn him of obstacles placed there, and it is not the servant's duty to inspect the premises. *Galveston, H. & S. A. Ry. Co. v. Manns*, 37 C. A. 356, 84 S. W. 254.

Where a brakeman threw a piece of ice from the train and injured his fellow brakeman, the former owed no duty to the latter to give warning of his intention to throw the ice, unless he was chargeable with knowledge that some person would probably be near the spot and might be hit by the ice. *Galveston, H. & S. A. Ry. Co. v. Henefy (Civ. App.)* 99 S. W. 884.

A railway company was negligent in placing a torpedo on a track without stationing a flagman there to warn sectionmen on an approaching hand car of its location. *Galveston, H. & N. Ry. Co. v. Murphy*, 52 C. A. 420, 114 S. W. 443.

If the use of bedbug poison by the employés of a sleeping car company was unusual dangerous, the company should warn them of its dangerous character. *Pullman Co. v. Caviness*, 53 C. A. 540, 116 S. W. 410.

A sleeping car company held not bound to anticipate that a match would be in one of its berths, and that a servant in cleaning the berth would ignite it, and cause bedbug poison, which he was using in the berth, to explode, so that it was not guilty of negligence causing the injury. *Id.*

Defendant held negligent in failing to warn plaintiff of danger of his work. *Houston & T. C. R. Co. v. Malloy*, 54 C. A. 490, 118 S. W. 721.

A foreman held negligent in requiring plaintiff to work in a dangerous gravel pit without warning him of the danger. *St. Louis Southwestern Ry. Co. of Texas v. Marshall (Civ. App.)* 120 S. W. 512.

An engineer held guilty of negligence in giving certain directions to his fireman. *Missouri, K. & T. Ry. Co. of Texas v. Gray*, 56 C. A. 61, 120 S. W. 527.

The principle that a master need not warn his servant of danger unless he knows the danger to which the servant is exposed held not to apply where the danger arises from the negligent act of the master. *El Paso & S. W. R. Co. v. Welter (Civ. App.)* 125 S. W. 45.

It is the duty of a master to warn his servant of dangers incident to his employment unless they are such as he may assume that the servant has knowledge, or will acquire knowledge thereof. *Texarkana & Ft. S. Ry. Co. v. Brandon (Civ. App.)* 126 S. W. 703.

Where a railroad conductor having stopped a train at night on a trestle which he knew was floored on one side only, failed to warn a train porter to alight on that side of the trestle in ordering him to deliver an oil can to the engineer, and the porter alighted on the other side, fell, and was injured, the failure to warn was negligence. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley (Civ. App.)* 153 S. W. 937.

89. — **Movement of locomotives, trains or cars.**—An engineer injured by collision with another train can show that no notice was given him that the other train was late. *Missouri, K. & T. Ry. Co. v. Johnson (Civ. App.)* 49 S. W. 265.

Evidence considered, and held to justify a finding that defendant was negligent in causing the tender to an engine to be pushed back while plaintiff was cleaning the engine cab without giving him notice. *Galveston, H. & S. A. Ry. Co. v. Quay*, 27 C. A. 516, 66 S. W. 219.

In action against railroad for injuries to servant, held that engineer was guilty of negligence in backing locomotive without signal or warning. *Gulf, C. & S. F. Ry. Co. v. Cooper*, 33 C. A. 319, 77 S. W. 263.

In an action against a railroad company for negligence, causing the death of a section foreman, who was killed while attempting to remove a push car from the track, an instruction that defendant was not negligent in failing to whistle for a public crossing held properly refused under the evidence. *International & G. N. R. Co. v. McVey (Civ. App.)* 81 S. W. 991.

In action against railroad for injury to engineer in collision with forward section of his train, defendant held not liable for negligence in failing to advise the rear section of the situation and take steps to prevent the collision. *Quinn v. Galveston, H. & S. A. Ry. Co. (Civ. App.)* 84 S. W. 395.

In an action by an engineer of a rear train for personal injuries, failure to send a flagman from the forward train held, under certain circumstances, not negligence warranting a recovery. *International & G. N. R. Co. v. Erice*, 100 T. 203, 97 S. W. 461.

Operatives of a switch engine held negligent in continuing to back certain cars for the purpose of coupling them into a train without further orders or signal from plaintiff, and contrary to the custom in the yard, by which negligence plaintiff was injured. *Cunningham v. Neal*, 49 C. A. 613, 109 S. W. 455.

Defendant railroad held liable to brakeman for injuries resulting from defendant's failure to signal the moving of a car. *Houston & T. C. R. Co. v. Anderson* (Civ. App.) 132 S. W. 377.

90. Statutory signals.—See Art. 6564 and notes.

91. Duties of dispatcher.—See, also, Art. 6553 and notes.

Train dispatcher's failure to notify engineer of whereabouts of a train with which he is liable to collide held negligence. *Houston & T. C. R. Co. v. Higgins*, 22 C. A. 430, 55 S. W. 744.

92. Inexperienced or youthful employé.—A railway company employing a minor as brakeman held to have violated a primary duty in failing to instruct him. *Missouri, K. & T. Ry. Co. of Texas v. Evans*, 16 C. A. 68, 41 S. W. 80.

Where railroad company knows that switchman is inexperienced, it should instruct him as to particular dangers of his employment. *Galveston, H. & S. A. Ry. Co. v. Hughes*, 22 C. A. 134, 54 S. W. 264.

Evidence in an action by a servant for injuries held to support a verdict in his favor. *Gulf, C. & S. F. Ry. Co. v. Newman*, 27 C. A. 77, 64 S. W. 790.

An employé injured while grinding a planer tool on an emery wheel held entitled to recover, though the wheel was not intended for grinding a tool in the manner adopted, and though he knew the velocity of the wheel. *Gulf, C. & S. F. Ry. Co. v. Archambault* (Civ. App.) 94 S. W. 1108.

In an action for death of an employé by being overcome by paint fumes while he was painting the inside of a locomotive tank, defendant held guilty of negligence in not warning him of the danger. *Houston & T. C. R. Co. v. Rutland*, 45 C. A. 621, 101 S. W. 529.

Facts considered, and held to show that a servant did not assume the risk of injury by taking a position on top of a gravel car in attempting to unload it. *Gulf, C. & S. F. Ry. Co. v. Jackson*, 49 C. A. 573, 109 S. W. 478.

An employer held required to inform an employé of the peculiar dangers attending a particular service. *Texas & N. O. R. Co. v. McCoy*, 54 C. A. 278, 117 S. W. 446.

In an action for injuries to a minor servant, defendant held negligent in failing to instruct plaintiff as to the proper method of cleaning a machine, and of not warning him of the danger of cleaning it while in motion. *Texas & N. O. R. Co. v. Plummer*, 57 C. A. 563, 122 S. W. 942.

Where a servant is directed to perform a dangerous operation, and the danger is not obvious and injury results, the master is liable, though its foreman did not know of the servant's ignorance where the servant's ignorance is apparent. *Texarkana & Ft. S. Ry. Co. v. Brandon* (Civ. App.) 126 S. W. 703.

A railroad company held liable to its servant for injuries resulting without his fault where its foreman directed him to do work he had not contracted to do, and failed to warn him of the danger. *Id.*

An infant, acting as a car checker, should be warned of the danger of riding on trains if he is expected to do so or his duties require it, but, if it is not required, he is a mere licensee when riding on trains and takes them with all defects. *Houston Belt & Terminal Ry. Co. v. Stephens* (Civ. App.) 155 S. W. 703.

93. Dangers known to employé.—Railroad conductor, having stopped his train at night on a trestle floored on one side only, in ordering his porter to go forward to the engineer, held not entitled to assume that the porter knew of the dangerous condition of the place, so as to relieve the conductor from duty to warn. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley* (Civ. App.) 153 S. W. 937.

94. Obvious or latent dangers.—Railway company held not negligent in failing to notify a section foreman of the unusual weight of a push car. *Seery v. Gulf, C. & S. F. Ry. Co.*, 34 C. A. 89, 77 S. W. 950.

Where dangers incident to employment are not obvious, and where the servant has not contracted to perform the service, it is the master's duty to warn the servant of dangers. *Texarkana & Ft. S. Ry. Co. v. Brandon* (Civ. App.) 126 S. W. 703.

The danger to an employé from straightening a car with a jack screw held not so apparent as to relieve the master of the duty of instructing and warning. *Missouri, K. & T. Ry. Co. of Texas v. Newton* (Civ. App.) 127 S. W. 873.

95. Dangers from extraneous sources.—Railroad held under no obligation to warn a call-boy of danger to be apprehended from riding around yards on freight trains. *St. Louis Southwestern Ry. Co. of Texas v. Spivey*, 97 T. 143, 76 S. W. 748.

A master may assume that a servant understands risks incident to his employment, but must warn him concerning those not incident to his employment. *Brandon v. Texarkana & Ft. Smith Ry. Co.* (Civ. App.) 113 S. W. 968.

In an action for death of a switchman, decedent's foreman held negligent in failing to warn him. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

96. Sufficiency of warnings.—A foreman of a section gang held required to give such notice of the approach of a train as to enable his men to get out of danger from flying cinders. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

97. Proximate cause of injury.—The proximate cause of injury to a section foreman, caused by a hand car on which he was riding exploding a torpedo placed on the track by trainmen, was the company's negligence in not placing a flagman to warn the sectionmen of the location of the torpedo. *Galveston, H. & N. Ry. Co. v. Murphy*, 52 C. A. 420, 114 S. W. 443.

Failure of a sleeping car company to warn a servant that an insect poison was explosive and dangerous held not negligence proximately causing an injury to its servant by an explosion of the poison. *Pullman Co. v. Caviness*, 53 C. A. 540, 116 S. W. 410.

Plaintiff's injury held to have proximately resulted from defendant's negligence in failing to instruct him as to the proper method of cleaning a machine, and in failing to

warn him of the danger of cleaning it while in motion. *Texas & N. O. R. Co. v. Plummer*, 57 C. A. 563, 122 S. W. 942.

Where a conductor, having stopped a train at night on a trestle, which he knew was flooded on one side only, failed to warn a train porter to alight on that side of the trestle in ordering him to deliver an oil can to the engineer, and the porter alighted on the other side, fell, and was injured, the conductor's failure to warn was the proximate cause of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Bunkley* (Civ. App.) 153 S. W. 937.

#### VI. FELLOW SERVANTS

98. Who are fellow servants.—See Art. 6642 and notes.

99. Nature and application of doctrine in general.—In a suit for injuries to a servant, defendant held not liable if the sole proximate cause was the act of plaintiff's fellow servants, whether the act was negligence or not. *Chicago, R. I. & T. Ry. Co. v. Jackson*, 40 C. A. 273, 89 S. W. 1117.

100. Duty to provide adequate number.—A master held liable for the injuries received by a servant while handling a wooden beam with inadequate assistance. *San Antonio Traction Co. v. De Rodriguez* (Civ. App.) 77 S. W. 420.

A master held bound, not only to provide a sufficient number of servants to perform the work, but to see that an adequate number of men is assigned to each particular of the work from time to time. *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 82 S. W. 808.

A master is bound to exercise ordinary care to employ a sufficient number of servants to perform the work with reasonable safety to themselves. *Turner v. Missouri, K. & T. Ry. Co. of Texas*, 45 C. A. 650, 119 S. W. 719.

101. Competency—Duty and liability in general.—Negligence imputed to railway company, when. *Galveston, H. & S. A. Ry. Co. v. Faber*, 77 T. 153, 8 S. W. 64.

The incompetency of a railroad employé cannot be shown by a single act of carelessness or recklessness. *Galveston, H. & S. A. Ry. Co. v. Davis*, 92 T. 372, 48 S. W. 570.

The negligence of a master in furnishing an incompetent fellow servant held to authorize a recovery by a servant injured thereby, though the latter had equal means of knowledge with the master as to the incompetency of the fellow servant. *Galveston, H. & S. A. Ry. Co. v. Sherwood* (Civ. App.) 67 S. W. 776.

Master held not negligent in employing a certain person as stationary engineer. *El Paso & S. W. Ry. Co. v. Kelley*, 99 T. 87, 87 S. W. 660.

Liability of an employer for injury to one employé inflicted by another stated. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

102. — Care required of master.—A railway company, in the selection of its employés and furnishing appliances to work with, is only required to use such care and caution as an ordinarily prudent man would use under like circumstances. *G., C. & S. F. Ry. Co. v. Schwabbe*, 1 C. A. 573, 21 S. W. 706.

An employer is liable to an employé for injuries resulting from a failure to exercise reasonable care in selecting co-employés or in retaining co-employés when their incompetency is known, or by the exercise of reasonable care might have been known. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

The duty of using ordinary care in the selection of servants is one personal to the master; and failure to use such care to discover incompetency is a breach of duty, and, if it be the proximate cause of injury to another servant, the master is liable. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

103. — Master's knowledge of incompetency.—A railway company must use ordinary care to inform itself of the character and efficiency of its employés. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

104. — Habits and reputation.—In an action for injury predicated on the negligence in employing an incompetent conductor, the fact that the rules of the company forbade drinking did not make it negligent in employing a drinking man. *Galveston, H. & S. A. Ry. Co. v. Davis*, 92 T. 372, 48 S. W. 570.

Proof of an employé being a drinking man is improper as affecting his competency, he not being shown to be drunk at the time of the accident. *Id.*

That an employé is an habitual drunkard need not necessarily make him incompetent, nor the company negligent in employing him. *Id.*

Testimony of a conductor that an engineer had no idea of speed, and would pull a train down hill as fast as he could turn a wheel, held admissible on the question of the latter's competency. *Id.*

Proof of general bad reputation of an employé may charge his employer with notice of his unfitness, though the employer have no actual knowledge thereof. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

105. Negligence as ground of recovery.—A railroad held not liable for the death of a servant caused by the act of another servant. *Galveston, H. & S. A. Ry. Co. v. Currie*, 100 T. 136, 96 S. W. 1073, 10 L. R. A. (N. S.) 367.

A master is not liable for injuries to a servant caused by the negligence of a fellow servant. *Faulkner v. Texas & N. O. Ry. Co.* (Civ. App.) 113 S. W. 765.

106. Statutory provisions limiting doctrine.—See, also, Arts. 6640-6643 and notes.

The fellow-servant doctrine is modified by statute, and does not apply, where a party has been injured on account of a defective switch and track, because the deceased had no control over or connection with such switch or track, and his assumed risks resulting from the negligence of a fellow servant does not include hazards which flow from the master's negligence unless he is apprised of the existence of such hazard, and continues to expose himself. *Railroad Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

107. Nature of act and performance of duties of master.—In general.—The doctrine of fellow servants does not apply to the death of a brakeman resulting from neglect to attend to the switch over which he had no control. *I. & G. N. Ry. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772, 787.

Instruction, in switchman's action for injuries on the principle of respondeat superior, held proper. *St. Louis & S. F. Ry. Co. v. Skaggs*, 32 C. A. 363, 74 S. W. 783.

Negligence of plaintiff's fellow servants in constructing appliances for the lowering of certain oil tanks, by which plaintiff was injured, held the negligence of the master. *American Cotton Co. v. Simmons*, 39 C. A. 189, 87 S. W. 842.

A railway company held liable for the injuries received by an employé on a work train, where the train dispatcher failed to comply with a rule of company. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

Where a locomotive engineer knew that a fireman was at work under an attached engine, ordinary care on the part of the engineer would be the use of every precaution to prevent the engine from moving. *Atchison, T. & S. F. Ry. Co. v. Seeger*, 44 C. A. 534, 93 S. W. 892.

An employé assisting a machinist held not deprived of the right to recover for injuries resulting in consequence of the negligence of the machinist. *Texas & P. Ry. Co. v. Johnson* (Civ. App.) 99 S. W. 738.

Workmen for a railroad company were engaged under a division engineer in replacing old piers under a bridge crossing a river with new ones and while so doing a freight train crossing the bridge fell into the river by reason of the bridge breaking in two and the conductor was injured. The accident was caused by undermining the old piers without furnishing sufficient support for the bridge. The workmen and the division engineer were the alter ego of the company, as to the conductor (the party injured) and as they were negligent the company was liable. *Beaumont, S. L. & W. R. Co. v. Olmstead*, 56 C. A. 96, 120 S. W. 600.

A train having stopped on a switchman's signal for the purpose of uncoupling cars, it was negligence for the engineer to start without a signal to that effect. *Houston & T. C. R. Co. v. Mayfield* (Civ. App.) 124 S. W. 141.

108. — **Scope of employment.**—A switchman, who, in violation of a rule of the company, boarded and moved an engine, was held to have acted within the general scope of his duties, and hence the company was liable for the death of a fireman killed by the moving of the engine. *Masterson v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 42 S. W. 1001.

In loading express matter in the car an express messenger is acting within the scope of his duties, and a fellow servant cannot recover because of the negligent manner in which it is done. *Wells, Fargo & Co. v. Page*, 29 C. A. 489, 68 S. W. 528.

The master is exempted from liability for injuries received by an employé caused by the negligence of a fellow servant only where the injured servant was at the time of the injury engaged in the performance of his duty under his employment. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

109. — **Inspection and repair.**—The failure of a railroad company to make a reasonable inspection of an appliance furnished an employé will constitute negligence in the company, though the duty of inspection was committed to a servant. *Galveston, H. & S. A. Ry. Co. v. Buch*, 27 C. A. 283, 65 S. W. 681.

A railroad company cannot shift its duty of inspection and starting out only such cars as are properly equipped onto its brakemen, by a rule forbidding them to put cars into a train which are not properly equipped. *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 477.

A railroad company held not entitled to delegate to its sectionmen its duty of furnishing a safe track and keeping the same in repair. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465.

A railroad held liable for the act of a car repairer done in the line of his duty and within the scope of his general employment. *Houston & T. C. R. Co. v. Bryan* (Civ. App.) 125 S. W. 82.

110. **Vice principals and other representatives of master—Who are vice-principals.**—See Art. 6641 and notes.

111. — **Nature of act or omission and performance of duties of master.**—Negligence of a railroad section foreman in failing to notify plaintiff and other employes under him of an approaching passenger train about to collide with a push car held negligence of the railroad company. *International & G. N. R. Co. v. Tisdale*, 39 C. A. 372, 87 S. W. 1063.

Statement of liability for negligence of vice principal where he is performing duties of a fellow servant. *Suderman & Dolson v. Kriger*, 50 C. A. 29, 109 S. W. 373.

In an action for injuries received while blocking up a defective turntable because plaintiff's foreman released a push car on the table which he had been holding, the foreman held negligent in releasing the car. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

The foreman's negligence in releasing the car held the proximate cause of plaintiff's injury. *Id.*

In an action for injuries to a servant a charge held properly to state the jury's duty to look to the facts and circumstances surrounding a foreman whose act was alleged to have been negligent to determine whether it was negligent. *Houston & T. C. R. Co. v. Johnson*, 103 T. 320, 127 S. W. 539.

In an action for injuries to a servant by lifting an engine spring under orders of his foreman, the master held not free from actionable negligence as a matter of law. *St. Louis & S. F. R. Co. v. Wilkinson* (Civ. App.) 136 S. W. 92.

112. **Concurrent negligence of master and fellow servant—In general.**—Where a master's negligence results in injury to a servant, concurring contributory negligence of a fellow servant is no defense. *Texas & P. Ry. Co. v. Eberhart* (Civ. App.) 40 S. W. 1060; *International & G. N. R. Co. v. Bonatz*, 48 S. W. 767; *Ft. Worth & D. C. Ry. Co. v. Monnell*, 50 C. A. 287, 110 S. W. 504.

Where an employé was not negligent, but was injured by negligence of his employer, he could recover, though his fellow servants' negligence contributed to the injury. *Texas & P. Ry. Co. v. Maupin* (Civ. App.) 63 S. W. 346.

In an action for injuries to a servant, an instruction that the evidence showed another servant to have been a fellow servant of plaintiff, and that, if plaintiff's injuries were caused by the other's negligence, he could not recover, held properly refused, since plain-

tiff could recover if defendant's negligence directly contributed to his injury, though combined with that of a fellow servant. *Texas & N. O. R. Co. v. Lee*, 32 C. A. 23, 74 S. W. 345.

An employé, not negligent, injured by negligence of co-employés, not fellow servants, held entitled to recover, though there was negligence of fellow servants. *Ray v. Pecos & N. T. Ry. Co.*, 35 C. A. 123, 80 S. W. 112.

Foreman of a bridge gang employed by a railroad held entitled to recover, though injured through the negligence of those in his charge, concurring with that of defendant. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

Where a servant was injured by the joint negligence of the master and a fellow servant, the fellow servant's negligence was no defense. *Bonn v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 82 S. W. 808.

Where a servant is not guilty of contributory negligence, and his master is guilty of negligence which is the proximate cause of injuries, it is liable, though the negligence of fellow servants may have concurred in producing the result. *Ray v. Pecos & N. T. Ry. Co.*, 40 C. A. 99, 88 S. W. 466; *Chicago, R. I. & P. Ry. Co. v. Birk*, 44 C. A. 615, 99 S. W. 763.

Where defendant employed plaintiff's son without his consent, knowing that the son was a minor, and the service was dangerous, and the son was injured, plaintiff could recover. *Texas & P. Ry. Co. v. Hervey* (Civ. App.) 89 S. W. 1095.

A master is liable for the injuries received by an employé in consequence of the master's negligence concurring with the negligence of a fellow servant. *Missouri, K. & T. Ry. Co. v. Wise* (Civ. App.) 106 S. W. 465; *Atchison, T. & S. F. Ry. Co. v. Mills*, 53 C. A. 359, 116 S. W. 852; *Texas & P. Ry. Co. v. Jones* (Civ. App.) 123 S. W. 434; *Id.*, 133 S. W. 744.

Where a defect in a locomotive was the cause of the injury to the fireman, the concurrent negligence of the engineer held not to release the master from liability for the injury. *Atchison, T. & S. F. Ry. Co. v. Seeger* (Civ. App.) 126 S. W. 1170.

113. — **Vice principal and fellow servant.**—Servant can recover for injury proximately caused by concurring negligence of the foreman and his fellow servants without contributory negligence on his part. *Railroad Co. v. Hannig*, 20 C. A. 649, 49 S. W. 116.

Negligence of the foreman causing injury renders the railroad company liable, though negligence of fellow servants contributed to the injury. *Haveman v. Ft. Worth & R. G. Ry. Co.*, 20 C. A. 610, 50 S. W. 155; *Galveston, H. & S. A. Ry. Co. v. Bonn*, 44 C. A. 631, 99 S. W. 413.

A master is liable for the death of a servant resulting from the negligence of a vice principal, when the servant is free from contributory negligence; even if the negligence of a fellow servant contributed thereto. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

The negligence of a fellow servant, concurring with the negligence of a vice principal, does not relieve the master from liability. *Texas Cent. R. Co. v. Pelfrey*, 35 C. A. 501, 80 S. W. 1036.

114. — **Operation of locomotives, trains and cars.**—Negligence of engineer in running the train at a reckless speed over a track covered with sand held not to save the company from liability to a fellow servant injured thereby, where the company was negligent in allowing the sand to accumulate. *Trinity & S. Ry. Co. v. Brown* (Civ. App.) 46 S. W. 926.

A railroad company held not relieved from liability for injuries to a brakeman caused by the negligent act of its engineer in operating a train, because such engineer might have foreseen that the company itself had been guilty of a concurring act of negligence. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

In an action for death of a car repairer caused by movement of a car under which he was working, failure of his helper to maintain a lookout was not such intervening negligence as will prevent recovery. *International & G. N. R. Co. v. Schubert* (Civ. App.) 146 S. W. 1083.

115. — **Defects in appliances and places for work.**—Though fellow servants of an injured employé start in motion cars injuring the employé, held not to excuse the master from liability, where defective brakes caused the accident. *Missouri, K. & T. Ry. Co. v. Rains* (Civ. App.) 40 S. W. 635.

Negligence of fellow servant concurring with defective appliances held no defense to injury to employé. *Missouri, K. & T. Ry. Co. of Texas v. Ferch*, 18 C. A. 46, 44 S. W. 317.

Where the negligence of the master is a concurring cause of an injury with the negligence of a fellow servant, the master is liable. *Galveston, H. & S. A. Ry. Co. v. Jackson* (Civ. App.) 44 S. W. 1072.

Where defendant's bumper beam caused the injury, concurring negligence of fellow servants does not affect liability of master. *International & G. N. R. Co. v. Zapp* (Civ. App.) 49 S. W. 673.

Where an employé is injured by falling into an open excavation near defendant's tracks, whether the employés who made the excavation acted prudently in leaving it unguarded cannot relieve defendant from liability. *Missouri, K. & T. Ry. Co. of Texas v. Johnson* (Civ. App.) 67 S. W. 769.

Fact that fellow servant of plaintiff, injured by the falling of a grain door from the top of a car, had fastened up the door, held not to preclude recovery, where the defective fastening and negligent inspection were the proximate causes of the injury. *Missouri, K. & T. Ry. Co. v. Hutchens*, 35 C. A. 343, 80 S. W. 415.

116. — **Number and competency of fellow servants.**—A servant, injured by the negligence of a vice principal in ordering an incompetent servant to assist him, may recover therefor, though the negligence of the fellow servant contributes to the injury. *Galveston, H. & S. A. Ry. Co. v. Sherwood* (Civ. App.) 67 S. W. 776.

Where an employé was incompetent, the fact that an accident resulting in injuries to a coemployé was caused by his negligence did not excuse the master from liability for the coemployé's injuries. *Gulf, C. & S. F. Ry. Co. v. Hays*, 40 C. A. 162, 89 S. W. 29.

117. **Willful acts and gross negligence of fellow servants.**—Where a railroad employé was injured by the engineer's sudden increase of the speed of the engine as plaintiff was



endeavoring to board it, the railroad company was not relieved from liability because the engineer's act was reckless or malicious. *Texas & P. Ry. Co. v. Wiley* (Civ. App.) 155 S. W. 356.

#### VII. ASSUMPTION OF RISK

118. When assumed risk a defense.—See Art. 6645 and notes.  
 119. Where safety appliance act is violated.—See Art. 6646 and notes.  
 120. Where statutes for protection of employes are violated.—See Art. 6650 and notes.

#### VIII. CONTRIBUTORY NEGLIGENCE

121. When contributory negligence a defense.—See Art. 6644 and notes.  
 122. Where safety appliance act is violated.—See Art. 6646 and notes.  
 123. Rules as to comparative negligence.—See Art. 6649 and notes.

#### IX. ACTIONS

124. Notice of claim for damages.—See, also, Art. 5714.  
 Acts held to be a waiver of written notice of injury to claim agent within 30 days after a personal injury. *Missouri, K. & T. Ry. Co. v. Hendricks*, 49 C. A. 314, 108 S. W. 745.

Filing suit for injuries to a servant within 90 days after the injury held a sufficient compliance with a contract condition, requiring notice of the time, place, and circumstances of the injury within such period. *Missouri, K. & T. Ry. Co. of Texas v. Hawley* (Civ. App.) 123 S. W. 726.

125. Release of claims.—See notes under Art. 6651.

126. Parties entitled to recover.—See, also, Chapter 5 of Title 37.

Parents suing for the death of a minor son employed by defendant held to have no right to recover, where they consented to the employment. *Missouri, K. & T. Ry. Co. of Texas v. Evans*, 16 C. A. 63, 41 S. W. 80.

A charge in an action for death of a minor son held to properly define acquiescence on issue whether the parents acquiesced in his employment by defendant. *Id.*

In the absence of a statute parents cannot recover for the services of a minor child who is instantly killed. *G., C. & S. F. Ry. Co. v. Beall*, 91 T. 310, 42 S. W. 1054, 41 L. R. A. 807, 66 Am. St. Rep. 892.

The fact that an action for the death of a railroad employe was brought in the name of the real beneficiaries, and not in the name of some administrator or executor of the decedent's estate, did not prevent a recovery. *St. Louis, S. F. & T. Ry. Co. v. Seale* (Civ. App.) 148 S. W. 1099.

127. Pleading.—See notes under Art. 1827.

128. Presumptions, burden of proof and admissibility of evidence.—See notes under Art. 3687.

129. Weight and sufficiency of evidence in general.—In case of master and servant negligence is not to be inferred from the character of the accident. The burden is upon the servant to show negligence on the part of the master, and due care on his own. *Railway Co. v. Crowder*, 63 T. 502; *Railway Co. v. Waldo* (Civ. App.) 26 S. W. 1004; *McCray v. Railway Co.* (Civ. App.) 32 S. W. 548.

Evidence held sufficient to sustain a recovery by an injured switchman. *International & G. N. R. Co. v. Bonatz* (Civ. App.) 48 S. W. 767.

Facts held sufficient to sustain a judgment for the plaintiff in an action to recover for the negligent killing of a servant. *Houston & T. C. R. Co. v. White*, 23 C. A. 280, 56 S. W. 204.

Evidence held sufficient to support a verdict in favor of defendant's servant for injuries caused by defendant's negligence. *Galveston, H. & S. A. Ry. Co. v. Dehnisch* (Civ. App.) 57 S. W. 64; *Galveston, H. & S. A. Ry. Co. v. Walker*, 38 C. A. 76, 85 S. W. 28.

In an action to recover for the death of an employe, evidence held insufficient to sustain a verdict for plaintiff. *Houston & T. C. R. Co. v. Loeffler* (Civ. App.) 69 S. W. 558.

In a suit by an employe for injuries received while lining rails on a bridge with an implement unsuitable for such purpose, facts held to entitle plaintiff to recover. *Smith v. Gulf, W. T. & P. Ry. Co.* (Civ. App.) 65 S. W. 83.

Evidence in an action by a fireman for injuries caused by negligence of the engineer held to support a verdict for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Sanders* (Civ. App.) 65 S. W. 889.

Evidence in an action by an engineer for injuries in a collision held to sustain a judgment for plaintiff. *Texas & N. O. R. Co. v. Mortensen*, 27 C. A. 106, 66 S. W. 99.

In an action by a section hand for injuries, verdict for plaintiff held not sustained by the evidence. *Missouri, K. & T. Ry. Co. of Texas v. Dyer* (Civ. App.) 75 S. W. 930.

Evidence held not to require a verdict for a railroad company, in an action against it for injury from slipping off the front of a hand car. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

Evidence in action by fireman for injuries caused by a defective step on engine held to sustain verdict for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Garren* (Civ. App.) 84 S. W. 1096.

Evidence held sufficient to support a verdict for injuries to a railroad fireman. *Missouri, K. & T. Ry. Co. of Texas v. Henserlang*, 38 C. A. 524, 86 S. W. 948.

In an action by a fireman, against a railroad, for injuries received, evidence held to show that defendant was negligent, and that plaintiff was not guilty of contributory negligence. *St. Louis & S. F. R. Co. v. Bussong*, 40 C. A. 476, 90 S. W. 73.

Evidence held to warrant finding that defendant was negligent, that plaintiff was not guilty of contributory negligence, and that the injuries were not the result of any risk ordinarily incident to his employment. *International & G. N. R. Co. v. Brice* (Civ. App.) 95 S. W. 660.

In an action by a locomotive fireman for personal injuries received in a wreck, evidence considered, and held sufficient to sustain a judgment for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Garrett*, 44 C. A. 406, 98 S. W. 932.

Evidence, in an action for injury to an employé, held sufficient to sustain a verdict on the ground of negligence from a risk not assumed. *Texas & N. O. R. Co. v. Middleton*, 46 C. A. 497, 103 S. W. 203.

Evidence in an action by a locomotive engineer for injury caused in collision with a preceding train held to sustain a verdict for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Quinn* (Civ. App.) 104 S. W. 397.

In an action by a servant for injuries received while attempting to set a defective brake on one of defendant's cars, evidence examined, and held sufficient to sustain a judgment for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Griggs*, 101 T. 145, 105 S. W. 486.

In an action for injuries to a fireman by the explosion of the boiler of his locomotive, evidence held insufficient to sustain a verdict for plaintiff. *Galveston, H. & S. A. Ry. Co. v. Garven*, 50 C. A. 245, 109 S. W. 426.

Evidence in an action for injury to a brakeman who fell across a track and was run over by cars held to show that a defective cross-tie caused his fall, that the accident resulted from the company's negligence, and that he was not guilty of contributory negligence. *St. Louis Southwestern Ry. Co. of Texas v. Cleland*, 50 C. A. 499, 110 S. W. 122.

In an action against a master for the wrongful death of a servant, evidence held sufficient to support the verdict for plaintiff. *Gulf, C. & S. F. Ry. Co. v. Beezley* (Civ. App.) 153 S. W. 651.

In a brakeman's action for injuries from falling from the footboard of a tender, evidence held to sustain a verdict in his favor. *St. Louis Southwestern Ry. Co. of Texas v. Barrow* (Civ. App.) 153 S. W. 665.

130. — **Existence of relation.**—In an action for the death of plaintiff's son, evidence held insufficient to show a contract between the son and defendant's agent, by which the latter undertook to teach the son telegraphy, and he in return agreed to assist the agent in and around the depot and pump station, so as to create the relation of master and servant between defendant and deceased. *Marshall & E. T. Ry. Co. v. Sirman* (Civ. App.) 153 S. W. 401.

Evidence held not to show that the relation of master and servant, in any of its forms, existed between the defendant and plaintiff's son, but to show that, at the time of the accident, he undertook to start a pump of his own accord, without notifying defendant's agent of his purpose. *Id.*

131. — **Scope of employment.**—In an action for negligent death of an employé, the evidence held to show that decedent was at the time of the injuries in the duty of his employment. *Texas & P. Ry. Co. v. Johnson*, 48 C. A. 135, 106 S. W. 773.

132. — **As to particular facts.**—Evidence in an action for the death of a brakeman, which occurred in a wreck when his train ran into an open switch, held insufficient to require the jury to find that the switch had been tampered with by a trespasser, as the company contended. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

Evidence as to the inspection of machinery held to warrant a finding that the owner could have discovered a defect in a machine. *Gulf, C. & S. F. Ry. Co. v. Hayden*, 29 C. A. 280, 68 S. W. 530.

In an action for injuries to a locomotive engineer, who ran his train into cars standing on the main track, evidence considered, and held sufficient to show that the engineer had not been furnished with a time card. *International & G. N. R. Co. v. Vanlandingham*, 38 C. A. 206, 85 S. W. 347.

Evidence, in an action for injury to an employé who was run down by an engine, held to warrant a finding that no switchman was on the footboard of the tender to keep a lookout ahead. *Galveston, H. & S. A. Ry. Co. v. Wafer*, 48 C. A. 279, 106 S. W. 897.

Evidence held insufficient to justify a finding that a switch was closed by a brakeman and afterwards forcibly opened by an unauthorized person. *Houston & T. C. R. Co. v. Shapard*, 54 C. A. 596, 118 S. W. 596.

133. **Evidence as to cause of injury—In general.**—Evidence held sufficient to sustain a finding that defendant's negligence was the proximate cause of injuries received by plaintiff while in its service. *International & G. N. R. Co. v. Newburn* (Civ. App.) 58 S. W. 542.

Evidence held to sustain a finding that an employé's injury was caused by the negligence of the employer. *Gulf, C. & S. F. Ry. Co. v. Hayden*, 29 C. A. 280, 68 S. W. 530.

Evidence held sufficient to show that plaintiff's injuries were due to contact with certain poisons. *Texas & N. O. R. Co. v. Gardner*, 29 C. A. 90, 69 S. W. 217.

Evidence held insufficient to show that a brakeman's death was attributable to defects in the coupling apparatus, the step of the pilot, and the track. *Missouri, K. & T. Ry. Co. v. Greenwood*, 40 C. A. 252, 89 S. W. 810.

Evidence held to warrant a finding that the cause of an employé's injury was as alleged in the complaint. *Galveston, H. & S. A. Ry. Co. v. Smith*, 100 T. 267, 98 S. W. 240.

In an action for the death of a switchman struck by cars in a railway yard, a finding that the engineer's negligence proximately caused the death held warranted. *Texas Mexican Ry. Co. v. Higgins*, 44 C. A. 523, 99 S. W. 200.

In an action for injuries received while working on defendant's coal bin in the night, evidence held sufficient to sustain a finding that the want of sufficient light at the time was at least a concurring proximate cause of the injury. *Chicago, R. I. & T. Ry. Co. v. Jackson*, 48 C. A. 567, 108 S. W. 483.

Evidence held to show that the negligence of other employés was the cause of plaintiff's injuries. *Texarkana & Ft. S. Ry. Co. v. Anderson* (Civ. App.) 111 S. W. 173.

Evidence held to justify a finding that an employé's death was proximately caused by the employer's negligence. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 341.

In an action for injury to a lumber company's employé while riding on a logging train which was derailed, evidence held to warrant a finding that the accident proximately caused his insanity. *Knox v. Robbins* (Civ. App.) 151 S. W. 1134.

134. — **Defective or dangerous appliances.**—In an action for injuries to a fireman, evidence held insufficient to show as a matter of law that the broken or disconnected condition of stay chains attached to a tank spout was not the proximate cause of the injury. *Missouri, K. & T. Ry. Co. of Texas v. Dickson*, 40 C. A. 550, 90 S. W. 507.

Evidence held sufficient to show that a section foreman's injuries were caused by his master's negligence in failing to furnish him a reasonably safe track drill. *Chicago, R. I. & G. Ry. Co. v. Evans* (Civ. App.) 143 S. W. 966.

135. — **Defects in cars and locomotives.**—In an action for death of a railroad brakeman, facts held insufficient to show that a defect in the drawbar connecting the engine with the tender was the proximate cause of decedent's death. *English v. International & G. N. Ry. Co.*, 44 C. A. 467, 98 S. W. 913.

The furnishing of a defective hand car held to be the proximate cause of defendant's injury. *St. Louis Southwestern Ry. Co. of Texas v. Browning*, 54 C. A. 521, 118 S. W. 245.

136. — **Obstructions on, over or near tracks.**—In an action against a railroad for injuries to a servant while riding on a hand car, owing to an obstruction across the track, evidence held sufficient to sustain a finding that the injury was due to the negligence of defendant in putting an obstruction on the track without warning to plaintiff. *Texas & N. O. R. Co. v. Kelly*, 34 C. A. 21, 80 S. W. 1073.

In a conductor's action against a street car company for injuries by being struck by a coal car on a railroad switch near the street car track, evidence held to show that defendant's negligence in not discovering the proximity of the car and having it removed, concurring with the negligence of the railroad company, proximately caused plaintiff's injury. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

137. — **Operation of trains, cars and locomotives.**—Verdict that a fireman was injured by lurch of engine held against preponderance of the evidence. *San Antonio & A. P. Ry. Co. v. Bolster* (Civ. App.) 51 S. W. 41.

Evidence of a conductor's negligence held sufficient to warrant the conclusion that it was the cause of an injury to a brakeman, authorizing a recovery from the company. *Ft. Worth & R. G. Ry. Co. v. Bowen*, 30 C. A. 14, 68 S. W. 700.

In an action for the death of a railroad section foreman, who was killed while attempting to remove a push car from the track, evidence held to show negligence in the engineer of the train which struck the car to be the proximate cause of his death. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

In an action for injuries to a brakeman, evidence held to sustain a finding that the engineer negligently brought the train to a sudden stop, which was the proximate cause of plaintiff's fall and injury. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

138. — **Warnings and signals.**—Evidence in action for negligent injury held sufficient to have justified finding that engineer's failure to signal was the proximate cause of accident. *San Antonio & A. P. Ry. Co. v. Ankerson*, 31 C. A. 327, 72 S. W. 219.

Evidence in an action by a servant to recover for injuries held to show that the proximate cause was the removal of a signal to prevent engines and cars running on the track where plaintiff was at work. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 108 S. W. 988.

In an action for injuries sustained by plaintiff's train colliding with another train at a station, evidence held insufficient to show that the other train overstayed its time at the station so as to require it to send back a flagman. *International & G. N. R. Co. v. Brice* (Civ. App.) 111 S. W. 1094.

139. **Evidence as to master's negligence—In general.**—Evidence held sufficient to justify a finding, in an action against a railroad company for a brakeman's death, that the company was negligent, unless it submitted explanatory testimony, or showed that it had exercised proper care. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

In action by engineer for injuries, evidence held to warrant finding of negligence on master's part. *Missouri, K. & T. Ry. Co. of Texas v. Mayfield*, 29 C. A. 477, 68 S. W. 807.

In action by servant for injuries, evidence held to show negligence of defendant. *Texas & N. O. R. Co. v. Gardner*, 29 C. A. 90, 69 S. W. 217.

A railroad company held not negligent in causing the death of an employé. *Jones v. Missouri, K. & T. Ry. Co.*, 32 C. A. 286, 73 S. W. 1090; *Hall v. Houston & T. C. R. Co.* (Civ. App.) 125 S. W. 946.

Evidence in switchman's action for injuries held to sustain findings favorable to plaintiff as to defective appliances and discovered peril. *St. Louis & S. F. Ry. Co. v. Skaggs*, 32 C. A. 363, 74 S. W. 783.

Injury to employé from burning of railway bridge held insufficient in itself to warrant finding of negligence. *Texas Mexican Ry. Co. v. Mendez* (Civ. App.) 78 S. W. 25.

In action for death of a bridge watchman, evidence held sufficient to sustain findings of negligence charged proximately causing deceased's death. *San Antonio & A. P. Ry. Co. v. Brock*, 35 C. A. 155, 80 S. W. 422.

Evidence held to support a finding that the death of plaintiff's intestate, a railway brakeman, was caused by defendant's negligence. *Ft. Worth & R. G. Ry. Co. v. Caskey*, 37 C. A. 463, 84 S. W. 264.

In an action for injuries to a servant, evidence held to sustain a finding of negligence. *Cane Belt R. Co. v. Crosson*, 39 C. A. 369, 87 S. W. 867.

In an action for injuries to a servant injured by the raising of the hammer of a pile driver, evidence considered, and held sufficient to warrant a finding of negligence. *Gulf, C. & S. F. Ry. Co. v. Huyett* (Civ. App.) 89 S. W. 1118.

In an action for injuries to an employé while unloading lumber from a car, a finding of negligence held authorized. *Galveston, H. & S. A. Ry. Co. v. Burns* (Civ. App.) 91 S. W. 618.

In an action for injuries to an employé while assisting in carrying a rail, a finding that the employer was negligent held authorized. *Galveston, H. & S. A. Ry. Co. v. Bonn*, 44 C. A. 631, 99 S. W. 413.

Evidence in an action by a servant for injuries through negligence held insufficient to show negligence on defendant's part. *International & G. N. R. Co. v. Hall*, 46 C. A. 493, 102 S. W. 740.

In an action for the death of a switchman, evidence held to sustain a finding that the railroad company was negligent. *Galveston, H. & S. A. Ry. Co. v. Berry*, 47 C. A. 327, 105 S. W. 1019; *Houston, E. & W. T. Ry. Co. v. Boone* (Civ. App.) 131 S. W. 616; *Paris & G. N. R. Co. v. Boston*, 142 S. W. 944.

In an action for injuries to a brakeman, evidence held to establish the railway company's negligence. *Galveston, H. & S. A. Ry. Co. v. Harris*, 48 C. A. 434, 107 S. W. 108.

Evidence in a servant's action for injuries while moving car wheels from a box car as to defendant's negligence held sufficient to sustain a verdict for plaintiff. *Freeman v. Grashel* (Civ. App.) 145 S. W. 695.

In an action for injuries to a fireman on a switch engine in railroad yards, evidence held to support a finding of negligence of the switch foreman. *Galveston, H. & S. A. Ry. Co. v. Sample* (Civ. App.) 145 S. W. 1057.

140. — *Inexperienced or youthful employé.*—The testimony of witnesses, in an action by a minor against a railroad company for personal injuries, held sufficient to show that the company knew that plaintiff was a minor at the time he was employed. *Texarkana & Ft. S. Ry. Co. v. Preacher* (Civ. App.) 59 S. W. 593.

Evidence held sufficient to sustain a finding that the employment was dangerous. *Id.* In an action for injuries to a servant from dangers incident to the work that were not obvious and of which the servant was ignorant, evidence held to show that defendant's foreman should have known that plaintiff was ignorant of the danger. *Texarkana & Ft. S. Ry. Co. v. Brandon* (Civ. App.) 126 S. W. 703.

141. — *Defective tools and appliances.*—In an action by a servant for injuries received through using a defective pinch bar, evidence examined, and held to warrant a finding that defendant was negligent. *St. Louis Southwestern Ry. Co. of Texas v. Schuler*, 46 C. A. 356, 102 S. W. 733.

In an action for injuries to a servant caused by a sliver flying off from a defective chisel or hammer and striking plaintiff in the eye, evidence held to support a finding that defendant was negligent. *Texas Mexican Ry. Co. v. Trijerina*, 51 C. A. 100, 111 S. W. 239.

Evidence held to show that a railroad company was negligent in using a defective water crane. *Missouri, K. & T. Ry. Co. of Texas v. Bush*, 56 C. A. 69, 120 S. W. 224.

Evidence held to warrant findings of a brake beam on a car, causing injury to a brakeman, having been defective, as a reasonable inspection would have shown. *St. Louis Southwestern Ry. Co. of Texas v. Keith* (Civ. App.) 124 S. W. 695.

Evidence held sufficient to show that defendant was negligent in failing to furnish plaintiff a reasonably safe track drill. *Chicago, R. I. & G. Ry. Co. v. Evans* (Civ. App.) 143 S. W. 966.

142. — *Defective or dangerous places.*—When an employé was injured by the falling of a stack of ties, held, that the evidence sustained a verdict in his favor based on defendant's neglect to maintain the premises in a safe condition. *Texas & N. O. R. Co. v. Echols*, 17 C. A. 677, 41 S. W. 488.

In an action to recover for injuries sustained by falling into a pit in the roundhouse, evidence held not sufficient to justify a finding that the plank furnished to serve as a bridge across such pit was insufficient or defective. *Galveston, H. & S. A. Ry. Co. v. Butchek* (Civ. App.) 66 S. W. 335.

In an action for injury to an employé while unloading a heavy object by pulling it off a truck, caused by it falling on him, evidence held to show that the place was reasonably safe. *Texas & P. Ry. Co. v. Lewis* (Civ. App.) 133 S. W. 1086.

In an action for injuries to a freight conductor slipping on an obstruction on the platform at a station while attempting to board his train, evidence held to show actionable negligence. *Texas & P. Ry. Co. v. Sandy* (Civ. App.) 140 S. W. 493.

143. — *Cars and locomotives.*—Evidence held to show negligence of railroad company in providing improper fastening for drawhead of freight car. *Missouri, K. & T. Ry. Co. of Texas v. Cox* (Civ. App.) 55 S. W. 354.

Evidence, in an action for injuries to an engineer from the breaking of a side rod of his engine, held sufficient to establish that the rod broke by reason of an old crack and crystallization, which was discoverable by proper inspection. *Galveston, H. & S. A. Ry. Co. v. Collins*, 31 C. A. 70, 71 S. W. 560.

In an action for injuries to a servant, who, when attempting to step down from a platform of a caboose, fell and was injured, evidence considered, and held to show that the construction of the step on the caboose was a reasonably safe one. *Texas & P. Ry. Co. v. Hemphill* (Civ. App.) 86 S. W. 350.

In an action for injuries to a locomotive engineer caused by a step on an engine giving way, his testimony held to make out a prima facie case of negligence against the company. *Galveston, H. & S. A. Ry. Co. v. Cherry*, 44 C. A. 344, 98 S. W. 893.

In an action for the death of a servant of a railroad company by a door of a box car falling on deceased, evidence examined, and held to show that the falling of the door was due to negligence of employés of railroad company. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

Evidence held to show negligence of a railway company respecting a defective boiler, an explosion of which injured a fireman. *Taylor v. White* (Civ. App.) 113 S. W. 554.

Evidence, in an action for injury to a brakeman by a defective car ladder, held to warrant findings against defendant. *San Antonio & A. P. Ry. Co. v. Beauchamp*, 54 C. A. 123, 116 S. W. 1163.

In a railroad fireman's action for injuries, evidence held to show that ash-pan attachments on an engine were defective. *Freeman v. Fuller* (Civ. App.) 127 S. W. 1194.

In an action for injuries to a servant falling into the manhole on a locomotive tender, evidence held to justify a finding of negligence in failing to maintain a proper lid over the hole. *International & G. N. R. Co. v. Meehan* (Civ. App.) 129 S. W. 190.

Allegation of negligence in not using engines of a different pattern held unsupported by the evidence, where it did not appear whether engines used were of an approved pattern, or whether engines of any different pattern existed. *Gulf, C. & S. F. Ry. Co. v. Riordan* (Civ. App.) 146 S. W. 711.

Evidence, in a brakeman's action for injuries by being thrown from a car by the sudden revolving of the brake wheel, because of a defective ratchet dog which failed to hold, held to sustain a finding that the brake dog was defective. *St. Louis Southwestern Ry. Co. of Texas v. Downs* (Civ. App.) 153 S. W. 714.

144. — **Tracks and roadbeds.**—In an action for injuries to a switchman, evidence held to sustain a finding of defendant's negligence in failing to keep its yard clear of obstructions and in allowing a frog to remain unfilled without notifying plaintiffs of its condition. *Texarkana & Ft. S. Ry. Co. v. Toliver*, 37 C. A. 437, 84 S. W. 375.

In an action for injuries to a brakeman, owing to his having stumbled over a clinker on the track while endeavoring to uncouple cars, evidence held sufficient to warrant a finding of negligence in the presence of the clinker. *Missouri, K. & T. Ry. Co. of Texas v. Keefe*, 37 C. A. 588, 84 S. W. 679.

Evidence in an action for a brakeman's death held to support a finding that his fall was caused by a lurch of the car, due to the defective condition of the track, and that the railroad company was negligent in permitting its track to be and remain in that condition. *Galveston, H. & N. Ry. Co. v. Wallis*, 47 C. A. 120, 104 S. W. 418.

In a conductor's action against a street car company for injuries by being struck by a coal car on a railroad switch near the street car track, evidence held to show negligence of defendant in not discovering the proximity of the railroad car to its tracks, and having it removed. *Rapid Transit Ry. Co. v. Edwards*, 55 C. A. 543, 118 S. W. 838.

In an action for injury to a switchman, who in alighting from an engine stepped on a bolt and was thrown, evidence held insufficient to show that any of defendant's employes were negligent. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 103 T. 187, 125 S. W. 309.

Evidence held to show that a railroad company was negligent in constructing a cinder platform along the track and in permitting it to remain in a defective condition. *Missouri, K. & T. Ry. Co. of Texas v. Rogers* (Civ. App.) 128 S. W. 711.

Defendant held not liable for injuries to plaintiff falling off a hand car by reason of dirt on the track at a crossing. *Marshall & E. T. Ry. Co. v. Crabb* (Civ. App.) 136 S. W. 825.

Evidence held not to support a finding of negligence in failing to have a turntable lined up for the main track at the time of the accident. *Delancey v. Missouri, K. & T. Ry. Co. of Texas* (Civ. App.) 149 S. W. 259.

145. — **Operation of trains, cars and locomotives.**—Where deceased was killed by a car run in where he was working, held that the evidence was sufficient to establish defendant's negligence, both in failing to use diligence to enforce its rules for warning its servants, and because of the neglect of its foreman to give warning. *Texas & P. Ry. Co. v. Eberhart* (Civ. App.) 40 S. W. 1060.

In an action for injuries to a servant, run over by a train in defendant's yard, evidence held sufficient to sustain a finding that plaintiff's injuries were proximately caused by defendant's negligence. *Gulf, C. & S. F. Ry. Co. v. Melville* (Civ. App.) 87 S. W. 863.

In an action for the death of a brakeman on a logging train in a collision between the train and a car, evidence held to justify a finding of negligence on the part of the employer. *Ragley Lumber Co. v. Parks*, 46 C. A. 539, 103 S. W. 424.

In an action for a fireman's death by collision, evidence held to sustain a finding that the engineer was negligent. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

In an action by a section hand for injuries, evidence held to warrant a finding that the time allowed plaintiff to leave the track to avoid a passing train was too short. *Pollock v. Houston & T. C. R. Co.*, 103 T. 69, 123 S. W. 408.

In an action for injuries to an engineer in a collision with cars on a side track in railroad yards, evidence held to justify a finding of negligence. *Houston & T. C. R. Co. v. Bryan* (Civ. App.) 125 S. W. 82.

In an action for injury to a brakeman while coupling cars, evidence held to warrant a finding that the engineer was negligent. *Ft. Worth & R. G. Ry. Co. v. Bailey* (Civ. App.) 136 S. W. 822.

In an action for a brakeman's death, held, on the evidence, that the defendant's failure to place a brakeman on top of the rear car of a train, which deceased had been ordered to flag, might be found to be concurrent negligence or the proximate cause of his death. *Pecos & N. T. Ry. Co. v. Finklea* (Civ. App.) 155 S. W. 612.

146. — **Negligence in giving orders.**—Evidence held not to support a finding that the foreman of a bridge crew was negligent in directing the crew to remove a hand car from the track in front of an approaching train. *Texas & P. Ry. Co. v. Myers* (Civ. App.) 125 S. W. 49.

147. — **Knowledge by master of defect or danger.**—Evidence held to show that the engineer knew that plaintiff was cleaning the ash pan when he started the engine. *Missouri, K. & T. Ry. Co. of Texas v. Hampton* (Civ. App.) 142 S. W. 89.

Evidence held insufficient to show that the train operatives realized the plaintiff's peril in time to have stopped the train. *Texas & P. Ry. Co. v. Hope* (Civ. App.) 149 S. W. 1077.

Evidence held to support jury's findings that engineer and fireman of switch engine were negligent in failing to discover dangerous position of a crossing flagman in time to avoid injuring him, and that such negligence was the proximate cause of his death. *Pecos & N. T. Ry. Co. v. Suitor* (Civ. App.) 153 S. W. 185.

148. — **Inspection and repair.**—A finding by the jury, in an action against a railroad company for a brakeman's death, that the company owed him the duty of inspecting the switch at least once during every six hours, and that it was guilty of negligence in failing to do so, held proper. *International & G. N. R. Co. v. Johnson*, 23 C. A. 160, 55 S. W. 772.

In an action against a railroad for injuries to a trainman caused by a defective flange, evidence held insufficient to sustain a finding that the defect should have been discovered by the railroad. *Hover v. Chicago, R. I. & G. Ry. Co.*, 40 C. A. 280, 89 S. W. 1084.

In an action for injuries received by a fireman, evidence held to justify a finding of negligence in failing to inspect the engine. *Missouri, K. & T. Ry. Co. of Texas v. Lynch*, 40 C. A. 543, 90 S. W. 511.

In an action for injuries received while employed as a fireman on defendant's engine, evidence considered, and held insufficient to show that the coal board in the engine was defective. *Missouri, K. & T. Ry. Co. of Texas v. Hanson* (Civ. App.) 90 S. W. 1122.

In an action for injuries to a switchman, evidence held sufficient to authorize a finding of an insufficient inspection. *Missouri, K. & T. Ry. Co. of Texas v. Box* (Civ. App.) 93 S. W. 134.

In an action for injuries to an engineer by a defect in a boiler step, evidence held to justify a finding that no proper inspection was made, and that, if it had been, the accident would not have occurred. *Galveston, H. & S. A. Ry. Co. v. Stevens* (Civ. App.) 94 S. W. 395.

In an action for injuries to a brakeman by the separation of cars negligently left uncoupled on a siding, evidence held to warrant a finding that the automatic couplers were defective, and that the defect could have been discovered by the simplest inspection. *St. Louis Southwestern Ry. Co. of Texas v. Pope*, 43 C. A. 616, 97 S. W. 534.

In an action for injuries to a servant from the explosion of a locomotive boiler, evidence held to sustain a finding that the explosion was due to the negligence of defendant in failing to discover defects therein which could have been discovered by a proper inspection or test. *Galveston, H. & S. A. Ry. Co. v. Senn* (Civ. App.) 125 S. W. 322.

Evidence held to sustain a finding that defendant's employé did not exercise ordinary care in inspecting the car in time to have remedied a defect in the ratchet dog on the brake wheel. *St. Louis Southwestern Ry. Co. of Texas v. Downs* (Civ. App.) 153 S. W. 714.

In an action for personal injuries by a switchman injured by the brake beam swinging to one side when he stepped on it and causing his foot to slip under the wheel, evidence held to warrant a finding that the brake beam was defective, and that defendant had not discharged its duty of inspection. *Freeman v. Gerretts* (Civ. App.) 153 S. W. 1163.

149. — **Warnings and Instructions.**—Evidence held not to require a finding that an employé had been adequately warned of the dangers of his work. *Ft. Worth & R. G. Ry. Co. v. Kime*, 21 C. A. 271, 51 S. W. 558.

Evidence held to show the negligence of a master in failing to instruct a brakeman of the dangers incident to the employment, which would warrant a recovery for injuries against the master. *Texarkana & Ft. S. Ry. Co. v. Preacher* (Civ. App.) 59 S. W. 593.

In an action for injuries sustained, owing to the unexpected starting of a steam shovel, held, that the evidence was sufficient to establish defendant's negligence in starting the shovel without warning to plaintiff. *Texas Cent. R. Co. v. Pelfrey*, 35 C. A. 501, 80 S. W. 1036.

Evidence held to sustain a finding that a foreman owed a servant the duty of notifying him of the approach of trains. *Houston & T. C. Ry. Co. v. Pollock* (Civ. App.) 115 S. W. 843.

Evidence held to show prima facie that a section hand was notified in time to retire a safe distance from the track. *Id.*

In an action for the death of an engineer in a rear end collision, evidence held to show a negligent failure to protect the first train by signals required by the rules of the company. *Missouri, K. & T. Ry. Co. of Texas v. Rothenberg* (Civ. App.) 131 S. W. 1157.

In an action for injuries to a brakeman who fell between cars when one was cut off from the train, evidence held not to show negligence of the railroad company, or its servants, in failing to warn him. *Freeman v. Irving* (Civ. App.) 136 S. W. 810.

150. **Evidence as to incompetency or negligence of fellow servant—Incompetency.**—On issue of incompetency of fellow servant, evidence held sufficient. *Galveston, H. & S. A. Ry. Co. v. Parrish* (Civ. App.) 43 S. W. 536.

Incompetency of servants to operate a hand car held sufficiently shown by evidence that training was necessary, and that the servants were inexperienced. *International & G. N. R. Co. v. Martinez* (Civ. App.) 57 S. W. 689.

151. — **Negligence.**—Evidence held sufficient to show negligence on the part of a foreman of a railroad company in failing to warn a workman of the danger. *Texas & P. Ry. Co. v. Utley* (Civ. App.) 6 S. W. 311.

In an action for injuries to a brakeman while passing over certain cars, evidence held to sustain a finding that the accident was caused by the negligence of the engineer in conjunction with that of other employé. *St. Louis Southwestern Ry. Co. of Texas v. Pope* (Civ. App.) 82 S. W. 360.

Evidence held sufficient to show negligence of switching crew in failing to notify plaintiff of approaching coupling. *Ft. Worth & D. C. Ry. Co. v. Smith*, 39 C. A. 92, 87 S. W. 371.

In an action for injuries to a trainman, evidence held insufficient to show negligence on the part of the engineer in failing to stop the train after discovering the defect. *Hover v. Chicago, R. I. & G. Ry. Co.*, 40 C. A. 280, 89 S. W. 1084.

In an action for injuries to a servant while assisting in carrying a railroad rail, evidence held sufficient to show that plaintiff's fellow servants, who were assisting in carrying the rail were negligent, and that their negligence caused plaintiff's injury. *Gulf, C. & S. F. Ry. Co. v. Johnson*, 47 C. A. 74, 103 S. W. 447.

In an action against a railroad for injuries to employé, evidence examined, and held to sustain finding that defendant's engineer started the train suddenly without warning. *Ft. Worth & D. C. Ry. Co. v. Monell*, 50 C. A. 287, 110 S. W. 504.

Evidence held sufficient to show that a violent coupling with a caboose, injuring an

employé of the railroad company, was caused by negligence of the engineer, and not by inevitable accident. *Ft. Worth & R. G. Ry. Co. v. Finley*, 50 C. A. 291, 110 S. W. 531.

In an action for injuries sustained by car doors falling on plaintiff by being shoved over by a rigging which was being removed by other of defendant's employés, evidence held to warrant a finding that such other employés might reasonably have anticipated injury to plaintiff or a like injury, as the natural and probable consequence of their acts. *Texas & N. O. R. Co. v. Barwick*, 50 C. A. 544, 110 S. W. 953.

In an action for injuries from the negligence of fellow servants, evidence held to sustain a judgment for plaintiff. *Texarkana & Ft. S. Ry. Co. v. Anderson* (Civ. App.) 111 S. W. 173.

Evidence held to support a finding that a railway brakeman was negligent in throwing a sack of ice from a caboose, resulting in injury to another brakeman. *Galveston, H. & S. A. Ry. Co. v. Henefy* (Civ. App.) 115 S. W. 57.

Evidence held not to show negligence of a locomotive engineer and fireman in an action by a brakeman for injuries. *San Antonio & A. P. Ry. Co. v. Middlebrooks* (Civ. App.) 124 S. W. 169.

In an action for injuries to a brakeman, evidence held not to show negligence of co-employés. *International & G. N. R. Co. v. Temple* (Civ. App.) 130 S. W. 850.

In an action against a railroad company for injury to a switchman, who was thrown from a car by sudden jarring thereof, evidence held to sustain findings that the engineer and another employé were negligent, and that their negligence proximately caused plaintiff's injury. *Missouri, K. & T. Ry. Co. of Texas v. Sadler* (Civ. App.) 149 S. W. 1188.

152. — **Willful injuries.**—In an action for assault by one employé upon another, evidence held to sustain a finding that the company was negligent in employing and retaining the assaulting employé. *Missouri, K. & T. Ry. Co. of Texas v. Day*, 104 T. 237, 136 S. W. 435, 34 L. R. A. (N. S.) 111.

153. — **Vice principals.**—Evidence held to warrant a finding that an employé's injury, received in loading ties for a railroad company, was caused by negligence of defendant's foreman, or else by concurrent negligence of him and other employés. *Sherman, S. & S. W. Ry. Co. v. Payne* (Civ. App.) 40 S. W. 43.

In an action against a railroad company for injuries to a servant, evidence held not to show any negligence on the part of plaintiff's foreman. *International & G. N. R. Co. v. Still*, 40 C. A. 22, 88 S. W. 257.

Evidence of a witness in an action by a servant to recover for injuries considered and held to show that the foreman through whose negligence plaintiff was injured was an habitual drunkard. *El Paso & S. W. Ry. Co. v. Smith*, 50 C. A. 10, 103 S. W. 988.

In a servant's action for injuries sustained while blocking a turntable by the foreman's negligence in releasing a push car thereon, evidence held to show that the foreman knew that it was dangerous to block up the car. *Missouri, K. & T. Ry. Co. of Texas v. Bailey*, 53 C. A. 295, 115 S. W. 601.

Evidence held not to show that the foreman of a bridge crew was negligent in directing the crew to remove a hand car on the track in front of an approaching train. *Myers v. Texas & P. Ry. Co.* (Civ. App.) 134 S. W. 814.

In servant's action against a railroad for injuries while repairing boilers, evidence held to show that defendants' vice principal was negligent. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.) 137 S. W. 711.

154. **Evidence as to assumption of risk.**—See notes under Art. 6645.

155. **Evidence as to contributory negligence.**—See notes under Art. 6644.

156. **Damages.**—As to measure of damages for personal injuries, see *Railway Co. v. Abbott* (Civ. App.) 24 S. W. 299.

In action for death of locomotive fireman, it may be shown that deceased was in the line of promotion to engineer, and that engineers get certain pay. *Galveston, H. & S. A. Ry. Co. v. Ford* (Civ. App.) 46 S. W. 77.

Where plaintiff claims damages for rupture and injury to eyes, and proof shows that he suffered with his eyes from day of injury, it is proper to submit the injury to his eyes as an element of damage. *Railroad Co. v. Hannig*, 20 C. A. 649, 49 S. W. 116.

A charge limiting the recovery of damages for mental and physical suffering is erroneous. Damages for future and permanent effect which necessarily result to the plaintiff are recoverable under the general ad damnum clause and need not be specifically alleged. *Railroad Co. v. Weigers*, 22 C. A. 344, 54 S. W. 910.

Where a physical injury results from a fright or other mental shock, caused by the wrongful act or omission of another, the injured party is entitled to recover his damages, provided the act of omission is the proximate cause of the injury, and the injury ought in the light of all the circumstances to have been foreseen as a natural and probable consequence thereof. As a general rule these questions should be left to the determination of the jury. *Railroad Co. v. Hayter et al.*, 93 T. 239, 54 S. W. 944, 47 L. R. A. 325, 77 Am. St. Rep. 856.

In an action for injury to an employé, who was ruptured by a fall, the fact that he was physically susceptible thereto is of no avail to defendant as to the amount of damages. *Galveston, H. & S. A. Ry. Co. v. Butshek*, 34 C. A. 194, 78 S. W. 740.

157. **Questions for jury and instructions.**—See notes under Art. 1971.

158. **Excessiveness of verdict.**—Verdict for \$15,000 for death of brakeman held not excessive. *Ft. Worth & R. G. Ry. Co. v. Kime*, 21 C. A. 271, 51 S. W. 558.

A verdict for \$17,500 for negligence, causing the death of a husband and father, an engineer 46 or 47 years of age, is excessive, and should be remitted in the sum of \$2,500. *Galveston, H. & S. A. Ry. Co. v. Johnson*, 24 C. A. 180, 58 S. W. 622.

In an action by parents for the wrongful death of their son, defendant's employé, a verdict for \$8,000 held excessive. *Atchison, T. & S. F. Ry. Co. v. Van Belle*, 26 C. A. 511, 64 S. W. 397.

Damages awarded in an action for death of brakeman held excessive. *San Antonio & A. P. Ry. Co. v. Waller*, 27 C. A. 44, 65 S. W. 210.

In action for negligent death of servant, verdict for \$10,416 held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Jones*, 35 C. A. 584, 80 S. W. 852.

In an action for negligence, causing the death of a section foreman, verdict for \$20,000 held not excessive. *International & G. N. R. Co. v. McVey* (Civ. App.) 81 S. W. 991.

In an action for the death of a section foreman, a verdict for \$15,000 held not excessive. *Galveston, H. & S. A. Ry. Co. v. Perry*, 38 C. A. 81, 85 S. W. 62.

A verdict for \$19,000 for the death of a fireman held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 47 C. A. 309, 104 S. W. 910.

In an action for death of railroad employé, damages of \$16,500 held not excessive. *Houston, E. & W. T. Ry. Co. v. McHale*, 47 C. A. 360, 105 S. W. 1149.

A verdict for \$16,000 for the death of a fireman held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. McDuffey*, 50 C. A. 202, 109 S. W. 1104.

\$17,500 held not excessive recovery by a brakeman's widow, children, and mother for his death. *Missouri, K. & T. Ry. Co. of Texas v. Wallace*, 53 C. A. 127, 115 S. W. 302.

In an action for the death of an engineer, who was 31 years of age, earning from \$165 to \$175 per month, and who left a wife and three children, a verdict for \$25,000 held not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Williams* (Civ. App.) 117 S. W. 1043.

In an action for a fireman's death by a collision of his engine with box cars, evidence held to sustain a verdict for plaintiff of \$10,000. *St. Louis Southwestern Ry. Co. of Texas v. Holt*, 57 C. A. 19, 121 S. W. 581.

Decedent, a switchman, 33 years of age, in good health, and earning \$90 a month, was killed by defendant's negligence. He formerly was a conductor, earning \$140 a month, and left a wife and children, aged respectively, 27 years, 4 years, and 1 year. He was temperate and economical, and devoted all of his earnings to the support of his wife and children, except \$5 a month, which he used for personal expenses. Held, that a verdict awarding \$20,000 for his death, one-half to his widow and one-fourth each to his minor children, was not so excessive as to show that the jury were influenced by prejudice, passion, or other improper motive. *Texas & N. O. R. Co. v. Walker* (Civ. App.) 125 S. W. 99.

A verdict of \$22,000 for death of a railroad telegraph lineman held not excessive. *Freeman v. McElroy* (Civ. App.) 126 S. W. 657.

In an action for negligently causing the death of an engineer, a recovery of \$9,500 by the widow, and \$7,000 and \$9,500, respectively, by his two minor daughters, held not excessive. *Galveston, H. & S. A. Ry. Co. v. Salisbury* (Civ. App.) 143 S. W. 252.

A verdict of \$10,000 for a widow of 43 for death of her unmarried son of 22, strong and industrious, extra fireman, earning over \$40 a month, largely devoted to her support, and who was in line for promotion to an earning of \$90 a month, is not excessive. *Missouri, K. & T. Ry. Co. of Texas v. Henderson* (Civ. App.) 148 S. W. 822.

An award of \$20,000 damages for the death of a brakeman, who earned on an average of \$100 a month, held not excessive. *Gulf, C. & S. F. Ry. Co. v. Beezley* (Civ. App.) 153 S. W. 651.

**Art. 6649. Contributory negligence, rule as to.**—In all actions hereafter brought against any such common carrier or railroad under or by virtue of any of the provisions of the foregoing article and the three succeeding articles to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé; provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violations by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé. [Id. sec. 2.]

**Constitutionality.**—This article is constitutional. *Missouri, K. & T. Ry. Co. of Texas v. Scott* (Civ. App.) 143 S. W. 710.

The legislature had power to enact this article. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

This article makes employers responsible for injuries to their employés incurred by reason of the negligence of the employers, and sufficiently punishes an employé for his negligence by diminishing the amount of damages which he would otherwise be entitled to recover, and, so construed, the statute is valid. *Freeman v. Kennerly* (Civ. App.) 151 S. W. 580.

**Title.**—Const. art. 3, § 35, providing that no act shall contain more than one subject, which shall be expressed in its title, is not contravened by Acts 31st Leg. (1st Called Sess.) c. 10, entitled, "An act declaring operators of railroads liable to employés for injury through negligence of such employer; prescribing the effect of contributory negligence on the right of recovery," etc., by reason of its provision that contributory negligence of the employé shall not bar a recovery for his injury, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to him. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

Under Const. art. 10, § 2, which declares all railroads to be common carriers, section 2 of Acts 31st Leg. 1909 (1st Ex. Sess.) c. 10, which regulates the liability of common carriers "by railroad," is within the scope of the title of the act, declaring "persons operating railroads in this state to be liable," in certain cases, where there is contributory negligence on the part of an injured employé. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

**Equal protection of laws.**—This act is not violative of the equal protection clause of Const. U. S. Amend. 14. *St. Louis, S. F. & T. Ry. Co. v. Jenkins* (Civ. App.)



137 S. W. 711; *Missouri, K. & T. Ry. Co. of Texas v. Sadler*, 149 S. W. 1188; *Texas & N. O. Ry. Co. v. Yerkes*, 156 S. W. 579.

This article does not discriminate against any particular railroad company, but applies to all railroads that are common carriers, and is not unconstitutional, as denying the equal protection of the laws. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

The provision of this act that an employé shall not be held guilty of contributory negligence where the violation by the carrier of any statute enacted for the safety of employés contributed to the death of such employé does not violate Const. U. S. Amend. 14, relating to the equal protection of the law. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

— **Due process of law.**—The provision of this article that contributory negligence of an employé of the operator of a railroad shall not bar a recovery from such employer for his injury, but is considered only in diminution of damages, is not class legislation, depriving such employer of property without due process of law. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

— **Class legislation.**—This article applies only to railroad employés, making a class of them; and it is not class legislation, within the state and federal constitutions. *St. Louis, S. F. & T. Ry. Co. v. Taylor* (Civ. App.) 134 S. W. 819.

This article is not class legislation. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

— **Interstate commerce.**—See, also, note under Art. 6648.

This article is not invalid, even though construed as an attempt to regulate interstate commerce, but is merely suspended as to such commerce while there is a federal statute in force relating to the same subject, such subject not being one over which the power of congress is exclusive, in the sense that the states are without power to act with reference thereto until congress takes action. *Missouri, K. & T. Ry. Co. of Texas v. Turner* (Civ. App.) 138 S. W. 1126.

This article is not invalid, under the commerce clause of the federal constitution, as an attempt to regulate interstate commerce. *Missouri, K. & T. Ry. Co. of Texas v. Sadler* (Civ. App.) 149 S. W. 1188.

The employers' liability act (Arts. 6640-6652) is not invalid, as obnoxious to the commerce clause of the federal constitution, because it does not limit its application to intrastate commerce; the statute being merely inoperative, in so far as it applies to interstate commerce, if congress has acted on the subject. *Texas & N. O. Ry. Co. v. Yerkes* (Civ. App.) 156 S. W. 579.

**Application and effect of statute—In general.**—This article, being in force at the time a servant sustained a personal injury, governs his right to recover notwithstanding his contributory negligence. *Gulf, C. & S. F. Ry. Co. v. Wafer* (Civ. App.) 130 S. W. 712.

A charge that an employé of an electric railway company may not recover for injuries, if he was guilty of contributory negligence, is not prejudicial to the company for failing to charge on contributory negligence as provided in this article. *El Paso Electric Ry. Co. v. Shaklee* (Civ. App.) 138 S. W. 188.

In view of this article, error in a charge, authorizing a recovery if plaintiff had acted as brakeman ordinarily or customarily did, under the circumstances, was harmless. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

This article, being in force at the time of an injury to an employé and at the time of the trial, controls the defense of contributory negligence. *Ft. Worth Belt Ry. Co. v. McKinney* (Civ. App.) 145 S. W. 666.

An instruction in an action for injuries to a railroad employé which ignores this article is properly refused. *Freeman v. Kennerly* (Civ. App.) 151 S. W. 530.

This article is applicable to injuries sustained by a railroad employé in consequence of a defective jack used in raising a car, where it was not the duty of the employé to inspect the jack, which was not a simple tool, and the defects therein were not obvious. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

— **To whom applicable.**—Where a railroad sectionman was thrown from a hand car and injured as the car was being propelled at a high speed over the section, because of a low and defective joint in the track, plaintiff not being engaged in any sense in interstate commerce, this article was applicable. *Missouri, K. & T. Ry. Co. of Texas v. Turner* (Civ. App.) 138 S. W. 1126.

The doctrine of comparative negligence is applicable only to common carriers, being made so in that case by statute, and in every other case contributory negligence is an absolute defense, however negligent defendant may be. *San Antonio Brewing Ass'n v. Wolfshohl* (Civ. App.) 155 S. W. 644.

This act applies to all employés of railroad companies, and not merely those engaged in the operation of railway trains or cars. *Houston & T. C. R. Co. v. Bright* (Civ. App.) 156 S. W. 304.

The employers' liability act (Arts. 6640-6652) applies to an employé working as a woodworker in railroad shops. *Texas & N. O. Ry. Co. v. Yerkes* (Civ. App.) 156 S. W. 579.

— **Contributory negligence not a bar to recovery.**—Art. 6645 and this article when construed together, do not bar a recovery for injuries received by a railroad employé guilty of contributory negligence; but the damages must be diminished thereby. *Pecos & N. T. Ry. Co. v. Thompson* (Civ. App.) 140 S. W. 1148.

Under this article a railroad company is liable for injuries to a brakeman caused by defects in the stirrup to a car, where the defective condition was the result of negligence, and the brakeman knew nothing thereof and was not guilty of contributory negligence in failing to know, and he was in the discharge of a duty to his master and exercised the care of a reasonably prudent employé similarly situated. *Id.*

Under the express provisions of this article, the fact that an injured employé may have been guilty of contributory negligence does not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé. *Texas & P. Ry. Co. v. Matkin* (Civ. App.) 142 S. W. 604.

In an action for injuries to an employé occurring after the enactment of this article,

an instruction making contributory negligence a complete defense was properly refused. *Galveston, H. & S. A. Ry. Co. v. Sample* (Civ. App.) 145 S. W. 1057.

While, under this article, a railroad company is not liable for an injury to its employé which resulted wholly from the act of the employé, yet an instruction that, if the employé's negligence was the proximate cause of the injury, then verdict should be for defendant was properly overruled, because barring a recovery, despite concurrent negligence of the employer. *Ft. Worth & D. C. Ry. Co. v. Keeran* (Civ. App.) 149 S. W. 355.

Instructions making contributory negligence of railway brakeman a bar to a recovery held properly refused in view of the federal and state employer's liability acts. *Kansas City, M. & O. Ry. Co. of Texas v. Hall* (Civ. App.) 152 S. W. 445.

Contributory negligence will not, under the statute, completely bar recovery, but will merely lessen it. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

Under Art. 6644 and this article, it was error, in an action by a railroad brakeman for personal injuries, to instruct that if the contributory negligence of plaintiff, concurring or co-operating with any negligent act of defendant, was the direct cause of the injury the jury should find for defendant. *Gregory v. Pecos & N. T. Ry. Co.* (Civ. App.) 155 S. W. 648.

Under this article a railroad company guilty of negligence in furnishing a defective appliance is liable for an injury sustained by an employé in consequence thereof; but the damages must be diminished in proportion to the amount of negligence attributable to him. *Pope v. St. Louis Southwestern Ry. Co. of Texas* (Sup.) 155 S. W. 1175.

— Applies to negligence in law or fact.—Under Art. 6648 and this article it is immaterial whether the employé is guilty of contributory negligence as a matter of law or in fact. *Freeman v. Gerretts* (Civ. App.) 153 S. W. 1163.

— Effect on assumption of risk rule.—The distinction between assumption of risk and contributory negligence in the case of injury to an employé of the operator of a railroad, where the ground of the defense is knowledge or means of knowledge of the defect and danger which caused the injury, being practically abolished, and the defense of assumption of risk merged in that of contributory negligence by Art. 6645, a requested instruction that if the coupling which caused his injury was being done in the usual and customary manner, and he knew the usual manner, the risk was an assumed one, preventing recovery, was properly refused; contributory negligence in such a case under this article not being a bar to recovery, but only matter for reduction of damages. *Galveston, H. & S. A. Ry. Co. v. Grenig* (Civ. App.) 142 S. W. 135.

The statute does not affect the rule of assumption of risk. *Carter v. Kansas City Southern Ry. Co.* (Civ. App.) 155 S. W. 638.

Art. 6645 merges assumed risk arising from knowledge of the defect and danger into a question of contributory negligence, and hence, in view of this article, assumption of risk arising from knowledge does not bar a recovery, but is available only in mitigation of damages. *Galveston, H. & H. R. Co. v. Hodnett* (Civ. App.) 155 S. W. 678.

— Discovered peril rule unaffected.—Construing this act, in view of the prior rules as to assumption of risk and contributory negligence, and of Art. 6645, abolishing the plea of assumed risk in certain cases, held that this act did not in any way affect the employer's liability for injuries to an employé in cases of discovered peril. *Pecos & N. T. Ry. Co. v. Rosenbloom* (Civ. App.) 141 S. W. 175.

— Liability where statutes are violated.—In view of the statute, a railroad company held liable for injuries caused by the concurring negligence of the switchman and itself. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

**Art. 6650. Assumed risk, rule as to.**—Any action brought against any common carrier under or by virtue of any of the provisions of the two preceding articles to recover damages for injuries to or the death of any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation of such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé. [Id. sec. 3.]

**Constitutionality.**—See, also, notes under Arts. 6648 and 6649.

The legislature had power to enact this article. *Freeman v. Swan* (Civ. App.) 143 S. W. 724.

**Art. 6651. Contract changing liability void.**—Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by the three preceding articles shall to that extent be void; provided, that, in any action brought against any such common carrier under or by virtue of said articles, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit or indemnity that may have been paid to the injured employé, or the person entitled thereto, on account of the injury or death for which said action was brought. [Id. sec. 4.]

**Contracts exempting from liability—validity in general.**—Father, who specially agrees to release employer of his minor son from liability for injuries can nevertheless recover for employer's negligence. *Texas & P. Ry. Co. v. Putman* (Civ. App.) 63 S. W. 910.

A stipulation in a railroad employé's application for employment held void, in so far as it attempted to relieve the company from its duty to provide a safe track and to warn such employé of dangerous obstructions. *Gulf, C. & S. F. Ry. Co. v. Darby*, 28 C. A. 413, 67 S. W. 446.

A construction contract with a railroad company held not to relieve the railroad company from liability for injuries to one of its servants by reason of the joint negligence of the servants of the railroad and the contractor. *St. Louis & S. W. Ry. Co. of Texas v. Arnold*, 32 C. A. 272, 74 S. W. 819.

A stipulation in a contract of employment of a minor, whereby his parents waived all claims against the employer for damages in the event of the minor's death in the course of his employment, is contrary to public policy and void. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

— **Public policy.**—A contract exempting a wrongdoer from liability for criminal negligence is contrary to public policy and void. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

— **Consideration.**—A contract, whereby parents waived all claims for injuries sustained by their minor son while in the employment of another, held not enforceable against the parents for want of consideration. *Galveston, H. & S. A. Ry. Co. v. Pigott*, 54 C. A. 367, 116 S. W. 841.

— **Inspection of appliances.**—This article forbids a carrier from shifting to employes the duty of inspection of appliances furnished employes. *Missouri, K. & T. Ry. Co. of Texas v. Odom* (Civ. App.) 152 S. W. 730.

— **Examination by surgeon.**—Contract between railroad and employe, requiring the latter to submit to an examination by the former's surgeon in the event of personal injuries as a condition of recovery of damages on account of such injuries, held void. *Galveston, H. & S. A. Ry. Co. v. Hughes* (Civ. App.) 91 S. W. 643.

**Contracts limiting liability under the act of 1897.**—See Art. 6643 and notes.

**Release of claims.**—In general.—Where a servant releases his master from liability for injuries received in part consideration of being retained in the same capacity, and accepts a less remunerative position, held not entitled to withdraw from such employment and sue for such injury. *Missouri, K. & T. Ry. Co. of Texas v. Chumlea* (Civ. App.) 61 S. W. 524.

In an action for injuries to an employe held, that defendant was entitled to an instruction that, if plaintiff accepted defendant's offer and released defendant from damages, plaintiff could not recover. *Gulf, C. & S. F. Ry. Co. v. Winter*, 38 C. A. 8, 85 S. W. 477.

— **Consideration.**—A contract to give employment for an indefinite time in consideration of a release of claim for damages held sufficient consideration therefor. *Carroll v. Missouri, K. & T. Ry. Co. of Texas*, 30 C. A. 1, 69 S. W. 1004.

Release for personal injuries held supported by valuable consideration. *Quebe v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 77 S. W. 442.

An agreement by plaintiff to release a claim against defendant for personal injuries held void for want of consideration. *Missouri, K. & T. Ry. Co. v. Smith*, 98 T. 47, 81 S. W. 22, 66 L. R. A. 741, 107 Am. St. Rep. 607, 4 Ann. Cas. 644.

A release of claim for personal injuries by a servant held to be without consideration. *Texas Cent. R. Co. v. Johnson*, 51 C. A. 126, 111 S. W. 1098.

A release for personal injuries to a trainman in consideration of \$1 and "the promise of said company to employ me for one day as ——— at the usual rate of pay" held supported by a sufficient consideration, where the trainman afterwards applied for and filled several positions in the company's employ. *Gregory v. Pecos & N. T. Ry. Co.* (Civ. App.) 155 S. W. 648.

A release of a master's liability for a servant's injuries in consideration of one day's employment at the usual pay, etc., the master being required by the servant's previous contract to employ him for the time referred to, held not based on a sufficient consideration, and invalid. *Freeman v. Morrow* (Civ. App.) 156 S. W. 284.

— **Fraud or mistake.**—Evidence of fraud in obtaining release from railroad employe of claim for injuries held sufficient to sustain finding. *International & G. N. R. Co. v. Harris* (Civ. App.) 65 S. W. 885.

A railroad company cannot avail itself of an employe's negligence in signing a release of his claim for damages without reading it, where he relied on a positive representation of fact that it was a different paper. *Id.*

A railroad employe held not bound by a release of damages for injuries, executed in reliance upon a false statement as to his injuries, etc., made by a physician for the company, though made in good faith. *Houston & T. C. R. Co. v. Brown* (Civ. App.) 69 S. W. 651.

Instruction that release of claim for injuries was binding on plaintiff, unless he did not and could not understand its contents, held proper. *Galloway v. San Antonio & G. Ry. Co.* (Civ. App.) 78 S. W. 32.

Instruction that release of claim for injuries is binding, unless defendant falsely represented that it was simply a receipt, held proper under the pleadings. *Id.*

A release by a servant of claim against the master for injuries held not void for mistake or fraud. *Quebe v. Gulf, C. & S. F. Ry. Co.*, 98 T. 6, 81 S. W. 20, 66 L. R. A. 734, 4 Ann. Cas. 545.

Where a servant was treated for injuries in a hospital conducted by the master, false statements of the physician in charge as to the servant's physical condition, made for the purpose of facilitating a settlement, invalidated the same. *Gulf, C. & S. F. Ry. Co. v. Huyett* (Civ. App.) 89 S. W. 1118.

Evidence held to authorize a finding for plaintiff on the theory that plaintiff was induced to sign a release by misrepresentations of defendant's agent. *Gulf, C. & S. F. Ry. Co. v. Huyett*, 49 C. A. 395, 108 S. W. 502.

— **Duress.**—Where plaintiff was informed by defendant's claim agent that he would not be permitted to leave the hospital in which he was confined until he had signed a release of defendant's liability for injuries for \$150, the jury were authorized to find that such statement, if made, was sufficient to avoid the release. *Texas & P. Ry. Co. v. Villafuerte* (Civ. App.) 156 S. W. 1155.

— **Rescission.**—A servant who had executed a release of the master from liability for injuries held entitled to rescind the release. *Galveston, H. & S. A. Ry. Co. v. Cade* (Civ. App.) 93 S. W. 124.

— Construction and effect.—A release by a servant of a claim against the master for damages held to have by its terms embraced an injury to his sight. *Quebe v. Gulf, C. & S. F. Ry. Co.*, 98 T. 6, 81 S. W. 20, 66 L. R. A. 734, 4 Ann. Cas. 545.

A release signed by the car inspector of another railroad company releasing it and certain named corporations from liability for injuries while inspecting one of defendant's cars held not to prevent him from suing defendant for the injuries sustained, though the amount of the recovery should be reduced by the sum paid under the release. *Atchison, T. & S. F. Ry. Co. v. Classin* (Civ. App.) 134 S. W. 358.

Release by a railway brakeman of two companies from liability for personal injury held not to have released a third, against whom a cause of action was reserved. *St. Louis, I. M. & S. Ry. Co. v. Bass* (Civ. App.) 140 S. W. 860.

— Deduction of amount paid.—Money paid by an employer to an employé injured by a third person held a part payment for the injury. *El Paso & S. R. Co. v. Darr* (Civ. App.) 93 S. W. 166.

An offer to allow an amount received under a settlement for personal injuries, alleged to have been fraudulently procured, upon any judgment which might be obtained in an action for the injuries, held sufficient, and a tender of the amount received under the settlement held not required. *Texas & P. Ry. Co. v. Jowers* (Civ. App.) 110 S. W. 946.

Recovery against a railway company for personal injury to an employé of another company held properly limited to the damages sustained by him in excess of an amount paid by another company in settlement. *St. Louis, I. M. & S. Ry. Co. v. Bass* (Civ. App.) 140 S. W. 860.

**Art. 6652. Articles of this chapter construed.**—Nothing in the provisions of the four preceding articles shall be held to limit the duty or liability of common carriers, or to impair the rights of employés, under other articles of this chapter, or under the provisions of the Revised Civil Statutes, but, in case of conflict, these articles shall prevail; and nothing in said articles shall affect the prosecution of any pending proceeding or right of action under any of the laws of this state. [Id. secs. 5 and 6.]

**Pending litigation.**—Under this article, the provision of Art. 6648 regarding procedure, where all the parties are not before the court, does apply to a case pending when the statute was enacted. *International & G. N. R. Co. v. White*, 103 T. 567, 131 S. W. 811.

## CHAPTER FIFTEEN

### RAILROAD COMMISSION OF TEXAS

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| <p><b>Art.</b><br/>6653. Railroad commission created.</p> <ol style="list-style-type: none"> <li>1. Qualifications of commissioners.</li> <li>2. Shall hold no other office, etc.</li> <li>3. Vacancies.</li> <li>4. Oaths, etc.</li> <li>5. Salary.</li> <li>6. Sessions; may appoint clerks, etc.; their salaries.</li> <li>7. Expenses.</li> <li>8. May hold sessions at any place, etc.</li> </ol> <p>6654. Powers and duties, etc.</p> <ol style="list-style-type: none"> <li>1. To classify freights.</li> <li>2. To fix reasonable rates.</li> <li>3. Classifications to be uniform.</li> <li>4. May fix different rates.</li> <li>5. Rates for connecting lines.</li> <li>6. Commission to fix when there is disagreement.</li> <li>7. Old rates to exist until changed by the commission.</li> <li>8. May alter, abolish, etc.</li> <li>9. May adopt rules and regulations.</li> <li>10. Empty cars.</li> <li>11. May fix rates for all services.</li> <li>12. Railways to maintain depots, etc.</li> </ol> <p>6655. Notice to be given, when rates fixed.</p> <ol style="list-style-type: none"> <li>1. May fix rules for all investigations.</li> <li>2. May administer oaths, etc.</li> </ol> <p>6656. Rates to be held conclusive, etc.</p> <p>6657. When railway dissatisfied, may, etc.</p> <p>6658. Burden of proof, etc.</p> <p>6659. To be furnished with schedules of rates fixed.</p> | <p><b>Art.</b><br/>6660. Emergency freight rates.</p> <p>6661. To what roads apply.</p> <p>6662. Rates to take effect, when, and how long continued.</p> <p>6663. Temporary freight and passenger tariffs, power to make.</p> <p>6664. Complainant may apply to commission, when.</p> <p>6665. May inspect books, etc.</p> <p>6666. To ascertain cost of railways, etc.</p> <p>6667. Blanks for information to be prepared.</p> <ol style="list-style-type: none"> <li>1. Penalty for failure to fill out blanks; commission to adopt system of bookkeeping.</li> <li>2. Annual reports.</li> <li>3. Duty as to through freights.</li> </ol> <p>6668. Power to issue subpoenas.</p> <p>6669. Penalty for extorting, etc.</p> <p>6670. "Unjust discrimination" defined.</p> <ol style="list-style-type: none"> <li>1. Same.</li> <li>2. Same.</li> <li>3. Same.</li> <li>4. Penalty for unjust discrimination.</li> <li>5. Law does not apply, when.</li> </ol> <p>6671. Damages; penalty; venue in cases of discrimination.</p> <p>6672. Penalty not otherwise provided.</p> <p>6673. Venue of suits for recovery of penalty.</p> <p>6674. Certified evidence.</p> <p>6675. All violations of duty to be reported.</p> <ol style="list-style-type: none"> <li>1. Duty to investigate all charges and see that the law is enforced.</li> </ol> |
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| <p>Art.<br/>6676. "Railroad," etc., defined; intra-state shipments; one train daily.<br/>6677. Law cumulative, etc.</p> <p><b>AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS</b></p> <p>6677a. Power over public wharves, etc.; elevators, warehouses, etc., and suburban, belt and terminal railroads; rates, charges and regulations, etc.<br/>6677b. Penalty for extortion.<br/>6677c. Penalty for discrimination.<br/>6677d. Rules and regulations; stock and bonds.<br/>6677e. Powers of commission; reports; suits; laws applicable.<br/>6677f. Objections to decisions, etc.; actions and appeals.<br/>6678. Railroad to furnish cars when demanded.<br/>6679. Application shall state what.<br/>6680. Penalty for failure to furnish.<br/>6681. Applicant shall make deposit.<br/>6682. To deliver loaded cars in reasonable time.<br/>6683. Necessary for applicant to show what.<br/>6683a. Not to affect demurrage regulations.<br/>6684. Duty to furnish cars and other rolling stock.<br/>6685. Railroad commission to require and authorize mortgage, etc.<br/>6686. Penalty for failure to comply.<br/>6687. Shall furnish freight facilities and interchange cars with connecting roads.<br/>6688. To interchange cars at junction points.<br/>6689. Railroad commission to make rules and regulations.<br/>6690. Liable for damages, when.</p> | <p>Art.<br/>6691. Other penalty; "shipper" defined.<br/>6691a. "Shipper" defined.<br/>6692. "Reasonable time" defined.<br/>6693. Duty to provide separate passenger depots and suitable freight depots.<br/>6694. Railroad commission to require compliance.<br/>6695. Commission may order construction of union depots.<br/>6696. Penalty for failure to comply.<br/>6697. Right to lease another road.<br/>6698. Lessor company subject to jurisdiction of commission.<br/>6699. Exception as to general office.<br/>6700. Process, served upon whom.<br/>6701. Railroad crossings under control of railroad commission.<br/>6702. Interlocking or other safety switches to be used.<br/>6703. Expenses of grade crossings paid by whom.<br/>6704. Trains may pass crossings without stopping, when.<br/>6705. Penalty, etc.<br/>6706. Double-header trains, use prohibited, except, when.<br/>6707. Use to be regulated by railroad commission.<br/>6708. Penalty and venue of suits.<br/>6709. Equipment to be used; commission to supervise.<br/>6710. Improved couplers to be used, and how.<br/>6711. Draw-bar of engine, length of.<br/>6712. May refuse rolling stock improperly equipped, by connecting lines.<br/>6713. Rolling stock to be provided with grab irons, etc.<br/>6714. Penalty, and how recovered.<br/>6715. To build sidings and spur tracks.<br/>6716. Railroad commission to enforce compliance.</p> |
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**Article 6653. [4561] Railroad commission created, etc.**—A railroad commission is hereby created, to be composed of three persons to be appointed by the governor, as follows: If the legislature be in session, the governor shall, by and with the advice of the senate, appoint said commissioners, but, if the legislature be not in session, the governor shall make such appointments; and each commissioner so appointed shall hold his office until the second Monday after the inauguration of the next succeeding governor, and until his successor is appointed and qualified. Each succeeding governor shall, on the second Monday after his inauguration, or as soon thereafter as practicable, appoint said commissioners, who shall each hold his office until the second Monday after the inauguration of the next succeeding governor, and until his successor is appointed and qualified.

**1. Qualifications of commissioners.**—The persons so appointed shall be resident citizens of this state, and qualified voters under the constitution and laws, and not less than twenty-five years of age. No person shall be appointed as such commissioner who is directly or indirectly interested in any railroad in this state, or out of it, or in any stock, bond, mortgage, security, or in the earnings of any such road; and if such commissioners shall voluntarily become so interested his office shall become vacant; and, if any railroad commissioner shall become so interested otherwise than voluntarily, he shall within a reasonable time divest himself of such interest; failing to do this, his office shall become vacant.

**2. Shall hold no other office, etc.**—No commissioner hereunder shall hold any other office under the government of the United States, or of this state, or of any other state government; and shall not, while such commissioner, engage in any occupation or business inconsistent with his duties as such commissioner.

3. **Vacancies.**—The governor shall fill all vacancies in the office of commissioner by appointment; and the person so appointed shall fill out the unexpired term of his predecessor.

4. **Oaths, etc.**—Before entering upon the duties of his office, each of said commissioners shall take and subscribe to the oath of office prescribed in the constitution, and shall, in addition thereto, swear that he is not directly or indirectly interested in any railroad, nor in the bonds, stock, mortgages, securities, contracts or earnings of any railroad, and that he will to the best of his ability faithfully and justly execute and enforce the provisions of this chapter, and all laws of this state concerning railroads, which oath shall be filed with the secretary of state.

5. **Salary.**—Each of said commissioners shall receive an annual salary of four thousand dollars, payable in the same manner that salaries of other state officers are paid.

6. **Sessions; may appoint clerks, etc.; their salaries.**—The commissioners appointed shall meet at Austin and organize and elect one of their number chairman of said commission. A majority of said commissioners shall constitute a quorum to transact business. Said commission may appoint a secretary at a salary of not more than two thousand dollars per annum, and may appoint not more than two clerks at a salary of not more than fifteen hundred dollars per annum each, and such other persons as experts as may be necessary to perform any duty that may be required of them by this chapter. The secretary shall keep full and correct minutes of all the transactions and proceedings of said commission, and perform such duties as may be required by the commission. The commission shall have power to make all needful rules for their government and for their proceedings. They shall be known collectively as, "Railroad Commission of Texas," and shall have a seal, a star of five points, with the words, "Railroad Commission of Texas," engraved thereon. They shall be furnished with an office in the capitol at Austin, and with necessary furniture, stationery, supplies, and all necessary expenses, to be paid for on the order of the governor.

7. **Expenses.**—The commissioners, secretary and clerks shall be entitled to receive from the state their actual necessary traveling expenses, which shall include the cost only of transportation while traveling on the business of the commission, to be paid out on the order of the governor upon an itemized statement thereof, sworn to by the party who incurred the expense, and approved by the commission.

8. **May hold sessions at any place, etc.**—Said commissioners may hold sessions at any place in this state when deemed necessary to facilitate the discharge of their duties. [Acts 1891, p. 55, secs. 1, 2.]

*Cited, Hughes v. State (Cr. App.) 149 S. W. 173.*

*Salary of commissioners.—See, also, Art. 7053.*

*Fees to be charged by commission.—See Art. 3345.*

**Art. 6654. [4562] Powers and duties.**—The power and authority is hereby vested in the railroad commission of Texas, and it is hereby made its duty, to adopt all necessary rates, charges and regulations to govern and regulate railroad freight and passenger tariffs, the power to correct abuses and prevent unjust discrimination and extortion in rates of freight and passenger tariffs on the different railroads in this state, and to enforce the same by having the penalties inflicted as by this chapter prescribed through proper courts having jurisdiction.

1. **To classify freights.**—The said commission shall have power, and it shall be its duty to fairly and justly classify and subdivide all freight and property of whatsoever character that may be transported over the railroads of this state into such general and special classes or subdivisions as may be found necessary and expedient.

2. **To fix reasonable rates.**—The commission shall have power, and it shall be its duty, to fix to each class or subdivision of freight a reason-

able rate for each railroad subject to this chapter for the transportation of each of said classes and subdivisions.

3. **Classifications to be uniform.**—The classifications herein provided for shall apply to and be the same for all railroads subject to the provisions of this chapter.

4. **May fix different rates.**—The said commission may fix different rates for different railroads and for different lines under the same management, or for different parts of the same lines if found necessary to do justice, and may make rates for express companies different from the rates fixed for railroads.

5. **Rates for connecting lines.**—The said commission shall have power, and it shall be its duty, to fix and establish for all or any connecting lines of railroad in this state reasonable joint rates of freight charges for the various classes of freight and cars that may pass over two or more lines of such railroads.

6. **Commission to fix when there is disagreement.**—If any two or more connecting railroads shall fail to agree upon a fair and just division of the charges arising from the transportation of freights, passengers or cars over their lines, the commission shall fix the pro rata part of such charges to be received by each of said connecting lines.

7. **Old rates to exist until changed by the commission.**—Until the commission shall make the classifications and schedules of rates as herein provided for, and afterwards if they deem it advisable, they may make partial or special classifications for all or any of the railroads subject hereto, and fix the rates to be charged by such roads therefor; and such classifications and rates shall be put into effect in the manner provided for general classifications and schedules of rates.

8. **May alter, abolish, etc.**—The commission shall have power, and it shall be its duty, from time to time, to alter, change, amend or abolish any classification or rate established by it when deemed necessary; and such amended, altered or new classifications or rates shall be put into effect in the same manner as the originals.

9. **May adopt rules and regulations.**—The commission may adopt and enforce such rules, regulations and modes of procedure as it may deem proper to hear and determine complaints that may be made against the classifications or the rates, the rules, regulations and determinations of the commission.

10. **Empty cars.**—The commission shall make reasonable and just rates of charges for each railroad subject hereto for the use or transportation of loaded or empty cars on its road; and may establish for each railroad or for all railroads alike, reasonable rates for the storing and handling of freight and for the use of cars not unloaded after forty-eight hours' notice to the consignee, not to include Sundays.

11. **May fix rates for all services.**—The commission shall make and establish reasonable rates for the transportation of passengers over each or all of the railroads subject hereto, which rates shall not exceed the rates fixed by law. The commission shall have power to prescribe reasonable rates, tolls or charges for all other services performed by any railroad subject hereto.

12. **Railways to maintain depots, etc.**—It shall be the duty of each and every railway subject to this chapter to provide and maintain adequate, comfortable and clean depots and depot buildings at its several stations for the accommodation of passengers; and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads;

provided, that this shall not be construed as repealing any existing laws on the subject. [Id. sec. 3.]

**Constitutionality.**—Properly construed, this article is constitutional. *International & G. N. Ry. Co. v. Railroad Commission*, 99 T. 332, 89 S. W. 961.

**Liberal Interpretation.**—This article should be liberally interpreted to effectuate its purpose. *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

**Nature of power to regulate railroads.**—The nature of the power to regulate the operation of a railroad by a commission, stated. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1028.

**Jurisdiction of commission.**—A failure to comply with the duties imposed by Arts. 6500, 6603, 6609 and 6670 constitutes such an abuse as authorizes the railroad commission under this article to correct. The rights conferred and the duties imposed by the articles referred to were not intended solely for the benefit of railroad companies. On the contrary, their primary object was to promote public interest. *I. & G. N. Ry. Co. v. Railroad Commission (Civ. App.)* 86 S. W. 17.

This article is not broad enough to embrace the correction of abuse of two railroads, which cross each other, failing to connect their tracks so that cars can be shifted from one to the other. If such failure to connect at a crossing be an abuse the act which established the commission does not give that body the power to correct it. If they have that power it must be sought elsewhere. *International & G. N. Ry. Co. v. Railroad Commission*, 99 T. 332, 89 S. W. 961, 962.

— **How determined.**—The question of the jurisdiction of the railway commission is by law committed to the commission without any provision by which the supreme court can revise its action. Its decision is final and conclusive which would preclude the supreme court from issuing a mandamus to compel the commission to give authority to a railroad to issue stock and bonds before completion of the road. *Denison & S. Ry. Co. v. Railroad Commission of Texas*, 95 T. 671, 69 S. W. 63.

— **Maintenance of depots.**—The railroad commission can compel a railroad company to erect suitable buildings just inside the Texas line when its nearest station in Texas is distant about ten miles, although just across the state line in another state (Oklahoma) there are depot buildings on the line extended through the latter state. *Railroad Commission v. Chicago, R. I. & G. Ry. Co.*, 102 T. 393, 117 S. W. 794.

— **Interstate commerce.**—See notes under Art. 6676.

— **Rules and regulations.**—The effect of the constitutional inhibition against delegation of legislative power on the power of a board of railroad commissioners to make rules for the government of the railroad, stated. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1028.

— **Collateral attack.**—See, also, notes under Art. 6646-6648.

Attempted exercise by railroad commission of power not conferred on it held subject to collateral attack. *Davis v. San Antonio & G. S. Ry. Co.*, 92 T. 642, 51 S. W. 324.

**Formulation of rates—In general.**—Rate-making is a legislative function, but the determination whether a rate is reasonable is a judicial function. *Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.)* 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573,

In rate-making the unit of cost of service in moving freight held the cost per ton per mile. *Id.*

In rate-making, it is not permissible, in order to equalize commercial advantages, to deprive any place of its natural advantages. *Id.*

— **Matters to be considered.**—In rate-making, distance is the primary basis, and, other things being equal, the rate charged must be in proportion to the length of the haul. *Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.)* 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

Density of traffic is an important factor. *Id.*

Competition is an important and frequently a controlling factor. *Id.*

Slight differences in a single item of cost do not justify a difference in freight rates. *Id.*

That a shipping center was a port on the high seas held not to be considered in determining its railroad rates. *Railroad Commission of Texas v. Galveston Chamber of Commerce (Sup.)* 145 S. W. 573, reversing judgment (Civ. App.) *Galveston Chamber of Commerce v. Railroad Commission of Texas (Civ. App.)* 137 S. W. 737.

— **What rate governs.**—Where a rate made by the Texas railroad commission applied to shipments to "Port Arthur," shipments calling for a haul beyond that of any material distance were not affected by the rate. *Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co. (Civ. App.)* 129 S. W. 198.

Under classification rule 35, enacted by the railroad commission, a shipper, having reconsigned goods from destination over a new line of the carrier which was not open when the shipment was made, held entitled to the benefits of the through rate from the point of shipment to that of final destination, though no such rate existed when the shipment was made. *Gulf, C. & S. F. Ry. Co. v. West Texas Lumber Co. (Civ. App.)* 145 S. W. 1085.

Where cars of lumber were billed to point Q., "final destination 'S,'" the contract was for shipment only to Q. where S. was on a new line which was not in operation and to which no freight rates had been established at the date of the contract. *Quanah, A. & P. Ry. Co. v. Drummond (Civ. App.)* 147 S. W. 728.

Under the rulings of the railroad commission, a consignment of goods held entitled to be reconsigned on a through rate to a point on a line not open at the time the shipment originated only upon compliance with classification rule No. 35 of the railroad commission. *Id.*



In determining whether freight rates charged are excessive, the rate which was in effect at the time the bill of lading was executed will control. *Id.*

Where no specific rate from point of origin to destination of a through shipment is provided, and no specific manner of constructing the combination rate for it is prescribed, the lowest combination of rates applicable over the route is the lawful rate. *Pecos & N. T. Ry. Co. v. Porter (Civ. App.) 156 S. W. 267.*

Where a commodity rate is named in a tariff on a commodity and between specified points, the commodity rate is the lawful rate, though a class rate or some combination may make a lower rate. *Id.*

**Rules and regulations.**—The rules of a railroad commission requiring railroad companies transporting cotton to have it compressed at the initial point, or at the nearest compress thereto, held not unreasonable as applied to the Houston & Texas Railway Company. *Railroad Commission of Texas v. Houston & T. C. R. Co., 16 C. A. 129, 40 S. W. 526, 1052.*

Where a company sued to set aside regulations of the railroad commission in their entirety, held, that it was not entitled to partial relief on showing the rules unreasonable only in certain respects. *Id.*

A shipper of cotton by bill of lading held, under rules of railroad commission, entitled to no deduction from freight rate; it not being compressed because there was no compress at shipping point or intermediate station. *Galveston, H. & S. A. Ry. Co. v. Orthwein-Fitzhugh Cotton Co., 27 C. A. 623, 69 S. W. 490.*

**Construction of orders.**—Where statutory or penal consequences are sought to be inflicted for violating the provisions of an order of the Texas railroad commission, it should receive a strict construction, and be enforced no further than it provides. *Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co. (Civ. App.) 129 S. W. 198.*

**Conclusiveness of rates or orders.**—See notes under Arts. 6656–6658.

**Regulation of carriers.**—See Title 20.

**Regulation of rates of express companies.**—See Title 56.

**Regulation of union depot companies.**—See Art. 1244.

**Art. 6655. [4563] Notice to be given when rates fixed.**—Before any rates shall be established under this chapter, the commission shall give the railroad company to be affected thereby ten days' notice of the time and place when and where the rates shall be fixed; and said railroad company shall be entitled to be heard at such time and place, to the end that justice may be done; and it shall have process to enforce the attendance of its witnesses. All process herein provided for shall be served as in civil cases.

1. **May fix rules for all investigations.**—The commission shall have power to adopt rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings of railroad companies and other parties before it, in the establishment of rates, orders, charges and other acts required of it under this law; provided, no person desiring to be present at any such investigation by said commission shall be denied admission.

2. **May administer oaths, etc.**—The chairman and each of the commissioners, for the purposes mentioned in this chapter, shall have power to administer all oaths, certify to all official acts, and to compel the attendance of witnesses, and the production of papers, way-bills, books, accounts, documents and testimony, and to punish for contempt as fully as is provided by law for the district or county court. [*Id.* sec. 4.]

**Art. 6656. [4564] Rates to be held conclusive until, etc.**—In all actions between private parties and railway companies brought under this law, the rates, charges, orders, rules, regulations and classifications prescribed by said commission before the institution of such action shall be held conclusive, and deemed and accepted to be reasonable, fair and just, and in such respects shall not be controverted therein until finally found otherwise in a direct action brought for that purpose in the manner prescribed by articles 6657 and 6658 of this chapter. [*Id.* sec. 5.]

See *Houston B. & T. Ry. Co. v. Hornberger (Civ. App.) 143 S. W. 272.*

**Constitutionality.**—This article is not invalid as denying to the railroads the equal protection of the laws in violation of the fourteenth amendment to the federal constitution, for Arts. 6657, 6658, provide a direct and appropriate proceeding in the courts to determine whether the rates fixed by the commission are just. *Texas & N. O. R. Co. v. Sabine Tram Co. (Civ. App.) 121 S. W. 256.*

**Presumption as to reasonableness of rates.**—The court, in a suit to enjoin the railroad commission from enforcing its rates, must assume that the rates fixed and applicable to the greater portion of the state are reasonable. *Galveston Chamber of Commerce v. Railroad Commission (Civ. App.) 137 S. W. 737.*

Where, in such case, there is no complaint as to the rates from the standpoint of revenue to the carriers, the court must assume that the rates are sufficiently high, if the present average is maintained, to furnish sufficient revenue, and where the differen-

tial rates complained of are abolished, and there is no lowering of rates, the commission may regulate rates, so as to give the carrier reasonable compensation without unjust discrimination. *Id.*

**Conclusiveness of rates and orders.**—This article denies to railroad companies and other persons interested the right to question the validity and justice of the rates, etc., made by the commission, in suits between the railroads and individuals because it would involve every action in the complications of making rates and practically deny redress. *Railroad Commission v. Weld*, 95 T. 278, 66 S. W. 1096.

A railroad company held liable for freight charges in excess of that prescribed by railroad commission of Texas. *Galveston, H. & S. A. Ry. Co. v. J. H. Nations Meat & Supply Co.* (Civ. App.) 136 S. W. 833.

This article does not affect the jurisdiction of the justice court, but only serves to show error in the judgment, where it fixes a different rate from that fixed by the railroad commission. *Houston & T. C. R. Co. v. Young* (Civ. App.) 137 S. W. 380.

The establishment of rates by the railroad commission is not final, but is subject to judicial review, in a direct action brought for that purpose. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

— **Effect of special contract.**—A railroad, by mistake of its agent, fixed a rate on an interstate shipment at less than the published schedule. Held, that the contract could not be enforced. *H. & T. C. R. Co. v. Dumas* (Civ. App.) 43 S. W. 609.

Stipulation in contract of shipment to pay "at the rate of tariff," held not to make the shipper liable to pay more than the rate agreed on. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 29 C. A. 507, 69 S. W. 119.

A contract by a carrier to carry goods at less than the maximum rates fixed by the commissioners is valid where there is no discrimination. *Wells Fargo Exp. Co. v. Williams* (Civ. App.) 71 S. W. 314.

Where plaintiff did not ask for a special rate for the transportation of his cattle, and knew that the contract, which, in fact, specified an erroneous rate, was made with the understanding that the rate to be charged was the regular rate, such understanding formed a part of the contract, and it was therefore immaterial that he did not know of a provision therein that the rate named was subject to correction so as to conform to that prescribed by the railroad commission. *Texas Mexican Ry. Co. v. Reed*, 56 C. A. 452, 121 S. W. 519.

Plaintiff contracted for the transportation of certain cattle at \$29 a car, both he and the initial carrier's agent believing that such was the regular rate. On the cattle arriving at destination, plaintiff was notified that the rate was \$30 a car, which the agent of the last connecting carrier demanded as a condition to delivery of the cattle. Plaintiff refused for several hours to pay the additional charge until the agent obtained authority to deliver the cattle without payment, when plaintiff, because of the lateness of the hour, refused to receive the cattle until the next day. Held that plaintiff was liable for the additional charge, and the carrier had a statutory right to hold the cattle until all the freight was paid. *Id.*

A carrier quoting a rate to a shipper held estopped from claiming a higher rate. *Freeman v. Kemendo* (Civ. App.) 148 S. W. 605.

A rate quoted for an interstate shipment and acted on by a shipper held to govern in the absence of a published rate as required by the interstate commerce act as amended. *Id.*

**Art. 6657. [4565] When railway dissatisfied, may file petition, etc.**  
—If any railroad company or other party at interest be dissatisfied with the decision of any rate, classification, rule, charge, order, act or regulation adopted by the commission, such dissatisfied company or party may file a petition setting forth the particular cause or causes of objection to such decision, act, rate, rule, charge; classification, or order, or to either or all of them, in a court of competent jurisdiction in Travis county, Texas, against said commission as defendant. Said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court. Either party to said action may appeal to the appellate court having jurisdiction of said cause; and said appeal shall be at once returnable to said appellate court, at either of its terms; and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that, if the court be in session at the time such right of action accrues, the suit may be filed during such term and stand ready for trial after ten days' notice. [*Id.* sec. 6.]

See *Houston B. & T. Ry. Co. v. Hornberger* (Civ. App.) 143 S. W. 272.

**Conclusiveness of rates and orders of commission.**—See notes under Art. 6656.

**Review of rates and orders.**—In general.—This article and Art. 6658 provide for determining the reasonableness and justice of rates and permits their enforcement until they are declared unreasonable and unjust by the judgment of a court. *Railroad Commission v. Weld*, 95 T. 278, 66 S. W. 1097.

Under this article and Art. 6658 the legislature intended to confer upon the courts power to determine the question of the reasonableness of rates as they affect the rights of shippers and the railroads by the same rules that would be applied in determining a like question between other parties. *Railroad Commission v. Weld & Neville*, 96 T. 394, 73 S. W. 529, 531.

Discretion vested in railroad commission should not be interfered with by the courts, unless manifestly abused. *International & G. N. R. Co. v. Railroad Commission of Texas* (Civ. App.) 86 S. W. 16.

Under this article and Art. 6658, a railroad company can attack any rate, or any number or all the rates prescribed by the commission as unjust and unreasonable. The petition must show such facts as would if true authorize the court to adjudge the rate to be unjust and unreasonable as a matter of law. To do this it must show the earnings of the road over all its line of the article in question. The road cannot select one rate and a particular part of its road for the application of that rate, showing thereby the deficiency in profit and from that establish that the rate is not reasonable. *Gulf, C. & S. F. Ry. Co. v. Railroad Commission*, 102 T. 338, 113 S. W. 741, 747, 116 S. W. 795.

— **Scope of inquiry.**—The determination as to the effect of competition and its influence on rates between different points is peculiarly for the railroad commission, and may not be reviewed by the courts. *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

Under these two articles the courts may not inquire into the motives of the commission but are concerned only with the results of their actions and its effect on the shippers. *Id.*

— **Reasonableness and justice of rates.**—This article and Art. 6658 confer authority upon the courts to examine into the reasonableness and justice of rates and in the exercise of that jurisdiction the courts will try the questions as if they arose in any other proceeding. And if hauling one of the principal articles of transportation over a road does not yield revenue sufficient to pay for the cost of transporting it, not including interest on investment, taxes or other expenses, then the rate applied to that article is unreasonable and unjust to the railroad. *Gulf, C. & S. F. Ry. Co. v. Railroad Commission*, 102 T. 338, 116 S. W. 795.

Under these articles a rate which barely returns the actual cost of the service without affording some profit on the investment is unjust and unreasonable. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

— **Burden and character of proof.**—See notes under Art. 6558.

— **Evidence.**—A petition alleging that there was nothing in the local conditions affecting the shipment of goods into Galveston justifying the charging of any greater freight rate than applied between other points in the state for similar services and that the excuse of the railroad commission in requiring higher freight rates to Galveston above the freight rates required of another city was to deprive Galveston, and the persons engaged in business there, of natural advantages, and to arbitrarily put the other city on a plane of commercial equality, evidence as to whether a lower rate to Galveston would be a sufficient charge was admissible. *Galveston Chamber of Commerce v. Railroad Commission* (Civ. App.) 137 S. W. 737.

A question, asked a member of the commission as an expert, as to whether, in his opinion, a lower rate would be a sufficient charge, was not objectionable as binding the commission by the individual opinion of the members. *Id.*

Evidence held not to justify the discrimination in rates established by the railroad commission on the ground of cost of construction, maintenance, and transportation or otherwise, authorizing relief. *Id.*

— **Interference with vested rights.**—The court held not prevented from setting aside rates fixed by the railroad commission on the ground that vested rights will be interfered with. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

That a system of rates has prevailed for a long time, and that persons have invested money on the faith of its continuance, do not prevent the court from setting aside the rates as unreasonable. *Id.*

— **Conclusiveness of court's decision.**—As estoppel by judgment must be mutual, the railroad commission cannot rely on a decision adjudging that rates are reasonable under specified facts to defeat a subsequent action alleging the unreasonableness of the rates under changed conditions. *Galveston Chamber of Commerce v. Railroad Commission* (Civ. App.) 137 S. W. 737.

— **Limitation of actions.**—A suit under this section is one against the state and is not barred by limitations. *Galveston Chamber of Commerce v. Railroad Commission* (Civ. App.) 137 S. W. 737.

The duty of the railroad commission to make and enforce proper rules preventing unjust discrimination is a continuing one, and limitations do not run in its favor, as against an action to restrain it from enforcing its rules. *Id.*

A suit to restrain enforcement of orders of the railroad commission involves the public welfare, and is not barred by limitations, though the suit is brought by private citizens. *Id.*

**Art. 6658. [4566] Burden of proof.**—In all trials under the foregoing article, the burden of proof shall rest upon the plaintiff, who must show by clear and satisfactory evidence that the rates, regulations, orders, classifications, acts or charges complained of are unreasonable and unjust to it or them. [Id. sec. 7.]

See *Railroad Commission of Texas v. Texas & P. Ry. Co.* (Civ. App.) 140 S. W. 829; *Houston, B. & T. Ry. Co. v. Hornberger*, 143 S. W. 272.

— **Construction of language.**—The same construction should be given the phrase, "unreasonable and unjust to it or to them," that would have obtained in a suit to recover from the carrier excess of charges paid. *Railroad Commission v. Wild & Neville*, 96 T. 394, 73 S. W. 529, 531.

— **Burden of proof on plaintiff.**—This article places the citizen in action to contest the reasonableness of rates fixed by the railroad commission upon the same footing as it does the railroad corporations and requires a shipper to make just as clear and conclusive proof of the unreasonableness or injustice of the rates as is required of a

railroad company. *Gulf, C. & S. F. Ry. Co. v. Railroad Commission*, 102 T. 338, 116 S. W. 795.

Under this article, one suing to enjoin the commission from enforcing its rates has the burden of showing that the rates are discriminatory against any person or locality for a like and contemporaneous service, and is therefore unreasonable and unjust. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

**Character of proof required.**—The intention of Art. 6657 and this article was to guard the railroad commission from improper interference, and to provide that the courts shall regard its actions, within the limits of its delegated powers, as the result of a purpose to do justice, so that the right of the courts to set aside decisions of the commission must be limited to cases in which the evidence leaves no reasonable doubt that the rate or rule is unjust and unreasonable. *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

Under this article, where, in a suit to enjoin the railroad commission from enforcing rates fixed by it, there was a differential in the rates for the same distance between Houston and Galveston, the advantage in rate being on the side of Galveston for the greater part of the distance, but in favor of Houston for the remainder, there is no injustice to Galveston, or any interest therein apparent; and, as the commission had authority to prescribe the rates, the mere fact that no valid reason for the difference clearly appears will not be sufficient to entitle the court to set aside the rates fixed. *Id.*

**Art. 6659. [4567]. Railroads to be furnished with schedule of rates fixed.**—The said commission shall, as soon as the classifications and schedules of rates herein provided for are prepared by them, furnish each railroad subject to the provisions of this chapter with a complete schedule in suitable form, showing the classification of freight made by them and the rates fixed by said commission to be charged by such road for the transportation of each class of freight, and shall cause a certified copy of such classification and schedule of rates to be delivered to each of said railroads at its principal office in this state, if it has such office in this state, and, if not, then to any agent of said company in this state; which said schedule, rules and regulations shall take effect at the date which may be fixed by said commission, not less than twenty days. Each of said railroad companies shall cause said schedule to be printed in type of a size not less than pica, and shall have the same posted up in a conspicuous place at each of its depots, so as to be inspected by the public. Said commission may at any time abolish, alter, or in any manner amend, the said schedules, or abolish or amend any such regulations; and in that event certified copies of the schedules, rules or regulations, showing the changes therein, shall be delivered to each road as herein specified. In all cases where the rates shall not have been fixed by the commission, no changes shall be made, except after ten days' notice to and consent of the commission. [*Id.* sec. 8.]

**Conclusiveness of rates and effect of special contract.**—See Art. 6656 and notes.

**Art. 6660. Emergency freight rates.**—In addition to the powers conferred on the railroad commission of Texas by articles 6655 and 6659, said commission shall have the power, when deemed by it necessary, to prevent interstate rate wars and injury to the business or interests of the people or railroads of the state, or in case of any other emergency, to be judged of by the commission, it shall be its duty to temporarily alter, amend or suspend any existing freight rates, tariffs, schedules, orders and circulars on any railroad or part of railroad in this state, and to fix freight rates where none exist. [*Acts 1899*, p. 311, sec. 1.]

**Art. 6661. To what roads apply.**—Said emergency rates, so made by the commission, shall apply on any one or more of all the railroads in this state, or part of railroads, as may be directed by, the commission. [*Acts 1897*, p. 51, sec. 2.]

**Art. 6662. Rates take effect, when, and how long continued.**—Said rates, so made, shall take effect at such time and remain in force for such length of time as may be prescribed by the commission. [*Id.* sec. 3.]

**Art. 6663. Temporary freight and passenger tariffs, power to make.**—In addition to all other powers conferred by law upon the railroad commission of Texas, said commission shall have the power to make temporary freight and passenger tariffs, to take immediate effect or at such times as shall be fixed by said commission, whenever an emergency

arises, the sufficiency of which shall be judged of by said commission, in order that justice may be done or injury prevented any person, place or locality; and said commission shall have the power at once to suspend temporarily any existing freight or passenger tariff, and to establish freight and passenger tariffs, rules and regulations for temporary use, to have immediate effect where none exists. [Acts 1907, p. 220, sec. 1.]

**Art. 6664. [4568] Complainants may apply to commission; proceedings thereunder.**—Any person, firm, corporation, or association, or any mercantile, agricultural, or manufacturing association, or any body politic, or municipal organization, complaining of anything done or omitted to be done by any railroad subject hereto, in violation of any law of this state, or the provisions of this chapter, for which penalty is provided, may apply to said commission in such manner and under such rules as the commission may prescribe; whereupon, if there shall appear to the commission to be any reasonable grounds for investigating such complaint, it shall give at least five days' notice to such railroad of such charge and complaint, and call upon said road to answer the same at a time and place to be specified by the commission. The commission shall investigate and determine such complaint under such rules and modes of procedure as it may adopt. If the commission finds that there has been a violation, it shall determine if the same was wilful; if it finds that such violation was not wilful, it may call upon said road to satisfy the damage done to the complainant thereby, stating the amount of such damage, and to pay the cost of such investigation; and if the said railroad shall do so within the time specified by the commission there shall be no prosecution by the state; but if said railroad shall not pay said damage and cost within the time specified by said commission, or if the commission finds such violation to be wilful, it shall institute proceedings to recover the penalty for such violation and the cost of such investigation. All such complaints shall be made in the name of the state of Texas upon the relation of such complainant. All evidence taken before said commission in the investigation of any such complaint, when reduced to writing and signed and sworn to by the witness, may be used by either party, the state, complainant, or the railroad company, in any proceeding against such railroad involving the same subject matter; provided, further, that the commissioners may require the testimony so taken before them to be reduced to writing when they may deem it necessary, or when requested to do so by either party to such proceedings; and a certified copy, under the hand and seal of said commission, shall be admissible in evidence upon the trial of any cause or proceeding growing out of the same transaction against such railroad, involving the same subject matter and between the same parties. The provisions of this article shall not abridge nor affect the rights of any person to sue for any penalty that may be due him under the provisions of this chapter, or any other law of this state. [Acts 1891, p. 55, sec. 9.]

**Remedy not exclusive.**—Under this article and Art. 6671, authorizing any person, injured by a railway company doing any prohibited act, to sue for damages and for penalties, a shipper may sue for excessive freight charges collected by the carrier and for the penalties therefor, without applying to the commission for relief. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

**Art. 6665. [4569] May inspect books, etc.**—The commissioners, or either of them, or such persons as they employ therefor, shall have the right, at such times as they may deem necessary, to inspect the books and papers of any railroad company and to examine under oath any officer, agent or employé of such railroad in relation to the business and affairs of the same. If any railroad shall refuse to permit the commissioners, or either of them, or any person authorized thereto, to examine its books and papers, such railroad company shall, for each offense, pay to the state of Texas not less than one hundred and twenty-five dollars

nor more than five hundred dollars for each day it shall so fail or refuse; provided, that any persons other than one of said commissioners who shall make any such demands shall produce his authority, under the hand and seal of said commission, to make such inspection. [Id. sec. 10.]

See *St. Louis Southwestern Ry. Co. of Texas v. Hixon* (Civ. App.) 126 S. W. 338.

**Art. 6666. [4570] To ascertain cost of railway, etc.**—The commission shall ascertain as early as practicable the amount of money expended in construction and equipment per mile of every railway in Texas, the amount of money expended to procure the right of way, and the amount of money it would require to reconstruct the roadbed, track, depots and transportation, and to replace all the physical properties belonging to the railroad. It shall also ascertain the outstanding bonds, debentures and indebtedness, and the amount respectively thereof, when issued, and rate of interest, when due, for what purpose issued, how used, to whom issued, to whom sold, and the price in cash, property or labor, if any, received therefor, what became of the proceeds, by whom the indebtedness is held, the amount purporting to be due thereon, the floating indebtedness of the company, to whom due and his address, the credits due on it, the property on hand belonging to the railroad company, and the judicial or other sales of said road, its property or franchises, and the amounts purporting to have been paid and in what manner paid therefor. The commission shall also ascertain the amounts paid for salaries to the officers of the railroad and the wages paid its employés. For the purpose in this article named, the commission may employ sworn experts to inspect and assist them when needed, and from time to time, as the information required by this article is obtained, it shall communicate the same to the attorney general by report, and file a duplicate thereof with the comptroller for public use; and said information shall be printed from time to time in the annual report of the commission. [Id. sec. 11.]

**Art. 6667. [4571] Blanks for information to be prepared.**—The said commission shall cause to be prepared suitable blanks with questions calculated to elicit all information concerning railroads, and as often as it may be necessary furnish said blanks to each railroad company. Any railroad company receiving from the commission any such blanks shall cause said blanks to be properly filled out so as to answer fully and correctly each question therein propounded, and in case they are unable to answer any question, they shall give a satisfactory reason for their failure; and the said answers, duly sworn to by the proper officer of said company, shall be returned to said commission at its office in the city of Austin within thirty days from the receipt thereof.

1. **Penalty for failure to fill out blanks; commission to adopt system of bookkeeping.**—If any officer or employé of a railroad company shall fail or refuse to fill out and return any blanks as above required, or fail or refuse to answer any questions therein propounded, or give a false answer to any such questions, where the fact inquired of is within his knowledge, or shall evade the answer to any such questions, such person shall be guilty of a misdemeanor and shall, on conviction thereof, be fined for each day he shall fail to perform such duty after the expiration of the time aforesaid a penalty of five hundred dollars, and the commission shall cause a prosecution therefor in the proper court; and a penalty of a like amount will be recovered from the company when it appears that such persons acted in obedience to its direction, permission or request in his failure, evasion or refusal. Said commission shall have the power to prescribe a system of bookkeeping to be observed by all the railroads subject hereto, under the penalties prescribed in this article.

2. **Annual reports.**—The said commission shall make and submit to the governor annual reports containing a full and complete account of

the transactions of their office, together with the information gathered by such commission as herein required, and such other facts, suggestions and recommendations as may be by them deemed necessary, which report shall be published as the reports of the heads of departments.

**3. Duty as to through freights.**—The said commission shall have power, and it is hereby made its duty, to investigate all through freight rates on railroads in Texas; and when the same are, in the opinion of the commission, excessive or levied or laid in violation of the interstate commerce law, or the rules and regulations of the interstate commerce commission, the officials of the railroads are to be notified of the facts and requested to reduce them or make the proper corrections, as the case may be. When the rates are not changed or the proper corrections are not made according to the request of the commission, the latter is instructed to notify the interstate commerce commission and to apply to it for relief. [Id. sec. 12.]

See *St. Louis Southwestern Ry. Co. of Texas v. Hixon* (Civ. App.) 126 S. W. 338.

**No penalty where blanks not furnished.**—The railroad commission is required by this article to furnish the railway companies blanks embracing questions concerning which it desires information, and a penalty is imposed only when the questions propounded and the information requested on the face of the blanks are not answered and furnished. If no blanks are furnished, no penalty can be imposed for failing to give requested information. *State v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 118 S. W. 738.

**Power to prescribe system of bookkeeping.**—The system of bookkeeping, which the commission is empowered by this article to prescribe for carriers doing an intrastate business, is not limited to a record of facts, but includes assumed facts based on theory, opinion, or supposed averages. *Railroad Commission of Texas v. Texas & P. Ry. Co.* (Civ. App.) 140 S. W. 829.

Notwithstanding a circular issued by the railroad commission prescribing a system of bookkeeping was objectionable and subject to injunction, it was improper for the court to enjoin the commission from issuing any further circular or order that might require complainants to keep or maintain any system of bookkeeping which required a separation of their expenses between passenger and freight business and state and interstate commerce on any theoretical basis. *Id.*

An order of the commission requiring railroads to divide their expense accounts into five primary accounts, and requiring such primary accounts to be divided into 123 sub-accounts, following the system of bookkeeping prescribed by the interstate commerce commission, and requiring that a few of the sub-accounts should again be subdivided so as to apportion expenses between freight and passenger traffic and between state and interstate traffic, was a compliance with this article. *Id.*

A circular issued by the railroad commission, requiring the expense accounts of railroads, engaged in both interstate and intrastate commerce, to be divided in accordance with the method prescribed by the interstate commerce commission, and in addition to show an apportionment of expenses between freight and passenger and state and interstate traffic, on the ton mile basis, was authorized by this article. *Id.*

The act of congress (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3169]) authorizing the interstate commerce commission to prescribe a uniform bookkeeping system and prohibiting the keeping of any accounts, etc., other than those ordered by the commission, was directed only against other accounts of matters relating to interstate commerce, and does not preclude a state commission from requiring the keeping of other accounts of matters relating to purely intrastate business. *Texas & P. Ry. Co. v. Railroad Commission of Texas*, 105 T. 386, 150 S. W. 878.

Under the "power to prescribe a system of bookkeeping," since "system" means "method" and "bookkeeping" is the art of recording in a systematic manner the transactions of merchants, traders, and other persons engaged in pursuits connected with money, the commission cannot order the apportionment of items of expense to be made upon a purely arbitrary basis of "car miles" in a certain ratio between passenger traffic and freight, and orders prescribing that certain conclusions and deductions be entered upon the books of the railroads are not authorized (citing 1 Words and Phrases, 842). *Id.*

**Art. 6668. [4572] Power to issue subpoenas; pay of witnesses; proceedings to compel attendance of witnesses.**—The said commission, in making any examination or investigation provided in this chapter, shall have power to issue subpoenas for the attendance of witnesses by such rules as they may prescribe. Each witness who shall appear before the commission by order of the commission, at a place outside of the county of his residence, shall receive for his attendance one dollar per day and three cents per mile traveled by the nearest practicable route, in going to and returning from the place of meeting of said commission, which shall be ordered paid by the comptroller of public accounts upon the presentation of proper vouchers, sworn to by such witness, and approved by the chairman of the commission; provided, that no witness shall be entitled to any witness fees or mileage who is

directly or indirectly interested in any railroad in this state or out of it, or who is in any wise interested in any stock, bond, mortgage, security or earnings of any such road, or who shall be the agent or employé of such road, or an officer thereof, when summoned at the instance of such railroad; and no witness furnished with free transportation shall receive pay for the distance he may have traveled on such free transportation. In case any witness shall fail or refuse to obey such subpoenas, said commission may issue an attachment for said witness, directed to any sheriff or any constable of the state of Texas, and compel him to attend before the commission and give his testimony upon such matter as shall be lawfully required by them. If a witness, after being duly summoned, shall fail or refuse to attend or to answer any question propounded to him, and which he would be required to answer if in court, the commission shall have the power to fine and imprison such witness for contempt, in the same manner that a judge of the district court might do under similar circumstances. The claim that any such testimony may tend to criminate the person giving it shall not excuse such witness from testifying, but such evidence or testimony shall not be used against such person on the trial of any criminal proceeding; provided, the commission shall in all cases have the right in its discretion to issue proper process and take depositions instead of compelling personal attendance of witnesses. The sheriff or constable executing any process issued under the provisions of this article or under any other provisions of this chapter shall receive such compensation as may be allowed by the commission, not to exceed fees as now prescribed by law for similar services. [Id. sec. 13.]

**Art. 6669. [4573] Penalty for extorting.**—If any railroad company, subject to this chapter, or its agent or officer, shall hereafter charge, collect, demand or receive from any persons, company, firm or corporation a greater rate, charge or compensation than that fixed and established by the railroad commission for the transportation of freight, passengers or cars, or for the use of any car on the line of its railroad, or any line operated by it, or for receiving, forwarding, handling, or storing any such freight or cars, or for any other service performed or to be performed by it, such railroad company and its said agent and officer shall be deemed guilty of extortion, and shall forfeit and pay to the state of Texas a sum not less than one hundred dollars nor more than five thousand dollars. [Id. sec. 14.]

See Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. A. Ry. Co. (Civ. App.) 130 S. W. 857.

**Wrongful demurrage charge.**—Where a railroad company demanded and collected \$1 per day for two days for the use of a car prior to the giving the use thereof, the 48 hours allowed by law for unloading the same, it was guilty of extortion under this article. St. Louis S. W. Ry. Co. v. Rutherford, 43 C. A. 544, 96 S. W. 74.

**Penalty for separate offenses.**—See notes under Art. 6671.

**Art. 6670. [4574] "Unjust discrimination" defined.**—If any railroad subject hereto, directly or indirectly, or by any special rate, rebate, drawback or other device, shall charge, demand, collect or receive from any person, firm or corporation a greater or less compensation for any service rendered or to be rendered by it than it charges, demands, collects or receives from any other person, firm or corporation for doing a like and contemporaneous service, such railroad shall be deemed guilty of unjust discrimination, which is hereby prohibited.

1. **Same.**—It shall also be an unjust discrimination for any such railroad to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or to subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage in any respect whatsoever.



2. **Same.**—Every railroad company which shall fail or refuse, under such regulations as may be prescribed by the commission, to receive and transport without delay or discrimination the passengers, tonnage and cars, loaded or empty, of any connecting line of railroad, and every railroad which shall, under such regulations as may be prescribed by the commission, fail or refuse to transport and deliver without delay or discrimination any passengers, tonnage or cars, loaded or empty, destined to any point on or over the line of any connecting line of railroad, shall be deemed guilty of unjust discrimination; provided, perishable freights of all kinds and live stock shall have precedence of shipment.

3. **Same.**—It shall also be an unjust discrimination for any railroad subject hereto to charge or receive any greater compensation in the aggregate for the transportation of like kind of property or passengers for the shorter than for a longer distance over the same line; provided, that upon application to the commission any railroad may in special cases, to prevent manifest injury, be authorized by the commission to charge less for longer than for shorter distances for transporting persons and property, and the commission shall from time to time prescribe the extent to which such designated railroad may be relieved from the operations of this provision; provided, that no manifest injustice shall be imposed upon any citizen at intermediate points; provided further, that nothing herein shall be so construed as to prevent the commission from making what are known as "group rates" on any line or lines of railroad in this state.

4. **Penalty for unjust discrimination.**—Any railroad company violating any provision of this article shall be deemed guilty of unjust discrimination, and shall for each offense pay to the state of Texas a penalty of not less than five hundred dollars nor more than five thousand dollars.

5. **Law does not apply, when.**—Nothing herein shall prevent the carriage, storage or handling of freight free or at reduced rates, or to prevent railroads from giving free transportation or reduced transportation, under such circumstances and to such persons as may be allowed or permitted by the law of this state. [Id. sec. 15.]

See *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256; *Thompson v. Missouri, K. & T. Ry. Co. of Texas*, 103 T. 372, 126 S. W. 257, 128 S. W. 109; *Vaugh v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 131 S. W. 843.

**Construction of statute.**—The word "delay" in this article means "discrimination," and where delay is shown a party is entitled to recover the penalty. *G., C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 26 C. A. 531, 63 S. W. 1026.

This article, though penal, must be construed in the light of the modern rule that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment. *Thompson v. Missouri, K. & T. Ry. Co. of Texas*, 103 T. 372, 126 S. W. 257, 128 S. W. 109.

The word "deliver" in the statute means something more than physical delivery, and where freight was delivered to a connecting carrier designated by the shipper, but because of the action of the initial carrier it was re-routed by such connecting carrier over a longer route, there was a discrimination by the connecting carrier, for which the penalty was recoverable. *Id.*

**Relation to Art. 6554.**—There is no repugnancy between Arts. 6670, 6671, and Art. 6554, authorizing the recovery of damages and 5¢ per month as special damages for refusal to transport any passenger or property at the regular appointed time, the object of the former articles being to prohibit unjust discrimination, and of the latter to prevent negligent delay. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.* (Civ. App.) 130 S. W. 250.

Art. 6554 is not repealed by implication by Arts. 6670, 6671. *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

**Interstate commerce.**—See, also, notes under Art. 6676.

The above article and Art. 6671 have no application to interstate commerce. *G. W. T. & P. Ry. Co. v. Barry* (Civ. App.) 45 S. W. 814.

**Unjust discrimination.—In general.**—Railway companies cannot operate their roads in such manner as to benefit one individual, town or community to the detriment of another. *H. & T. C. Ry. Co. v. Smith*, 63 T. 322.

*Oak Cliff* held a part of the city of Dallas, so that defendant railroad company, which ran to Dallas, but not to *Oak Cliff*, and failed to deliver a car load of lumber to a connecting carrier at Dallas station for transportation to *Oak Cliff*, was not liable to the penalty provided by Art. 6671 for discrimination, as defined in this article. *Texas & P. Ry. Co. v. Driskell* (Civ. App.) 128 S. W. 466.

The railroad commission act (Arts. 6653-6677) forbids discriminations which are undue and unreasonable, and a discrimination in a freight rate against any person or

locality for a like and contemporaneous service is unjust and unreasonable. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737.

The questions of what is a like and contemporaneous service and of what is undue and unreasonable preference, within this article, are questions of fact, the determination of which is within the discretion of the railroad commission, to the extent of making any rate fixed by it a legal rate, until otherwise determined by the court. *Id.*

Under this article the commission may not make rates which are unjustly discriminatory and permit a carrier to charge one person a greater or less compensation for a service than it charges any other person for a like service, or to give undue preference to any particular person or locality. *Id.*

The common law held to prohibit carriers from making unjust discriminations as between localities or individuals. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

— **Between individuals.**—To prove an unjust discrimination the evidence must show a preference given one shipper over another. If a contract made by a railroad company with a shipper amounts to unjust discrimination it is unlawful. *Texas & P. Ry. Co. v. Shawnee Cotton Oil Co.*, 55 C. A. 183, 118 S. W. 779.

Under the statute prohibiting discrimination by charging one shipper a different rate from that charged another, a lower rate charged in a particular case, unless shown to be open to all shippers, is prohibited as a discrimination. *Texas Mexican Ry. Co. v. Reed*, 56 C. A. 452, 121 S. W. 519.

Where the freight rate specified in a cattle transportation contract was a mistake, it being the intention of both parties that the regular rate should be charged, there was no discrimination. *Id.*

Where an express company refused to carry liquor C. O. D., and plaintiff paid the return charges on packages not accepted, it would have been unlawful for the carrier to rebate these charges. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

One charged a rate not unreasonable per se may complain on the ground that he has been discriminated against, on showing that he was charged a greater rate than the carrier charged another. *Galveston Chamber of Commerce v. Railroad Commission* (Civ. App.) 137 S. W. 737.

Freight rates held objectionable as giving an undue preference to individuals in a particular locality, and should not be enforced. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

— **Selection of route by shipper.**—A refusal to ship property over route selected by shipper whereby injury results entitles the shipper to the penalty, although the shipper signed the contract of shipment over the route selected by the railroad company, as the refusal to ship over route selected by him left him no other alternative than to sign the contract stipulating for a different route. *S. A. & A. P. Ry. Co. et al. v. Stribling* (Civ. App.) 86 S. W. 374.

If a railroad receiving a shipment to be carried over it and connecting lines refuses to deliver to a connecting line designated by the shipper, it is liable for the penalty fixed in Art. 6671. A person has the right to have his property received by a railroad company and carried as he directs, and for the failure of the company to do either he has his remedy. *San Antonio & A. P. Ry. Co. v. Stribling*, 99 T. 319, 89 S. W. 963, 964.

Penalties cannot be imposed under this article where the gist of the offense is not the failure or refusal of a railroad company to deliver the freight to its connecting carrier without delay or discrimination, but the exacting from the latter as a condition upon which it should receive the freight that the same should be transported over a different route from that selected by the owner. No penalty is provided by statute for such conduct, even though it may be violative of the shipper's rights. *M., K. & T. Ry. Co. v. Thompson* (Civ. App.) 118 S. W. 618, 623.

A shipper has the right to designate the route by which his goods shall be carried by the different railroads over which they are destined to pass. *Thompson v. Missouri, K. & T. Ry. Co.*, 103 T. 372, 126 S. W. 257, 128 S. W. 109.

Where a shipper at a station having no freight agent leaves car loads of lumber to be shipped with directions that they be routed over a specified connecting line, and the conductor taking up the cars, at the instance of the company, disregards the instructions, and leaves bills of lading routed over a different connecting line, there is no waiver of right to insist that the change in routing was an unjust discrimination, under this article and Art. 6671, by accepting the bill of lading as so left. *Id.*

— **Between localities.**—It is an unjust discrimination and in violation of subdivision 1 of this article for the railroad commission to require a higher freight rate to be charged from points on a railroad to and from one city, than to and from another when each city is practically the same distance from said points as the other, although the city thus discriminated against has natural advantages which enable it to hold its own against the other in commercial rivalry, notwithstanding the discrimination. *Railroad Commission v. Galveston Chamber of Commerce*, 51 C. A. 476, 115 S. W. 94, 99.

The fact that a railroad had habitually in making charges treated certain docks as within certain city limits, though it might have made an additional charge for hauling to the docks, does not compel the continuance of such custom, nor, when sued for the statutory penalty for overcharging because of the additional charge made, estop them from asserting that the city and the docks were different places for the purpose of making rates. *Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co.* (Civ. App.) 129 S. W. 198.

Rates held discriminatory, unless special circumstances justify them. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

The unit of cost of service in moving freight is the cost per ton per mile, and may decrease as the length of the haul increases; and hence, under like conditions, freight may be carried long distances at rates proportionately lower than short distances. *Id.*

Slight differences in a single item of cost does not justify a difference in freight rates. *Id.*

That freight rates between designated points are too low does not justify a discrimination against one of the points in hauls over maximum distances, and the rates between the points must be increased. *Id.*

Group rates, to which the influence of mileage does not apply, which are unjustly discriminatory, are illegal, and such rates, though inherently unequal, must be so made as to lessen such inequality as far as possible. *Id.*

In rate-making, distance is the primary basis, and other things being equal, the rate charged must be in proportion to the length of the haul. *Id.*

In rate-making, density of traffic is an important factor. *Id.*

In rate-making, competition is an important and frequently a controlling factor, and a carrier must be allowed to meet competition. *Id.*

It is not permissible, in order to equalize commercial advantages, to deprive any place of its natural advantages arising from its location. *Id.*

Where freight rates compel cotton men at Galveston to pay on cotton concentrated there about 12½ cents per bale for delivery to shipside, in addition to the freight rate, while carriers are compelled to pay all expenses of delivery to shipside on cotton concentrated at Houston out of the same rate, an undue preference is given to cotton men in Houston, and the rates should not be enforced. *Id.*

Where carriers entering Galveston through Houston must, under rates fixed by the railroad commission, charge a higher rate to Galveston for all freight, varying with different commodities, than is permitted for the same character of freight for like distance to Houston and between other points in common territory, the rates are discriminatory. *Id.*

— **Furnishing cars to connecting carriers.**—See, also, Arts. 6687-6690 and notes.

Neither by force of this article, nor by an order of the railroad commission can a railway company be compelled, after receiving freight from a shipper and carrying it over its own line to a junction with a connecting line to deliver its own loaded car to a connecting line to be carried to destination on the connecting line. One railway company cannot be compelled to furnish cars to carry freight over another railroad. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1037.

— **Sufficiency of evidence.**—Evidence held not to show that a higher freight rate than contracted for was established and published as required by the interstate commerce act. *Gulf, C. & S. F. Ry. Co. v. Leatherwood*, 29 C. A. 507, 69 S. W. 119.

In an action against a carrier under this article for unjust discrimination, evidence held sufficient to warrant a judgment denying the penalty. *Port Arthur Rice Milling Co. v. Gulf & I. Ry. Co. of Texas* (Civ. App.) 128 S. W. 923.

In an action for penalties against a railroad for charging a higher rate for shipping lumber between certain points than that fixed by the Texas railroad commission, evidence held to show that "Port Arthur docks" was not a place embraced within the designation "Port Arthur." *Texarkana & Ft. S. Ry. Co. v. Sabine Tram. Co.* (Civ. App.) 129 S. W. 198.

In a suit to enjoin the railroad commission from enforcing rates, because discriminatory against a locality, evidence held not to justify the discrimination. *Galveston Chamber of Commerce v. Railroad Commission of Texas* (Civ. App.) 137 S. W. 737, judgment reversed *Railroad Commission of Texas v. Galveston Chamber of Commerce*, 105 T. 101, 145 S. W. 573.

Evidence in action against a carrier to recover overcharges and statutory penalty held sufficient to sustain a finding that the rate made by the railroad commission did not apply to the place to which the freight was shipped. *Sabine Tram Co. v. Texarkana & Ft. S. Ry. Co.*, 105 T. 32, 143 S. W. 143.

In a shipper's action to recover an overcharge, on the ground that the shipment was intrastate, evidence held to show that the shipper intended to ship the cattle through to a point outside the state by an uninterrupted journey. *Galveston, H. & S. A. Ry. Co. v. Wood, Hagenbarth Cattle Co.* (Sup.) 146 S. W. 538, reversing judgment (Civ. App.) *Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. A. Ry. Co.*, 130 S. W. 857.

— **Recovery of damages.**—See Art. 6671 and notes.

— **Contracts to carry at rate different from legal rate.**—See notes under Art. 6656.

**Art. 6671. [4575] Damages; penalty; venue in cases of discrimination.**—In case any railroad subject to this chapter shall do, cause to be done, or permit to be done any matter, act or thing in this chapter prohibited or declared to be unlawful, or shall omit to do any act, matter or thing herein required to be done by it, such railroad shall be liable to the person or persons, firm or corporation injured thereby for the damages sustained in consequence of such violation; and in case said railroad company shall be guilty of extortion or discrimination as by this chapter defined, then, in addition to such damages, such railroad shall pay to the person, firm or corporation injured thereby a penalty of not less than one hundred and twenty-five dollars nor more than five hundred dollars, to be recovered in any court of competent jurisdiction in any county into or through which such railroad may run; provided, that such road may plead and prove as a defense to the action for said penalty that such overcharge was unintentionally and innocently made through a mistake of fact; provided, that any such recovery as herein

provided shall in no manner affect a recovery by the state of a penalty provided for such violation. [Id. sec. 17.]

See *Wood, Hagenbarth Cattle Co. v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 130 S. W. 857.

**Interstate commerce.**—See, also, notes under Art. 6676.

This article has no application to interstate commerce. *Gulf, W. T. & P. Ry. v. Barry* (Civ. App.) 45 S. W. 814.

The above article is not applicable to discriminations as to freight shipped from another state. *Fielder v. M., K. & T. Ry. Co.*, 92 T. 176, 46 S. W. 633.

**Relation to Art. 6554.**—See notes under Art. 6670.

**Jurisdiction of county court.**—Under this article the penalty would not attach if plaintiff did not sue for it; and hence an action for overcharge merely is not one for penalties, and can be brought in the county court. *Galveston, H. & S. A. Ry. Co. v. J. H. Nations Meat & Supply Co.* (Civ. App.) 136 S. W. 833.

**Actions for damages or penalties.**—Under this article and Art. 6664a shipper may sue for excessive freight charges collected by the carrier and for the penalties therefor, without applying to the commission for relief, as permitted by Art. 6664. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

A shipper is not authorized to recover of an initial carrier of live stock, as damages for misrepresentation, the difference between the rate stated by the initial carrier for a through interstate shipment and the authorized published rate which he was required to pay. *Texas & P. Ry. Co. v. Leslie* (Civ. App.) 131 S. W. 824.

A carrier is liable to a shipper discriminated against by the giving of an advantage to other shippers of the same class for the damages caused by such discrimination, and such damages may be recovered, though the shipper does not sue for the statutory penalty. *Vaugh v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 131 S. W. 843.

**What constitutes unjust discrimination.**—See Art. 6670 and notes.

**Defenses.**—If an overcharge is innocently made through a mistake, it is a matter of defense for the railroad company to plead and prove. *St. Louis S. W. Ry. Co. v. Rutherford*, 43 C. A. 544, 96 S. W. 74.

In an action for penalty for overcharge on a local shipment, the defense that under the same contract the carrier had transported interstate cars at a reduced rate and that on the whole transaction plaintiff was not overcharged in respect to the local cars, was not available under this article. *Timpson & N. W. Ry. Co. v. Sanford & Morris*, 46 C. A. 636, 103 S. W. 433.

Under this article, a railroad making an overcharge with knowledge of the facts, but under a mistake of law, is liable to the penalty. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

**Penalties for separate offenses.**—See, also, Art. 6677 and notes.

Under this article and Art. 6669, where a shipper made 24 shipments on 24 different days, and the carrier extorted excessive charges, but its agent allowed the bills to accumulate and collected the charges on 5 occasions, held, that the carrier was guilty of 24 different offenses, authorizing the collection of the penalty for each offense. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

Where a party was entitled to separate penalties for 24 violations of a statute imposing minimum and maximum penalties, and the trial court awarded him separate penalties for 5 violations, and he agreed that the court on appeal might render judgment for the minimum penalty for each offense, the court on appeal would render judgment for the minimum penalty for each of the 24 offenses. *Id.*

Under the statute providing for penalties for overcharges in demanding and receiving from a shipper a rate in excess of that fixed by the Texas railroad commission, a shipper compelled to pay excessive freight charges on different shipments may recover the penalty for each shipment. *Texarkana & Ft. S. Ry. Co. v. Sabine Tram Co.* (Civ. App.) 129 S. W. 198.

**Recovery of attorney's fees.**—See Art. 2178.

**Art. 6672. [4576] Penalty not otherwise provided.**—If any railway company doing business in this state shall hereafter violate any other provision of this chapter, or shall do any other act herein prohibited, or shall fail or refuse to perform any other duty enjoined upon it for which a penalty has not been provided by law, or shall fail, neglect or refuse to obey any lawful requirement, order, judgment or decree made by the railroad commission of Texas, for every such act of violation it shall pay to the state of Texas a penalty of not more than five thousand dollars. [Id. sec. 18. Amended Acts 1901, p. 265.]

See *Houston & T. C. R. Co. v. Young* (Civ. App.) 137 S. W. 380,

**Art. 6673. [4577] Venue of suits for recovery of penalty.**—All of the penalties herein provided, except as provided in article 6671, shall be recovered and suits thereon shall be brought in the name of the state of Texas in the proper court having jurisdiction thereof in Travis county, or in any county to or through which such railroad may run, by the attorney general, or under his direction; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected by him, and ten per cent of the amount collected, to be paid by the state. In all suits arising under this chapter, the rules of evidence

shall be the same as in ordinary civil actions, except as otherwise herein provided. All fines and penalties recovered by the state under this chapter shall be paid into the treasury of the state; provided, however, suits brought under the acts of 1907, chapter 42, page 93, set out in the Penal Code in title 18, chapter 16, for the recovery of penalties, may be brought in any court in this state having jurisdiction of the subject matter in any county: (1) where an act violative of the provisions hereof is committed; (2) where such company or receiver has an agent or representative; (3) where the principal office of such company is situated, or such receiver or receivers, or either, reside; and one-half of all moneys collected under the provisions of said act, less the commission and expenses allowed by law, shall be paid into the state treasury and constitute a part of the general revenue of the state, and the remainder thereof shall be paid into the treasury of the county where such suit or suits may be maintained and constitute a part of the jury fund of such county; and be it further provided, that, it is hereby made the duty of the railroad commission of Texas, the attorney general, and the district and county attorneys of this state, under the direction of the attorney general, to see that the provisions of said act are enforced and obeyed, and penalties due the state are recovered and collected; and said commission shall report to the attorney general all violations within their knowledge, with the facts in their possession, and request him to institute, or have instituted, the proper proceedings for the recovery of any penalty that may be due the state. Any provision or provisions of said act which exempt or except any person, corporation or class of persons from the operation and effects of the same, or which authorize any such persons, corporations or class of persons to give, grant, issue, receive or accept free transportation or transportation at any rate other than is granted to any and all persons of this state, shall be held unconstitutional or invalid, such holding as to any such provision or provisions shall not invalidate any other portion of said act. [Acts 1891, p. 55, sec. 19.]

**Venue—Jurisdiction.**—The provision of this article referring to recovery of penalty relates to the subject of venue only and not to the subject of jurisdiction. Neither defendant filed a plea of privilege to be sued in some other county and the objection sought to be urged comes too late, when made for first time in appellate court. *S. A. & A. P. Ry. Co. et al. v. Stribling* (Civ. App.) 86 S. W. 375.

**Attorney general to represent state.**—The language of this article in connection with Art. 6675 shows the intention to make the attorney general the representative of the state's interest in all such prosecutions and to place them strictly under his direction, and neither a district nor county attorney has any authority to represent the state in such suits except by request of the railroad commission. *Railroad Commission v. Weld*, 95 T. 278, 66 S. W. 1095.

**Art. 6674. [4578] Certified copies of commission rates to be evidence. Effect given to classifications, when.**—Upon application of any persons, the commission shall furnish certified copies of any classification, rates, rules, regulations, or orders; and such certified copies, or printed copies published by authority of the commission, shall be admissible in evidence in any suit and sufficient to establish the fact that any charge, rate, rule, order, or classification therein contained and which may be in issue in the trial, is the official act of the commission. A substantial compliance with the requirements of this chapter shall be sufficient to give effect to all the classifications, rates, charges, rules, regulations, requirements and orders made and established by the commission, and none of them shall be declared inoperative for any omission of a technical matter in the performance of such act. [Id. sec. 20.]

**Copies of letters.**—Under this article printed copies of letters signed by one of the commissioners are not rendered admissible as the commission can act only as a body and not by its individual members. *Quanah, A. & P. Ry. Co. v. Drummond* (Civ. App.) 147 S. W. 738.

**Art. 6675. [4579] All violations of duty to be reported to attorney general.**—It is hereby made the duty of such railroad commission to see that the provisions of this chapter and all laws of this state concerning railroads are enforced and obeyed, and that violations thereof are prompt-

ly prosecuted, and penalties due the state therefor recovered and collected. And said commission shall report all such violations, with the facts in their possession, to the attorney general, or other officer charged with the enforcement of the laws, and request him to institute the proper proceedings; and all suits between the state and any railroad shall have precedence in all courts over all other suits pending therein.

**1. Duty to investigate all charges and see that the law is enforced.—**

It shall be the duty of the commission to investigate all complaints against railroad companies subject hereto, and to enforce all laws of this state in reference to railroads. But any two connecting railroads may enter into a contract whereby any part or all of the passengers, freight or cars, empty or loaded, hauled or transported by one and destined to points on or beyond the line of the other, shall be delivered to, received and transported by the other; which contract, however, shall be submitted to the railroad commission for examination and approval, and when so approved shall be binding; but, if the said contract be not approved by the commission, the same shall be void; provided, that any connecting line delivering freight to the owner or consignee of such freight may be sued by the owner thereof in the county where the freight is delivered for any damage that may be done to such freight in its transportation. [Id. sec. 21.]

**Art. 6676. [4580] "Road," "railroad," "railroad companies," etc., defined. Law applies only to railroads in this state. One train a day to be run.—**The terms, "road," "railroad," "railroad companies," and, "railroad corporations," as used herein, shall be taken to mean and embrace all corporations, companies, individuals and associations of individuals, their lessees or receivers, appointed by any court whatsoever, that may now or hereafter own, operate, manage or control any railroad, or part of a railroad, in this state, and all such corporations, companies and associations of individuals, their lessees or receivers, as shall do the business of common carriers on any railroad in this state.

1. The provisions of this chapter shall be construed to apply to and affect only the transportation of passengers, freight and cars between points within this state; and this chapter shall not apply to street railways nor suburban or belt lines of railways in or near cities and towns.

2. It shall be the duty of the commissioners to see that, upon every railroad and branch of same carrying passengers for hire in this state, shall be run at least one train a day, Sundays excepted, upon which passengers shall be hauled, and the commission shall have no power to relax this provision, and shall further regulate passenger train service by requiring all passenger trains carrying passengers for hire to stop for a time sufficient to receive and let off passengers at such stations as may be designated by the commissioners; provided, that four trains each way, carrying passengers for hire, if so many are run daily, Sundays excepted, be required to stop as aforesaid at all county seat stations. [Id. sec. 22. Amended Acts 1903, p. 183.]

See *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256; *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 130 S. W. 250.

**To what railroads applicable.—**This article applies to railways owning and operating their own roads, and not to a railroad company having a mere trackage contract over another road. The right to use the road exists by contract with its owner, and where the service of the company owning the road is ample over that part covered by the trackage contract, there is no need for the commission to require anything from the road having the trackage contract. *State v. Trinity & B. V. Ry. Co.* (Civ. App.) 120 S. W. 1128.

**Interstate commerce.—**A state cannot regulate charges on switching cars at terminal points containing freight brought from another state. This is within the meaning of interstate commerce and is controlled by congress. *Fielder v. M., K. & T. Ry. Co.* (Civ. App.) 42 S. W. 362.

A contract of a common carrier for delivery to another carrier of goods for transportation out of the state is not subject to state railway commission regulations, because such business is interstate commerce. *State v. G., C. & S. F. R. R.* (Civ. App.) 44 S. W. 542.

Arts. 6670 and 6671 have no application to interstate commerce. *Gulf, W. T. & P. Ry. v. Barry* (Civ. App.) 45 S. W. 814.

Where freight is shipped from a point outside of Texas under a contract for its delivery f. o. b. car at a point in Texas to be shipped to another place in the state, it is interstate commerce. *State v. Railroad Co.* (Civ. App.) 49 S. W. 252.

Under certain facts, held, that a shipment of freight would be an interstate shipment, and not subject to the commission rates of Texas. *Gulf, C. & S. F. Ry. Co. v. Fort Grain Co.* (Civ. App.) 72 S. W. 419.

A person has the right under a foreign bill of lading to ship property from different points in the state to a foreign port and concentrate it at another point in the state and there classify it, and have it compressed at the place of concentration, although it has passed compresses on the way from the original points of shipment to the place of concentration, this being a foreign and not a domestic shipment. He can substitute property from one foreign bill of lading to another so as to have property of the same class in the same bill of lading and a railroad carrier transporting such property to the point of concentration without stopping at the first compress on the route from the original point of shipment does not violate the law and therefore is not liable for the penalty fixed for violating this law. *State v. San Antonio & A. P. Ry. Co.*, 32 C. A. 58, 73 S. W. 572.

The act of congress (Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169]). Authorizing the interstate commerce commission to prescribe a uniform book-keeping system, and prohibiting the keeping of any accounts, etc., other than those ordered by the commission, was directed only against other accounts of matters relating to interstate commerce, and does not preclude a state commission from requiring the keeping of other accounts of matters relating to purely intrastate business. *Texas & P. Ry. Co. v. Railroad Commission of Texas*, 105 T. 386, 150 S. W. 878.

**More than one train per day each way.**—This act confers upon the railroad commission the power, to require if the circumstances and the demands of the public require it, the operation of more than one passenger train a day each way. *Railroad Commission v. G. H. & S. A. Ry. Co.*, 51 C. A. 447, 112 S. W. 345, 354.

**Stopping at stations.**—Where a railroad granted to another road the right to run its trains over the former's line between certain points, it not to do business at intermediate points, the railroad commission held not authorized to compel the second road to stop its trains for passengers and freight at such intermediate points. *State v. Trinity & B. V. Ry. Co.*, 56 C. A. 424, 120 S. W. 1123.

**Art. 6677. [4581] Law cumulative.**—Any of the provisions of this chapter which may be inconsistent or in conflict with the act of 1907, chapter 42, page 93, relating to free passes and free transportation of goods, etc., incorporated in and made a part of the Penal Code of the state of Texas, shall be void and inoperative, but to that extent only. And the provisions of the foregoing articles of this chapter shall not have the effect to release or waive any right of action by the state, or any person, for any right, penalty or forfeiture which may have arisen or may hereafter arise under any law of this state; and all penalties accruing under this chapter shall be cumulative of each other, and a suit for or recovery of one shall not be a bar to the recovery of any other penalty. [Acts 1891, p. 55, sec. 23.]

**Constitutionality.**—This article is not invalid as authorizing the imposition of excessive fines in violation of Const. art. 1, § 13. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

**Penalty for separate offenses.**—Under Art. 6669, imposing penalties on a railroad company demanding excessive freight charges, and this article, a shipper compelled to pay excessive freight charges on different shipments may recover the penalty for each separate act of extortion. *Texas & N. O. R. Co. v. Sabine Tram Co.* (Civ. App.) 121 S. W. 256.

## AUTHORITY AND DUTIES OF COMMISSION OVER OTHER SUBJECTS

**Art. 6677a. Power over public wharves, etc., elevators, warehouses, etc., and suburban, belt and terminal railroads; rates, charges and regulations, etc.**—Power and authority are hereby conferred upon the railroad commission of Texas over all public wharves, docks and piers and all elevators, warehouses, sheds, tracks and other property used in connection therewith in the state of Texas, and over all suburban, belt and terminal railroads in said state, and over all persons, associations and corporations, private or municipal, owning or operating any such railroad, wharf, dock, pier, elevator, warehouse, shed, track, or other property, and it is hereby made the duty of the said railroad commission to fix and adopt all necessary rates, charges and regulations, to govern and regulate said persons, associations and corporations, and to correct abuses and prevent unjust discriminations in the rates, charges and tolls of said persons, associations and corporations, and to fix divisions of rates, charges and regulations between same and railroads and all other com-

mon carriers, under the control of the railroad commission where a division is proper, and to correct and prevent any and all other abuses in the conduct of their business. [Acts 1911, p. 157, sec. 1.]

**Art. 6677b. Penalty for extortion.**—If any person, association or corporation subject to the provisions of this Act, shall demand or receive a greater compensation for any service rendered or to be rendered than that fixed and established by the said railroad commission then, and in every such case, such person, association or corporation shall be deemed guilty of extortion and shall forfeit and pay to the state of Texas, a sum not to exceed five hundred dollars for each offense; provided, that if it shall appear that such violation was not wilful, said person, association or corporation shall have ten days to refund such overcharges or damages, in which case the penalty shall not be incurred, and the said commission shall have authority and it shall be its duty to sue for and recover the same in the same manner as may be prescribed by law for like suits against railroad companies. [Id. sec. 2.]

**Art. 6677c. Penalty for discrimination.**—If any person, association or corporation subject to the provisions of this Act shall by any special rate, rebate, drawback or other device, or in any manner directly or indirectly charge, demand, collect or receive from any other person, association or corporation a greater or less compensation for any service rendered, or to be rendered, by it than it charges, demands, collects or receives from any other person, association or corporation for doing a like and contemporaneous service, or if any such person, association or corporation shall make or give any undue or unreasonable preference or advantage to any other person, association or corporation, or to any locality, or shall subject any particular description of traffic to any undue or unreasonable prejudice, delay or disadvantage, then and in any such case the person, association or corporation thus offending shall forfeit and pay to the state of Texas a sum not to exceed five hundred dollars (\$500.00) for each and every offense. [Id. sec. 3.]

**Art. 6677d. Rules and regulations; stock and bonds.**—Said railroad commission shall have the same power to make and prescribe rules and regulations for the government and control of all such persons, associations and corporations as is or may be conferred upon said commission for the regulation of railroad companies, and such persons, associations and corporations shall issue no stock or bonds, except such as are authorized by the railroad commission under the provisions of the railroad stock and bond law of this state. [Id. sec. 4.]

**Art. 6677e. Powers of commission; reports; suits; laws applicable.**—The said railroad commission shall have the authority, and it shall be its duty, to call upon such persons, associations and corporations for reports, and to investigate their books in the same manner as is or may be prescribed by law for the regulation of railroad companies; and said commission shall have power and authority to institute suits and sue out such writs and process as may be applicable and authorized for the regulation of railroad companies. All laws made and prescribed for the government and control of railroad companies, and the valuation of their properties, in so far as they are applicable, shall be of equal force and effect against all such persons, associations and corporations. [Id. sec. 5.]

**Art. 6677f. Objections to decisions, etc.; actions and appeals.**—If any such person, association or corporation or other party at interest, be dissatisfied with any decision, rate, charge, toll, rule, order, act or regulation adopted by the commission, such dissatisfied person, association, corporation or party may file a petition setting forth the particular cause or causes of objection to such decision, rate, charge, toll, rule, order, act or regulation, or to either or all of them, in a court of com-



petent jurisdiction in Travis county, Texas, against such commission as defendant, said action shall have precedence over all other causes on the docket of a different nature, and shall be tried and determined as other civil causes in said court, either party [party] to said action may appeal to the appellate court having jurisdiction of said cause, and said appeal shall be at once returnable to said appellate court, at either of its terms, and said action so appealed shall have precedence in said appellate court of all causes of a different character therein pending; provided, that if the court be in session at the time of such right of action accruing, the suit may be filed during such term and stand ready for trial after ten days' notice. [Id. sec. 6.]

**Art. 6678. Railroad to furnish cars when demanded.**—When any person, firm or corporation desiring to ship any freight of any kind shall make application in writing to any superintendent, agent or other person in charge of transportation, to any railway company, receiver or trustee operating a line of railway at the point the cars are desired upon which to ship any freight, it shall be the duty of such railway company, receiver, trustee, or other person in charge thereof, to supply the number of cars so required, at the point indicated in the application, within a reasonable time thereafter, not to exceed six days from the receipt of such application, and shall supply such cars to the persons so applying therefor, in the order in which such applications are made, without giving preference to any person; provided, if the application be for twelve cars or less, the same shall be furnished in three days; and provided, further, that, if the application be for fifty cars or more, the railway company may have ten full days in which to supply the cars. [Acts 1887, p. 133. Amended Acts 1899, p. 67. Acts 1913, S. S., p. 23, sec. 1, amending Art. 6678, Rev. St. 1911.]

See *Gulf, C. & S. F. Ry. Co. v. Louis Werner Stave Co.* (Civ. App.) 131 S. W. 658.

**Constitutionality.**—This article and Art. 6681 are a proper exercise of the police power reserved to the state and are therefore valid. *H. & T. C. Ry. Co. v. Mayes*, 36 C. A. 606, 33 S. W. 53, 55.

That part of this article and Arts. 6679 and 6680 imposing a penalty for delay in furnishing cars is invalid and inoperative, both as to interstate and intrastate shipments, but an action will lie for actual damages caused by negligent delay in furnishing cars when requested under these articles. *Texas P. Ry. Co. v. Allen* (Civ. App.) 98 S. W. 451.

Arts. 6678-6683 are valid so far as they apply to intrastate shipments, though invalid as to interstate shipments, and penalties can be recovered for their violation as to an intrastate shipment. *Allen v. Texas & P. Ry. Co.*, 100 T. 525, 101 S. W. 792, 793, 794.

**Strict construction.**—See notes under Art. 6680.

**Time for supplying cars.**—What is a reasonable time within which a railroad company shall furnish cars for transportation of cattle is a question of fact for the jury. *Davis v. T. & P. Ry. Co.*, 91 T. 605, 44 S. W. 322.

Where the order was not written but was entered in the company's order book, and the company accepted the order and undertook to fill it without requiring a deposit of one fourth of the amount of freight, nine days is held not to be an unreasonable time within which the company was required to furnish the cars called for. *T. & P. Ry. Co. v. Smith & White*, 34 C. A. 571, 79 S. W. 614, 615.

This law should be construed to carry a penalty as against the railroad company when ten cars or less are demanded, only when the shipper having in his application named as the time for the delivery a date not earlier than three days in advance of the time when the application therefor is delivered to it, it fails on that date to furnish the cars, and as against the shipper only, when the cars having been furnished on that date, he fails to use them. *Texas & P. Ry. Co. v. Blocker* (Civ. App.) 106 S. W. 720.

Under the act of 1887 (Arts. 6678-6683) a railroad company is not liable for damages and the penalties provided therein for failure to deliver cars to a shipper when the requisition for the cars designates as the date of delivery the day the application is made. The date of the delivery must not be stated to be earlier than three days from the date of the application. See *T. & P. Ry. Co. v. Blocker*, 48 C. A. 100, 106 S. W. 713; *Griffith v. Texas & N. O. Ry. Co.*, 53 C. A. 510, 116 S. W. 649.

The penalty is not recoverable where the railroad company has a legal excuse for failing to furnish the cars by the time named in the application. *Texas & P. Ry. Co. v. Andrews, Reynolds & Co.*, 103 T. 271, 126 S. W. 562.

**Particular kind of car.**—A shipper has no right to demand that a particular kind of car be furnished, and recover a penalty for a failure to do so, unless he shows that no other car was proper or suitable. *Railway Co. v. Slator*, 7 C. A. 344, 26 S. W. 233.

No particular kind of cars is prescribed by the statute and the only requirement in this respect that can be lawfully imposed by a shipper is that the cars furnished be reasonably suited to the purposes intended. When one demands a particular kind of cars and they are not furnished, he must look for redress to an action upon his contract and not to one for the recovery for the penalty denounced in Art. 6681. *T. & P. Ry. Co. v. Barrow*, 33 C. A. 611, 77 S. W. 643.

This statute does not impose upon the railway company the duty of supplying a particular kind of cars and a shipper who imposes upon a carrier that duty does not bring himself within the letter of the statute, giving the penalty and therefore has no cause of action in this respect. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 55 C. A. 66, 119 S. W. 898.

**Interstate commerce.**—See, also, Art. 6676.

An application which requests cars to be furnished for shipment of cattle to a certain point in the state, and from there to be shipped over another line to a point without the state is insufficient to support a judgment for the penalty imposed. (Note. —This case was decided before the motion for rehearing was passed on in the *Allen Case* [Civ. App.] 98 S. W. 451.) *Texas & P. Ry. Co. v. Loving* (Civ. App.) 98 S. W. 451, 452, 453.

Arts. 6678–6683 are invalid as to interstate shipments. *Allen v. Texas & P. Ry. Co.*, 100 T. 525, 101 S. W. 792, 793, 794.

This article applies in cases of interstate shipment. An application in writing to local agent at station from which it is desired to ship complies with the statute. *Texas & P. Ry. Co. v. Smith* (Civ. App.) 118 S. W. 1119.

**Contract to furnish cars.**—See notes under Art. 6690.

**Railroads to keep clean stock cars.**—See Art. 7317.

**Art. 6679. [4498] Application shall state what.**—Said application for cars shall state the number of cars desired, the place at which they are desired, and the time they are desired; provided, that the place designated shall be at some station or switch on the railroad. [Acts 1887, p. 133, sec. 2.]

**Constitutionality.**—See notes under Art. 6678.

**Strict construction.**—See notes under Art. 6680.

**Where cars must be furnished.**—Every switch is not a receiving and discharging station, and only such switches at which the company has an agent are within the statute. *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

A railway company is not liable in a penalty for failure to furnish freight cars at a point where it has no agent. *Id.*

**Art. 6680. [4499] Penalty for failure to furnish.**—When cars are applied for under the provisions of this chapter, if they are not furnished, the railway company so failing to furnish them shall forfeit to the party or parties so applying for them the sum of twenty-five dollars per day for each car failed to be furnished, to be recovered in any court of competent jurisdiction, and all actual damages that such applicant may sustain. [Id. sec. 3.]

See *Texas Mexican Ry. Co. v. King* (Civ. App.) 132 S. W. 966.

**Constitutionality.**—See notes under Art. 6678.

**Strict construction.**—These articles must be strictly construed. *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

The statute is highly penal, and he who seeks to recover a penalty under such statute must bring himself strictly within the provisions of the law in framing his application. *Texas & P. Ry. Co. v. Hughes*, 99 T. 533, 91 S. W. 567, 568.

**Amount of penalty.**—Where an order filed November 28th, for cars to be furnished on December 2d, was complied with by furnishing cars on December 13th, held that only 10 days remained for which a penalty for delay should be allowed. *Texas & P. Ry. Co. v. Taylor*, 54 C. A. 419, 118 S. W. 1097.

The penalty is to be inflicted at the rate of \$25 per day for each car and to be continued for the whole time of the carrier's delinquency. *Id.*

**Damages.**—Measure of damages for not furnishing cars for the shipment of cattle, see *Railway Co. v. Martin* (Civ. App.) 28 S. W. 577.

**Defenses.**—Where the application was not in writing but was accepted and entered in the company's order book, and effort was made to comply with it and no deposit of one-fourth of amount of freight was required, the penalty for failing to furnish the cars within a reasonable time could not be recovered. *T. & P. Ry. Co. v. Smith & White*, 34 C. A. 571, 79 S. W. 614, 615.

The penalty is not recoverable where the railroad company has a legal excuse for failing to furnish the cars by the time named in the application. *Texas & P. Ry. Co. v. Andrews, Reynolds & Co.*, 103 T. 271, 126 S. W. 562.

That one making a demand for cars is only part owner of the freight to be shipped will not prevent him suing for the penalty. *Texas & P. Ry. Co. v. Taylor*, 103 T. 367, 126 S. W. 1117.

**Interstate commerce.**—See, also, Art. 6676 and notes, and notes under Art. 6678.

Under this article, that a shipper demanding cars had the intention and did actually ship them to a point in Mexico does not change the shipment to a foreign shipment, where the freight was shipped to a point within the state consigned to the shipper, and the freight was there paid, and the freight was thereafter shipped to a point in Mexico. *Texas & P. Ry. Co. v. Taylor*, 103 T. 367, 126 S. W. 1117.

**Art. 6681. Applicant shall make deposit.**—Such applicant shall deposit with such agent, superintendent or other person one-fourth of the amount of freight charges for the use of such cars. And such applicant shall, within forty-eight hours after such car or cars have been delivered and placed as hereinbefore provided, fully load the same; and upon fail-

ure to do so, he shall forfeit and pay to the company the sum of twenty-five dollars for each car not used; provided, that where applications are made on several days, all of which are filed upon the same day, the applicant shall have forty-eight hours to load the car or cars furnished on the first application, and the next forty-eight hours to load the car or cars furnished on the next application, and so on; and the penalty prescribed shall not accrue as to any car or lot of cars applied for any one day, until the period within which they may be loaded has expired. And if the said applicant shall not use such cars so ordered by him, and shall so notify the said company or its agent, he shall forfeit and pay to the said railroad company, in addition to the penalty herein prescribed, the actual damages that such company may sustain by the said failure of the applicant to use said cars. [Acts 1887, p. 133, sec. 4. Amended. Acts 1899, p. 67. Acts 1913, S. S., p. 23, sec. 2, amending Art. 6681, Rev. St. 1911.]

**Construction of statute.**—The provisions of the statute that a deposit of one-fourth of the freight money must be made "at the time of applying for such car or cars" is given a liberal construction. Where cars were wanted at a flag station, and written applications to the superintendent were delivered to the baggage masters of trains on the 2d and 3d days of November, and a tender of the freight money was made to the nearest station agent on the morning of the 3d, and refused, it was held that the application was sufficient. *H., E. & W. T. Ry. Co. v. Campbell* (Civ. App.) 40 S. W. 431.

In common acceptance the "agent" of a railroad company is the person representing the company at a station or depot on its line. *Id.*

The provision imposing a penalty of \$25 for each car not used by a shipper within 48 hours after it is furnished him for loading, being penal, cannot be extended by implication, and must be strictly construed, so as not to impose any penalty not expressly provided by its terms. *Gulf, C. & S. F. Ry. Co. v. Louis Werner Stave Co.* (Civ. App.) 131 S. W. 658.

Where a statute requires an act to be performed within a certain number of days or hours, and does not expressly exclude Sunday in computing such time, the court cannot construe it so as to exclude Sunday, so that the provision of this article imposing a penalty on shippers for failure to load within 48 hours after the delivery of cars should under such rule be construed to include Sunday within the time provided. *Id.*

**Sufficiency of tender.**—Tender of deposit for freight charges with an application to a railroad company for cars for loading held sufficient. *Houston, E. & W. T. Ry. Co. v. Campbell* (Civ. App.) 40 S. W. 431.

**Amount of penalty.**—Under this article only one penalty may be collected for each car not loaded within 48 hours after it is placed for loading. *Gulf, C. & S. F. Ry. Co. v. Louis Werner Stave Co.* (Civ. App.) 131 S. W. 658.

**Negligence of shipper in loading.**—If damage is caused by the negligence of the shipper while he is loading the car, he is responsible for such damage, and not the railroad company which furnished him the car. *Washington v. Railroad Co.*, 22 C. A. 189, 54 S. W. 1092.

**Art. 6682. To deliver loaded cars in reasonable time.**—When cars have been supplied and loaded, it shall be the duty of the railway company to deliver the same to the party or parties to whom they are consigned within a reasonable time; and the party or parties to whom the cars are consigned shall unload the same within forty-eight hours after delivery and notice, or forfeit and pay to the company the sum of twenty-five dollars per day for each car not so unloaded. [Acts 1887, p. 133, sec. 5. Acts 1913, S. S., p. 23, sec. 3, amending Art. 6682, Rev. St. 1911.]

**Liability of consignor as to unloading.**—The consignor is not liable for failure to see that cars are unloaded at point of destination within the time required by the statute. *H. E. & W. T. Ry. Co. v. Campbell*, 91 T. 551, 45 S. W. 2, 43 L. R. A. 225.

**Art. 6683. Necessary for applicant to show what.**—It shall be necessary for the party or parties bringing suit against any railroad company under the provisions of this law to show by evidence that such cars would have been loaded within the time specified by this Act; provided that the provisions of this law shall not apply in cases of strikes or other public calamity. [Acts 1887, p. 133, sec. 6. Acts 1913, S. S., p. 23, sec. 4, amending Art. 6683, Rev. St. 1911.]

**What must be shown.**—This article does not require the intending shipper to have the property at the immediate point of shipment at the time of demand, but it means that he has or owns the property, and that he is so circumstanced that it may be shipped within the time named in the statute after the delivery of the cars at the point demanded. *Texas & P. Ry. Co. v. Taylor*, 54 C. A. 419, 118 S. W. 1099; *Same v. Smith* (Civ. App.) 118 S. W. 1119; *Same v. Andrews, Reynolds & Co.*, 55 C. A. 302, 118 S. W. 1102.

The shipper must have on hand at the time of making the order the necessary freight for loading them. It is not enough to show that he would have the freight by the time

the cars were to be furnished. *Chicago, R. I. & G. Ry. Co. v. Risley Bros. & Co.*, 55 C. A. 66, 119 S. W. 898.

Where a shipper, demanding stock cars, has his stock within five miles of the station ready to be loaded within a few hours after receiving notice of the arrival of the cars, he has his stock "on hand," within this article. *Texas & P. Ry. Co. v. Taylor*, 103 T. 367, 126 S. W. 1117.

**Art. 6683a. Not to affect demurrage regulations.**—Provided that the provisions of this Act shall not be held to forfeit or annul the demurrage regulations provided by the railroad commission of Texas, and all penalties accruing to the carrier hereunder shall be cumulative of and additional to all demurrage charges prescribed by said commission. [Acts 1913, S. S., p. 23, sec. 5.]

**Art. 6684. Duty to furnish cars, etc.**—It is hereby declared to be the duty of every railroad company incorporated under the laws of the state of Texas and doing business in this state, under limitations and regulations prescribed by the railroad commission of Texas, to equip and provide sufficient motive power and rolling stock to handle all passenger and freight traffic expeditiously and without delay. [Acts 1907, p. 297, sec. 1.]

**Art. 6685. Commission to require and authorize mortgage, etc.**—The railroad commission shall have authority, and it is hereby made its duty, to see that each and every railroad corporation chartered under the laws of this state, holding itself out as a public highway and common carrier, shall provide and equip itself with sufficient motive power and rolling stock, or other equipment necessary, to handle all passenger and freight traffic expeditiously and without delay. The railroad commission of Texas shall be vested with full power to require of such common carriers the purchase of such rolling stock and motive power as will properly equip such common carrier and facilitate the movement of all traffic, passenger and freight, and that will supply the transportation accommodations which such common carrier offers to perform as an inducement to the public to travel or ship via the lines of such railroad company, or common carrier. The railroad commission is also authorized and empowered to approve liens or mortgages that may be given by such railroad companies and common carriers to secure the purchase or lease price of any equipment or motive power which may be deemed by the railroad commission necessary for the proper discharge of its duty as a common carrier. If in the judgment and discretion of the commission any railroad company in this state, which now has an excessive issue of bonds and stocks outstanding, has not sufficient passenger and freight equipment and motive power to handle the passenger and freight business of such common carrier and railroad company, it shall be the duty of said railroad commission of Texas, after not less than five days' notice and hearing, to issue an order requiring the purchase of such rolling stock as in the judgment and discretion of the commission may be deemed necessary for the prompt, expeditious and comfortable transportation of freight and passengers over the line of such railroad company and common carrier; and in such case, the railroad commission of Texas is authorized to approve contracts or liens for the purpose of securing the purchase or lease price of such rolling stock, motive power and equipment. [Id. sec. 2.]

**Duty to furnish facilities.**—A railroad company is bound to afford adequate facilities for such business, both passenger and freight, as may be offered it, or may be reasonably expected, and the company is given large discretion in determining questions as to the equipment and operation of its road, subject, however, to the state or railroad commission to control such discretion when the interests of the public require it. *Railroad Commission of Texas v. Galveston, H. & S. A. Ry. Co.*, 51 C. A. 447, 112 S. W. 345.

The duty of a railroad company to furnish sufficient cars to meet the demands of traffic, stated. *Gulf, C. & S. F. Ry. Co. v. State*, 56 C. A. 353, 120 S. W. 1028.

**Art. 6686. Penalty for failure to comply.**—Any railroad company or common carrier failing to comply with the provisions of the two preceding articles, or to obey the orders of the railroad commission, made in pursuance of the provisions hereof, shall be deemed guilty of an abuse

of their rights and privileges, and, upon conviction, shall be subject to a fine of one hundred dollars for a violation or failure to comply with any order that may be issued by the railroad commission as is provided said commission may do by article 6685, and each day that such railroad company or common carrier neglects, fails or refuses to comply with such orders shall constitute a separate offense. [Id. sec. 3.]

**Art. 6687. Shall furnish freight facilities, interchange cars, etc.—**It is hereby declared to be the duty of every railroad company operating a line of railroad within this state, to provide sufficient tracks, switches, sidings, yards, depots and other facilities for receiving and delivering freight, motive power, cars and all other needful facilities and appliances, to enable it with reasonable dispatch to perform all of its duties as to all traffic which with ordinary foresight and diligence could be anticipated, as a common carrier; and to furnish all necessary and suitable cars and vehicles of transportation for all freight offered or tendered, or to be offered or tendered, to it for shipment within a reasonable time after demand therefor made by any shipper of such freight; and to supply within a reasonable time, at its station or stations, spurs, sidings, switches, or other places, at which it receives freight for transportation, and from which such shipper gives notice to such railway company that he desires to ship such freight, at the time designated by the shipper, where it is within reasonable time, sufficient suitable cars in which to load the same; and as to all services to be performed within the limits of this state, as to such freight and cars to transport same within a reasonable time to destination, when destined to a point upon the line of such railway receiving such freight, and, if destined to a point beyond the line of such railroad, then to transport and deliver within a reasonable time such freight in such loaded car or cars to the connecting carrier forming any part of the route over which such shipment is made, or to be made, for the purpose of transportation by such connecting carrier onto the destination of such freight, or for delivery by it to the connecting line or lines forming any part of the route over which same is to be transported to its ultimate destination; and it shall likewise be the duty of each connecting line of railroad engaged in such transportation, as to all such service to be performed, as to all such freight and cars in which the same is carried within this state, to receive and transport within a reasonable time such loaded car or cars offered or tendered to it, if in suitable condition for movement, and deliver the same at the destination thereof, if destined to a point upon its line of railroad, and, if destined to a point beyond its line of railroad, then to its connecting carrier forming any part of the route over which such car or cars are to be transported, subject to the same duties and obligations as if such freight had originated upon such line of railroad; provided, that where such freight forms less than a carload, or where it may be necessary to unload the same because of any accident or injury thereto, or to the car in which the same is being transported, or where such freight is unloaded at the request of the shipper en route, or where, by reason of any accidental or unavoidable cause, or in order to comply with any law or regulation provided by law, such freight is unloaded, or it is reasonably necessary to do so, or where it is for any other reason necessary to unload such freight in order to forward, or before it can be forwarded, in any such cases where suitable cars may be supplied. Provided, that as to freight carried wholly within this state, the railroad commission of Texas shall have the power, and authority is hereby vested in it, to make all needful rules and regulations for unloading cars at junction points, or otherwise forwarding cars, furnishing cars for forwarding or reloading and the exchange of cars and forwarding of such freight in the same or other cars. Provided, also, that whenever by reason of any accidental or unavoidable cause which can not be reasonably provided against by the use of reasonable foresight or dili-

gence, such railroad company fails to so furnish cars and shall use reasonable diligence to do so promptly after the happening of such accidental or unavoidable cause, it shall not, on account of such failure, be liable to the penalties of attorney's fees, or as otherwise herein prescribed. But nothing in this article shall in any wise affect the right or remedy of any shipper or other person as same may exist at common law or under any statute to recover on account of the failure, delay, refusal to furnish cars for transportation of any freight, or other failure to perform any other legal duty, nor to in any wise exempt any such railroad company from any of the provisions of the statutes of this state, or other duties imposed by law. [Acts 1907, p. 343, sec. 1.]

**Duty to furnish facilities.**—See, also, notes under Art. 6685.

Where the sole issue was whether a defendant had furnished cars to a live stock shipper in a reasonable time after demand, a special charge, in the language of this article that it was defendant's duty to have sufficient cars to meet all demands, was erroneous as calculated to cause the jury to consider that a duty not in issue was important. *Galveston, H. & S. A. Ry. Co. v. Word* (Civ. App.) 124 S. W. 478.

**Interchange of cars and freight—In general.**—Freight must be received and transported and not be halted and delayed by connecting lines until the differences between the carriers are voluntarily and satisfactorily settled among themselves. Under this construction neither the carrier nor the connecting railway lines would suffer. The initial carrier has no right to attach unlawful conditions to its delivery of the freight. Neither has the connecting carrier the right to force the initial carrier to terms by refusing to receive and transport the freight. The commission having fixed the joint rate, the companies must agree or have the commission make the division. *Railroad Co. v. Lone Star Salt Co.*, 19 C. A. 676, 48 S. W. 619.

A connecting carrier being bound to accept and forward cattle delivered to it by the initial carrier was not bound by a freight rate less than the legal rate specified by the agent of the connecting carrier by mistake. *Texas Mexican Ry. Co. v. Reed*, 56 C. A. 452, 121 S. W. 519.

— **Defective car.**—Where a car when tendered to a connecting carrier was not in a condition suitable for further movement, the carrier had a right to refuse to receive it under this article. *Port Arthur Rice Milling Co. v. Gulf & I. Ry. Co. of Texas* (Civ. App.) 128 S. W. 923.

**Art. 6688. To interchange cars at junction points.**—For the purpose of facilitating the movement, preservation and exchange of freight, it shall be the duty of every railroad company in this state, whose line of railroad connects with the line of any other railroad company in this state, to exchange at such connecting or junction points, the loaded and empty cars used in or for the transportation of freight carried upon such lines of railroad forming any part of the route over which said freight is carried or to be carried; and it shall be the duty of any such railroad companies forming any part of the through or joint route over which any freight is carried or to be carried, or having or participating in the joint rates on which such freight is carried or to be carried, on demand of any such connecting line, delivering to it any such loaded car or cars of freight at junction points within this state, to furnish to such delivering line within a reasonable time after such loaded cars are so received, at such junction point in this state, as many cars suitable for the carriage or transportation of similar freight as may be so delivered to it loaded, by such connecting line; and, upon the demand of the owner thereof, or the railroad company entitled thereto, or to the use thereof, it shall be the duty of every such railroad company so receiving the cars of another to return the same at the place where they were received, or at such place, as may be by said railroads agreed upon, within a reasonable time after demand therefor; and as to cars exchanged in transporting freight wholly in this state within the time and according to the rules and regulations prescribed by the railroad commission of Texas. [Id. sec. 2.]

**Intersecting tracks.**—See Arts. 6499-6501 and notes.

**Joint use of yards.**—Where defendant maintained railroad yards jointly with another company, it was not liable for injuries resulting from the negligence of the servants of the other company. *Jolly v. Missouri, K. & T. Ry. Co. of Texas*, 38 C. A. 332, 85 S. W. 837.

**Injuries to servants from defective foreign cars.**—See Art. 6648 and notes.

**Art. 6689. Commission to make rules and regulations.**—The railroad commission of Texas is hereby authorized and empowered, as to all freight carried wholly within this state and the cars used therefor, to

make and establish all needful rules and regulations, general and special, which may be different according to the circumstances and conditions to different railroads and localities and for different kind and classes of freight and cars, providing for the time, place and manner of demanding cars for or giving notice of shipment of such freight and the time, place, manner and order in which the same shall be furnished to shippers for the purpose of shipping freight between points in this state; and to prescribe rules and regulations for the furnishing, exchanging and interchanging of cars, loaded and empty, by railroad companies as between each other; the time, place, terms and conditions upon which such cars shall be furnished and such interchange shall be made, and in the absence of an agreement of such railroad companies, the reasonable compensation to be paid by each railroad company for the use, loss, injury or destruction of the cars of another railroad company in the transportation of such freight; the time within which, and the manner by which railroad companies shall give notice or make demand upon each other for cars to be furnished by one railroad company in exchange for loaded cars, or to have its cars returned, the reasonable free time to be allowed the shippers for the loading of such car or cars without incurring liability for demurrage, the free time which shall be allowed to the shipper or consignee in which to unload such freight without incurring any liability for demurrage; a schedule of reasonable demurrage charges reciprocal or otherwise, for the use of cars, irrespective of damages or penalties herein provided, which may be different for different railroads and different traffic and localities, to be paid by shippers for the detention or use of cars either in loading or unloading, or by the railroads for failing in a reasonable time to furnish cars, or to make delivery of loaded cars, subject to the penalties and damages herein provided, and the rules and regulations with respect thereto. Said commission, whenever it may deem same necessary in order to secure the prompt transportation of freight and preservation of the property, shall be authorized to prescribe the minimum speed at which freight shall be moved when being transported between points within this state, including the time for transfer and delivery as between connecting railroads. It shall be the duty of every such railway company to conform to all of the rules and regulations and orders of the commission made in accordance with the two preceding and the three succeeding articles; and the failure of any such railroad company to observe the rules and regulations of the commission, or to comply with the provisions of this law, as to freight carried wholly within this state, shall be deemed an abuse subject to correction by the railroad commission of Texas, and shall subject such railroad company to the penalties hereinafter provided. [Id. sec. 3.]

**Art. 6690. Liable for damages, when.**—Every railroad company which, in violation of any of the provisions of this law, shall fail to furnish any car or cars for the shipment of any freight within a reasonable time, or in case of the shipment of freight between points when within this state, then within the time prescribed by the railroad commission of Texas, in the event it shall prescribe the time by rules or regulations as provided for herein, and, if it shall fail to do so then within a reasonable time, or shall fail to receive and forward any loaded car or cars or to exchange cars as provided for herein, shall be liable to the shipper or other person injured or damaged thereby for all such injury and damages as may result to such shipper, and all special damages of which such railroad company had notice at the time of the shipment, or which shall occur after written notice thereof, and shall be liable in addition thereto for an amount equal to a reasonable attorney's fee in case suit is brought for the recovery of such damage; and in case of the failure or refusal to so furnish within a reasonable time any car or cars for the shipment of live stock, green fruit, vegetables or other perishable freight,

such railroad company for such failure to furnish such car or cars within a reasonable time shall be liable to the shipper for the damage caused thereby, and a reasonable attorney's fee in case suit is brought to recover the same. Every railroad company which shall fail to furnish cars or to exchange as required by the provisions of this law, or by the rules and regulations of the railroad commission as provided for herein, shall be liable to the railroad company injured thereby for all such damage as may result to it, and in addition thereto an amount equal to a reasonable attorney's fee in case of suit brought for the recovery of any damage. Every railroad company using cars of another railroad company, or which have been delivered to it by such railroad company, shall be liable to the party entitled thereto to pay for the reasonable use and hire thereof, and for injury or damage thereto, or destruction thereof, while in its possession or under its control, for the amount of such injury; and, in case of cars in the shipment of freight between points wholly within this state, the amount for the use or hire thereof may be prescribed by the railroad commission of Texas, except where the owners of such cars and such railway companies agree upon such compensation, in which case, the amount so fixed shall govern. And, where any such railroad company, or owner of any such car or cars, shall be dissatisfied with the amount fixed by the commission for such use, hire, loss or destruction, or damage to such car, or where the railroad company liable therefor shall fail to pay for the same, the railroad commission, or person entitled thereto, or which is liable for the use, hire, loss, injury or destruction of such cars, shall be entitled to establish the reasonable value thereof in a suit brought in any court of this state having jurisdiction of the parties, and of the amount in controversy; and such court shall render such judgment as to it shall seem just and reasonable; provided, that no railroad company shall be compelled to furnish its own cars to any other railroad company which is involved, except upon reasonable security furnished to it to protect it from loss of or damages to or destruction of such cars and compensation for the use thereof, and in no event shall any railroad company be required to furnish any cars to any connecting line, except to exchange for other cars reasonably suitable for the transportation of freight. [Id. sec. 4.]

**Actions for damages—in general.**—A railroad company held liable for injury to stock caused by a failure to furnish proper cars, though plaintiff agreed to load and reload and assume risk of transportation. *International & G. N. R. Co. v. Pool*, 24 C. A. 575, 59 S. W. 911.

That the car tendered to a railroad company for shipment was not the car in which freight was originally loaded by a connecting carrier held no defense to an action to recover a penalty for delay. *Gulf, C. & S. F. Ry. Co. v. Lone Star Salt Co.*, 26 C. A. 531, 63 S. W. 1025.

A release of two railroad companies from liability for injuries to cattle shipped held not to preclude plaintiff from maintaining an action against a third for failure to furnish cars within a reasonable time in which to ship such cattle. *Pecos & N. T. Ry. Co. v. Lovelady & Pyron*, 39 C. A. 239, 87 S. W. 710.

In an action against defendant railway company for injuries caused by its failure to furnish plaintiff with the cars of a connecting railway company, defendant's failure to accept cars of the connecting carrier held not excusable on the ground that it would have worked an unjust discrimination against other shippers. *Ft. Worth & D. C. Ry. Co. v. Matador Land & Cattle Co.* (Civ. App.) 150 S. W. 461.

**Contributory negligence.**—A shipper of live stock is not guilty of contributory negligence in simply having his stock at the point of shipment at what is in fact a reasonable time after a demand for cars. *Galveston, H. & S. A. Ry. Co. v. Word* (Civ. App.) 124 S. W. 478.

**Measure of damages.**—A railroad refusing without reasonable excuse to furnish cars to an applicant for the shipment of an article under a contract, of which it had knowledge, is liable to the applicant for the loss of his profits by cancellation of the contract by the purchaser. *Houston, E. & W. T. Ry. Co. v. Campbell* (Civ. App.) 40 S. W. 431.

Measure of damages for delay in holding car containing vegetables at original destination after change in destination has been made, is difference in values at changed destination. *San Antonio & A. P. Ry. Co. v. Thompson* (Civ. App.) 66 S. W. 792.

When a consignee paid the freight on a car of coke in the carrier's yards at its destination, he informed the carrier that the consignee's supply of coke was running short, and that, unless it received the coke promptly, its plant would likely be shut down, as coke was necessary to run it. Held sufficient to charge the carrier with notice of special damages by loss of business. *Texarkana & Ft. S. Ry. Co. v. Neches Iron Works*, 57 C. A. 249, 122 S. W. 64.



The measure of damages for a carrier's failure to furnish cars for the transportation of live stock is the difference between the market value at the destination to which the cattle were to be carried at the time they would have arrived if the carrier had furnished cars, and their value at the same time at the place from which they were to be shipped, less the freight, though the shipper treated the carrier's obligation to furnish cars as at an end by selling his cattle, and though the breach complained of was of the carrier's common-law, instead of contract, duty. *Southern Kansas Ry. Co. of Texas v. O'Loughlin Land & Cattle Co.* (Civ. App.) 127 S. W. 568.

The measure of damages for delay in furnishing cars for the shipment of cattle is the same as for injuries in transportation, and in either case is the difference between the market value at destination, at the time of arrival, in their then condition, and their market value if they had not been delayed or had not been injured en route, and this measure of damages obtains although the cattle were not to be sold immediately upon their arrival at destination. *Pecos & N. T. Ry. Co. v. Bivins* (Civ. App.) 130 S. W. 210.

Where cattle were properly brought to the place of shipment six days before the time for shipment, and the carrier failed to provide cars, the expense of holding the cattle before as well as after the date of shipment was a proper item of damage. *Eastern Ry. Co. of New Mexico v. Littlefield* (Sup.) 154 S. W. 543.

**Liability for breach of special contract—In general.**—A railroad company, by special contract, agreed to receive cattle for shipment on a day named, but did not have cars to receive the cattle as agreed. Held, that plaintiff could recover damages for breach of the contract, as the liability of the defendant in this case rested upon the contract, and not upon its duties as a common carrier. *T. & P. Ry. Co. v. Hamm*, 2 App. C. C. § 494; *Mo. Pac. Ry. Co. v. Graves*, 2 App. C. C. § 680; *T. & P. Ry. Co. v. Nicholson*, 61 T. 491.

A carrier's liability for breach of an oral contract to furnish cars held not avoided by a subsequent written contract. *Gulf, C. & S. F. Ry. Co. v. House & Watkins*, 40 C. A. 105, 88 S. W. 1110.

If a railroad company makes an express contract with a shipper to deliver cars on a certain date, it is liable for breach of same although there is an unexpected movement of freight and a shortage of cars. *Texas & P. Ry. Co. v. Shawnee Cotton Oil Co.*, 55 C. A. 183, 118 S. W. 779.

Where one contracted for cars to ship cattle in his own name for a third person, under his authority, he could recover for the delay in furnishing the total number of cars. *Pecos & N. T. Ry. Co. v. Cox* (Civ. App.) 150 S. W. 265.

**Interstate shipment.**—Where a shipper contracts to use cars for shipment of stock, he may recover for breach of the contract though the shipment was to be made beyond the limits of the state. *Missouri, K. & T. Ry. Co. of Texas v. Golson* (Civ. App.) 133 S. W. 456.

**Damages.**—A carrier having failed to perform a contract to furnish certain cars for the shipment of cattle as agreed, the shipper held not bound to arrange for the shipment for a part of the distance over such carrier's line in order to reduce the damages. *Pecos River R. Co. v. Latham*, 40 C. A. 78, 88 S. W. 392.

If a railroad company wrongfully or negligently delayed to furnish plaintiff cars for which plaintiff was bound to ship logs under his contract with another, after notice of the facts making it necessary for plaintiff to incur the expense of keeping teams ready to load the cars when furnished, it would be liable for such additional expenses, in an action by plaintiff for damages for breach of its contract to furnish cars and discrimination in furnishing them. *Waugh v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 131 S. W. 843.

A carrier failing to furnish cars for the shipment of live stock pursuant to its agreement is liable for the damages proximately resulting therefrom. *San Antonio & A. P. Ry. Co. v. Broad-Davis Cattle Co.* (Civ. App.) 140 S. W. 514.

**Sufficiency of evidence.**—Evidence held sufficient to support verdict for damages for breach of contract to furnish cars for shipment of stock. *Texas & P. Ry. Co. v. Jones*, 23 C. A. 551, 53 S. W. 174.

In an action against a carrier for breach of an alleged contract to furnish cars, evidence held insufficient to show a promise and acceptance. *Pecos & N. T. Ry. Co. v. Francis* (Civ. App.) 138 S. W. 797.

**Duty to furnish cars on demand.**—See Arts. 6678-6683 and notes.

**Art. 6691. Other penalty; "shipper" defined.**—Every railroad company which shall wilfully, by its own gross negligence, or by the gross negligence of its agents having charge and management of the matter of furnishing cars, fail or refuse to furnish or exchange cars as herein provided for, or to transport or deliver the same within the time prescribed by the commission, as to freight carried between points wholly within this state, or if not so prescribed then within a reasonable time, shall, in addition to the other liabilities herein provided for, forfeit to the state of Texas, for each of such violations, not less than one dollar nor more than one hundred dollars for each offense; and each day of such failure or neglect as to each car which it, by such wilful or gross negligence, shall fail or refuse to furnish or exchange shall be treated as a separate offense; such penalties to be recovered at the suit of the attorney general of the state of Texas in the court having jurisdiction of the amount, at Austin in Travis county. [Id. sec. 5.]

**Art. 6691a. "Shipper" defined.**—By the term, "shipper," as herein used, is meant any person, firm, or corporation tendering freight for shipment, and any consignor or consignee of any bill of lading, or other

person, firm or corporation having the right of a consignor or consignee. [Id. sec. 5.]

**Art. 6692. "Reasonable time" defined.**—It shall be deemed *prima facie* a reasonable time within which to order cars that any shipper shall give written notice thereof to the station agent at the place of shipment, or in his absence, to the nearest station agent of the railroad company to which such application is made, three days before such shipment of five cars or less, and five days for less than ten or more than five cars, and eight days for ten cars or more, and it shall be the duty of the railroad companies to furnish their station agents with printed blanks upon which shippers may make application for their cars; provided, that nothing in this and the five preceding articles shall be construed to exempt any railroad company from the obligation to furnish cars for shipment without such written notice, but it shall only be subject to the penalties of this law for failure to furnish cars to shippers where notice thereof shall be given in writing, or in case of shipment of freight wholly between points in this state, then in accordance with the rules and regulations of the railroad commission of Texas. [Id. sec. 6.]

**Art. 6693. Duty to provide suitable freight and passenger depots.**—It shall be the duty of all railroad companies in this state to provide and maintain adequate, comfortable and clean depots and depot buildings at their several stations for the accommodation of passengers, and to keep said depot buildings well lighted and warmed for the comfort and accommodation of the traveling public; provided, further, that said railroad companies shall keep and maintain separate apartments in such depot buildings for the use of white passengers and negro passengers, and to keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freights handled by such roads. [Acts 1909, 2 S. S., p. 401, sec. 1.]

**Keeping depots opened, lighted and warmed.**—See Art. 6591 and notes.

**Art. 6694. Commission to require compliance.**—Power is hereby conferred upon the railroad commission of Texas to require compliance by railroad companies with the provisions of the preceding article under such regulations as said commission may deem reasonable, and all railroad companies shall be subject to the penalties prescribed by law for failure to comply with such requirements. [Id. sec. 2.]

**Where commission can compel erection of depots.**—The railroad commission cannot exercise power to require a railway company to erect and maintain depots at places selected arbitrarily and in disregard of public necessity. *Railroad Commission of Texas v. Chicago, R. I. & G. Ry. Co.* (Civ. App.) 114 S. W. 192.

An order of the railroad commission directing the railroad company to establish a station in the state of Texas within a few hundred feet of an established station in Oklahoma, held unreasonable. *Id.*

The railroad commission has the power to compel a railroad company to erect depot buildings, not only at places designated by itself as stations but at places of starting, when the nearest station from the starting point is about ten miles distant, although just across the state line in another state are station buildings on the line as it extends through the latter state. *Railroad Commission v. Chicago, R. I. & G. Ry. Co.*, 102 T. 393, 117 S. W. 795.

The railroad commission held entitled to enforce an order for the construction of a passenger and freight station at a particular town located on state line. *Pecos & N. T. Ry. Co. v. Railroad Commission of Texas*, 56 C. A. 422, 120 S. W. 1055.

**Art. 6695. Commission may order construction of union depots.**—Where two or more railroad companies reach the same city or town in this state, it shall be the duty of the railroad commission of Texas to ascertain whether it is practicable and feasible for such railroad companies to use a joint or union passenger depot; and, if the railroad commission finds upon investigation that it is practicable for such railroad companies to join in the construction and use of a passenger depot, then it shall give notice to said railroad companies, and, after investigation and public hearing, may require the construction and maintenance of such union passenger depot by the railroad companies entering any

such city or town; provided, that it shall appear to the railroad commission that the construction and maintenance of such joint or union passenger depot are just and reasonable to the railroad companies involved, and demanded by the public interest. The railroad commission may specify the requirements of such union depot as to kind and character; and said railroad commission may apportion the cost of constructing and maintaining the same to each railroad company in cases where the interested railroad companies can not themselves agree. [Acts 1909, 2 S. S., p. 399, sec. 1.]

**Art. 6696. Penalty for failure.**—Failure upon the part of any railroad company to observe and obey the orders of the railroad commission, issued in compliance with the preceding article, shall subject such railroad company to the fines and penalties prescribed by law for failure to obey the lawful requirements, orders, judgments and decrees made by the railroad commission of Texas. [Id. sec. 2.]

**Art. 6697. Right to lease another road.**—Any railroad not exceeding thirty miles in length, connecting at or near the state line with any other railroad, may be leased by the company owning such other railroad, on such terms and for such time, not exceeding ten years, as may be approved by the railroad commission of Texas; provided, that said commission may refuse to approve the same for any cause which it may deem sufficient; and provided, further, that at any time before or after the expiration of such lease, the same may be renewed or another lease executed, subject to the provisions and limitations of this chapter; and provided, further, that the provisions of this chapter shall not apply to railroads whose total mileage in this state may exceed thirty miles, although a portion thereof so connecting at the state line may not exceed thirty miles in this state. [Acts 1899, p. 73, sec. 1.]

**Art. 6698. Lessor company subject to jurisdiction of commission.**—During the term of such lease, the lessor company shall remain subject to the jurisdiction of the said railroad commission of Texas, and, notwithstanding such lease, shall be liable for any and all things occurring on or in connection with such road to the same extent as it would be if such lease had not been made, it being the intent hereof that the lease shall not operate to exempt the lessor company from any liability that would otherwise exist against it; but this article shall not be so construed as to release the lessee company from any liability. [Id. sec. 2.]

**Art. 6699. Exception as to general office, etc.**—Any company whose road may be leased under the provisions of the two preceding articles is hereby exempted from the laws of this state requiring general offices to be maintained and the general officers to reside in this state, except in so far as it may be required by section 3, article 10, of the constitution of the state of Texas, and except in so far as may be required by the order or orders of said railroad commission. [Id. sec. 3.]

**Art. 6700. Process served upon whom.**—In any suit against the lessor company, for the purpose of service of process, the officers and agents of the lessee company shall be the officers and agents of the lessor company. [Id. sec. 4.]

**Art. 6701. Railroad crossings under control of commission.**—Where it should become necessary for the track of one railroad company to cross the track of another railroad company, it shall be the duty of the railroad commission of the state of Texas to ascertain and define by its decree the mode of such crossings which will occasion the least probable injury upon the rights of the company owning the road which is intended to be crossed; and, if it should appear to the said commission that it is reasonable and practicable to avoid a grade crossing, said

commission shall by its order prevent the same. [Acts 1901, p. 255, sec. 1.]

**Street Railways.**—An electric street railway held not to be an additional servitude in a street, and that it could cross over the tracks of a steam railroad crossing the highway without complying with conditions other than those to which the general public is subject in traveling over the highway. *Galveston, H. & S. A. Ry. Co. v. Houston Electric Co.*, 57 C. A. 170, 122 S. W. 287.

This act (Arts. 6701-6705) does not apply to street railways. *Id.*

**Art. 6702. Interlocking, etc., switches to be used.**—In any case where the tracks of two or more railways cross each other at a common grade in this state, it shall be the duty of such railroad company to protect such crossings by interlocking or other safety devices and regulations to be designated by the railroad commission of Texas, to prevent trains colliding at such crossings. [*Id.* sec. 2.]

**Art. 6703. Expenses of grade crossing to be paid by whom.**—In case any railway company shall hereafter seek to cross, at grades with its track or tracks, the track or tracks of another railroad, the railroad seeking to cross at grade shall be compelled to interlock, or protect such crossings by safety devices to be designated by the railroad commission, and to pay all costs of appliances together with the expense of putting them in; provided, that this law shall not apply to crossings of side tracks. [*Id.* sec. 3.]

**Street railroads.**—All that a street railroad company could require as to the crossing of its tracks by a steam railroad would be the installation of a reasonably safe crossing in common use. *Galveston & W. Ry. Co. v. Galveston Electric Co.* (Civ. App.) 123 S. W. 1140.

**Art. 6704. Trains may pass crossings without stopping, when.**—Whenever interlocking or other safety devices are constructed and maintained in good order to the satisfaction of the railroad commission in compliance with the two preceding articles, then and in that case it shall be lawful for the engines and trains of such railroad or railroads to pass over such crossings without stopping. [*Id.* sec. 4.]

**Art. 6705. Penalty, etc.**—Any company, corporation, receiver or person operating any railroad who shall refuse or neglect to comply with any order made by the said railroad commission in pursuance of the terms of the four preceding articles shall forfeit and pay to the state of Texas a penal sum of five hundred dollars per week for each week of such refusal and neglect; which said sum may be recovered in suit or suits to be brought by the attorney general of the state of Texas in the name of the state of Texas, upon duly verified information of such refusal and neglect, by any such railway company being lodged with said attorney general by the said railroad commission. [*Id.* sec. 5.]

**Art. 6706. Double-header trains, use prohibited, except when.**—Where an unreasonable degree of hazard results to its employes, it is hereby declared to be an abuse of its franchise and privileges for any railroad company, or receiver, operating a line of railroad in this state to run or operate more than one working locomotive at the same time in propelling or moving any one train of cars, except in moving trains up steep grades, or where a locomotive propelling the train becomes temporarily disabled after leaving the terminal; and it shall be the duty of the railroad commission to investigate such abuses and see that the same are corrected, regulated, or prohibited as hereinafter provided. [Acts 1900, S. S., p. 15, sec. 1.]

**Art. 6707. Use to be regulated by commission.**—After such investigation, should the railroad commission decide to regulate or forbid the practice of using more than one working locomotive in the operation of any train at the same time on any railroad, or part of railroad, within this state, then it shall be their duty to make and record an order fully setting forth their decision and clearly designating the railroad, or part of railroad, on which such practice is forbidden or regulated, and how regulated. Notice of said order shall be served upon said railroad

affected by it. Said notice shall contain in full a copy of said order, and shall be directed to the sheriff or any constable of the county where the general offices of such railroad are located; and a copy of the same shall be delivered by the officer executing the same to the president, or the vice-president, or the general manager, or the general superintendent, or any general officer of said railroad in this state residing in said county; and said officer executing said writ shall make his return on the original, and deliver the same with his return forthwith to the commission. [Id. sec. 2.]

**Art. 6708. Penalty and venue of suits.**—It shall be the duty of such railroad to obey said order; and any railroad corporation, or receiver, who shall at any time after such notice shall have been served for ten days violate the order of the commission, shall be liable to the state of Texas for a penalty of not less than five hundred dollars nor more than five thousand dollars for each offense; and such penalty shall be recovered, and suits therefor shall be brought in the name of the state of Texas in the proper court having jurisdiction thereof in Travis county, Texas, or in any county into or through which such railroad may run, by the attorney general, or under his direction; and such suit shall be subject to the provisions of article 6673. [Id. sec. 3.]

**Art. 6709. Equipments to be used; commission to supervise.**—It shall be unlawful for any common carrier engaged in intrastate commerce by railroad within the state of Texas to use on its lines in moving intrastate traffic within said state any locomotive engine not equipped with a power driving wheel brake and appliances for operating the train brake system, or to run any train in such traffic that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose, or to run any train in such traffic that has not all of the power or train brakes in it used and operated by such engineer, or to run any train in such traffic that has not at least seventy-five per centum of the cars in it equipped with power or train brakes; and for the purpose of fully carrying into effect the objects of this and the five succeeding articles, the railroad commission of Texas may, from time to time, after full hearing by public order, increase the minimum percentage of cars in any train which shall be equipped with power or train brakes; and after such minimum percentage has been so increased it shall be unlawful for any common carrier to run any train in such traffic which does not comply with such increased minimum percentage. [Acts 1909, p. 64, sec. 1.]

**Art. 6710. Improved couplers to be used.**—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to haul or permit to be hauled or used on its line of railroad within the state of Texas, any locomotive, tender, car or similar vehicle employed in moving intrastate traffic within the said state which is not equipped with couplers, coupling automatically by impact, and which can be coupled and uncoupled without the necessity of men going between the ends of locomotives, tenders, cars and similar vehicles. [Id. sec. 2.]

**Injuries to servants from defective appliances.**—See Art. 6648 and notes.

**Art. 6711. Drawbar of engine, length of.**—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to use in moving intrastate traffic within said state any locomotive, tender, car or similar vehicle, any drawbar of which, when measured perpendicularly from the level of the tops of the track rails upon which such locomotive, tender, car or similar vehicle is standing to the center of such drawbar, is more than thirty-four and one-half inches in height, or less than thirty-one and one-half inches in height. [Id. sec. 3.]

**Art. 6712. May refuse rolling stock not properly equipped.**—When any person, firm, company, corporation or receiver engaged in commerce as aforesaid, shall have equipped a sufficient number of its locomotives, tenders, cars and similar vehicles so as to comply with the provisions of article 6709, it may lawfully refuse to receive from connecting lines of road or shippers any locomotives, tenders, cars, or similar vehicles not equipped sufficiently, in accordance with article 6709, with such power or train brakes as will work and readily interchange with the brakes in use on its own locomotives, tenders, cars, and similar vehicles, as required by this law. [Id. sec. 4.]

**Art. 6713. Rolling stock to be provided with grab irons, etc.**—It shall be unlawful for any common carrier, engaged in commerce as aforesaid, to use in moving intra-state traffic within said state any locomotive, tender, cars, or similar vehicle which is not provided with sufficient and secure grab irons, hand holds and foot stirrups. [Id. sec. 5.]

**Injuries to servants from defective appliances.**—See, also, Art. 6648 and notes. Using in intrastate commerce a car with a defective handhold, made unlawful by this article, whereby an employé was injured, was negligence per se, irrespective of inspection. *Galveston, H. & S. A. Ry. Co. v. Kurtz* (Civ. App.) 147 S. W. 658.

**Art. 6714. Penalty, how recovered.**—Every such common carrier, whether a co-partnership, a corporation, a receiver, or an individual or association of individuals, violating any of the provisions of the five preceding articles shall be liable to the state of Texas for a penalty of not less than two hundred nor more than one thousand dollars for each offense; and such penalty shall be recovered and suit brought in the name of the state of Texas, in any court of proper jurisdiction in the county of Travis, or in any other county in said state into or through which such line of railroad may run, by the attorney general, or under his direction, or by the county or district attorney in the county in which the suit is brought; and the attorney bringing such suit shall receive a fee of fifty dollars for each penalty recovered and collected by him, and ten per cent of the amount collected, to be paid by the state; and the fees and compensation so allowed shall be over and above the fees allowed such attorney under other provisions of law. [Id. sec. 6.]

**Art. 6715. To build sidings, etc., when.**—All railroads in Texas shall be required to build sidings and spur tracks sufficient to handle the business tendered such railroads, when ordered to do so by the railroad commission, as hereinafter provided. [Acts 1903, p. 93, sec. 1.]

**When and where switches, etc., can be required.**—This law confers power upon the railroad commission to require the construction of sidings and spur tracks for public uses only, and free from discrimination in favor of any particular individual. The commission exceeds its authority when it undertakes to compel a railroad company to construct a side track for the preferential use of a lumber company. *Railroad Commission v. St. L. S. W. Ry. Co.*, 35 C. A. 52, 80 S. W. 102, 103, 104.

The language "the business tendered such railroads" refers to freight and passengers which come to the railroad from the public for transportation as a public highway. It was not intended to require railroad companies to construct "switches and spur tracks" away from their lines to accommodate individual interests. *Ry. Com. v. St. L. S. W. Ry. Co.*, 98 T. 67, 80 S. W. 1141.

**Validity of special contract.**—A contract between a railroad company and a mill owner for the construction of a side track and switch, in consideration of the latter releasing the company from liability, held to show on its face a sufficient consideration, so as to prevent determination of the issue by the court ex parte. *Missouri, K. & T. Ry. Co. of Texas v. Carter*, 95 T. 461, 68 S. W. 159.

A contract between a railroad company and a mill owner for the construction of a side track and switch, in consideration of the latter releasing the company from liability, held not void as against public policy. *Id.*

A contract by a railroad section foreman to procure a switch track at a specified place in consideration for a conveyance of land held not to be void as against public policy. *Wright v. Riley* (Civ. App.) 118 S. W. 1134.

**Use of spur track.**—Where a lumber company and a railroad construct a spur track from the former's premises to the latter's line, the former has no right to authorize a use of the spur by another railroad. *Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co.*, 28 C. A. 551, 67 S. W. 525.

**Art. 6716. Commission to enforce compliance.**—Power is conferred on the railroad commission of Texas to require compliance by railroad companies with the provisions of the preceding article, under such reg-

ulations as said commission may deem reasonable; and all railroad companies shall be subject to the penalties prescribed by law for failure to comply with the requirements of the railroad commission as provided herein. [Id. sec. 2.]

When and where switches, etc., can be required.—See notes under Art. 6715.

## CHAPTER SIXTEEN

### ISSUANCE OF STOCKS AND BONDS REGULATED

Art.	Art.
6717. State vested with regulation of issue of bonds, stocks, etc.	6725. Duty of secretary of state.
6718. Prohibiting incumbrance above value.	6726. Forfeiture of charter.
6719. Commission to ascertain and report values, etc.	6727. Certificates, bonds, etc., void.
6720. Effect of judicial or other sale, etc.	6728. Penalties hereunder.
6721. Purchasers complying with law may issue bonds.	6729. State not liable.
6722. Authority to issue bonds to be secured.	6730. Amendment of charter; construction of branch lines; issuance of bonds.
6723. How certificates of stock shall issue.	6731. Suburban railroad stocks and bonds valid when.
6724. Prerequisites to issue of bonds.	6732. Stocks and bonds may issue for double tracks.

**Article 6717. [4584a] Regulation of issue of stocks, bonds, etc., by railroads vested in state.**—Among other things, the power and authority of issuing or executing bonds, or other evidences of debt, and all kinds of stock and shares thereof, and the execution of all liens and mortgages by railroad corporations in this state are special privileges and franchises, the right of supervision, regulation, restriction, and control of which has always been, is now, and shall continue to be vested in the state government, to be exercised according to the provisions of this and other laws. [Acts 1893, p. 57.]

**Art. 6718. [4584b] Issue of incumbrance above value of the road prohibited; except, etc.**—Hereafter no bonds or other indebtedness shall be increased or issued or executed by any authority whatsoever, and secured by lien or mortgage on any railroad, or part of railroad, or the franchises or property appurtenant or belonging thereto, over or above the reasonable value of said railroad property; provided, that in case of emergency, on conclusive proof shown by the company to the railroad commission that public interests or the preservation of the property demand it, the said commission may permit said bonds, together with the stock in the aggregate, to be executed to an amount not more than fifty per cent over the value of said property. [Id.]

**Art. 6719. [4584c] Railroad commission to ascertain and report railroad values; proceeding incident thereto.**—It shall be the duty of the railroad commission to ascertain, and in writing report to the secretary of state, the value of each railroad in this state, including all its franchises, appurtenances and property. After it shall have prepared said report of value, the commission shall give the company interested ten days notice in writing, by registered letter to the president, treasurer or receiver of said railroad, to the effect that said report is ready to be made, and that if it have any objections thereto it must file them, in writing, within forty days after said service, or the same will be so deposited with the secretary of state as correct. Should the company, or its duly authorized representative, file with said commission any objections to said report of value, the commission shall duly investigate and pass on the same. On investigation, if the commission conclude that its report of value is too low or too high, then it shall make the necessary correction before filing it. Should no objections be filed within the time permitted, or being filed and on examination found without merit, the commission shall forthwith file its said report in the office of the

secretary of state, where it shall remain as a public record, as a limitation for the issuance of indebtedness under the limitations prescribed in article 6718. To promote public interests and protect private rights, the commission, after due notice under the rule herein prescribed, may correct its report of value of any railroad at any time it may deem proper. [Id.]

**Art. 6720. [4584d] Effect of judicial or other sale of railroad.**—Every judicial or other sale of any railroad in this state hereafter made, which shall have the effect to discharge the property so sold from liability in the hands of purchasers for claims for damages, unsecured debts, or junior mortgages against such railroad company so sold out, shall have the effect to annul and cancel all claims of every stockholder therein to any share in the stock of such railroad; and it shall not be lawful for said purchasers, or for any railroad company organized hereafter to operate said railroad, to issue any stock in lieu of the old stock or to allow any compensation therefor in any manner whatever, nor shall all or any part of the debt to satisfy which such sale is made be continued or held as a claim or lien on said property. [Id.]

**Release of claims.**—A judicial sale of a railroad made under the above article, has the effect to annul and cancel all claims of stockholders in the stock of such railroad. *Davis v. S. A. & G. S. Ry. Co.* (Civ. App.) 44 S. W. 1012.

A receiver's sale does not cancel the claim of stockholders so that they can not file a bill to review a judgment subsequently rendered enjoining them from voting the stock. *Davis v. San Antonio & G. S. Ry. Co.*, 92 T. 642, 51 S. W. 324.

Under this article a judicial sale of a railroad company's property relieved the reorganized railroad, taking under such sale, of liability on a contract with citizens of a municipality to maintain its general offices, shops, etc., in that city. *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

**Ratification of obligation of old company.**—Under this article, where a railroad company contracted, in consideration of plaintiffs' providing a right of way through a county and purchasing certain of its stocks and bonds, to locate its general offices, machine shops, etc., and maintain the same at S., but such company's property was thereafter sold on foreclosure, and was ultimately purchased by defendant, a bill to restrain defendant from removing its offices, shops, etc., to another city, merely alleging that defendant recognized, ratified, adopted, and acknowledged its obligation to carry out the original contract, but failing to allege that the bonds held by complainants were a lien on defendant's property, or that the sale of the property then held by defendant was made subject to any obligation of the old company, or to any liens on the property sold, or that defendant had ever legally bound itself to discharge any of the obligations of the original railway company, was fatally defective. *Kansas City, M. & O. Ry. Co. of Texas v. Cole* (Civ. App.) 145 S. W. 1094.

**Art. 6721. [4584e] Purchasers complying with law may issue bonds, etc.**—The purchasers of said property who procure it clear of incumbrance, or any company organized by their consent to operate said railroad under and in pursuance of the laws of this state, may issue stock and bonds in the proportion that they may deem advisable, subject to the rules, restrictions and limitations prescribed in the three preceding articles.

**Issuance of bonds.**—A corporation organized to acquire a railroad bought at a judicial sale may issue bonds in payment for the property and franchises, subject to the restrictions fixed by law. *Thayer v. Watham*, 17 C. A. 382, 44 S. W. 906.

**Purchasers and new corporation the same.**—The fact that the parties comprising the purchasers are the same as those comprising the new corporation is no bar to their dealing with each other. *Thayer v. Watham*, 17 C. A. 382, 44 S. W. 906.

**Art. 6722. [4584f] Authority to issue bonds before completion of roads must be obtained, etc.**—Should any company or corporation authorized to construct, own or operate a railroad in this state desire to issue bonds or other indebtedness, to be secured by lien or other mortgage on its franchises and property, in advance of the completion of the said railroad, it shall make application to and first procure the consent of the railroad commission thereto. In said application, it shall exhibit to the commission its contract with the construction company, if it have any, the profile of its completed road or part of road, the evidence of its right of way, depot grounds, terminal facilities, the extent and value of work done or in process of completion, the amount of property received, the amount of stock subscribed and the amount paid in, and all other necessary facts showing the value of the franchises and property pro-



posed as security for said contemplated debts. If, on investigation, the commission is satisfied that the company is acting in good faith, and that its contract with the construction company is reasonable and fair to the public, then it shall authorize the execution of said indebtedness and lien to the extent necessary for the demands of the work, at no time to be more than fifty per cent over the value of the whole property and franchises. In executing said bonds, the company shall comply with article 6723, and have them registered, as required in article 6724. [Id.]

**Consent of commission to issuance of bonds.**—This article prescribes the manner of proceeding before the commission to obtain the consent of that body to the issuance of bonds. *Denison & S. Ry. Co. v. Railroad Commission of Texas*, 95 T. 671, 69 S. W. 62, 63.

The act of which this article is a part, known as the stock and bond law, was enacted among other things to prevent the over capitalization of railroad corporations organized under laws of this state and to protect the purchasers of stocks and bonds against inflated issues. The railroad commission controls the issues of bonds and stocks, and it is its duty to value each railroad in the state and the work done upon it in process of construction. *U. S. & Mex. Trust Co. v. Delaware W. Const. Co.* (Civ. App.) 112 S. W. 447, 457.

**Art. 6723. [4584g] Prescribing how certificates of stock shall issue.**—Each railroad company now existing, or that shall hereafter be organized, or that shall be reorganized under the laws of this state, or which shall increase its stock under the laws of this state, shall issue certificates to the subscribers to its said stock under the following regulations: A majority of the board of directors shall meet in person in the state of Texas, at the principal office of such company, and shall cause to be made a list of the subscribers to such stock, showing the number of shares subscribed by each, the amount of stock represented by each share and the amount actually paid, labor done or property received on each share of stock, and shall cause to be affixed to each name on said list a number, beginning with number one, or the next highest number of any certificate previously issued. The president of the board, or presiding officer of the meeting at which the issuing of such certificates of stock is authorized, shall make a certificate to said statement to the effect that the same is correct, and that the amount of money paid, labor done and property received as stated is correct, and shall sign the same in person. Such statement shall thereupon be entered at large upon the minutes, and, after having the seal of the company affixed thereto, shall be attested by the secretary of the company, and deposited with the railroad commission, and by it filed and preserved in the office. The secretary of the company shall then be authorized to make out and deliver to each stockholder in said list a certificate corresponding with said statement in number, name, number of shares, amount of stock represented by each share, and the amount of money or its equivalent paid upon each share; which certificate shall be signed by the president of the said railroad company, attested by the secretary, with the seal of said company affixed. No railroad company shall hereafter increase its stock, unless all existing shares of stock shall have been paid in full, or all unpaid shares of such stock have been sold out as forfeited under the law. When the certificates to be issued are for increase of stock, the statement herein required to be made by the board of directors shall state that all existing shares of stock have been paid in full, or that all shares not paid in full have been sold out or forfeited under the law. In no event shall the stock exceed the value of the railway property, and the correct aggregate amount of stock so issued by each railway company shall be certified to and registered in the office of the secretary of state by or at the instance of the railroad commission. [Id.]

**Stock to be certified and registered.**—Stock in a railway company must be certified to and registered in the office of the secretary of state. *Davis v. S. A. & G. S. Ry. Co.* (Civ. App.) 44 S. W. 1012.

**Authority of commission.**—The railroad commission has no authority to prevent the issuance of stock certificates nor to declare void stock once issued. *Davis v. San Antonio & G. S. Ry. Co.*, 92 T. 642, 51 S. W. 324.

**Art. 6724. [4584h] Prerequisites to the issue by railroad companies of bonds, etc.**—Whenever any railroad company in this state shall hereafter desire to make, issue, and sell any bonds, or evidences of debt, which are to become a lien on its property, it shall comply with the laws of this state regulating the same, and in addition thereto shall have said bonds prepared, signed by the president of the company, and attested by the secretary, with the seal of the company attached thereto. Each bond shall be numbered, beginning with number one, or the next highest number of any preceding bond issued by it, and continue consecutively until all are numbered. The bonds shall be dated, made payable at a time not exceeding thirty years from date, and shall bear interest not exceeding six per cent per annum. The said bonds, when thus prepared, shall be presented to the railroad commission of this state, with a statement in writing, signed and sworn to by the president of said company, showing the amount of the stock of said company, and the amount of outstanding bonds, if any, of said company. If said bonds are such as are permitted under this law, and the railroad commission shall be so satisfied, it shall approve said bonds, and shall issue to the secretary of state a direction to register said bonds, specifying the numbers, dates, and amounts thereof. And said commission shall keep in its office a correct record of the bonds so approved by it, giving the name of the company, the numbers, dates of execution and maturity of the bonds, the amount and rate of interest of each, and the date of approval; provided, that this provision shall not apply to receivers' certificates where the amount does not exceed one hundred thousand dollars. [Id.]

**Conclusiveness of commission's decision.**—Decision of the state railroad commission as to its jurisdiction of a railroad on application to it for permission to issue bonds held final and conclusive under the statutes. *Denison & S. Ry. Co. v. Railroad Commission of Texas*, 95 T. 671, 69 S. W. 62.

A final adjudication of the railroad commission acting, under the stock and bond law on the issue of fact presented on an application by a railroad company for permission to issue stock and bonds, held conclusive on the court. *United States & Mexican Trust Co. v. Delaware Western Const. Co.* (Civ. App.) 112 S. W. 447.

**Effect of receiver's certificates.**—Certificates of the receiver of a railroad, issued pursuant to order of court to pay debts due for labor and materials furnished before appointment of the receiver and approved by the railroad commission, as authorized by this article, have only the effect given by the order authorizing their issuance, and purchasers of the certificates are charged with notice of the order. *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Civ. App.) 126 S. W. 296.

**Art. 6725. [4584i] Duty of secretary of state.**—When any such bonds shall be presented to the secretary of state with the direction aforesaid to register, he shall register said bonds by entering a description thereof in a book to be kept for that purpose, which shall show the date, number, amount, when due, the rate of interest on each bond, and also the date when the same is registered. The secretary of state shall indorse on each bond, under the seal of his office and his official signature, together with the date thereof, as follows: "This bond is registered under the direction of the railroad commission of Texas." No bond, or other evidence of debt, hereafter issued by or under the authority of any person, firm, corporation, court, or railroad company, whereby a lien is created on its franchise or property situated in this state, shall be valid or have any force until the same has been registered as required herein.

**Fee for making indorsement.**—The indorsement required by this article to be made on each bond by the secretary of state, is not such a certificate within the meaning of Art. 3837, that the secretary of state can charge a fee of \$1 therefor. *State ex rel. Railway Co. v. Hardy*, 93 T. 340, 55 S. W. 322.

**Art. 6726. [4584j] Forfeiture of charter.**—If any railroad company owning or operating a railroad in this state shall hereafter issue or consent to or cause to be issued any bonds or other evidences of debt to be or become a lien on its railroad property so owned or operated, or shall issue any stock not in accordance with the provisions of this chapter, such action shall work a forfeiture of the charter of said company; and

it shall be the duty of the attorney general to institute proceedings in a court of competent jurisdiction to forfeit the same. [Id.]

**Art. 6727. [4584k] Certificates, bonds, etc., void.**—Every certificate of stock in any railroad company, and every bond and other evidence of debt operating as a lien upon the property of such railroad company, which shall be made, issued or sold without a compliance with this chapter, shall be void.

**Effect of noncompliance.**—Stock in a railroad company not issued in compliance with this chapter is void. *Davis v. S. A. & G. S. Ry. Co.* (Civ. App.) 44 S. W. 1012.

**Art. 6728. [4584l] Penalties hereunder; venue.**—Each and every railroad director, president, secretary, or other official, who shall knowingly make any false statement upon which to secure the registration of any bond or other evidence of debt as aforesaid, or who shall by false statement knowingly made procure of the railroad commission direction to the secretary of state to register the same, and which shall be by the secretary of state registered, or shall with knowledge of such fraud negotiate, or cause to be negotiated, any such bond or other security issued in violation of this chapter, shall be punished as provided in the Penal Code, and shall likewise be liable to any creditor of such company for the full amount of damages sustained by such wrongful conduct. Venue in such cases shall be in either of the district courts held in Travis county, or in the county where the principal office of the railway company whose property is sought to be so incumbered or affected is located.

**Art. 6729. [4584m] State not liable, etc.**—Nothing in this law, and no act done or performed under or in connection with it, shall be held or construed to bind or make the state of Texas liable to pay or guarantee, in any manner whatsoever, any obligation, debt, or claim executed or assumed under or by virtue of its provisions.

**Art. 6730. Amendment of charter; construction of branch lines; issuance of bonds.**—Any corporation incorporated for the purpose of constructing, owning, maintaining and operating a railroad under the laws of this state, and which on April 15, 1901, owned a line of railway already constructed, which has outstanding stocks and also outstanding bonds secured by a mortgage lien upon its property, or by any other character of lien, may amend its charter in accordance with chapter 1 of this title, and in accordance with the constitution and laws of this state, and may provide by such amendment for the making of any extension or extensions, or branch line or lines, that it may desire to construct, and may issue stocks and bonds, or bonds, in an amount equal to the reasonable value of such extension, or extensions, or such branch line or lines, and such terminal properties as it may acquire, the same to be issued in accordance with the provisions of this chapter; and the railroad commission of the state of Texas is hereby empowered to authorize the execution and issuance of such stocks and bonds, or bonds, and, in determining the right to issue such stock and bonds, said commission shall not consider the amount of outstanding stock or indebtedness, or bonds previously issued and secured by lien upon the property of such corporation theretofore constructed; provided, that any existing mortgages or liens upon the property of such corporation constructed or owned prior to the time of making such amendment of its charter and to the construction of such extension or extensions, or branch line or lines, or to the acquiring of such terminal properties, shall not attach to or become a lien upon the extension or extensions, branch line or lines, or terminal properties constructed or acquired under such amended charter. This article shall not be so construed as to in any wise repeal or impair any other of the provisions of this chapter, or of the existing laws of this state, except in so far as the same may be changed by the provisions of this article. [Acts 1901, p. 257, secs. 1 and 2.]

**Art. 6731. Suburban railroad stocks and bonds valid, when.**—In all cases in which the railroad commission of the state of Texas may decide that any corporation created under chapter 1 of this title for the purpose of operating a local suburban railway not exceeding ten miles from the corporate limits of any city or town, in addition to such mileage as it may have within the same, is not for any reason subject to the control of said railroad commission in reference to the issuance of stock and bonds, or either, under the act of the legislature of this state entitled, "An Act to define franchises, to make public the value of railroads, to make effective section 6, article 12, of the constitution of the state of Texas; to declare the effect of judicial and other sale of railroads; to limit the amount of stocks and bonds and other indebtedness that may be issued by railroad companies, and to regulate the manner of issuing, registering and securing the same; to prescribe penalties for violating the provisions of this act, and to prescribe the duties of the railroad commission and the attorney general in relation thereto," being chapter 50 of the acts of the legislature of Texas of 1893, and this chapter. Said corporation, after such decision of said railroad commission, shall have the right to issue its said stock and bonds, or either, and also to increase its stock and bonds, or either, without the control of said railroad commission, and without complying with the acts aforesaid in reference thereto; and said stock and bonds, when so issued, shall in all respects be as valid and binding as they would be if there were no such acts. [Acts 1903, p. 29, sec. 1.]

**Art. 6732. Stocks and bonds may issue for double tracks.**—Any railroad company chartered under the laws of this state, whenever the railroad commission shall find it advisable to authorize it to do so, may construct, own and operate an additional line of road upon its right of way, together with all necessary sidings, switches and turnouts, and may issue stock and bonds, or bonds, in an amount equal to the reasonable cost of such improvements, the same to be issued in accordance with the provisions of this chapter; and the railroad commission of the state of Texas is empowered to authorize the execution and issuance of such stock and bonds, or bonds; and, in determining the right to issue such stock and bonds, or bonds, the said commission shall not consider the amount of outstanding stock, indebtedness or bonds previously issued and secured by lien upon the property of such corporation theretofore constructed. [Acts 1903, p. 131, sec. 1.]

## CHAPTER SEVENTEEN

### INTERURBAN RAILROAD COMPANIES

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| <p><b>Art.</b><br/>6733. Right of eminent domain.<br/>6734. Width of right of way, survey, etc.<br/>6735. May construct across streams, streets, etc.<br/>6736. Same powers of eminent domain as steam railroads.<br/>6737. May condemn easement over other electric railway tracks, etc.</p> | <p><b>Art.</b><br/>6738. Proceedings to condemn easement.<br/>6739. "Interurban railway company" defined.<br/>6740. Chartered rights may include sale of electric lights and power.<br/>6741. The provisions of this chapter cumulative.</p> |
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**Article 6733. Right of eminent domain.**—All corporations chartered for the purpose of constructing, acquiring, maintaining and operating lines of electric railway between any cities and towns in the state of Texas, for the transportation of freight or passengers, or both, shall have the right of eminent domain, as fully to all intents and purposes as is now conferred by law upon steam railroad corporations, and shall have the right and power to enter upon, condemn and appropriate the lands, rights of way, easements and property of any person or corpora-

tion whomsoever for the purpose of acquiring rights of way upon which to construct and operate their lines of railways and sites for depots and power plants; provided, that no cemetery grounds, nor any part thereof, shall be so taken or condemned. [Acts 1907, p. 23, sec. 1.]

**Street railways.**—This act does not apply to street railways. Galveston, H. & S. A. Ry. Co. v. Houston Electric Co., 57 C. A. 170, 122 S. W. 287.

**Art. 6734. Width of right of way, survey, etc.**—Such corporation shall have the right and power to lay out rights of way for their railways not to exceed two hundred feet in width, and to construct their railways and appurtenances thereon, and, for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of their said railways, and to cut down any standing trees, or remove any other structure that may be in danger of falling upon or obstructing such railway, compensation being made therefor in accordance with law. And to the accomplishment of these ends, such corporation shall have the right to cause such examination and survey of their proposed railways to be made as may be necessary to the selection of the most advantageous route, and for such purposes may enter upon the lands or waters of any person or corporation subject to responsibility for all damages that may be occasioned thereby. [Id. sec. 2.]

**Validity of conveyance for right of way.**—A conveyance of land for an interurban railroad right of way is not void because the corporation is not authorized to take and hold land, to exercise the right of eminent domain, or to construct and operate an interurban road. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

**Consent of owner to use of land for right of way.**—A traction company constructing an interurban road over land with the consent of the owner held entitled to rely on estoppel to prevent the owner from ousting it. Knowles v. Northern Texas Traction Co. (Civ. App.) 121 S. W. 232.

Evidence held to support a finding that a corporation owning land agreed to the construction of a right of way over the land for a traction company, authorizing the company to claim the right of way. Id.

A corporation giving its consent to the construction of a railroad track over its land held not entitled to revoke the consent but confined to an action for damages resulting from the use of the land. Id.

**Art. 6735. May construct across streams, streets, etc.**—Such corporations shall have the right and power to construct their railways along, across and over any stream of water, water course, bay, navigable water, arm of the sea, street, highway, steam railway, plank road, turnpike or canal which the route of such railway shall touch, and shall have the right to erect and operate bridges, trams, trestles, or causeways over, along or across any such stream, water course, navigable water, bay, arm of the sea, street, highway, plank road, turnpike, or canal; provided, however, that any such bridge or other structure shall be so erected as not unnecessarily or unreasonably to prevent the navigation of any such stream, water course, bay, arm of the sea, or navigable water; and provided, further, that nothing herein contained shall authorize the construction of any such railway upon or across any street, alley, square, or property of any incorporated city or town, without the assent of said corporation of said city or town, and that in case of the construction of any electric railway along and upon highways, plank roads, turnpikes or canals, such interurban electric railway company shall first obtain the consent of the lawful authorities having the jurisdiction of the same. [Id. sec. 3.]

**Art. 6736. Same powers of eminent domain as steam railroads.**—All rights and powers of eminent domain and condemnation of property in this title hereinbefore set out and conferred upon steam railway companies of this state, and the manner of exercise thereof, are hereby conferred upon interurban railway companies mentioned in this chapter. [Id. sec. 4.]

**Art. 6737. May condemn easement over other electric railway tracks, etc.**—The right of condemnation herein given to interurban electric railway companies shall include the power and authority to con-

demn, for their use and benefit, easements and rights of way to operate interurban cars along and upon the track or tracks of any electric street railway company owning, controlling or operating such track or tracks upon any public street or alley in any town or city of this state for the purpose hereinafter mentioned, subject to the consent, authority and control of the city council of such town or city. [Id. sec. 5.]

**Art. 6738. Proceedings to condemn easement.**—Any such interurban electric railway company, seeking to avail itself of the benefits of this chapter shall have the right to condemn an easement along and upon the track or tracks of any electric street railway company for the purposes only of securing an entrance into and an outlet from a town or city upon a route to be designated by the city council or other city authorities in control of the streets and alleys of such city. And in any proceeding to condemn an easement or right of way for the purposes above mentioned, the court, or the jury trying the case, shall define and fix the terms and conditions upon which such easement or right of way shall be used; provided, the court rendering such judgment shall be authorized upon a subsequent application or applications by either of the parties to the original proceedings, or any one claiming through or under them, to review and reform the terms and conditions of such grant and the provisions of such judgment, and the hearing upon such application shall be in the nature of a retrial of said cause with respect to the terms and conditions upon which said easement shall be used; but the court shall not have power upon any such rehearing to declare such easement forfeited, or to impair the exercise thereof; provided, that no application for a rehearing shall be made until two years after the final judgment on the last preceding application. [Id. sec. 5.]

**Art. 6739. "Interurban railway company" defined.**—An interurban electric railway company, within the meaning of this chapter, is a corporation chartered under the laws of this state for the purpose of conducting and operating an electric railway between two cities or between two incorporated towns, or between one city and one incorporated town in this state; and the rights secured under this chapter by any interurban company shall be inoperative and void if the road to be constructed under the charter of said company is not fully constructed from a city or incorporated town to some other city or incorporated town within twelve months from the date of the final judgment awarding to said company said easements and right of way. Any interurban company availing itself of the privileges conferred by this chapter is hereby prohibited from receiving for transportation at any point on that portion of the track or tracks so condemned, without the consent of the company over whose track or tracks the easement is condemned, any freight or passengers destined to a point or points between the termini of the track or tracks so condemned; and a wilful violation by the company of this provision of this article shall operate to forfeit such easements or rights of way. If this article shall be held by the courts of this state invalid for any reason, such invalidity shall not affect any other article or portion of this chapter. [Id. sec. 5.]

Regulation of carriers, and rights, duties and liabilities of carriers.—See Title 20.

Liability for injuries to employes.—See Art. 6640 et seq., and notes.

Gross earnings taxes.—See Art. 7378.

**Art. 6740. Chartered rights include sale of electric lights and power.**—Such interurban electric railway companies shall also have the right and authority to produce, supply and sell electric light and power to the public and to municipalities. [Id. sec. 6.]

**Art. 6741. Provisions of this chapter cumulative.**—The provisions of this chapter shall be held and construed to be cumulative of all general laws of this state on the subject of interurban electric railways when not in conflict herewith; but nothing contained in this chapter

shall be construed to have the effect to confer the power of eminent domain, or any of the powers herein conferred, except those conferred in the preceding article, upon any interurban railroad or interurban railroad company, or upon any person, firm, association, corporation, or to add to the powers already possessed by any such railroad, or railroad company, person, firm, association or corporation, so as to enable or authorize it to condemn any land or ground occupied by any portion of its line or track, already constructed March 5, 1907, or to condemn any land or ground for the purpose of changing the location of any track or line already constructed at said date; provided, that nothing contained in this article shall be construed to take from any interurban railroad company, person, firm, association or corporation, any power of eminent domain already possessed by it. [Id. sec. 7.]

## CHAPTER EIGHTEEN

### STREET RAILROADS

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| <p>Art.<br/>6742. Half fare for children in cities of forty thousand or more inhabitants.</p> <p>6743. Reduced tickets, how used and sold, etc.</p> | <p>Art.<br/>6744. Free fare for children under five years of age.</p> <p>6745. Transfers regulated.</p> |
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[See notes of decisions relating to Street Railroads in general, at end of chapter.]

**Article 6742. Half fare for children in cities of forty thousand and more inhabitants.**—All persons or corporations, owning or operating street railways in or upon the public streets of any town or city in this state of not less than forty thousand inhabitants, are required to carry children of the age of twelve years or less at and for one-half the charge or fare regularly collected by such person or corporation for the transportation of adult persons; provided, that this article shall not apply to street cars carrying children or students to and from schools, colleges, or other institutions of learning, situated at a distance of one mile or more beyond the limits of the incorporated city or town from which said cars run. [Acts 1903, p. 182, sec. 1.]

**Regulation of rates.**—The legislature has the power to regulate the rates of fare of a street railway company in the absence of any provision in its charter relinquishing that right, provided the rates are not so unreasonable as to practically destroy the value of the property of the corporation. *San Antonio Traction Co. v. Altgelt* (Civ. App.) 81 S. W. 108.

**Art. 6743. Reduced tickets, how used and sold, etc.**—All such persons or corporations, owning or operating street railways, shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one-half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age in actual attendance upon any academic, public or private school, of grades not higher than the grades of the public high schools of this state, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only upon the presentation by the student desiring to purchase the same of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used, except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets. [Id. sec. 2.]

**Art. 6744. Free fare for children under five years.**—All such persons or corporations are required to transport children of the age of five years or less, when attended by a passenger of above said age, free of charge. [Id. sec. 3.]

**Art. 6745. Transfers regulated.**—All such persons or corporations are required to accord to all passengers referred to in the foregoing articles of this chapter the same rights as to the use of transfers issued by their own or other lines as are or may be accorded to passengers paying full fare. [Id. sec. 4.]

#### DECISIONS RELATING TO STREET RAILROADS IN GENERAL

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| <p><b>I. Establishment, construction and maintenance.</b></p> <ol style="list-style-type: none"> <li>1. Right to construct and operate.</li> <li>2. What constitutes street railroad.</li> <li>3. Crossing with other railroads.</li> <li>4. Sale of property.</li> <li>5. Consolidation of roads.</li> <li>6. Contract to operate for term of years.</li> <li>7. Power of city to assess and collect taxes.</li> <li>8. Gross earnings taxes.</li> </ol> <p><b>II. Regulation and operation.</b></p> <ol style="list-style-type: none"> <li>9. Power of city to regulate.</li> <li>10. Companies liable for injuries.</li> <li>11. Care required in operation of road.</li> <li>12. Right to use streets.</li> <li>13. Defects in tracks or equipment and obstructions in streets.</li> <li>14. Frightening animals.</li> </ol> | <ol style="list-style-type: none"> <li>15. Collisions between cars.</li> <li>16. Collisions with animals or vehicles.</li> <li>17. Injuries to persons on or near tracks—In general.</li> <li>18. — Signals and lookouts.</li> <li>19. — Duty on seeing person on or approaching track.</li> <li>20. — Right to presume persons will leave track.</li> <li>21. — Children.</li> <li>22. Contributory negligence—In general.</li> <li>23. — Drivers of vehicles and persons therein.</li> <li>24. — Children.</li> <li>25. Proximate cause of injury.</li> <li>26. Injury avoidable notwithstanding contributory negligence.</li> <li>27. Sufficiency of evidence.</li> <li>28. Notice of claim for damages.</li> <li>29. Injuries to employes.</li> </ol> |
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#### I. ESTABLISHMENT, CONSTRUCTION AND MAINTENANCE

**1. Right to construct and operate.**—A natural person or a firm or joint-stock association can engage in the business of operating an electric street railway as well as a corporation. *Beaumont Traction Co. v. State*, 57 C. A. 605, 122 S. W. 615, 618.

**2. What constitutes street railroad.**—Fact that an electric railway company carries mail, persons, and property would not render it a commercial, and not a street, railroad. *Galveston, H. & S. A. Ry. Co. v. Houston Electric Co.*, 57 C. A. 170, 122 S. W. 287.

**3. Crossing with other railroads.**—Where a street railway company had been given permission to construct its road along a public highway by the commissioners' court, held, that it could not be deprived of that right by objection of a steam railway company which had previously been permitted to cross the road. *Galveston, H. & S. A. Ry. Co. v. Houston Electric Co.*, 57 C. A. 170, 122 S. W. 287.

The invalidity of a portion of a contract providing for crossing of street car tracks over a railroad's right of way held not to invalidate a provision for division of the cost of maintaining lights and safety appliances at the crossing. *Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.* (Civ. App.) 124 S. W. 987.

**4. Sale of property.**—Where a street railroad has power to sell its property under certain conditions, it was held that a deed thereof passed a prima facie title, although it did not recite the existence of such conditions. *Farmers' & Merchants' Nat. Bank v. Scott*, 19 C. A. 22, 45 S. W. 26.

**5. Consolidation of roads.**—A consolidation agreement held to charge defendant with liability of the consolidated street car company to contribute to the cost of maintaining lights at a crossing over the tracks of a railroad company. *Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.*, 103 T. 49, 123 S. W. 124.

A consolidation agreement held to charge defendant with liability of the consolidated street car company to contribute to the cost of maintaining lights at a crossing over the tracks of a railroad company. *Beaumont Traction Co. v. Texarkana & Ft. S. Ry. Co.* (Civ. App.) 124 S. W. 987.

**6. Contract to operate for term of years.**—Contract between street railroad company and property owner on the line held to require the road to be operated continuously for 25 years. *Santa Fé St. Ry. Co. v. Schutz*, 37 C. A. 14, 83 S. W. 39.

**7. Power of city to assess and collect taxes.**—See Art. 863.

**8. Gross earnings taxes.**—See Art. 7378.

#### II. REGULATION AND OPERATION

**9. Power of city to regulate.**—See Arts. 862 and 863.

**10. Companies liable for injuries.**—Where plaintiff was injured while crossing the track by reason of its defective condition, the fact that the cars were operated by another company than defendant, who owned the track, did not relieve it from liability. *Houston City St. Ry. Co. v. Medlenka*, 17 C. A. 621, 43 S. W. 1028.

Rights stated, as between two persons liable through their negligence for injury to a third person, where one was the active perpetrator of the wrong and the negligence of the other was merely passive. *Austin Electric Ry. Co. v. Faust* (Civ. App.) 133 S. W. 449.



11. **Care required in operation of road.**—A street railway company has no right to the exclusive use of any part of the street upon which its track is laid, and is bound to use ordinary prudence in the operation of its cars. *San Antonio Traction Co. v. Kumpf* (Civ. App.) 99 S. W. 863.

The care required of a motorman to avoid accidents with persons getting in the way of the car stated. *Dallas Consol. Electric St. Ry. Co. v. Chambers*, 55 C. A. 331, 118 S. W. 851.

12. **Right to use streets.**—Street cars have no exclusive right to use the streets, but have a preferential right. *Austin Electric Ry. Co. v. Faust* (Civ. App.) 133 S. W. 449.

13. **Defects in tracks or equipment and obstructions in streets.**—Degree of care required in maintaining wires of electric street railroad determined. *Citizens' Ry. Co. v. Gifford*, 19 C. A. 631, 47 S. W. 1041.

A street railway company, purchasing the property and franchise of another company, held bound to exercise ordinary care to keep a street on which a track was laid in condition for travel. *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

A street railroad company, purchasing the property of another company and its franchise to build and operate a street railroad, held required to use ordinary care to keep the tracks constructed by the selling company in a reasonably safe condition for public travel. *Id.*

It is the duty of a street railroad company to use reasonable care to keep its roadbed in repair, so as not to obstruct travel across or along the same. *San Antonio Traction Co. v. Cassanova* (Civ. App.) 154 S. W. 1190.

It was not necessary to plead or prove that it was the duty of defendant to keep its track in such condition as not to interfere with free and unimpeded travel over the tracks. *Id.*

14. **Frightening animals.**—Where the horse plaintiff's wife was driving frightened at a street car, it was not error to instruct that defendant would be liable if the gong was sounded after either the conductor or motorman discovered that the horse had been frightened thereby, without regard to whether the gong was sounded by the one who made the discovery. *Denison & S. Ry. Co. v. Powell*, 35 C. A. 454, 80 S. W. 1054.

15. **Collisions between cars.**—A street car motorman injured in a rear end collision with a car of another company operated on the same track held negligent as a matter of law precluding a recovery against such other company. *Texas Traction Co. v. Bogue* (Civ. App.) 139 S. W. 1042.

Where a street car motorman was injured by bringing his car in a collision with a preceding car belonging to another company, defendant was entitled to plead plaintiff's violation of the rules of his own company to establish contributory negligence. *Id.*

16. **Collisions with animals or vehicles.**—In an action for injuries received in a collision with a street car, an instruction that the street railway company had no right to the exclusive use of the street held proper. *San Antonio Traction Co. v. Kumpf* (Civ. App.) 99 S. W. 863.

After a motorman in charge of a street car discovers the peril of the driver of a vehicle attempting to cross the track in front of the car, he must use every care in his power consistent with the safety of his passengers to avoid injury, and the use of only ordinary care is not sufficient. *Austin Electric Ry. Co. v. Faust* (Civ. App.) 133 S. W. 449.

Where a motorman saw a boy attempting to cross in front of the car, or the manner of driving was such as to reasonably indicate an intent to do so, he was bound to use proper care to prevent a collision, and could not take chances on the boy's getting across, nor wait until the danger was manifest. *Galveston Electric Co. v. Antonini* (Civ. App.) 152 S. W. 841.

17. **Injuries to persons on or near tracks—In general.**—The degree of care required by a street car company to avoid injuring persons on and along the tracks, stated. *San Antonio Traction Co. v. Haines*, 45 C. A. 289, 100 S. W. 788.

A street railway company must exercise ordinary care to prevent injuring those on the street or crossing its tracks to take passage. *San Antonio Traction Co. v. Leverson*, 52 C. A. 122, 113 S. W. 569.

Where a street railway company had provided a bench for waiting passengers, its operators were bound to regard the act of a prospective passenger crossing from one corner to the other as a signal to stop that he might take passage. *Id.*

Liability of a street railway company for injury to persons on its track determined. *San Antonio Traction Co. v. Young* (Civ. App.) 141 S. W. 572.

18. — **Signals and lockouts.**—In the absence of a statute or ordinance requiring it, held there was no implied negligence in failing to sound the gong or bell of a street car. *Citizens' Ry. Co. v. Holmes*, 19 C. A. 266, 46 S. W. 116.

In an action for injuries to a traveler by a street car, an instruction requiring the motorman to look on each side of his car to see that no persons were about to get on the track, etc., held erroneous. *Metropolitan St. Ry. Co. v. Kirkpatrick* (Civ. App.) 94 S. W. 1092.

In the absence of any ordinance requiring the giving of signals of the approach of street cars, a failure to do so is not negligence per se. *El Paso Electric Ry. Co. v. Adkins*, 56 C. A. 202, 120 S. W. 218.

19. — **Duty on seeing person on or approaching track.**—A motorman who discovers the peril of a person on the tracks is bound to use only ordinary care to use all the means at hand to avoid injuring the person in peril. *Beaty v. El Paso Electric Ry. Co.* (Civ. App.) 91 S. W. 365.

In an action against a street railway company for injuries to a pedestrian in a collision, with a car, a finding of negligence in failing to stop the car, after discovering the pedestrian's peril, held justified. *Northern Texas Traction Co. v. Thompson*, 42 C. A. 613, 95 S. W. 708.

A motorman upon discovering the perilous position of a person upon a trestle must use every means reasonably within his power to avoid running such person down. *Northern Texas Traction Co. v. Mullins*, 44 C. A. 566, 99 S. W. 433.

Where a motorman, upon discovering a pedestrian upon a trestle, could not reasonably have foreseen that he would not leave the track in time to avoid injury, the railway company is not liable for injuries received as the result of his being run down. *Id.*

Failure of a motorman, on discovering the perilous position of a person on the track, to use all reasonable means to avoid a collision, held not to render the railway company liable, unless the use of such means would have avoided the accident. *San Antonio Traction Co. v. Kumpf* (Civ. App.) 99 S. W. 863.

Where a motorman used proper care to prevent an injury as soon as he realized the danger and that plaintiff would attempt to drive in front of his car, the issue of discovered peril was not raised. *Logre v. Galveston Electric Co.* (Civ. App.) 146 S. W. 303.

20. — **Right to presume persons will leave track.**—If an adult person is seen on the track it may be presumed that he will leave the track before the car reaches him. When the danger is imminent, the operator must use the highest degree of care to avert it. If a child is on a street railway track in advance of a moving car, the person operating it is not at liberty to act on the assumption that it will see the danger and avert it. *Railroad Co. v. Hewitt*, 67 T. 473, 3 S. W. 705, 60 Am. Rep. 32.

The rule that an engineer or motorman may act on the theory that a person on or near the track, who sees a train or car approaching, will get out of the way of danger, has no application after it becomes reasonably apparent that this will not be done. *Denison & S. Ry. Co. v. Craig*, 35 C. A. 548, 80 S. W. 865.

A person in charge of a car ordinarily has a right to assume that one walking on the track will step aside in time to avoid injury. *San Antonio Traction Co. v. Kelleher*, 48 C. A. 421, 107 S. W. 64.

21. — **Children.**—In an action for injuries to a child by a street car, the motorman held guilty of negligence. *San Antonio Traction Co. v. Court*, 31 C. A. 146, 71 S. W. 777.

It was the duty of the motorman to use every effort to prevent injury to a boy who he saw was not aware of the approaching car, and would probably run on the track in front of it. *Galveston City Ry. Co. v. Hanna*, 34 C. A. 608, 79 S. W. 639.

Where a boy on street paid no attention to warnings of approaching car, it was motorman's duty to lessen the car's speed, and not attempt to run by the boy. *Id.*

22. **Contributory negligence.**—In general.—One passing over or on the track of a street railway should exercise diligence to ascertain the approach of a car, as well as caution to avoid a collision. *Citizens' Ry. Co. v. Holmes*, 19 C. A. 266, 46 S. W. 116.

Plaintiff, injured in a collision with a street car, held under the evidence not to have been guilty of contributory negligence as a matter of law. *San Antonio Traction Co. v. Upson*, 31 C. A. 50, 71 S. W. 665.

Though the public has an equal right with a street railway company to use a street, a person is not entitled to go on a street made dangerous by the tracks of such railway, if a person of ordinary care would not have done so. *Citizens' Ry. Co. v. Gossett*, 37 C. A. 603, 85 S. W. 35.

In a personal injury case, plaintiff held guilty of contributory negligence. *San Antonio Traction Co. v. Kelleher*, 48 C. A. 421, 107 S. W. 64.

A pedestrian is not ordinarily negligent in making a legitimate use of a street on which a street car is operated, though it be the part of the street used by the railroad company. *San Antonio Traction Co. v. Levysen*, 52 C. A. 122, 113 S. W. 569.

Deceased held not necessarily negligent, as a matter of law, because he stepped immediately in front of a moving street car. *Id.*

A person need not always look and listen for approaching cars before going on a street railroad track, and the measure of ordinary care may be satisfied by the exercise of either the sense of hearing or sight. *Northern Texas Traction Co. v. Hunt*, 54 C. A. 415, 118 S. W. 827.

One using a street car track held not entitled to station himself on the track and remain there heedless until he is struck by a passing car. *El Paso Electric Ry. Co. v. Adkins*, 56 C. A. 202, 120 S. W. 218.

The mere failure of a person approaching a street railway crossing to look and listen for cars is not negligence per se. *Jones v. Rapid Transit Ry. Co.* (Civ. App.) 146 S. W. 618.

23. — **Drivers of vehicles and persons therein.**—Evidence held sufficient to warrant a finding that plaintiff, whose wagon collided with defendant's street car, was not guilty of contributory negligence imputable to his son, who was killed while riding with plaintiff. *Citizens' Ry. Co. v. Washington*, 24 C. A. 422, 58 S. W. 1042.

In an action against a street railway company for damages from collision, evidence held not to show contributory negligence proximately contributing to the injury. *Dallas Consol. Electric St. Ry. Co. v. Ilo*, 32 C. A. 290, 73 S. W. 1076.

Contributory negligence of a husband, driving with his wife over a street on which a street car track was so laid as to protrude above the surface of the street, will preclude recovery by him for injuries to his wife. *Citizens' Ry. & Light Co. v. Johns*, 52 C. A. 489, 116 S. W. 62.

An instruction, in an action for injuries in a collision with a street car, authorizing a verdict for defendant on plaintiff's act in driving suddenly in front of the car proximately contributing to the injury, held properly refused. *Northern Texas Traction Co. v. Hunt*, 54 C. A. 415, 118 S. W. 827.

A driver of a vehicle approaching a street railroad crossing must exercise ordinary care in going upon the track to see that he may do so with safety. *Jones v. Rapid Transit Ry. Co.* (Civ. App.) 146 S. W. 618.

24. — **Children.**—Contributory negligence shown. *San Antonio St. Ry. Co. v. Caillonette*, 79 T. 341, 15 S. W. 390.

25. **Proximate cause of injury.**—A street railway held not relieved from liability for injuries to driver of a vehicle, resulting from defective track, by reason of concurrent negligence of another road. *Shelton v. Northern Texas Traction Co.*, 32 C. A. 507, 75 S. W. 338.

A street car motorman's failure to use all the power within his means to prevent a collision held the proximate cause of the collision. *El Paso Electric Ry. Co. v. Kelly* (Civ. App.) 109 S. W. 415.

Where car tracks project too far above the street, and occupants of a vehicle, in attempting to get off the track on seeing an approaching car, were prevented by the projection, the projecting track was the proximate cause of the injury. *San Antonio Traction Co. v. Cassanova* (Civ. App.) 154 S. W. 1190.

26. Injury avoidable notwithstanding contributory negligence.—Plaintiff's contributory negligence in attempting to cross a street car track held to preclude recovery, though defendant could have discovered his danger in time to prevent the accident. *Austin Dam & S. Ry. Co. v. Goldstein*, 18 C. A. 704, 45 S. W. 600.

Contributory negligence of one injured while attempting to cross a street railway track in front of a moving car held to prevent recovery if the motorman did not actually see plaintiff's peril in time to have stopped the car. *Dallas Consol. Electric St. Ry. Co. v. Conn* (Civ. App.) 100 S. W. 1019.

Contributory negligence of one struck by a street car in attempting to cross the track in front of a moving car held to bar recovery if the motorman could not have stopped with the appliances at hand in time to have avoided the collision. *Id.*

27. Sufficiency of evidence.—Evidence held to show negligence of motorman. *City Ry. Co. v. Thompson*, 20 C. A. 16, 47 S. W. 1038.

In an action for injuries to a child by a street car, evidence held to justify a finding that the car was moving slowly at the time of the injury. *San Antonio Traction Co. v. Court*, 31 C. A. 146, 71 S. W. 777.

In an action against a street railway company for damages from collision, evidence held to show negligence on the part of defendant. *Dallas Consol. Electric St. Ry. Co. v. Ilo*, 32 C. A. 290, 73 S. W. 1076.

In an action for injuries sustained by reason of plaintiff's wife being struck by an interurban car, evidence examined, and held to sustain a judgment for plaintiff. *Northern Texas Traction Co. v. Mullins*, 44 C. A. 566, 99 S. W. 433.

In an action for injuries to one run over by a street car, evidence considered, and held sufficient to sustain a finding that plaintiff was not guilty of contributory negligence, and that her injuries were caused by the negligence of defendant. *San Antonio Traction Co. v. Haines*, 45 C. A. 289, 100 S. W. 788.

In a personal injury action against a street railroad company, evidence held to support a finding that defendant's motorman discovered that plaintiff was about to go upon the track in front of the moving car in time to have avoided injury, but negligently attempted by increasing speed to pass plaintiff before he actually got on the track. *Northern Texas Traction Co. v. Smith* (Civ. App.) 110 S. W. 774.

In an action for death of a pedestrian in a collision with a street car at a street intersection, evidence held to warrant a finding that the motorman's negligence in failing to keep a proper lookout was the proximate cause of the death. *San Antonio Traction Co. v. Levysen*, 52 C. A. 122, 113 S. W. 569.

Evidence held to warrant a finding that defendant's motorman was negligent in failing to keep a lookout for people on and at the intersection of streets where intestate was struck and killed. *Id.*

Evidence, in an action against a street railroad for personal injuries and for value of property destroyed, held sufficient to sustain a finding that plaintiff was guilty of contributory negligence. *Jones v. Rapid Transit Ry. Co.* (Civ. App.) 146 S. W. 618.

Evidence held sufficient to show that a collision between street cars was violent enough to cause the 'injuries complained of, and that they were the proximate and direct result of such collision. *San Antonio Traction Co. v. Roberts* (Civ. App.) 152 S. W. 455.

On the issue of discovered peril, evidence held sufficient to show that the motorman realized the perilous position of the occupants of the vehicle struck by his car in time to have stopped the car. *San Antonio Traction Co. v. Cassanova* (Civ. App.) 154 S. W. 1190.

28. Notice of claim for damages.—See Art. 5714.

29. Injuries to employes.—See Art. 6640 et seq. and notes.

## CHAPTER EIGHTEEN A

### STATE RAILROAD

Art.  
6745a. Management, in whom vested.  
6745b. Office of manager created; powers.  
6745c. Appointment, etc.  
6745d. Oath and bond.

Art.  
6745e. Appropriation.  
6745f. Duties of manager; moneys, how paid, etc.

**Article 6745a. Management, in whom vested.**—That the management, control and operation of the state railroad, running from Rusk to Palestine, be and the same is hereby taken out of the hands of the prison commission and vested in a manager, as hereinafter provided for. [Acts 1913, p. 279, sec. 1.]

**Art. 6745b. Office of manager created; powers.**—That there is hereby created the office of manager of the state railroad running from Rusk to Palestine, and that said manager be and is hereby vested with full

power and authority to manage, control and operate said railroad and to repair and improve the same and with the approval of the governor to employ such assistance as may be necessary for the successful operation of such railroad. [Id. sec. 2.]

**Art. 6745c. Appointment, etc.**—Said manager shall be appointed by the governor to hold his office for a term of two years; provided that the governor may at any time, for good cause, remove said manager and appoint his successor. [Id. sec. 3.]

**Art. 6745d. Oath and bond.**—Said manager shall before entering upon the duties of his office be required to take the oath of office provided by the constitution and enter into bond payable to the governor of the state of Texas for the sum of \$50,000.00, conditioned that he shall faithfully perform the duties of such office and pay over all sums in money and deliver all property that may come into his hands as provided by law. [Id. sec. 4.]

**Art. 6745e. Appropriation.**—For the purpose of enabling said manager to repair and equip said railroad, to improve, develop and operate the same, and to purchase engines, cars and equipment therefor, that there be and is hereby appropriated out of the general revenue not otherwise appropriated, the sum of \$60,000.00 or so much thereof as may be necessary; provided that all expenditures made by virtue hereof shall be made by and with the consent and approval of the governor. [Id. sec. 5.]

**Art. 6745f. Duties of manager; moneys, how paid, etc.**—Said manager shall cause to be kept a complete and accurate system of books, showing the receipts and disbursements of said railroad and shall make an itemized report thereof to the comptroller on or before the tenth day of each month, and oftener if required to do so by the governor, and all moneys received during the preceding month shall be paid into the state treasury through the comptroller's deposit warrant, and all moneys received from the railroad and all moneys appropriated by the legislature and deposited in the state treasury to the credit of said railroad, shall be subject to payment for the necessary expenses incurred in the maintenance and operation of said railroad upon itemized accounts sworn to by the manager and approved by the governor and filed in the comptroller's department. The receipt of said itemized account, properly sworn to by the manager and approved by the governor, shall be authority for the comptroller to issue his warrant on the treasury for the amount of said account or claim. Provided, that in no event shall the comptroller issue a warrant on the treasury in excess of the amount deposited or appropriated to that special fund. [Id. sec. 6.]

## CHAPTER NINETEEN

### GENERAL PROVISIONS

<p>Art. 6746. Separate coaches for white and negro passengers. 6747. "Negro" defined. 6748. Separate coaches, how defined and marked. 6749. Penalty.</p>	<p>Art. 6750. Exceptions and limitations as to provisions. 6751. Law to be posted conspicuously. 6752. Does not apply to excursions. 6753. Conductor to exclude passengers from wrong car.</p>
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**Article 6746. Separate coaches for white and negro passengers.**—Every railway company, street car company, and interurban railway company, lessee, manager, or receiver thereof, doing business in this state as a common carrier of passengers for hire, shall provide separate

coaches or compartments, as hereinafter provided, for the accommodation of white and negro passengers, which separate coaches or compartments shall be equal in all points of comfort and convenience. [Acts 1907, p. 58.]

**Constitutionality.**—This law requiring railroads to furnish separate coaches or compartments for whites and negroes is not repugnant to the federal organic law, and the penalty for violating the law may be imposed. *Southern Kan. Ry. Co. v. State*, 44 C. A. 218, 99 S. W. 166.

**Equal accommodations.**—The right of a passenger to recover damages for failure to furnish coaches equal in all points of comfort, etc., is based on injuries, physical and mental. *Norwood v. Railway Co.*, 12 C. A. 560, 34 S. W. 180.

Damages must be shown to authorize an action. *Norwood v. Railway Co. (Civ. App.)* 34 S. W. 180. See *Henderson v. Railway Co. (Civ. App.)* 38 S. W. 1136.

**Art. 6747. "Negro" defined.**—The term "negro," used herein, includes every person of African descent as defined by the statutes of this state. [Id. sec. 2.]

**Art. 6748. Separate coaches, how defined and marked.**—Each compartment of a railroad coach, divided by good and substantial wooden partitions with a door therein, shall be deemed a separate coach within the meaning of this chapter; and each separate coach shall bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart; and each compartment of the street car or interurban car, divided by board or marker placed in a conspicuous place, bearing appropriate words in plain letters indicating the race for which it is set apart, shall be sufficient as a separate compartment within the meaning of this chapter. [Id. sec. 3.]

**Art. 6749. Penalty.**—Any railway company, street car company, or interurban railroad company, lessee, manager or receiver thereof, which shall fail to provide its cars bearing passengers with separate coaches or compartments, as above provided for, shall be liable for each and every failure to a penalty not less than one hundred nor more than one thousand dollars, to be recovered by suit in the name of the state in any court of competent jurisdiction; and each trip run with such train or street car or interurban car without such separate coach or compartment shall be deemed a separate offense. [Id. sec. 4.]

**Authority of county attorney.**—Const. art. 5, § 21, provides that the county attorney shall represent the state in all cases in the district and inferior courts in their respective counties; but, if a county shall be included in a district in which there shall be a district attorney, the respective duties of district attorneys and county attorneys shall in such counties be regulated by the legislature. Held that, there being no statute conferring on county attorneys authority to sue in behalf of the state for penalties under these articles, a county attorney for a county in a district in which there was a district attorney could not sue. *State v. Texas Cent. R. Co. (Civ. App.)* 130 S. W. 663.

**Art. 6750. Exceptions and limitations as to provisions.**—The provisions of this chapter shall not be so construed as to prohibit nurses from traveling in any coach or compartment with their employer, or employés upon the train or cars in the discharge of their duty, nor shall it be construed to apply to such freight trains as carry passengers in cabooses; provided, that nothing herein contained shall be construed to prevent railroad companies in this state from hauling sleeping cars, dining or cafe cars, or chair cars, attached to their trains, to be used exclusively by either white or negro passengers, separately but not jointly. [Id. sec. 6.]

**Negro's right in sleeping car.**—A negro passenger, having a sleeping car ticket from a point outside to a point in Texas, held unlawfully ejected from the car on its arrival in Texas. *Pullman Palace-Car Co. v. Cain*, 15 C. A. 503, 40 S. W. 220.

**Art. 6751. Law to be posted conspicuously.**—Every railroad company carrying passengers in this state shall keep this law posted in a conspicuous place in each passenger depot and each passenger coach provided in this law. [Id. sec. 7.]

**Art. 6752. Does not apply to excursions.**—The provisions of this law shall not apply to any excursion train or street car or interurban car as such for the benefit of either race. [Id. sec. 8.]

**Art. 6753. Conductors to exclude passengers from wrong car.**—Conductors of passenger trains, street cars, or interurban lines, provided with separate coaches, shall have the authority to refuse any passenger admittance to any coach or compartment in which they are not entitled to ride under the provisions of this law; and the conductor in charge of the train or street car, or interurban car, shall have authority, and it shall be his duty, to remove from a coach or street car, or interurban car, any passenger not entitled to ride therein under the provisions of this chapter, and upon his refusal to do so knowingly shall be punished as provided in the Penal Code of this state. [Id. sec. 9.]

**Negro in car for whites.**—It is not negligence per se under this article to permit a negro to enter a car reserved for white people and remain there for a short time, in a case where a woman sued the railway company for damages caused by an assault by a negro, while she was in the car. *Segal v. St. T. S. W. Ry. Co.*, 35 C. A. 517, 80 S. W. 233.

**Whites in negro coaches.**—\$1,000 held excessive damages for compelling a white woman to ride 60 miles in a negro car. *Missouri, K. & T. Ry. Co. of Texas v. Ball*, 25 C. A. 500, 61 S. W. 327.

Where white woman is compelled to ride in negro coach, she cannot recover for humiliation caused by profanity of negroes, where such misconduct was not called to the conductor's attention. *Id.*

Where carrier compels white woman to ride in negro coach, it is liable for the distress or humiliation suffered, if the direct result of its neglect. *Id.*

It is a violation of law to permit the whites to occupy the coaches set apart for the negro and it is the duty of the conductor to prevent such occupancy and to remove whites when found in negro coaches. It is not contributory negligence for negroes to stand on platform of car when the coach for negroes is so crowded with whites that he cannot go inside. *Williams v. International & G. N. Ry. Co.*, 28 C. A. 503, 67 S. W. 1085, 1087.

## TITLE 116

## RANGERS—STATE

<p><b>Art.</b> 6754. <b>Organization.</b> 6755. To consist of four companies. 6756. Compensation. 6757. Quartermaster. 6758. Under command of governor. 6759. Members to serve two years. 6760. Quartermaster to purchase supplies. 6761. Members to furnish horses, equipment, etc.</p>	<p><b>Art.</b> 6762. Arms and equipment. 6763. Rations and forage. 6764. Clothed with powers of peace officers. 6765. In case of arrest to convey prisoner to county jail. 6766. Regulations to be made by governor and adjutant general.</p>
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**Article 6754. Organization.**—The ranger force, authorized to be organized by the governor, is for the purpose of protecting the frontier against marauding or thieving parties, and for the suppression of lawlessness and crime throughout the state. [Acts 1901, p. 41, sec. 1.]

**Art. 6755. To consist of four companies.**—The ranger force shall consist of not to exceed four separate companies of mounted men, each company to consist of not to exceed one captain, one first sergeant and twenty privates, and one quartermaster for the entire force. The captains of companies and the quartermaster shall be appointed by the governor, and shall be removed at his pleasure; unless sooner so removed by the governor, they shall serve for two years and until their successors are appointed and qualified. [Id. sec. 2.]

**Art. 6756. Compensation.**—The pay of officers and men shall be as follows: Captains, one hundred dollars each, per month; sergeants, fifty dollars each, per month; and privates, forty dollars each, per month. The payments shall be made at such times and in such manner as the adjutant general of the state may prescribe. [Id. sec. 3.]

**Art. 6757. Quartermaster.**—The governor shall appoint a quartermaster for this force, who shall discharge the duties of quartermaster, commissary and paymaster, and shall rank and receive the pay of a captain. [Id. sec. 4.]

**Art. 6758. Under command of governor.**—This force shall always be under the command of the governor, to be operated by his direction, in such manner, in such detachments, and in such localities as the governor may direct. [Id. sec. 5.]

**Art. 6759. Members to serve two years.**—The governor is authorized to keep this force, or so much thereof as he may deem necessary, in the field as long as in his judgment there may be necessity for such a force; and men who may volunteer in such service shall do so for such term not to exceed two years, subject to disbandment in whole or in part at any time, and reassemblage or reorganization of the whole force, or such portion thereof as may be deemed necessary by order of the governor. [Id. sec. 6.]

**Art. 6760. Quartermaster to purchase supplies.**—The quartermaster, or, if so directed by the adjutant general, company commanders shall purchase all supplies hereinafter provided for, and shall make a certificate on the voucher of the party or parties from whom the supplies are purchased, to the effect that the account is correct and just, and the articles purchased were at the lowest market price. [Id. sec. 7.]

**Art. 6761. Members to furnish equipment, etc.**—Each officer, non-commissioned officer and private of said force shall furnish himself with a suitable horse, horse equipment, clothing, etc.; provided, that if his horse is killed in action it shall be paid for by the state at a fair market value at the time when killed. [Id. sec. 8.]

**Art. 6762. Arms and equipment.**—The state shall furnish each member of said force with one improved carbine and pistol at cost, the price of which shall be deducted from the first money due such officer or man, and shall furnish said force with rations of subsistence, camp equipage and ammunition for the officers and men, and also forage for horses. [Id. sec. 9.]

**Art. 6763. Rations and forage.**—The amount of rations and forage shall not exceed the following, to wit: For each man's daily allowance, twelve ounces bacon or twenty ounces beef, twenty ounces of flour or corn meal, two and two-fifths ounces of beans or peas, one and three-fifths ounces of rice, three and one-fifth ounces of coffee, three and one-fifth ounces of sugar, one-sixth gill of vinegar or pickles, one-sixth ounce candles, one-third ounce of soap, two-thirds of an ounce of salt, one-twenty-fourth of an ounce of pepper, four and four-fifths ounces of potatoes, sixteen-twenty-fifths of an ounce of baking powder. The forage for each horse shall not exceed twelve pounds of corn or oats, and fourteen pounds of hay per day, and two ounces of salt per week; provided, that, when in case of emergency the members of said force are employed in such duty that it is impracticable to furnish the rations herein provided for, each member of said force so employed shall be allowed for his necessary actual expenses for such subsistence not to exceed one dollar and fifty cents per day; and provided, further, that, when it becomes necessary to move the members of said force from one place to another by railroad, the actual necessary expenses of such transportation shall be paid [by the state]. [Id. sec. 10.]

**Art. 6764. Clothed with powers of peace officers.**—The officers, non-commissioned officers and privates of this force shall be clothed with all the powers of peace officers, and shall aid the regular civil authorities in the execution of the laws. They shall have authority to make arrests, and to execute process in criminal cases, and in such cases they shall be governed by law regulating and defining the powers and duties of sheriffs when in discharge of similar duties; except that they shall have the power, and shall be authorized to make arrests and to execute all process in criminal cases in any county in the state. They shall, before entering on the discharge of these duties, take an oath before some authority legally authorized to administer the same, that each of them will faithfully perform his duties in accordance with law. In order to arrest and bring to justice men who have banded together for the purpose of committing robbery, or other felonies, and to prevent the execution of the laws, the officers, non-commissioned officers and privates of said force may accept the services of such citizens as shall volunteer to aid them; but while so engaged such citizens shall not receive pay from the state for such services. [Id. sec. 11.]

**Art. 6765. In case of arrest to convey prisoner to county jail.**—When said force, or any member or members thereof, shall arrest any person charged with the commission of a criminal offense, they shall forthwith convey said person to the county where he or they stand charged with the commission of an offense, and shall deliver him or them to the proper officer, taking his receipt therefor, and all necessary expenses thus incurred will be paid by the state. [Id. sec. 12.]

**Art. 6766. Regulations to be made by governor and adjutant general.**—The governor, and adjutant general, shall cause to be made such regulations for the government and control of the organization herein provided for, and for the enlistment and employment of non-commissioned officers and privates, as they may deem necessary, to the end that the force so provided shall be as effective as possible. [Id. sec. 13.]



## TITLE 117

## RECORDS

Chap.

1. Transcribing Old Records.

Chap.

2. Supplying Lost Records, etc.

## CHAPTER ONE

## TRANSCRIBING OLD RECORDS

Art.

6767. Old records to be transcribed, when.

6768. Shall conform to the original record and be compared.

6769. Correctness to be certified, and effect of same.

6770. Original books to be preserved.

6771. To what records shall apply.

Art.

6772. Commissioners' court to have records transcribed, when.

6773. How to be transcribed.

6774. To have effect of judicial proceedings, when.

6775. Compensation for transcribing.

6776. Translations from the Spanish.

6777. Effect of such translations.

**Article 6767. [4585] Old records to be transcribed, when and how.**—It shall be the duty of the county commissioners' court of any county, when the records or indexes of such county have become or may become defaced, worn, or in any condition endangering their preservation in a safe and legible form, to procure a good and well-bound book or books, as the case may be, and require the county clerk to transcribe, or have transcribed by a sworn deputy, the records contained in such book or books, in a plain, legible hand and with some standard ink of a permanent black color. [Act Aug. 7, 1876, p. 84, sec. 1.]

**Art. 6768. [4586] Shall conform to the original record and be compared.**—The book or books so transcribed shall conform in all respects to the original record as indexed; and the designation of such transcribed book or books, whether by letter or number, shall not be changed from the original and they shall be carefully compared with the original record by said clerk or sworn deputy so transcribing the same, assisted by some other sworn deputy. [Id. secs. 1, 2.]

**Art. 6769. [4587] Correctness to be certified to, and effect of same.**—When said record or records shall have been found to be truly and correctly transcribed, the county clerk, with the sworn deputies so transcribing and verifying the same, shall certify officially, at the conclusion of the record, with the impress of the seal of said court affixed on the same page to the correctness of the same, reciting the number of pages contained in said book, from one to the highest number; after which said transcribed record or records shall have all the force and effect in judicial proceedings in the courts of the state as the original records. [Id. sec. 2.]

**Art. 6770. [4588] Original books to be preserved.**—The original book or books transcribed according to the provisions of this chapter shall be carefully kept and preserved by such clerk, as other archives of his office. [Id.]

**Art. 6771. [4589] To what records this chapter shall apply.**—The provisions of this chapter shall apply to all records belonging to the district court, county court and commissioners' court, including all records used for registration, except the records of the surveyor's office; but the clerk of the district court shall perform all the duties herein required of the county clerk so far as the same appertains to the records of the said district clerk's office; and the records so transcribed by the district clerk shall have the same force and effect as the original records.

**Art. 6772. [4590] Commissioners' court to have records transcribed, when.**—It shall be the duty of the county commissioners' court of any county in this state which may have been created, either in whole or in part from the territory of any other county or counties in this state, or to which may have been added since its creation the territory of any other county or counties in this state, to secure a well-bound book or books, as the case may be, and require the county clerk to transcribe, or have transcribed, from the record of said other county or counties by a sworn deputy, all the deeds, mortgages, conveyances, incumbrances and muniments of title affecting or in any wise relating to all lands and real property which are or may be embraced in the territory so acquired from another county or counties, and which deeds, mortgages, conveyances, incumbrances and muniments of title appear of record in said county or counties from which said territory may have been taken as having been there recorded prior to the transfer of territory as aforesaid; and, when the acquired territory may have been from more than one county, then the clerk shall provide a separate record book for each county, which said book or books shall be indexed and arranged as is now required for record books in case of deeds and mortgages. [Acts 1879, p. 105.]

**Art. 6773. [4591] How to be transcribed.**—Said records shall be transcribed in a plain, legible hand, and with some standard ink of a permanent black color, and when so transcribed shall be carefully compared with the original record by the said clerk or sworn deputy so transcribing the same, assisted by some other sworn deputy. [Id. sec. 2.]

**Art. 6774. [4592] To have effect of judicial proceedings, when.**—When said record or records shall have been found to be truly and correctly transcribed, the county clerk, with the sworn deputies so transcribing and verifying the same, shall certify under their official oath of office at the conclusion of the record with the impress of the seal of said court affixed on the same page the correctness of the same, after which said transcribed record or records shall have all the force and effect in judicial proceedings in the courts of this state as the original records. [Id. sec. 3.]

**Art. 6775. [4593] Compensation.**—The county clerk, or person making such transcript, shall be entitled to compensation therefor at the rate of fifteen cents for one hundred words, and for comparing and verifying the same, payable out of the county treasury upon warrant issued under order of the commissioners' court. [Id. sec. 4.]

**Art. 6776. [4593a] Translations may be authorized by commissioners' court.**—The county commissioners of any county of this state are authorized and empowered to contract with the clerk of the county courts of their respective counties to cause to be translated into the English language, by themselves or their deputies, the archives and records of their offices, or any part thereof, now in the Spanish language, in their official custody, relating to titles to land, and copy said translations in a well-bound book or books; provided, that they shall not contract to pay more than fifteen cents per hundred words for both the translation and recording. [Acts 1893, p. 168.]

**Art. 6777. [4593b] Effect of such translations, etc.**—When said archives and records, now in Spanish, are translated and recorded as hereinbefore provided, said records in English shall have the same force and effect as if the archives and instruments were originally made and recorded in the English language, and certified copies may be used as evidence and otherwise, for like purposes and with like effect as the originals are and certified copies of records of the originals can now be used; and said record books hereinbefore provided for shall be and are hereby made permanent archives and records of the county clerk's office of the counties when so translated and recorded. [Id.]

## CHAPTER TWO

## SUPPLYING LOST RECORDS, ETC.

<p><b>Art.</b> 6778. Lost records may be supplied by proof, etc. 6779. Proceedings to establish lost records, etc. 6780. Judgment, etc. 6781. Proceedings in the county court.</p>	<p><b>Art.</b> 6782. Effect of judgment, etc. 6783. Certified copies may be recorded. 6784. Original deeds, etc., recorded again, when. 6785. Judgment shall have force of originals.</p>
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[In addition to the notes under the particular articles, see also notes on Abstracts of Title, at end of chapter.]

**Article 6778. [4594] Lost records may be supplied by proof, etc.—**All deeds, bonds, bills of sale, mortgages, deeds of trust, powers of attorney and conveyances of any and every description which are required or permitted by law to be acknowledged or recorded, and which have been so acknowledged or recorded, and any and every judgment of a court of record in this state, and which record and minutes of court containing such judgment have been or may hereafter be lost, destroyed or carried away, may be supplied by parol proof of the contents thereof; which proof shall be taken in the manner hereinafter provided. [Act July 13, 1876, p. 45, sec. 1.]

**Does not apply to lost originals.—**This and the succeeding article do not apply to lost originals. To supply a lost power of attorney under which land was conveyed, suit should be brought in the county of the residence of the defendant, and not where the land is situated. *Douglas v. Baker*, 79 T. 499, 15 S. W. 801.

**Defines and limits the instruments that may be supplied.—**This article defines and limits the specific kinds of written instruments whose loss may be supplied. A contract between a city and a railway company as to its domicile and shops is not within the statute. *Railway Co. v. Harris*, 78 T. 375, 11 S. W. 405.

**Art. 6779. [4595] Proceedings to establish lost records, etc.—**Any person having any interest in any such deed, instrument in writing, or any judgment, order or decree in the district court, the record or entry of which has been or may hereafter be lost, destroyed, or carried away, may, in addition to any mode now provided by law for establishing the existence of such record and the contents thereof, file with the clerk of the district court of the county where such loss or destruction took place, his written application setting forth the facts entitling him to the relief sought; whereupon such clerk shall issue a citation to the grantor in such deed, or to the party or parties interested in such instrument of writing, or to the party or parties who were interested adversely to the applicant at the time of the rendition of any such judgment, or who may be now interested, or the heirs and legal representatives of such parties, to appear at a term of the district court to be designated in said citation, and contest the right of the applicant to have any such deed, instrument in writing, or judgment substituted and recorded; and service shall be as now provided for process in other cases. [Id. sec. 2.]

**Necessity for citation to grantor, heirs, etc.—**A judgment establishing the record of a deed rendered in a cause wherein neither the alleged grantor nor his heirs or legal representatives were made parties, is void. *Cook v. Robertson* (Civ. App.) 46 S. W. 866.

**Limitation.—**While a suit to supply evidence of a lost deed and to perpetuate testimony is subject to the plea of laches if not brought within a reasonable time after such loss, the right to sue for land and establish the title through said lost deeds would only be barred by statutes of limitation barring recovery of land. *Shepard v. Cummings*, 44 T. 502.

**Art. 6780. [4596] Judgment, etc.—**On hearing said application, if the court shall be satisfied from the evidence of the existence of such deed, instrument in writing, record, judgment, order or decree, and of the loss, destruction or carrying away of the same, as alleged by the applicant, and the contents thereof, an order shall be entered on the minutes of the district court to that effect, which order shall contain a description of the lost deed, instrument in writing, judgment or rec-

ord, and the contents thereof, and a certified copy of such order may be recorded in the records of the proper county. [Id.]

**Art. 6781. [4597] Proceedings in the county court.**—Whenever any judgment, order or decree duly entered in the county court of any county has been or may hereafter be lost, destroyed or carried away, any person interested therein may file his written application with the clerk of the county court to which the original record belonged, setting forth the facts entitling him to the relief sought, when the same proceedings shall be had and the court shall enter a like judgment as provided in the two preceding articles, so far as applicable.

*In general.*—Not having shown actual possession of the land in controversy and holding under a muniment of title other than a deed (a will) which was not kept of record as required by statute, the possession relied on did not include the land in controversy. The record of the will was destroyed by fire and no steps taken to put it again on record. *Wall v. Lubbock*, 52 C. A. 405, 118 S. W. 888.

*Preliminary evidence as to contents.*—In the absence of any proof of the contents of the records of one county, they cannot be proved by the records of another county. *Ellis v. Le Bow*, 30 C. A. 449, 71 S. W. 576.

**Art. 6782. [4598] Effect of judgment, etc.**—Whenever such judgment, order or decree rendered in the district or county court shall be duly entered, it shall stand in the place of and have the same force and effect as the original of said lost deed, instrument in writing, judgment or record; and when duly recorded may be used in evidence in any of the courts of this state with like effect as the original thereof. [Id.]

**Art. 6783. [4599] Certified copies may be recorded.**—All certified copies from the records of such county, the record of which has been or may hereafter be lost, destroyed or carried away, and all certified copies from the records of the county or counties from which said county was created, may be recorded in such county; provided, the loss of the original shall first be established. [Id. sec. 3.]

**Art. 6784. [4600] Original deeds, etc., recorded again, when.**—When any of the original papers mentioned in the first article of this chapter may have been saved or preserved from loss, the record of said originals having been lost, destroyed or carried away, the same may be recorded again, and this last registration shall have force and effect from the filing for original registration; provided, said originals are recorded within four years next after such loss, destruction or removal of the records; and certified copies from any record authorized by the provisions of this title to be made may be received in evidence in any of the courts of this state in the same manner and with like effect as certified copies of the original record. [Id. sec. 4. Acts 1879, ch. 35, p. 35.]

*Application.*—This law applies to the re-registration of deeds, the record of which was destroyed before it was enacted, the time in which it could be recorded, so as to cause notice to commence with its first registration, beginning to run from the time the law went into effect. *Kempner v. Beaumont Lumber Co.*, 20 C. A. 307, 49 S. W. 412.

*When original not filed in time former record ceases to be constructive notice.*—The record of a deed was destroyed by fire February 25, 1873. The deed was again recorded in September, 1886. An intervening bona fide purchaser from the grantor in the deed acquired title. *Salmon v. Huff*, 80 T. 133, 15 S. W. 257, 1047; *O'Neal v. Pettus*, 79 T. 254, 14 S. W. 1065; *Barcus v. Brigham*, 84 T. 538, 19 S. W. 703.

Where the record of a deed has been destroyed, if the original be not re-recorded within the time prescribed by the statute (four years), a subsequent purchaser for value without notice will be protected; and he will not be charged with constructive notice by reason of the fact that the deed was once recorded, the record of which has been destroyed. *Magee v. Merriman*, 85 T. 105, 19 S. W. 1002.

When records are destroyed, the destroyed record will not operate as constructive notice unless the original paper if preserved is again placed of record within the time prescribed by law. *Lanier v. Davis* (Civ. App.) 60 S. W. 1019.

The land having been located by virtue of a valid certificate all deeds affecting it after such location are subject to Art. 6824. The record of deeds was destroyed by fire in 1875, and a deed from an ancestor was not recorded until 1891; persons who bought the land from the heir in 1882, without actual notice of the ancestor's deed, were no more affected by it than they would have been had it never been recorded. *Greer v. Willis* (Civ. App.) 81 S. W. 1186, 1187.

Where a deed, the record of which was destroyed, was not refiled for record within four years from the enactment of this section, its former record ceased to be notice to subsequent purchasers, and its priority depended upon its second filing more than four

years after the adoption of the section. *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241.

Recording original document again.—Where records are destroyed, deeds, etc., must be recorded again to constitute notice. *Barcus v. Brigham*, 84 T. 538, 19 S. W. 703.

Where a deed was properly recorded under the law in force at the time (1849) its re-registration in 1894 (after the record had been burned) was regular and sufficient for all purposes after that date. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 740, 741.

**Art. 6785. [4601] Judgments shall have force of originals.**—Judgments, orders and decrees, when substituted as hereinbefore provided, shall carry all the rights thereunder in every respect as the originals, especially preserving the liens from the date of the originals, and giving the parties the right to issue executions under the substituted judgments as under the originals. [Id.]

**Venue.**—An action of debt was brought in Mitchell county, where the defendant resided, on a dormant judgment of the district court of Tarrant county, the record of which, it was alleged, had been destroyed by fire. On exception to the petition it was held that the suit was properly brought in the county of defendant's residence, the remedy under this statute being cumulative. *Johnson v. Skipworth*, 59 T. 473.

#### ABSTRACTS OF TITLE

**Nature.**—"Abstract of title" defined. *McMillan v. First Nat. Bank*, 56 C. A. 45, 119 S. W. 709.

An abstract of title is a memorandum or concise statement of the conveyances and incumbrances which appear on the public records, affecting the title to real estate. *Nicholson v. Lieber* (Civ. App.) 153 S. W. 641.

**Property in.**—A compiler from public records and other sources of an abstract of title to lands held entitled to the exclusive use of the abstract until published. *Vernon Abstract Co. v. Waggoner Title Co.*, 49 C. A. 144, 107 S. W. 919.

**Liability of abstractor of titles.**—See notes under Art. 1827, § 126.

**As notice.**—See note under Art. 6842.

**As evidence.**—See notes under Art. 3687.

## TITLE 118

## REGISTRATION

Chap.

1. Recorders and Their Duties.
2. Acknowledgment and Proof of Deeds, etc., for Record.
3. Instruments Authorized to be Recorded, and the Effect of Recording.

Chap.

4. Registration of Separate Property of Married Women.
5. General Provisions.

## CHAPTER ONE

## RECORDERS AND THEIR DUTIES

[As to chattel mortgages, see title Liens, Title 86, Chapter 7.]

Art.

6786. County clerks shall be recorders.  
 6787. What shall be their seal.  
 6788. Shall provide books, etc.  
 6789. Shall keep memorandum and give receipt.  
 6790. Shall record without delay in the order presented.

Art.

6791. Record shall take effect, when.  
 6792. Shall keep alphabetical indexes, etc.  
 6793. What they shall contain.  
 6794. Same subject.  
 6795. Shall give attested copies, when.  
 6796. Separate record books.

**Article 6786. [4602] County clerks shall be recorders.**—The county clerks of the several counties shall be the recorders for their respective counties; they shall provide and keep in their offices well-bound books in which they shall record in a fair and legible hand all instruments of writing authorized or required to be recorded in the recorder's office of their respective counties, in the manner hereinafter provided. [Act May 12, 1846, sec. 1. P. D. 5001.]

*Historical.*—Under the laws in force prior to the Revolution, written contracts were reduced to writing by the proper officer, upon stamped paper, which remained as an archive of his office, and copies, also upon stamped paper, were given to the parties. See ante, Title 8, "Archives."

The plan and powers of the provisional government of Texas, adopted November 13, 1835, articles 5, 6, constituted a provisional judiciary consisting of two judges for each jurisdiction. Their court was declared a court of record for conveyances, which may be made in English, and not on stamped paper, the use of which was dispensed with. A judge was ex officio notary public. Each municipality was authorized to continue to elect a sheriff, alcalde and other officers of ayuntamientos.

By article 14 the primary judges, alcaldes and other municipal officers of the various jurisdictions were directed to deliver their archives to their successors in office, immediately after their election and appointment. The archives of the several political chiefs of Nacogdoches, Brazos and Bexar were to be transmitted to the governor and council for their disposition. Sayles' Const. of Texas, p. 139.

By the act of December 20, 1836, it is made the duty of the judge of the first instance of each and every county to deposit in the office of the clerk of the county court of his county every matter of record, paper, document or thing heretofore filed in the office, not by law required to be transmitted to the district court, or to justices of the peace. 1st Cong. § 33, p. 148.

By the act of December 20, 1836, clerks of the county courts were made recorders for their respective counties. 1st Cong. § 35, p. 148.

By the constitution of 1869, ratified on the first Monday of July, 1869, and the act of August 8, 1870, the clerk of the district court was recorder for the county of all instruments required to be recorded. Art. 5, sec. 9, Sayles' Constitutions, p. 431; Laws 12th Leg., S. S., p. 49. This constitution was superseded by a new constitution, which went into effect on the 18th of April, 1876, under which the county clerk again became recorder.

In counties of less than eight thousand inhabitants a single clerk could formerly perform the duties of district and county clerk. Art. 5, secs. 20, 21, Sayles' Constitutions, p. 547; R. S. 1895, art. 1152.

**Duties ministerial.**—The duties of a recording officer are ministerial. First Nat. Bank v. McElroy, 51 C. A. 284, 112 S. W. 801.

**Interest of clerk.**—The clerk can record an instrument in which he is interested. Brockenborough v. Melton, 55 T. 493.

**Deputies.**—Clerks can appoint deputies. Art. 1148.

Where a deputy signed as special deputy, the word "special" was held surplusage. Thompson v. Johnson, 84 T. 548, 19 S. W. 784.

**Offices of county and district clerks merged.**—Registration in the office of the county clerk of an instrument required to be recorded by the clerk of the district court, under an

act passed at a time when both offices were merged in that of district clerk, will be sufficient when the registration is made after the office of county clerk has been re-established. *Shields v. Morrow*, 51 T. 393.

**Need not pay fees in advance.**—A party who files a deed for record is not required to pay the recording fees before the record is made. *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241.

**Art. 6787. [4603] What shall be his seal.**—The seal of the county court shall be the seal of the recorder, and shall be used for the authentication of all his official acts. [Id. sec. 2. P. D. 5002.]

**Art. 6788. [4604] Shall provide books, etc.**—Each recorder shall provide suitable books and presses for his office, and keep regular and faithful accounts of the expenses thereof, and such accounts shall be audited by the commissioners' court and paid out of the county treasury. [Id. sec. 3. P. D. 5003.]

**Art. 6789. [4605] Shall keep a memorandum and give receipts, etc.**—When any instrument of writing authorized by law to be recorded shall be deposited in the recorder's office for record, if the same shall be acknowledged or proved in the manner prescribed by law for record, the recorder shall enter in a book to be provided for that purpose, in alphabetical order, the names of the parties and date and nature thereof, and the time of delivery for record; and shall give to the person depositing the same, if required, a receipt specifying the particulars thereof. [Id. sec. 12. P. D. 5012.]

**Paper handed to clerk outside office.**—If a paper required to be filed and recorded in the office of the clerk of the county court is handed to him for record outside of his office, it will be regarded as deposited for record from the time of its actual deposit and filing by the clerk. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

**Art. 6790. [4606] Shall record without delay in the order presented.**—Each recorder shall, without delay, record every instrument of writing authorized to be recorded by him, which is deposited with him for record, with the acknowledgments, proofs, affidavits and certificates written or printed on the same, and all other papers referred to and thereto annexed, in the order and as of the time when the same shall have been deposited for record, by entering them word for word and letter for letter, and noting at the foot of such record all interlineations, erasures and words visibly written on erasures, and noting at the foot of the record the hour and the day of the month and year when the instrument so recorded was deposited in his office for record. [Id. sec. 13. P. D. 5013.]

**Not repealed.**—This article is not repealed by Arts. 5610-5620. *Spence v. Brown* (Civ. App.) 24 S. W. 309.

**Art. 6791. [4607] Record shall take effect from date of deposit.**—Every such instrument of writing shall be considered as recorded from the time it was deposited for record; and the recorder shall certify under his hand and seal of office to every such instrument of writing so recorded, the hour, day, month and year when he recorded it, and the book and page or pages in which it is recorded; and when recorded deliver the same to the party entitled thereto or to his order. [Id. sec. 14. P. D. 5014.]

**Must be strictly observed.**—The requirements of this article must be strictly observed. *Webb v. Huff*, 61 T. 677.

**Notice from time of deposit, though not recorded.**—Under this article and Art. 6828, a deed properly acknowledged or proved and certified is as effectual as notice, as if it had been duly and properly recorded, from the date it is properly deposited for record, and the person depositing it owes no duty to make inquiry as to whether it has been, in fact, recorded. *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581.

The patentee of a survey conveyed a part to one B. in 1860, the record of which was destroyed in 1862, the deed being filed again for record in 1892, but the fee for recording was not then paid and it remained in the office unrecorded, and in January, 1906, it was filed and recorded; the plaintiff herein claiming under that chain of title. In 1872 the patentee conveyed the remaining part to one W. through whom the defendant claims by conveyance made in March, 1906. Held that, under this article, and by Art. 6789, the filing of a deed in 1892 operated as notice to subsequent purchasers, and hence defendant acquired no title by his purchase in 1906. *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241.

Under this article a deed filed by the county clerk is notice to subsequent purchasers, though not transcribed upon the records, and though the fee for filing was not paid. *William Carlisle & Co. v. King* (Sup.) 133 S. W. 864.

Evidence sufficient to show filing.—Record of deed, with extraneous evidence, held to show that it was filed for record. *Riviere v. Wilkens*, 31 C. A. 454, 72 S. W. 608.

**Art. 6792. [4608] Shall keep alphabetical indexes.**—Each recorder shall make and enter in a well-bound book an index, in alphabetical order, to all books of records wherein deeds, mortgages or other instruments of writing concerning lands and tenements are recorded, distinguishing the books and pages in which every such deed or writing is recorded. [Id. sec. 15. P. D. 5015.]

**Art. 6793. [4609] What they shall contain.**—It shall be a cross-index and shall contain the names of the several grantors and grantees in alphabetical order; and, in case the deed be made by a sheriff, the name of the sheriff and defendant in execution; and, if by executors, administrators or guardians, their names and the names of their testators, intestates or wards; and, if by attorney, the name of such attorney and his constituents, and, if by a commissioner, the name of such commissioner and the person whose estate is conveyed. [Id. sec. 16. P. D. 5016.]

**Art. 6794. [4610] Same subject.**—Each recorder shall, in like manner, make and keep in his office a full and perfect alphabetical index to all books of record in his office, wherein all instruments of writing in relation to goods and chattels, or movable property of any description, marriage contracts and powers of attorney, and all other instruments of writing authorized or required to be recorded in his office are recorded; and a like index of all the books of record wherein official bonds are recorded, the names of the officers appointed, and of the obligors in any bond recorded, and a reference to the book and page where the same are recorded. [Id. sec. 17. P. D. 5017.]

**Art. 6795. [4611] Shall give attested copies, when.**—It shall be the duty of the recorder to give attested copies whenever demanded of all papers recorded in his office; and the recorder shall receive for all such copies, and all other writings required of him by virtue of his office, such fees as may be provided by law. [Act Dec. 20, 1836, sec. 36. P. D. 4979.]

**Art. 6796. [4612] Mortgages, etc., to be recorded in separate book.**—All deeds of trust, mortgages, judgments which are required to be recorded in order to create a judgment lien, or other instruments of writing intended to create a lien, shall be recorded in a book or books separate from those in which deeds or other conveyances are recorded.

Provisions directory, except.—Except in those cases where actual recording is required to fix the right as against a third person, this article is deemed directory; otherwise effect could not be given to the statutes which give to filing with the clerk the effect of full registration. *Kennard v. Mabry*, 78 T. 151, 14 S. W. 272.

## CHAPTER TWO

### ACKNOWLEDGMENT AND PROOF OF DEEDS, ETC., FOR RECORD

[As to registration of foreign wills, see title "Wills."]

Art. 6797. Before whom acknowledgment may be made in this state.	Art. 6803. Certificate of officer.
6798. Without this state and within the United States.	6804. Form of certificate of acknowledgment.
6799. Without the United States.	6805. Form of acknowledgment by a married woman.
6800. Acknowledgment, how made.	6806. Proof of instrument by witness.
6801. Party must be known or proven.	6807. Witness must be personally known to the officer.
6802. Acknowledgment of married woman, when and how taken.	



Art.		Art.	
6808.	Form of certificate of proof by witness.	6815.	May compel attendance and answers of witness.
6809.	Handwriting may be proved, when.	6816.	Statement of the acknowledgment, etc., to be recorded.
6810.	Evidence may prove what.	6817.	What statement for record shall contain.
6811.	Proof, how made when grantor has made his mark.	6818.	Statement shall further recite.
6812.	Proofs, how made and certified.	6819.	The book to be a public record.
6813.	Officers are authorized to administer oaths, etc.	6820.	Action for damages will lie by person injured.
6814.	Subpœna shall issue, when.		

**Article 6797. [4613] Before whom acknowledgments may be made in this state.**—The acknowledgment or proof of an instrument of writing for record may be made within this state before either:

1. A clerk of the district court.
2. A judge or clerk of the county court.
3. A notary public. [Act May 6, 1871, sec. 1. P. D. 7418.]

**Authority to take—Historical.**—By the act of December 20, 1836, the recorder was authorized to take acknowledgment of execution of instrument in writing by the grantor. 1st Cong. sec. 35, p. 148; P. D. 4973. By the same act, such instrument could be proven before a county judge, or before the clerk of the county court in whose office such record is proposed to be made. 1st Cong. sec. 38, p. 148; P. D. 4982.

Under the act of June 12, 1837, notaries public were authorized to perform all such duties as chief justices of county courts are required to perform by virtue of their office as ex officio notaries public, and an associate justice was authorized to act as a notary public when the chief justice was interested or was unable to act. 1st Cong. p. 273.

The act of January 19, 1839, authorized the acknowledgment or proof of instruments of writing affecting titles to land and immovable property to be made before a county court, or chief justice of the same, or before the clerk in whose office such instrument is proposed to be recorded. 3d Cong. sec. 1, p. 47; P. D. 4974.

The act of February 5, 1840, authorized a record on the acknowledgment of the grantor, before the clerk of the county court of the county where the record was made, or before a district judge, chief justice or notary public, or two justices of the peace. 5th Cong. secs. 5, 6, p. 153; P. D. 4975.

The act of February 5, March 17, 1841, authorized a record upon the acknowledgment of the grantor before the register or clerk of the county court of the county, chief justice or notary public of the county, or any associate or the chief justice of the supreme court. 5th Cong. sec. 21, p. 163; Early Laws, art. 997, § 20.

The act of May 12, June 13, 1846, authorized the acknowledgment or proof within this state before some notary public or clerk of the county court of any county in the state, whose certificate must be attested by his official seal. 1st Leg. sec. 8, p. 236.

By the act of May 13, June 22, 1846, notaries public were authorized to take the acknowledgment or proof of instruments of writing to entitle them to registration. 1st Leg. p. 341.

Under the act of March 16, August 7, 1848, the chief justice of the county court was authorized to take the acknowledgment and proof of all instruments of writing for the purpose of being recorded. 2d Leg. p. 113.

By the act of December 31, 1861 (9th Leg. p. 21), commissioners of deeds in the Choctaw, Chickasaw, Cherokee and Creek nations of Indians were authorized to take the acknowledgment of married women.

By the act of April 6, 1861, the acknowledgment or proof within this state is made before some notary public, clerk of the county court, or judge of a court of record. 8th Leg., S. S., sec. 1, p. 37. This was amended January 14, 1862 (9th Leg. sec. 1, p. 57), so as to confer authority upon the deputy of the county clerk and to validate acknowledgments heretofore made before such officer. By the act of August 8, 1870, clerks of the district courts, their deputies and notaries public were authorized to take the acknowledgment of deeds and other instruments required by law to be recorded in this state, and the certificate of such officer over his official signature and seal of office, that such instrument has been so acknowledged, entitled the same to registration. 12th Leg. p. 49.

The chief justice of a county had the right to take the acknowledgments of deeds in 1845. *Willis v. Lewis*, 28 T. 185.

This article was in force when Act April 27, 1874 (Acts 1874, p. 152, c. 105), was enacted, which provided that every deed required to be registered, which shall have been heretofore acknowledged in the manner required by law, within the United States; before any officer now authorized by law to take such acknowledgments, and which shall have been duly certified by such officer, shall be held to be acknowledged with the full consequences of existing laws. Held, that since a judge of the supreme court of Louisiana could have legally taken an acknowledgment of a deed when the act of 1874 was passed, any defect in the acknowledgment of a deed, acknowledged before a judge of such court a number of years before that date, because the statute of the republic of Texas then in force required foreign acknowledgments to be taken before consular agents, etc., was cured by the act of 1874, and hence a copy of such deed was admissible in evidence. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

— **District clerk and deputies.**—A deputy district clerk can take acknowledgments in all cases where his principal is authorized so to do. *Wert v. Schneider*, 64 T. 327.

In 1872 the district clerk and his deputies could take acknowledgments. *Thompson v. Johnson*, 84 T. 548, 19 S. W. 784.

— **County clerk and deputies.**—See notes under Art. 6786.

By the act of December 18, 1849 (3d Leg. p. 11), clerks of the county courts were authorized to take the separate acknowledgment of married women.

A deputy clerk of the county court can take acknowledgments. *Rose v. Newman*, 26 T. 131, 80 Am. Dec. 646; *Frizzell v. Johnson*, 30 T. 31.

In May, 1872, a special deputy was appointed to take the acknowledgment to a deed. In August, 1872, the clerk requested the deputy to take another acknowledgment. Held, that the deputy was certainly a de facto officer. *Thompson v. Johnson*, 84 T. 548, 19 S. W. 784.

— **Justice of the peace.**—A justice of the peace may act as a notary (Art. 2287), and must authenticate his acts by a notarial seal (*Daugherty v. Yates*, 13 C. A. 646, 35 S. W. 937).

**Disqualification of officer.**—An officer named as trustee in a deed of trust cannot take the acknowledgment of the grantor in such deed. *Brown v. Moore*, 38 T. 645.

One who signs an instrument as agent of one of the parties thereto is not competent as a notary public to take the acknowledgment of any of the parties. *Brown v. Moore*, 38 T. 645; *Sample v. Irwin*, 45 T. 567; *Morton v. Lowell*, 56 T. 643.

The effect of the record of an instrument concerning lands, on its face regularly acknowledged or proved for record and duly recorded, cannot be attacked by showing (1) that the officer who took the acknowledgment or proof had an interest in the land, or (2) by showing that the acknowledgment was taken outside the territorial limits of the officer's appointment, or that the officer was exercising two incompatible offices. *Titus v. Johnson*, 50 T. 224.

The general attorney of the husband having no interest in the transaction may take the separate acknowledgment of the wife. *Kutch v. Holley*, 77 T. 220, 14 S. W. 32.

A certificate of a privy acknowledgment to a deed of transfer taken by the trustee named in the deed is void, although the trust be assumed by a substitute trustee appointed by the beneficiaries under a stipulation in such instrument. If the property be the separate estate of the wife, then the trust deed is void. *Rothschild v. Daugher*, 85 T. 332, 20 S. W. 142, 16 L. R. A. 719, 34 Am. St. Rep. 811.

A party to a deed, or identified with the transaction, or one having a pecuniary interest in the subject, is not competent to take the acknowledgment. *Silcock v. Baker*, 25 C. A. 508, 61 S. W. 940.

That the sheriff's acknowledgment to a deed under a tax judgment was taken by the grantee did not render the deed inadmissible in evidence, a subsequent acknowledgment before a different officer being shown. *Carr v. Miller* (Civ. App.) 123 S. W. 1158.

**Art. 6798. [4614] Without this state and within the United States.**—The acknowledgment or proof of an instrument of writing for record may be made without this state, but within the United States or their territories, before either:

1. A clerk of some court of record having a seal.
2. A commissioner of deeds duly appointed under the laws of this state.
3. A notary public. [Id.]

**Authority to take—Historical.**—The act of February 5, March 17, 1841, authorized the acknowledgment or proof of deeds, etc., for record without the republic but within the United States or their territories, before any circuit or supreme judge, or chancellor of the same, certified by him, with the certificate of the chief magistrate of the nation as to the official character of such officer, and the great seal of the United States thereto annexed. 5th Cong. sec. 21, p. 163.

By the act of May 8, June 22, 1846, commissioners of deeds for the state of Texas in other states, and in the District of Columbia, had authority to take the acknowledgment and proof of the execution of any deeds, mortgages and other conveyances of any lands, tenements or hereditaments. 1st Leg. p. 187.

The act of May 12, June 13, 1846, permitted an instrument to be acknowledged or proven, without this state and within the United States or their territories, before some judge of a court of record having a seal, whose certificate must be attested by his official seal. 1st Leg. sec. 2, p. 236.

By the act of April 6, 1861, the acknowledgment or proof of an instrument of writing, without this state and within the Confederate States, or the United States or their territories, could be made before some judge of a court of record having a seal, the certificate thereof to be attested under the seal of the officer taking the same. 8th Leg. sec. 1, p. 37. This was re-enacted January 14, 1862. 9th Leg. p. 57.

By the act of December 31, 1861, commissioners of deeds in the Choctaw, Chickasaw, Cherokee and Creek nations of Indians had authority to take acknowledgments of deeds, transfers or conveyances of all kinds of property situated in this state. 9th Leg. p. 21.

In 1847 a notary public was not authorized to take the acknowledgment of a deed conveying real estate; the validating act of April 27, 1874, by its terms restricted its operation to acknowledgments taken within the United States. *Birdseye v. Rogers* (Civ. App.) 26 S. W. 841.

— **Judge of a court of record of another state.**—It appearing by the certificate that the court in which the judge presided, before whom an affidavit was made, had a clerk and seal, was sufficient evidence that it was a court of record. *Moore v. Carson*, 12 T. 66.

No authority exists in the judge of a court of record in another state to take an acknowledgment of a deed conveying land in Texas. *Talbert v. Dull*, 70 T. 675, 8 S. W. 530.

— **Notary public.**—Where the law in force confers authority upon notaries public in other states of the Union to authenticate conveyances for the purpose of registration, the authority of a notary, who is lawfully such by virtue of his holding some other office, is quite as ample as if he were a notary by direct appointment. *Butler v. Dunagan*, 19 T. 559, cited in *Wilson v. Simpson*, 68 T. 306, 4 S. W. 839.

— **Not required to prove commissioner's authority.**—One claiming under a deed, acknowledgment of which purports to have been taken by a commissioner of deeds, held not required to prove the appointment and qualification of the officer. *Stark v. Harris* (Civ. App.) 106 S. W. 887.

**Disqualification of officer.**—An acknowledgment taken by a notary who is a stockholder and director in a company for whose benefit the lien on the homestead created by the instrument acknowledged, is void. *Workman's Mut. Aid Ass'n v. Monroe* (Civ. App.) 53 S. W. 1029.

**Art. 6799. [4615] Without the United States.**—The acknowledgment or proof of an instrument of writing for record may be made without the United States before either:

1. A minister, commissioner or charge d' affaires of the United States, resident and accredited in the country where the proof or acknowledgment is made.

2. A consul-general, consul, vice-consul, commercial agent, vice-commercial agent, deputy consul or consular agent of the United States, resident in the country where the proof or acknowledgment is made.

3. A notary public. [Id.]

**Historical.**—The act of February 5, March 17, 1841, authorized the acknowledgment or proof of a deed, etc., for record, without the United States, before any judge of a superior court of record, or in any such court, and certified by such judge, or the record thereof exemplified, and either so counter-certified by the chief magistrate or sovereign of such other nation or kingdom, under the great seal, or by the consul of this republic, or minister resident there. 5th Cong. sec. 21, p. 163.

The act of May 12, June 13, 1846, permitted an instrument to be acknowledged or proven without the United States, before some public minister, chargé d'affaires, or consul of the United States, whose certificate must be attested by his official seal. 1st Leg. p. 236.

By the act of April 6, 1861, the acknowledgment or proof of an instrument, without the Confederate States or United States, could be made before some public minister, chargé d'affaires, or consul of the Confederate States, the certificate of such acknowledgment or proof to be attested under the official seal of the officer taking the same. 8th Leg., S. S., sec. 1, p. 37. This section was re-enacted January 14, 1862. 9th Leg. 57.

In 1847 a notary public in Mexico was not authorized to take an acknowledgment of the execution of a deed conveying land in Texas. *Birdseye v. Rogers* (Civ. App.) 26 S. W. 841.

**Consul and commercial agent.**—It seems that a consul and a commercial agent are invested with the same powers and duties, the name being determined by the relative importance of the post. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484.

**Art. 6800. [4616] Acknowledgment, how made.**—The acknowledgment of an instrument of writing for the purpose of being recorded shall be by the grantor or person who executed the same appearing before some officer authorized to take such acknowledgment, and stating that he had executed the same for the consideration and purposes therein stated; and the officer taking such acknowledgment shall make a certificate thereof, sign and seal the same with his seal of office. [Act May 12, 1846, sec. 7. P. D. 5007.]

**Historical.**—The acts of December 20, 1836, and January 19, 1839, authorized a record when the grantor "himself shall acknowledge the same," which shall be certified by the recorder, and form part of the record. 1st Cong. sec. 35, p. 148; 3d Cong. sec. 1, p. 47.

The act of February 5, 1840, authorized the record of a deed upon the certificate, under seal, of any two justices of the peace for any county in this republic, annexed to such deeds, and to the following effect, to wit: "Republic of Texas, County of —, We, A. B. and D. C., justices of the peace of the county aforesaid, do hereby certify that E. F., a party (or E. G. and G. M., etc., parties) to a certain deed bearing date on the — day of —, and hereto annexed, personally appeared before us, in our county aforesaid, and acknowledged the same to be his (or their) act and deed, and desired us to certify the said acknowledgment to the clerk of the county of —, in order that said deed may be recorded. Given under our hands and seals this — day of —." 4th Cong. sec. 6, p. 153.

The act of February 5, March 17, 1841, authorized a record on the acknowledgment of the grantor, in which case there need be no subscribing witnesses. 5th Cong. sec. 21, p. 163.

By the act of May 12, June 13, 1846, the acknowledgment of an instrument of writing for the purpose of being recorded was by the grantor or person who executed the same appearing before some officer authorized to take such acknowledgment, and stating that he had executed the same for the consideration and purposes therein stated; and the officer taking such acknowledgment was required to make a certificate thereof, sign and seal the same with his seal of office. 1st Leg. sec. 7, p. 236. See Art. 6820.

**Necessity of acknowledgment.**—The authentication of an instrument is a necessary part of the record, and its omission is fatal to the effect of the registry. *Taylor v. Harrison*, 47 T. 454, 26 Am. Rep. 304.

**Acknowledgment, how made.**—A special commissioner appointed in 1834 to issue title to land under a special concession, on the 19th of June, 1838, appeared before the proper officer and acknowledged his signature to the testimonio of title made by him. Held, to be duly probated. *Fulton v. Bayne*, 18 T. 50.

A deed purported to have been executed in 1835 before A., as second judge of the first instance, acting with two instrumental and two assisting witnesses. On the 3d of April, 1839, A. appeared before the county clerk of Milam county and acknowledged

his own signature, and made oath to the signature of the grantor. Held, that the deed was properly authenticated for record. *McKissick v. Colquhoun*, 18 T. 148.

When an acknowledgment is prescribed by statute without declaring of what it shall consist, it is meant that the person executing the instrument must appear before a duly authorized officer and state that he executed it. *Punchard v. Masterson*, 100 T. 479, 101 S. W. 204.

**Acknowledgment by corporation, how.**—Any corporation may convey lands by deed, sealed with the common seal of the corporation, and signed by the president or the presiding member or trustee of said corporation; and such deed, when acknowledged by such officer to be the act of the corporation, or proven in the manner prescribed for other conveyances of lands, may be recorded in like manner and with the same effect as other deeds. Art. 1173.

By the act of April 6, 1861, when any deed, transfer or other instrument of writing executed by the president of any railroad company which has been or may be incorporated by the laws of this state shall be attested by the seal of said company, it shall be considered sufficiently authenticated to authorize the clerk of the county court to record the same. 8th Leg., S. S., p. 37. This section was re-enacted January 14, 1862. 9th Leg. p. 57.

**Certificate—Requisites and sufficiency.**—See notes under Art. 6801.

On the record of a mortgage a note was written "No seal on." The original of the mortgage was produced with the impress thereon of the official seal. The officer making the certificate testified that he attached the seal at the time he made the certificate. These facts appearing, it was held that the mortgage was duly recorded. *Equitable Mortgage Co. v. Kempner*, 84 T. 102, 19 S. W. 358.

**Art. 6801. [4617] Party must be known or proven.**—No acknowledgment of any instrument of writing shall be taken, unless the officer taking it knows or has satisfactory evidence on the oath or affirmation of a credible witness, which shall be noted in his certificate, that the person making such acknowledgment is the individual who executed and is described in the instrument. [Id. sec. 10. P. D. 5010.]

See *Adams v. Pardue* (Civ. App.) 36 S. W. 1015.

**Proof of identity.**—The act of May 12, June 13, 1846, is as follows: Whenever any grantor or person who executed any instrument of writing, or any subscribing witness to such instrument, shall appear before any officer authorized to take acknowledgments or proofs of such instruments, for the purpose of acknowledging or proving such instrument for record, if such grantor or person who executed such instrument or subscribing witness shall be personally unknown to such officer, his identity, and his being the person he purports to be on the face of such instrument, shall be proven to such officer; which proof may be made by witnesses known to the officer, or the affidavit of such grantor or person who executed such instrument, or subscribing witness, if such officer shall be satisfied therewith, which proof or affidavit shall also be indorsed on such instrument of writing. 1st Leg. sec. 10, p. 236.

**Art. 6802. [4618] Acknowledgment of married woman, when and how taken.**—No acknowledgment of a married woman to any conveyance or other instrument purporting to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment, on an examination privily and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it. [Act April 30, 1846, sec. 1. P. D. 1003.]

**Historical.**—The act of April 30, 1846 (1st Leg. p. 156), is substantially the same as the act of February, 1841, except that the acknowledgment of the wife shall be made before a judge of the supreme or district court, or notary public; the words "sign and seal" are used instead of the words "seal and deliver."

The certificate under the act of 1846 is as follows: "State of Texas, County of ——. Before me, ———, judge of, or notary public of, ——— county, personally appeared ———, wife of ———, parties to a certain deed or writing, bearing date on the ——— day of ———, hereto annexed, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said ———, acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. To certify which, I hereto sign my name and affix my seal, this ——— day of ———."

By the act of April 30, 1846 (1st Leg. p. 156), the acknowledgment of the wife, when the deed is signed and sealed out of this state, but within the United States or any of their territories, could be taken by the judge of a court of record having a seal.

When the deed is signed and sealed out of the United States, the acknowledgment of the wife could be taken before any public minister, chargé d' affaires or consul of the United States.

By the act of May 8, June 22, 1846 (1st Leg. p. 187), commissioners of deeds for Texas in any of the states of the United States or of the District of Columbia were authorized to take the acknowledgment of married women.

By a deed dated October 2, 1837, W. H. and his wife, E. H., conveyed to M. certain tracts of land, the property of the wife, situated in Texas. The deed was acknowledged by the husband and wife before the chief justice of Brazoria county, without a privy

examination of the wife. Held, that the deed was valid. Under the Spanish law, which was in force in Texas until the adoption of the common law by the act of January 20, March 16, 1840 (4th Cong. p. 3), the privity examination of the wife was not required in any case, and contracts made by her without the consent or license of the husband were valid if they did not operate to his prejudice. *Harvey v. Hill*, 7 T. 591. And his assent would be presumed when it was evident that he was aware of the transaction, and made no objection for several (in this case fourteen) years thereafter. *Poor v. Boyce*, 12 T. 440; *Allen v. Urquhart*, 19 T. 480; *Parker v. Spencer*, 61 T. 155.

By the act of February 3, 1841, when a husband and wife have sealed and delivered a writing purporting to be a conveyance of an estate or interest in any land, or other effects, the separate property of the wife, if she appears before any judge of the district court, or chief justice of the county court, and, being examined privily and apart from her husband, shall declare that she did freely and willingly seal and deliver the said writing (to be then shown and explained to her), and wishes not to retract it, and shall acknowledge the said writing, so again shown to her, to be her act, such privity examination, acknowledgment and declaration the said judge or chief justice shall certify, under his hand and seal, by a certificate annexed to said writing, and to the following effect, or substance thereof, that is to say:

"Republic of Texas, }

"County of —, }

"I, A. B., chief justice of the county aforesaid, do hereby certify that E. F., the wife of G. H., parties to a certain deed, bearing date on the — day of —, and hereunto annexed, personally appear before me, the chief justice of the county aforesaid, and having been examined by me privily and apart from her husband, and having the deed aforesaid fully explained to her, she, the said E. F., acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it.

"Given under my hand and seal, this — day of —."

But any certificate showing that the requisitions of the law have been complied with shall be as valid as the form prescribed. 5th Cong. p. 144. This is the first law enacted requiring the privity examination of a married woman. *Berry v. Donley*, 26 T. 737.

Prior to act of Feb. 3, 1841 (Laws 1840-41, p. 144), a privity acknowledgment of a deed by a married woman was not necessary to its validity. *Wm. Cameron & Co. v. Cuffie* (Civ. App.) 144 S. W. 1024.

**In general.**—A wife held not to have executed a deed of her own free will and accord. *Wiley v. Prince*, 21 T. 637.

An instruction as to duty of the notary in regard to acknowledgment of deed by a wife held sufficient. *Evart v. Dalrymple* (Civ. App.) 131 S. W. 223.

**Necessity of acknowledgment.**—Where a deed by a husband and wife was not privily acknowledged by the wife, it was absolutely void. *Poland v. Porter*, 44 C. A. 334, 98 S. W. 214.

The privity examination of and acknowledgment by a married woman are absolutely essential to the passing of her title to land by deed. *Veeder v. Gilmer*, 103 T. 458, 129 S. W. 595.

A married woman is not bound by her deed of land till after due acknowledgment thereof before an officer. *Bott v. Wright* (Civ. App.) 132 S. W. 961.

**Provisions mandatory.**—The statute regulating the acknowledgment by married women of deeds is mandatory, and neither the homestead right of a wife nor her separate property may be conveyed except in the manner prescribed. *De West v. Barthelow* (Civ. App.) 136 S. W. 86.

**Acknowledgment—After death of husband.**—An acknowledgment by a married woman, after her husband's death, to a deed for her separate property, validates the deed. *Breitling v. Chester*, 88 T. 586, 32 S. W. 527, reversing (Civ. App.) 30 S. W. 464.

**Explanation by officer.**—A notary, in taking a married woman's acknowledgment to a deed of the homestead, held not compelled to explain to her another contemporaneous instrument not signed by her. *Andrews v. Bonham*, 19 C. A. 179, 46 S. W. 902.

Where a deed executed by a married woman has been lost, the fact that the officers explained the deed to her and took her acknowledgment may be proved by circumstances. *Texas Land & Cattle Co. v. Walker*, 47 C. A. 543, 105 S. W. 545.

Since the statute requires the officer taking the acknowledgment of a married woman to explain the instrument to her privily, a failure to do so renders the instrument void, though she in fact fully understood it. *Stringfellow v. Braselton*, 54 C. A. 1, 117 S. W. 204.

If deeds were correctly read to a wife so that she understood them while her husband was present, it was not necessary to reread the deeds to her, though the notary must explain the deeds and the acknowledgments fully, so that she could fairly understand the contents, and this in the husband's absence. *Evart v. Dalrymple* (Civ. App.) 131 S. W. 223.

An instruction that the notary must explain to a wife executing a deed out of the presence and hearing of her husband "all the contents of the deed" sufficiently complies with the law requiring the notary to "fully" explain the same to her. *Id.*

Officer taking acknowledgment of married woman held required to divulge fraud known to the officer. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

This article is satisfied by full explanation of the instrument being executed, and does not require the officer to make a full investigation of the facts and circumstances attending its execution. *Id.*

— **Privily and apart.**—Acknowledgment of wife to deed of separate property is not vitiated by mere presence of the grantee at her privity examination. *Tippett v. Brooks*, 95 T. 335, 67 S. W. 495, 512.

**Rights of married woman where acknowledgment is defective or procured by fraud.**—The fraud of the husband in obtaining his wife's signature to a deed, or the failure of the officer taking her acknowledgment to explain it to her, will not avoid the deed, which appears to be properly executed and acknowledged, in the absence of testimony

connecting the purchaser with the wrongs complained of, or privity with the parties who may have committed them. *Hartley v. Frosh*, 6 T. 208, 55 Am. Dec. 772; *Shelby v. Burtis*, 18 T. 644; *Wiley v. Prince*, 21 T. 640; *Pool v. Chase*, 46 T. 207; *Williams v. Pouns*, 48 T. 141; *McDannell v. Horrell*, 1 U. C. 521.

A deed of a feme covert, which is invalid by reason of noncompliance with the statute, may serve as a basis of a claim for improvements made in good faith. *Johnson v. Bryan*, 62 T. 623. See *Cole v. Bammel*, 62 T. 108.

To estop a married woman from asserting her rights to land conveyed by her in a manner not authorized by law, it is essential that she should have been guilty of some positive act of fraud, or else of some act of concealment or suppression which, in law, would be equivalent thereto. *Johnson v. Bryan*, 62 T. 623.

A certificate obtained by fraud or force, or making a false recital, may be avoided, if the purchaser is chargeable with notice of these facts before payment of the purchase-money. *Stallings v. Hullum*, 79 T. 422, 15 S. W. 677.

A married woman whose acknowledgment to a deed conveying land is defective is estopped by the foreclosure of the vendor's lien and receipt of the purchase-money by her. *Morris v. Turner*, 5 C. A. 708, 24 S. W. 959.

If execution of a deed by a married woman was procured by fraud, she might attack it, though it had been lawfully delivered, the same as if possession of it had been obtained and record made of it by fraud, so that, in such case, question of delivery is immaterial. *Stringfellow v. Brazelton* (Civ. App.) 142 S. W. 937.

Where, in an action to set aside deeds because of land fraudulently included, the proper execution of the deeds was not questioned, plaintiffs were not required to allege that the notary who took the acknowledgments, through fraud or imposition, failed to explain the deeds to them. *Oar v. Davis*, 105 T. 479, 151 S. W. 794.

Authority to take.—See Art. 6797 et seq. and notes.

Certificate—Requisites and sufficiency.—See notes under Art. 6805.

Conveyance of separate property.—See Art. 1114.

Conveyance of homestead.—See Art. 1115.

**Art. 6803. [4619] Certificate of officer.**—Any officer taking the acknowledgment of a deed, or other instrument of writing, must place thereon his official certificate, signed by him and given under his seal of office, substantially in form as hereinafter prescribed.

Necessity of proper certificate.—Deed entitled to record, though defectively acknowledged as to one party. *Rork v. Shields*, 16 C. A. 640, 42 S. W. 1032.

The record of a deed where the certificate of acknowledgment is fatally defective is a nullity. *Wanza v. Trapp* (Civ. App.) 87 S. W. 878.

A deed is not authorized to be recorded unless it has placed thereon or attached thereto the certificate of acknowledgment in compliance with the law. *Hughes v. Wright & Vaughan* (Civ. App.) 97 S. W. 526.

Conclusiveness and impeachment of certificate.—When the certificate of the privy examination of a married woman is in due form, it is conclusive as to the facts stated therein, in absence of evidence of fraud, to which the person claiming under the instrument was a party, or had knowledge of before the payment of money thereon. *Hartley v. Frosh*, 6 T. 208, 55 Am. Dec. 772; *Shelby v. Burtis*, 18 T. 644; *Pool v. Chase*, 46 T. 207; *Kocourek v. Marak*, 54 T. 201, 38 Am. Rep. 623; *Waltee v. Weaver*, 57 T. 569; *Davis v. Kennedy*, 58 T. 517; *Pierce v. Fort*, 60 T. 464; *Stringer v. Swenson*, 63 T. 7; *McDannell v. Horrell*, 1 U. C. 521; *T. L. & L. Co. v. Blalock*, 76 T. 85, 13 S. W. 12; *Gray v. Shelby*, 83 T. 405, 18 S. W. 809; *Bryant v. Grand Lodge Sons of Hermann* (Civ. App.) 152 S. W. 714.

The certificate is conclusive of the facts therein stated, except in cases of fraud, mistake or imposition, and a party will not be affected thereby unless he participated therein or had notice thereof. *Kocourek v. Marak*, 54 T. 205, 38 Am. Rep. 623; *Gray v. Shelby*, 83 T. 407, 18 S. W. 809; *Summers v. Sheern* (Civ. App.) 37 S. W. 246; *Atkinson v. Reed* (Civ. App.) 49 S. W. 260; *Claffin v. Harrington*, 23 C. A. 345, 56 S. W. 370; *Ellis v. Lehman*, 48 C. A. 308, 106 S. W. 453; *Bryant v. Grand Lodge Sons of Hermann* (Civ. App.) 152 S. W. 714.

Production of record book and certified copy of deed to avoid objections to deed offered in evidence. *Moses v. Dibrell*, 2 C. A. 457, 21 S. W. 414.

A recital in an acknowledgment of a deed executed by a firm as attorneys for the grantor, that the person acknowledging the deed is a member of the firm, is sufficient evidence of the fact. *McCulloch County Land & Cattle Co. v. Whitefort*, 21 C. A. 314, 50 S. W. 1042.

In trespass to try title to land, held, that the inserting of the description of the property in a deed after the same had been signed, sealed, and acknowledged did not render the recording thereof inoperative as against subsequent purchasers, third parties being precluded from questioning the notarial certificate. *Henke v. Stacy*, 25 C. A. 272, 61 S. W. 509.

That grantors may attack recitals in certificates of acknowledgment, it is necessary to show that the grantees had notice of the fraud of the notary and of his failure to properly take the acknowledgments. *Evart v. Dalrymple* (Civ. App.) 131 S. W. 223.

To impeach facts stated in an acknowledging officer's certificate, it is not essential that fraud on his part or collusion between him and the person perpetrating the fraud be alleged. *Oar v. Davis* (Civ. App.) 135 S. W. 710.

A certificate which recites that she is the wife of a person named may be contradicted by the parol testimony of such person that the woman is not his wife. *Dunn v. Taylor* (Civ. App.) 143 S. W. 311.

Where, in an action to set aside deeds executed by married women on the ground that defendant, their stepfather, had fraudulently included therein a 100-acre tract not agreed upon, and through their confidence in him had induced them to sign the deeds without reading them or discovering the fraud, the proper execution of the deeds was not questioned, it was not necessary for the petition to allege that the notary, through fraud or imposition, failed to explain the deeds to them; the rule that the notary's

certificate is conclusive of the facts therein stated, unless fraud or imposition is alleged, not applying where the proper execution of the deed is admitted. *Oar v. Davis*, 105 T. 479, 151 S. W. 794.

**Certificate—Requisites and sufficiency.**—See notes under Arts. 6804 and 6805.

**Art. 6804. [4620] Form of certificate of acknowledgment.**—The form of an ordinary certificate of acknowledgment must be substantially as follows:

“The State of \_\_\_\_\_,

“County of \_\_\_\_\_.

“Before me \_\_\_\_\_ [here insert the name and character of the officer] on this day personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

“Given under my hand and seal of office this \_\_\_\_\_ day  
[Seal] of \_\_\_\_\_, A. D. \_\_\_\_\_.  
“\_\_\_\_\_.”

**Certificate—Requisites and sufficiency—In general.**—The act of February, 1840, required the officer to certify that such acknowledgment of the execution of the instrument was made by the grantor. 4th Cong., sec. 5, p. 153.

A certificate, formal in other respects, which declares that the party whose name appears to a deed to which the certificate is attached appeared “and acknowledged that \_\_\_\_\_” had signed, sealed and delivered the same, is not sufficient. *Huff v. Webb*, 64 T. 284.

As to form of certificate, see *Farrell v. Palestine Loan Co.* (Civ. App.) 30 S. W. 814.

A certificate of acknowledgment to a deed held sufficient. *Hays v. Tilson*, 18 C. A. 610, 45 S. W. 479.

Certificate held to show that deed was acknowledged before notary. *Johnson v. Thompson* (Civ. App.) 50 S. W. 1055.

A certificate authenticating a deed held sufficient to entitle it to record. *Hughes v. Wright & Vaughan*, 100 T. 511, 101 S. W. 789, 11 L. R. A. (N. S.) 643, 123 Am. St. Rep. 827.

— **Pasted to deed.**—A certificate of acknowledgment written on a piece of paper separate from the deed, and pasted to it, is in compliance with the statute. *Schramm v. Gentry*, 63 T. 583.

— **Venue.**—The certificate of the notary did not show the county or state on the record. It is presumed that it was shown by the seal. *Stephens v. Motl*, 81 T. 115, 16 S. W. 731.

A certificate is not defective in not showing in what county the officer acted and was authorized to act. *Chamberlain v. Pybas*, 81 T. 511, 17 S. W. 50.

— **Date.**—A certificate of acknowledgment attached to a deed, but without date, is sufficient. *Webb v. Huff*, 61 T. 677.

— **Recitals as to authority of officer.**—The official character of the officer who makes the certificate must be shown in the body or appended to the signature. *Holliday v. Cromwell*, 26 T. 189; *Ballard v. Perry*, 28 T. 347; *Brown v. Moore*, 33 T. 645; *McKellar v. Peck*, 39 T. 381; *Sample v. Irwin*, 45 T. 567; *Titus v. Johnson*, 50 T. 224; *Morton v. Lowell*, 56 T. 643-647; *Coffey v. Hendricks*, 66 T. 676, 2 S. W. 47; *Railway Co. v. Carter*, 5 C. A. 675, 24 S. W. 1033; *Settegast v. Charpeot* (Civ. App.) 28 S. W. 580.

Other parts of the deed may be examined to show that the person making the certificates was authorized by law to authenticate deeds. It is not material that the certificate states that the deed was “assigned” by the grantor instead of “signed.” *Broussard v. Dull*, 3 C. A. 59, 21 S. W. 937.

Official character of officer taking acknowledgment of deed held to be sufficiently shown in certificate. *Riviere v. Wilkens*, 31 C. A. 454, 72 S. W. 608.

A certificate of acknowledgment of a deed held to sufficiently show that the person taking it was a notary public, so as to justify the admission in evidence of a certified copy of the deed. *Williams v. Cessna*, 43 C. A. 315, 95 S. W. 1106.

Abbreviations following the name of an officer taking an acknowledgment held to sufficiently disclose the official character of the officer. *Best v. Kirkendall* (Civ. App.) 107 S. W. 932.

— **Signature and seal.**—See *Equitable Mortgage Co. v. Kempner*, 84 T. 102, 19 S. W. 358.

A notary's certificate of probate of a deed for record is defective if not authenticated by his seal. *Ballard v. Perry*, 28 T. 347.

The registration in 1855 of a deed authenticated in 1838 by the county clerk without the seal is valid. *Waters v. Spofford*, 58 T. 115.

— **Matters to be certified.**—Under the act of May 12, 1846, a certificate of acknowledgment was sufficient though proof of the identity of the grantor was not indorsed thereon. *Monroe v. Arledge*, 23 T. 479; *Watkins v. Hall*, 57 T. 3; *Mullins v. Weaver*, 57 T. 6; *Sowers v. Peterson*, 59 T. 216.

The officer in his certificate, given under the statute of 1846, stated that the grantor appeared before him in person, and that “he was made known to him.” Held, that the failure to indorse the proof of identity on the deed did not vitiate the record. *Sowers v. Peterson*, 59 T. 216.

A certificate which states “that the grantor was personally known to him, and that he declared to him that he had executed the deed,” is a substantial compliance with the statute. *Schramm v. Gentry*, 63 T. 583.

A certificate that "this day personally appeared Jacob Presley, to be the person whose name is subscribed to the foregoing instrument and acknowledged," etc., is fatally defective. *McKie v. Anderson*, 78 T. 207, 14 S. W. 576; *Frost v. Erath Cattle Co.*, 81 T. 510, 17 S. W. 52, 26 Am. St. Rep. 831.

A certificate in other respects sufficient stating that the grantor is "well known—," is sufficient. *Gray v. Kauffman*, 82 T. 65, 17 S. W. 513.

A certificate of acknowledgment to a deed recited: "Personally appeared J. T. B., tax collector of said county, to me well known, and acknowledged," etc. "J. T. B., tax collector of C. county." This was a substantial compliance with the statute in the form of the certificate. *Schleicher v. Gatlin*, 85 T. 270, 20 S. W. 120.

A certificate of acknowledgment prior to the act of 1863 was not required to show that the grantor was known to the officer. *Driscoll v. Morris*, 2 C. A. 607, 21 S. W. 629; *Hill v. Smith*, 6 C. A. 312, 25 S. W. 1079.

A certificate of acknowledgment held insufficient in failing to state that the grantor acknowledged the deed. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

The certificate of acknowledgment to a deed which recites that before the officer personally came the grantor "to me well known and acknowledged that he signed and delivered the foregoing transfer for the purposes and considerations therein stated" is a sufficient compliance with the law. *Hayes v. Tilson*, 18 C. A. 610, 45 S. W. 479.

A certificate of acknowledgment reciting that the officer knew the grantor "by introduction [by the grantee]" held not to invalidate the acknowledgment. *Lindley v. Lindley*, 92 T. 446, 49 S. W. 573.

An acknowledgment reading, "Before me \* \* \* personally appeared (the grantor) known to me by introduction by (the grantee) to be the person whose signature is subscribed," etc., is not invalid because of the words "by introduction by (the grantee)." *Id.*

When the officer has determined upon the evidence presented to him, that he identifies the person in question as being the same that executed the instrument under consideration, and when he so certifies according to law, the certificate must be held to be sufficient, unless it shows upon its face that in fact the statement of such knowledge is untrue. *Id.*

An acknowledgment reciting that the grantor is known to the officer taking the acknowledgment, by introduction, held sufficient. *Lindley v. Lindley* (Civ. App.) 50 S. W. 159.

An acknowledgment that states that the vice-president and secretary of a corporation who executed a deed, were well known to the officer taking the acknowledgment and that each acknowledged that he executed the deed, is a substantial compliance with the statute. *Zimpleman v. Stamps*, 21 C. A. 129, 51 S. W. 341.

A certificate of acknowledgment, stating that J. and M., by their attorney in fact, T., being known to the officer to be the persons whose names were subscribed to the preceding deed, personally appeared before the officer and acknowledged that they executed the same for the purposes and consideration therein expressed, was insufficient to authorize a recording of the deed, and made it inadmissible in evidence as a recorded instrument. *Christy v. Romero* (Civ. App.) 140 S. W. 516.

— "Executed for purposes, etc., therein expressed."—In the authentication of a deed under the act of May 12, 1846, the word "consideration" was omitted. The omission held to be immaterial. *Monroe v. Arledge*, 23 T. 478.

The failure of the officer to certify that the grantor executed the deed for the purposes expressed therein is immaterial. *Sowers v. Peterson*, 59 T. 219; *Butler v. Brown*, 77 T. 342, 14 S. W. 136; *Stephens v. Motl*, 81 T. 115, 16 S. W. 731.

The omission from a certificate of acknowledgment to a deed of a recital that it was executed for the purposes and consideration therein expressed is not a fatal defect. *Arlo-la v. Newman*, 51 C. A. 617, 113 S. W. 157.

— Names of parties.—That the officer taking the acknowledgment to a deed by Jasper M. Williamson, signed J. M., certified that James M. acknowledged it, will not vitiate the deed, its execution and the identity of the grantor being otherwise proved. *Cheek v. Herndon*, 82 T. 146, 17 S. W. 763.

When more than one of the makers appears to acknowledge a deed, a certificate that he acknowledged, "that he executed it," is void for uncertainty. *Threadgill v. Bickerstaff*, 7 C. A. 406, 26 S. W. 739. See *McKie v. Anderson*, 78 T. 207, 14 S. W. 576; *Davidson v. Wallingford*, 88 T. 619, 32 S. W. 1030.

Omission of "y" from "they" held not to invalidate acknowledgment. *Montgomery v. Hornberger*, 16 C. A. 28, 40 S. W. 628.

A certificate of acknowledgment of a deed, stating that, "Came R., by his attorney, J., the grantor, with whom I am acquainted, and acknowledged that he signed, sealed, and delivered the foregoing instrument," was not void for uncertainty. *Ferguson v. Ricketts* (Civ. App.) 55 S. W. 975.

A certificate of acknowledgment, stating that the grantors (naming them separately) appeared before the notary and acknowledged that "he" executed the instrument, etc., is bad. *Kane v. Sholars*, 41 C. A. 154, 90 S. W. 937.

Where two persons execute a deed and the officer in making his certificate of acknowledgment says that "he" acknowledged, etc., without making it plain that each acknowledged, etc., the certificate is defective and the registration of the deed a nullity. *Hughes v. Wright & Vaughan* (Civ. App.) 97 S. W. 526.

Where there was no issue as to the identity of a person who executed and acknowledged an instrument, the error of the notary in writing both in the signature to the instrument and in the certificate of acknowledgment an incorrect name of the person was immaterial. *Taylor v. Silliman*, 49 C. A. 285, 108 S. W. 1011.

— Attestation clause.—A certificate was signed by the notary officially, but did not have the attestation clause, "Given under my hand and seal of office," and date of acknowledgment. It was held that the omission was immaterial. *Webb v. Huff*, 61 T. 677.

— Presumption from lapse of time.—See notes under Art. 3687, Rule 12. Sufficiency of certificate of acknowledgment by corporation.—A deed purporting to convey title to land by a national bank to which was signed the corporation name, with the bank seal affixed, by J. K., president, and R. P. A., cashier, had affixed thereto the



following certificate of acknowledgment: This day personally appeared J. K., president of said First National Bank of the city of Dallas, and R. P. A., cashier of said bank, both of whom are to me well known, and severally acknowledged that they executed the above and foregoing instrument for the purposes and considerations therein contained, signed by the officer and authenticated with his seal. Held to be in compliance with the statute (Art. 1173). *Muller v. Boone*, 63 T. 91.

Corporation can convey lands, how.—See Art. 1173.

**Art. 6805. [4621] Form of acknowledgment by a married woman.**—The certificate of acknowledgment of a married woman must be substantially in the following form:

“The State of \_\_\_\_\_,

“County of \_\_\_\_\_.

“Before me, \_\_\_\_\_ [here insert the name and character of the officer] on this day personally appeared \_\_\_\_\_, wife of \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_) to be the person whose name is subscribed to the foregoing instrument, and having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said \_\_\_\_\_, acknowledged such instrument to be her act and deed, and declared that she had willingly signed the same for the purposes and consideration therein expressed, and that she did not wish to retract it.

“Given under my hand and seal of office this \_\_\_\_\_ day  
[Seal] of \_\_\_\_\_, A. D. \_\_\_\_.

“\_\_\_\_\_.”

[Id. P. D. 1003.]

See *Claffin Co. v. Kamsler* (Civ. App.) 36 S. W. 1018; *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

**Signature and seal.**—In the authentication of a deed by a married woman, acknowledged October 25, 1845, the word “seal” before the words “of office,” in the authentication clause, was omitted. The officer testified that the acknowledgment was taken by him, and the words were inadvertently omitted in the certificate. Held, that the omission was immaterial. *Nichols v. Stewart*, 15 T. 226.

An acknowledgment of a married woman before a notary public was made in April, 1861. The certificate was regular in every respect, except that the seal of the county court was used instead of the notarial seal. Held, that the certificate was a nullity. *McKellar v. Peck*, 39 T. 381.

**Necessity of certificate.**—Without a proper certificate of a married woman's acknowledgment to a deed showing that the provisions of the statute with regard to such conveyance were complied with, it was utterly void. *Kimmev v. Abney* (Civ. App.) 107 S. W. 885.

**Matters which must be certified—That she personally appeared.**—A certificate of the acknowledgment of a married woman failing to state that she appeared in person, that she was the same party who signed the instrument, and that she was the wife of the one who signed with her, is fatally defective. *Beitel v. Wagner*, 11 C. A. 365, 32 S. W. 366; *Hayden v. Moffatt*, 74 T. 650, 12 S. W. 820, 15 Am. St. Rep. 866; *McKie v. Anderson*, 78 T. 207, 14 S. W. 576; *Frost v. Cattle Co.*, 81 T. 510, 17 S. W. 52, 26 Am. St. Rep. 831; *Watkins v. Hall*, 57 T. 1.

**Identity.**—The certificate is insufficient if it omits to state that she was known to the officer, or made known, or that she executed it for the purposes and consideration therein stated. *Hurst v. Finley*, 22 C. A. 605, 55 S. W. 388.

A certificate is sufficient, where it sufficiently identifies her as the wife of the grantor, though her given name is omitted. *Noel v. Clark*, 25 C. A. 136, 60 S. W. 356.

A deed by D. M. M. and his wife, L. A. M., held not invalidated because the acknowledgment described her as “L. A. M., wife of \_\_\_\_\_.” *Smith v. Burgher* (Civ. App.) 136 S. W. 75.

**Examined privily and apart.**—A certificate which stated that she had been examined “separate” instead of “privily” was cured by the act of July 28, 1876, validating defective certificates of acknowledgment. *McDannell v. Horrell*, 1 U. C. 521.

A statement that “she was examined and interrogated by me touching the same” is insufficient. *Runge v. Sabin* (Civ. App.) 30 S. W. 568.

Certificate held to show that separate examination of wife was conducted by notary. *Johnson v. Thompson* (Civ. App.) 50 S. W. 1055.

The privy examination and acknowledgment are absolutely essential to the passing of her title to land, and the only evidence thereof is the certificate of the officer stating them or the judgment of a court correcting such certificate in accordance with Arts. 6852-6854, so as to show them. *Veeder v. Gilmer*, 103 T. 453, 129 S. W. 595.

Where a wife's acknowledgment of a deed of the homestead was not taken privily and apart from her husband, and the grantee was present and cognizant of the fact, the deed was void as against the wife. *De West v. Barthelow* (Civ. App.) 136 S. W. 86.

A certificate, reciting that grantors, who were married women, having been made acquainted with the contents of the instrument, acknowledged, on examination apart from their husbands, that they executed the same freely and voluntarily and did not wish to retract, is sufficient; the provision for a privy examination not meaning that no person other than the officer shall be present. *W. D. Cleveland & Sons v. Smith* (Civ. App.) 156 S. W. 247.

— **Explanation.**—A certificate of acknowledgment which failed to show that a deed had been fully explained to a married woman by the officer is fatally defective. *Ruleman v. Pritchett*, 56 T. 482; *Langton v. Marshall*, 59 T. 296; *Johnson v. Bryan*, 62 T. 623; *Rhine v. Hodge*, 1 C. A. 368, 21 S. W. 140; *Moores v. Linney*, 2 C. A. 293, 21 S. W. 709.

Certificate held to show that contents of a deed were fully explained to grantor. *Johnson v. Thompson* (Civ. App.) 50 S. W. 1055.

It is the duty of an officer to inform himself of the details of the transaction and fully explain them to her. It is not enough that the officer state what the contents of the instrument are. *Blume v. White* (Civ. App.) 111 S. W. 1068, 1069.

While it is ordinarily sufficient for an officer to explain to her the instrument which he is called upon to execute, if the officer has knowledge of any fraud about to be perpetrated on the wife in connection with the instrument, it is his duty to divulge the same to her. *Ward v. Baker* (Civ. App.) 135 S. W. 620.

— **Acknowledgment.**—Where the certificate of the officer omitted to state that she acknowledged the instrument to be "her act and deed," but showed that she had "willingly signed it and wished not to retract it," it was held to be sufficient. *Thompson v. Johnson*, 84 T. 548, 19 S. W. 784.

A certificate of acknowledgment that failed to show that the party acknowledged the deed is insufficient. *Heintz v. O'Donnell*, 17 C. A. 21, 42 S. W. 797.

— **Willingly signed, etc.**—If the certificate of acknowledgment fails to show that a married woman "willingly" (or freely) signed the deed it is fatally defective. *Tieman v. Cobb*, 35 C. A. 289, 80 S. W. 251.

— **"Did not wish to retract it."**—The words that "she did not wish to retract it" are supplied by the equivalent words, "that she voluntarily assents thereto." *Norton v. Davis*, 83 T. 32, 18 S. W. 430.

The certificate must state that she did not wish to retract. *Murphy v. Reynaud*, 2 C. A. 470, 21 S. W. 991; *Fitzgerald v. Turner*, 43 T. 79; *Ryan v. Maxeey*, 43 T. 192; *Railway Co. v. Durrett*, 57 T. 48; *Railway Co. v. Donahoo*, 59 T. 128; *Randall v. Railway Co.*, 63 T. 586.

Married woman's acknowledgment held not invalidated by omission of word "it" after the statement that she "wished not to retract." *Montgomery v. Hornberger*, 16 C. A. 28, 40 S. W. 628.

Where a married woman, in her acknowledgment to a deed, consented that it might be recorded, a statement that she did not wish to retract the deed held unnecessary. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

Where the certificate of acknowledgment of a married woman of a deed of her separate property does not state that after executing it she declared she "did not wish to retract it" in compliance with the law then in force (Paschal's Dig. art. 1003), the deed is invalid, although the price was paid. *March v. Spivy* (Civ. App.) 133 S. W. 529.

Failure of the acknowledgment of a deed to state that she did not wish to retract will not defeat a suit by her remote grantee against a mere intruder, where she lived near the land, and for over 50 years neither she nor her heirs ever questioned the deed. *Spivy v. March*, 105 T. 473, 151 S. W. 1037, 45 L. R. A. (N. S.) 1109.

— **Need not state that it was shown to her.**—The law does not require that the certificate of officers should state that the instrument was shown the married woman. *Breneman v. Mayer*, 24 C. A. 164, 58 S. W. 733.

**Errors and defects.**—A notary cannot correct a certificate of the acknowledgment of a married woman after the instrument has once passed from his possession. The right to amend in a proper proceeding is barred in four years. *Stone v. Sledge* (Civ. App.) 24 S. W. 697.

Where the acknowledgment of a deed by a married woman did not contain a statement "that she did not wish to retract it," it was properly amended by a subsequent acknowledgment in due form. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

A deed from a married woman not bearing a proper certificate of acknowledgment is void if the certificate speaks the whole truth correctly, but it is not if the acknowledgment was properly taken and incorrectly certified. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

Where a married woman's signature to a deed was not essential to a conveyance of the land, an objection to the certificate of her acknowledgment held immaterial. *Ariola v. Newman*, 51 C. A. 617, 113 S. W. 157.

**Action to correct error.**—See Art. 6852.

**Certificates held sufficient.**—A certificate attached to a deed of a married woman read as follows: Personally appeared before me, etc., "W. B., party to a deed bearing date November 29, 1859, and acknowledged that he, the said B., signed the said deed for the purposes and considerations therein set forth and expressed; and E. B., wife of said B., also a party to said deed, whose signature, with her mark to the same, being by me examined privately and apart from that of her husband, and having the said deed fully explained to her, she, said Ellen Belcher, acknowledged that she signed the said deed without any bribe, threat or compulsion from that of her husband, and that she does not wish to retract the same. Given under my hand," etc. Held, that the certificate, though very informal, was sufficient. *Belcher v. Weaver*, 46 T. 293, 26 Am. Rep. 267.

A certificate to the privy examination and acknowledgment of a married woman read as follows: Before me, etc., "on this 11th day of April, 1872, personally came and appeared Francis Solyer and Caroline L. Solyer, his wife, to me well known, and severally acknowledged that they had executed and delivered the foregoing conveyance as their voluntary act and deed, for the purposes and considerations therein expressed, and the said Caroline L. Solyer having been examined by me privily and apart from her said husband, and having the same fully explained to her, she, the said Caroline L. Solyer, declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it." Given, etc. Held, sufficient. *Solyer v. Romanet*, 52 T. 567.

Certificate held sufficient under the act of April, 1846, where the words "sealed and delivered" were omitted. *Mullins v. Weaver*, 57 T. 5.

The certificate of the privy examination of a married woman read as follows: Before me, etc., "personally appeared J. P. T. and S. T., his wife, who are to me well known, and acknowledged that they signed, sealed, executed and delivered the foregoing deed for the purposes and considerations therein specified; and the said S. T. having been examined by me separate and apart from her said husband, and after having the contents and effects of the foregoing deed fully explained to her by me, she acknowledged that she signed the same of her own free will and accord, without the fear, force or persuasion of her husband, and that she wished not to retract it. Witness," etc. It was objected that the certificate failed to show that she had acknowledged the deed to be her act; that it failed to show the delivery of the deed by Mrs. T., or a declaration by the officer that said deed was delivered by her; and that it failed to show any privy examination of Mrs. T. by the officer. The objections were overruled. *Coombes v. Thomas*, 57 T. 321.

A certificate reciting "that the said E. J. S., after being examined by me privily and apart from her said husband, and having said instrument fully explained to her, she acknowledged it to be her own free act and deed and that she did not wish to retract it," held sufficient. *Wilson v. Simpson*, 80 T. 279, 16 S. W. 40.

Certificates held sufficient. *Clark v. Groce*, 16 C. A. 453, 41 S. W. 668; *Johnson v. Thompson* (Civ. App.) 50 S. W. 1055; *Arnall v. Newcomb*, 29 C. A. 521, 69 S. W. 92; *Milby v. Hester* (Civ. App.) 94 S. W. 178; *W. D. Cleveland & Sons v. Smith*, 156 S. W. 247.

Certificate held to show that grantor executed a deed without constraint. *Johnson v. Thompson* (Civ. App.) 50 S. W. 1055.

Certificates held insufficient.—The certificate by a notary public, apparently made under the act of 1846, recited that the grantor, a married woman, appeared before him, "and acknowledged herself party to the annexed deed of trust, and, being examined and apart from her husband, acknowledged that she signed, sealed and delivered the same for the purposes and considerations therein expressed, and that she wished not to retract it." Held, that the certificate was fatally defective. *Rice v. Peacock*, 37 T. 392.

Acknowledgment held insufficient, under Pasch. Dig. art. 1003. *Estes v. Turner*, 30 C. A. 365, 70 S. W. 1007.

Certificates held defective.—*McAnulty v. Ellison* (Civ. App.) 71 S. W. 670; *Kopke v. Votaw*, 95 S. W. 15.

A married woman's deed containing an acknowledgment indicating that the officer did not comply with the statute is void. *Holland v. Votaw* (Civ. App.) 130 S. W. 882.

Conclusiveness of certificate.—See Art. 6803.

Certificate—Requisites and sufficiency.—See notes under Art. 6804.

**Art. 6806. [4622] Proof of instrument by witness.**—The proof of any instrument of writing for the purpose of being recorded shall be by one or more of the subscribing witnesses personally appearing before some officer authorized to take such proof, and stating on oath that he or they saw the grantor or person who executed such instrument subscribe the same, or that the grantor or person who executed such instrument of writing acknowledged in his or their presence that he had executed the same for the purposes and consideration therein stated, and that he or they had signed the same as witnesses at the request of the grantor or person who executed such instrument; and the officer taking such proof shall make a certificate thereof, sign and seal the same with his official seal. [Act May 12, 1846, sec. 8. P. D. 5008.]

Historical.—The act of December 20, 1836, required proof to be made by one of the witnesses of the number required by law who "shall swear to the signature of the signer, which shall be certified by the recorder, and form part of the record." 1st Cong., sec. 35, p. 145.

The act of December 20, 1836, contained the following sections:

Sec. 37. "Any person who owns or claims land of any description, by deed, lien or any other color of title, shall, within twelve months from the 1st day of April next, have the same proven in open court, and recorded in the office of the clerk of the county court in which said land is situated; but if a tract of land lies on the county line, the title may be recorded in the county in which part of said land lies." This section was repealed by the act of May 10, 1838. 2d Cong., p. 146.

Sec. 38. "All titles, liens, mortgages or other color of title, before they can be admitted upon record, must be proven by at least two subscribing witnesses if living in the county and, if not so living in the county, then the handwriting shall be proven either before some county judge or before the clerk of the county court in whose office such record is proposed to be made; and in all cases the certificate of any county judge that the said witness appeared before him and acknowledged his signature, or that the handwriting of the same was duly proven, shall be sufficient evidence to authorize the clerk of the county court to enter such title, lien, mortgage or other color of title upon record." Act Dec. 20, 1836; 1st Cong., § 38, p. 148.

There is an apparent conflict between the thirty-fifth and thirty-eighth sections of the act of December 20, 1836. Section 35 requires proof of the signature of the signer by one of the witnesses of the number required by law, but such witness is not specifically described as a subscribing witness. Section 38 requires proof by two subscribing witnesses, if living in the county, or the handwriting of the signer, or of one of the subscribing witnesses. *Paschal v. Perez*, 7 T. 348.

By the act of January 9, 1839, proof was made by one of the subscribing witnesses who shall swear to the signature of the signer. 3d Cong., p. 47.

Under the act of January 18, 1840, a conveyance of personal property for a consideration not deemed valuable in law, where possession does not remain with the donee, must

be proven for record by two or more witnesses. 4th Cong., p. 28. This provision of the statute of frauds was virtually repealed by the act of February 5, 1841, and May 13, 1846. *Manly v. Culver*, 20 T. 143.

Under the act of February 5, March 17, 1841, the proof within the republic could be made by a subscribing witness. A deed, etc., executed abroad could be proved by two subscribing witnesses. 5th Cong., sec. 21, p. 163. A bond dated September 17, 1835, witnessed by three subscribing witnesses, one of whom made his mark, was proven for record in September, 1845, by the witness who made his mark, who made oath that "to the best of his knowledge and belief he signed the same as a witness, and that J. P. (the obligor) acknowledged that he signed it for the purposes therein expressed." Held properly authenticated. *Stramler v. Coe*, 15 T. 211.

By the act of May 12, June 13, 1846, the proof of an instrument by a witness is the same as prescribed in this article. 1st Leg., sec. 8, p. 236. A bond for title to land in Texas, with two subscribing witnesses thereto, was executed in Arkansas, and its execution acknowledged before the presiding judge of a county court in that state, who subsequently made oath before a notary public in Texas that it had been executed and acknowledged before him, and that his certificate of such acknowledgment was genuine. Held, that in absence of evidence of the death of the subscribing witnesses, the execution of the instrument was not properly proven under the act of May 12, 1846, to admit it to record. *Craddock v. Merrill*, 2 T. 494.

**Need not have signed at request of grantor, when.**—Where the witness states that he saw the grantor subscribe the same, he is not required to show that he signed the same as a witness at the request of the grantor; and the use of the word "execute" instead of "subscribe" is not material. *Dorn v. Best*, 15 T. 62; *Deen v. Wills*, 21 T. 642; *Downs v. Porter*, 54 T. 59; *Sowers v. Peterson*, 59 T. 216. In the case last cited it is said: "The present registration law differs materially from all former laws on the subject. It is more rigorous in its requirements, and greater care and accuracy in taking the acknowledgments of deeds are now required than formerly. A stricter rule of construction may, therefore, properly be applied to them than would be to deeds executed and recorded under former laws." In the certificate of authentication, under the act of 1846, after the word "known," the words "to me to be the person whose name is subscribed to the foregoing instrument," were not added. Held, the omission was immaterial. *Watkins v. Hall*, 57 T. 1.

Where the witness is present and sees the instrument signed, subscribed or executed, and signed as a witness, it is not necessary that he should swear that he signed it at the request of the grantor. *Dorn v. Best*, 15 T. 65; *Deen v. Wills*, 21 T. 642; *Downs v. Porter*, 54 T. 59; *Jones v. Robbins*, 74 T. 615, 12 S. W. 824.

**Proof by subscribing witnesses.**—The oath of a subscribing witness to a deed held insufficient to prove the deed for record. *Johnson v. Franklin* (Civ. App.) 76 S. W. 611.

**Certificate—Requisites and sufficiency.**—See notes under Art. 6808.

**Art. 6807. [4623] Witness must be personally known to officer.**—The proof by a subscribing witness must be by some one personally known to the officer taking the proof to be the person whose name is subscribed to the instrument as a witness, or must be proved to be such by the oath of a credible witness, which fact shall be noted in the certificate. [Id. sec. 10. P. D. 5010.]

**Art. 6808. [4624] Form of certificate or proof by witness.**—The certificate of the officer, where the execution of the instrument is proved by a witness, must be substantially in the following form:

"The State of \_\_\_\_\_,

"County of \_\_\_\_\_.

"Before me, \_\_\_\_\_ [here insert the name and character of the officer], on this day personally appeared \_\_\_\_\_, known to me (or proved to me on the oath of \_\_\_\_\_), to be the person whose name is subscribed as a witness to the foregoing instrument of writing, and after being duly sworn by me stated on oath that he saw \_\_\_\_\_, the grantor or person who executed the foregoing instrument, subscribe the same (or that the grantor or person who executed such instrument of writing acknowledged in his presence that he had executed the same for the purposes and consideration therein expressed), and that he had signed the same as a witness at the request of the grantor [or person who executed the same].

"Given under my hand and seal of office this \_\_\_\_\_ day  
 [Seal] of \_\_\_\_\_, A. D. \_\_\_\_\_.  
 "\_\_\_\_\_."

**Certificate—Requisites and sufficiency.**—In general.—The act of February, 1840, reads as follows: "The clerks of the several county courts of this republic and their deputies shall be, and they are hereby, authorized and required to admit to record, at any time, in the form required by this act, any conveyance, either on the acknowledgment of the party or parties, or the proof, on oath, of such acknowledgment by the legal number of witnesses thereto made, in the offices of the respective clerks, or upon the certificate of some district judge, or chief justice, or notary public of a county, with the seal of his office thereunto annexed, that such acknowledgment was made, or the execution of the

instrument proven as required above; and any conveyance so recorded shall have the same legal validity in all respects as if it were proven in open court." 4th Cong., sec. 5, p. 153.

A deed executed in Louisiana in 1874 was attested as follows: "In testimony whereof the said parties hereto sign their names, together with me, notary, and the undersigned competent witnesses, and I affix hereto my official seal on this 31st day of March, 1874, the date," etc. This acknowledgment held sufficient. *Brownson v. Scanlan*, 59 T. 222. See *Beaumont Pasture Co. v. Preston*, 65 T. 448; *Snowden v. Rush*, 69 T. 593, 6 S. W. 767.

The certificate of the officer to the proof by a subscribing witness to a deed, when made under this article, which copies the form of the certificate in the alternative, as given in the statute, leaving it uncertain whether the witness saw the grantor sign the instrument, or heard him acknowledge his signature, is insufficient to prove the execution of the instrument. *Harvey v. Cummings*, 68 T. 599, 5 S. W. 513; *Riley v. Pool*, 5 C. A. 346, 24 S. W. 85.

— **Historical.**—The act of December 20, 1836, required the proof or acknowledgment to "be certified by the recorder and form part of the record." 1st Cong., sec. 35, p. 148; P. D. 4973.

The act of January 19, 1839, directed that "a certificate of the proof or acknowledgment shall be made upon such instrument by the proper officer, and become a part of the record." 3d Cong., p. 47; P. D. 4974.

— "For the purposes therein expressed."—The failure of the officer to certify that the grantor executed the deed for the purposes expressed therein does not affect the legality of the certificate. *Butler v. Brown*, 77 T. 342, 14 S. W. 136; *Monroe v. Arledge*, 23 T. 478.

— **Identity of person acknowledging.**—The certificate of the officer identified the person who proved the deed as the same person who signed it as a witness, and a discrepancy in the middle initial of the name of the witness was held immaterial. *Page v. Arnim*, 29 T. 53.

As to sufficient identification of person making the acknowledgment. *Moses v. Dibrell*, 2 C. A. 457, 21 S. W. 414.

A deed was insufficiently proved by a subscribing witness, under Art. 6806, where the certificate did not state that such person was known to the officer, as required by such article and Art. 6807. *Christy v. Romero* (Civ. App.) 140 S. W. 516.

**Certificate—Requisites and sufficiency.**—See notes under Arts. 6804 and 6805.

**Art. 6809. [4625] Handwriting may be proved, when.**—The execution of an instrument may be established for record by proof of the handwriting of the grantor and of at least one of the subscribing witnesses in the following cases:

1. When the grantor and all the subscribing witnesses are dead.
2. When the grantor and all the subscribing witnesses are non-residents of this state.
3. When the place of their residence is unknown to the party desiring the proof, and can not be ascertained.
4. When the subscribing witnesses have been convicted of felony, or have become of unsound mind, or have otherwise become incompetent to testify.
5. When all the subscribing witnesses to an instrument are dead or are non-residents of this state, or when their residence is unknown, or when they are incompetent to testify, and the grantor in such instrument refuses to acknowledge the execution of the same for record.

See this case for the mode by which a deed can be proven for record where the subscribing witnesses are dead. *Vasquez v. Texas Loan Agency* (Civ. App.) 45 S. W. 942.

**Grantee competent witness of handwriting.**—On the 8th of July, 1854, the grantee in a deed made the affidavit required by statute to admit the deed to record upon proof of the handwriting of the subscribing witness. Held, that the grantee was competent to make the affidavit. *Waters v. Spofford*, 58 T. 115.

**Art. 6810. [4626] Evidence must prove what.**—The evidence taken under the preceding article must satisfactorily prove to the officer the following facts:

1. The existence of one or more of the conditions mentioned therein; and,
2. That the witness testifying knew the person whose name purports to be subscribed to the instrument as a party, and is well acquainted with his signature, and that it is genuine; and,
3. That the witness testifying personally knew the person who subscribed the instrument as a witness, and is well acquainted with his signature, and that it is genuine; and,
4. The place of residence of the witness testifying.

**Variance in names.**—A deed dated February 10, 1844, was signed by the maker, Charles M. Gould, and by the subscribing witnesses, D. M. Marange and A. G. Richardson. On the 8th of July, 1854, affidavit was made that Henry G. Richardson, one of the subscrib-

ing witnesses to the "annexed" deed, was dead, and the other absent from the state. On the same day two witnesses made affidavit that they were well acquainted with the handwriting of the grantor, and "Henry G. Richardson, one of the subscribing witnesses to the annexed deed," etc. Held, that the variance in the names was immaterial. *Waters v. Spofford*, 58 T. 115.

**Art. 6811. [4627] Proof, how made when grantor made his mark.**—When the grantor or person who executed the instrument signed the same by making his mark, and when also any one or more of the conditions mentioned in article 6809 exists, the execution of any such instrument may be established by proof of the handwriting of two subscribing witnesses and of the place of residence of such witnesses testifying. [Act March 6, 1863, sec. 1. P. D. 5009.]

See *McClintic v. Midland Grocery & Dry Goods Co.* (Sup.) 154 S. W. 1157.

**Art. 6812. [4628] Proofs, how made and certified.**—The proof mentioned in the three preceding articles must be made by the deposition or affidavit of two or more disinterested persons in writing; and the officer taking such proof shall make a certificate thereof, and sign and seal the same with his official seal; which proofs and certificate shall be attached to such instrument. [Id. P. D. 5009.]

**Art. 6813. [4629] Officers are authorized to administer oath, etc.**—Officers authorized to take the proof of instruments of writing under the provisions of this chapter are also authorized in such proceedings—

1. To administer oaths or affirmations.
2. To employ and swear interpreters.
3. To issue subpoenas.
4. To punish for contempt as hereinafter provided.

**Art. 6814. [4630] Subpoena shall issue when.**—Upon the sworn application of any person interested in the proof of any instrument required or permitted by law to be recorded, stating that any witness to the instrument refuses to appear and testify touching the execution thereof, and that such instrument can not be proved without his evidence, any officer authorized to take the proof of said instrument shall issue a subpoena requiring such witness to appear and testify before such officer touching the execution of such instrument. [Act Feb. 9, 1860, sec. 1. P. D. 5020.]

**Art. 6815. [4631] May compel attendance and answers of witness.**—When such witness shall fail to appear in obedience to such subpoena, said officer shall have the same power to enforce his attendance and to compel his answers on oath touching the execution of such instrument as a judge of the district court has to compel the attendance and answers of witnesses; provided, that an attachment shall in no case issue without the same compensation is made or tendered to each witness as is allowed to witnesses in other cases; and provided, further, that no witness shall be required to go beyond the limits of the county of his residence, unless he shall, for the time being, be found in the county where the execution of such instrument is sought to be proved for registration.

**Art. 6816. [4632] Statement of acknowledgment, etc., to be recorded.**—All officers authorized or permitted by law to take the acknowledgment or proof of any deed, bond, mortgage, bill of sale, or any other written instrument required or permitted by law to be placed on record shall procure a well-bound book, in which they shall enter and record a short statement of each acknowledgment or proof taken by them, which statement shall be by them signed officially. [Act April 28, 1874, p. 155, sec. 1. P. D. 7418b.]

**Art. 6817. [4633] What the statement for record shall contain.**—Such statement shall recite the true date on which such acknowledgment or proof was taken, the name of the grantor and grantee of such instrument, its date, if proved by a subscribing witness, the name of the witness, the known or alleged residence of the witness and whether per-

sonally known or unknown to the officer; if personally unknown, this fact shall be stated, and by whom such person was introduced to such officer, if by any one, and the known or alleged residence of such person. [Id. sec. 1.]

**Art. 6818. [4634] Statement shall further recite.**—Such statement shall also recite, if the instrument is acknowledged by the grantor, his then place of residence, if known to the officer; if unknown, his alleged residence, and whether such grantor is personally known to the officer; if personally unknown, by whom such grantor was introduced, if by any one, and his place of residence. If land is conveyed or charged by the instrument, the name of the original grantee shall be mentioned, and the county where the same is situated. [Id. sec. 1.]

**Art. 6819. [4635] The book to be a public record.**—The book herein required to be procured and kept, and the statements herein required to be recorded in the same shall be an original public record, and shall be delivered to his successor, and the same shall be open to the inspection and examination of any citizen at all reasonable times. [Id.]

**Art. 6820. [4636] Action for damages will lie by person injured.**—Any person injured by the failure, refusal or neglect of any officer whose duty it is to comply with any of the provisions of this chapter shall have a right of action against such officer so failing, refusing or neglecting, before any court of competent jurisdiction, for the recovery of all damages resulting from such neglect, failure or refusal. [Id.]

**Contributory negligence.**—B. conveyed to R. a tract of land, reciting a consideration of \$1,500 "paid and secured" by R. A mortgage was at the same time executed to secure the payment of a note for \$1,000, the unpaid purchase money. Both were acknowledged and deposited in the clerk's office on the 16th of May, 1870, the recording fees paid, and the deed was recorded on the same day. The clerk did not keep a file book. The mortgage was not recorded until after July 20, 1870. On the last-named date R. applied to C. for a loan of \$8,000, proposing to secure the same by a deed of trust on the land. The records were examined by C.'s attorney, who saw the deed, but did not see the mortgage or make inquiry for the file book, or for instruments filed but not recorded. B. lived but a short distance from the court-house. B. was compelled to pay off a judgment for the unpaid purchase money. Held, that C. was guilty of contributory negligence in failing to inquire for instruments filed and not recorded, and to make inquiry of B., and could not recover. *Crews v. Taylor*, 56 T. 461.

## CHAPTER THREE

### INSTRUMENTS AUTHORIZED TO BE RECORDED, AND THE EFFECT OF RECORDING

Art.	Art.
6821. Patents and grants may be recorded without proof.	6832. Judgments to be recorded.
6822. Copies of archives recorded.	6833. Transfer of judgments to be recorded.
6823. What may be recorded.	6834. Judgments in justices' courts, how recorded, etc.
6824. All sales to be void as to creditors and purchasers unless registered.	6835. Partition to be recorded.
6825. Located lands have priority over unrecorded title lands, when.	6836. Decree may be abbreviated.
6826. English language to be used.	6837. Suit for land, notice to be filed.
6827. Deeds to be recorded where.	6838. Record of, how made.
6828. Deeds valid, etc., against subsequent creditors from, etc.	6839. Transfers without notice valid.
6829. Marriage contract valid, when.	6840. Effect of notice.
6830. Recorder shall record, etc.	6841. Titles to chattels, where recorded.
6831. Copies from land office to be recorded.	6842. Record of any grant, etc., when notice.

**Article 6821. [4637] Patents and grants may be recorded without proof.**—Letters patent from the state of Texas, or any grant from the government, executed and authenticated pursuant to existing law, may be recorded without further acknowledgment or proof.

**Patents.**—See notes under Art. 6824.

**Admissibility of recorded instruments in evidence.**—See Art. 3700.

**Art. 6822. [4638] Copies of archives recorded.**—Copies of all deeds, transfers, or any other written evidence of title to land, which have been filed in the general land office, in accordance with law, or copies when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the officers having lawful custody thereof, shall be admitted to record in the county where such land lies. [Act Jan. 19, 1839, sec. 2. P. D. 4984.]

**Application.**—By the act of January 19, 1839, copies of all deeds, etc., when the originals remain in the public archives, and were executed in conformity with the laws existing at their dates, duly certified by the proper officers, were admitted to record in the county where such land lies. 3d Cong., sec. 2, p. 47; P. D. 4984. This section was applicable only to copies of instruments which at the date of the act remained in the public archives, which, upon authentication by the proper officers in charge of them, could be recorded; and it did not permit instruments then in private hands to be recorded on the faith of certificates made by officers of the pre-existing government. *Lambert v. Weir*, 27 T. 359.

**Public archives.**—See notes under Arts. 82-90, 3694.

Deeds and other instruments of writing which were executed or issued prior to the 2d of March, A. D. 1836, upon stamped paper of the second or third seal, and which deeds or instruments of writing are not original documents in the original land office, or expressly declared by law to be archives of said office, are hereby declared to constitute no part of the archives of said office. Art. 84.

The testimonio or second original of a Spanish title is not a public archive, and its execution must be proven before it is admissible in evidence. *Smith v. Townsend*, Dallah, 569; *Houston v. Perry*, 5 T. 464; *Titus v. Kimbro*, 8 T. 210; *Wood v. Welder*, 42 T. 396; *Hutchins v. Bacon*, 46 T. 408; *State v. Cardinas*, 47 T. 250; *Houston v. Blythe*, 60 T. 506.

**Proof of testimonio.**—Proof of the handwriting of the commissioner and attesting witness to a testimonio is sufficient. *De Leon v. White*, 9 T. 598; *Paschal v. Perez*, 7 T. 348; *Edwards v. James*, 7 T. 372.

**Effect of filing in land office of transfer of land certificate.**—The statute does not make the filing in the general land office of the transfer of a land certificate or of land to have the same effect as registration in the proper county, and in the absence of a statute giving such effect to the filing of such a paper in the general land office, such effect cannot be given to it. *Lewis v. Johnson*, 68 T. 448, 4 S. W. 644.

**Art. 6823. [4639] What may be recorded.**—The following instruments of writing, which shall have been acknowledged or proved according to law, are authorized to be recorded, viz.: All deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasances or other instruments of writing concerning any lands or tenements, or goods and chattels, or movable property of any description. [Act May 12, 1846, sec. 4. P. D. 5004.]

See *Gooch v. Addson*, 13 C. A. 76, 35 S. W. 83.

**What may be recorded—Deeds, conveyances, mortgages, etc.**—The act of December 20, 1836, authorized the recording of deeds, conveyances, mortgages and other liens. 1st Cong., sec. 35, p. 148.

The act of January 19, 1839, authorized the recording of deeds, conveyances, mortgages and other liens affecting the titles to land and immovable property situated within the county. 3d Cong., sec. 1, p. 47.

The act of February 5, March 17, 1841, authorized the record of any grant, deed or instrument for the conveyance of real estate, or personal, or both, or for the settlement thereof, in marriage, or separate property or conveyance of the same in mortgage, on trust to uses, or on conditions. 5th Cong., sec. 20, p. 163.

By the act of May 12, June 13, 1846, the following instruments could be recorded: Deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing or concerning any lands or tenements, or goods and chattels, or movable property of any description, judgments and abstracts of judgments; also marriage contracts, powers of attorney and official bonds. 1st Leg., secs. 4, 5, 6, p. 236.

An instrument acknowledging an obligation by the maker to transfer land to another, duly acknowledged, may be recorded, whatever its form may be. *Chamberlin v. Boon*, 74 T. 659, 12 S. W. 727.

— **Conveyance not under seal.**—A conveyance of land not under seal was admissible to record. *Miller v. Alexander*, 8 T. 36.

— **Foreign will.**—A will conveying or disposing of land in this state having been duly probated according to the laws of any state or territory, an attested copy thereof may be recorded in the same manner as a deed and without further proof. See Art. 7875.

— **Assignment for benefit of creditors.**—An assignment of accounts for the benefit of creditors made August 12, 1852, was not an instrument that could be recorded under the law then in force. *Burnham v. Chandler*, 15 T. 441.

A deed of assignment for the benefit of creditors, made in compliance with the statute, will pass title to the property to the assignee, where the deed was filed for record before the levy of a writ of attachment, although the writ was issued before such filing. The court say that the validity of the assignment, and its completeness to pass the title to the property, does not depend upon the act of filing the deed for registry. The provisions of the statute are to be construed so far beneficially to the creditors, for whose benefits its provisions are intended, as to give effect to such advantages and benefits as its enactments are intended to confer on them as a class of persons;



and so are not to be defeated by a construction that would place it in the power of a single creditor or a few creditors to frustrate them. It would be in fraud of the law of assignments to allow a creditor to issue an attachment before it was practicable, perhaps, for the assignee to file the deed for record. *Piggott v. Schram*, 64 T. 447.

— **Release of interest in partnership debts.**—*Quære*, as to an instrument releasing an interest in partnership debts, executed in 1869. *Pegram v. Owens*, 64 T. 475.

— **Assignment of judgment.**—See Art. 6833.

Under the act of 1846 an assignment of a judgment by the plaintiff to a third person was not an instrument that could be recorded. *Johnson v. Brown*, 25 T. Sup. 120.

— **Abstracts of judgments.**—Art. 5610 et seq. authorize the record of abstracts of judgments and of satisfaction thereof.

— **Assignment of vendor's lien notes.**—An assignment of vendor's lien notes is such an instrument as is required by the registry laws to be recorded in order to be effectual against subsequent purchasers for valuable consideration without notice. *Busch v. Broun* (Civ. App.) 152 S. W. 683.

— **Liens of mechanics, etc.**—See Arts. 5621, 5640, 5663-5671.

— **Chattel mortgages and conditional sales, etc.**—See Art. 5654.

— **Brands and trade-marks.**—See Arts. 706, 7159, 7723.

**Probate proceedings.**—See Art. 3217.

**Does not validate acknowledgment.**—The act does not validate a previous defective acknowledgment. *McCelvey v. Cryer*, 28 S. W. 691, 8 C. A. 437.

**How foreign will may be proved.**—See Art. 7875.

**"Movable fixtures."**—Movable fixtures defined. *Railway Co. v. Dunman* (Civ. App.) 33 S. W. 1024.

**Art. 6824. [4640] All sales, etc., to be void as to creditors and purchasers, unless registered.**—All bargains, sales and other conveyances whatever, of any land, tenements and hereditaments, whether they may be made for passing any estate of freehold of inheritance or for a term of years; and deeds of settlement upon marriage, whether land, money or other personal thing; and all deeds of trust and mortgages shall be void as to all creditors and subsequent purchasers for valuable consideration without notice, unless they shall be acknowledged or proved and filed with the clerk, to be recorded as required by law; but the same as between the parties and their heirs, and as to all subsequent purchasers, with notice thereof or without valuable consideration, shall nevertheless be valid and binding. [Act Feb. 5, 1840, p. 69, sec. 4. P. D. 4988.]

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|----------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------|
| 1. Article not retroactive.                                                | 17. — Pre-existing debt.                                                                      |
| 2. Laws do not apply to trusts, etc., arising by operation of law.         | 18. Purchases from bona fide purchasers.                                                      |
| 3. Patents not within article.                                             | 19. Title and rights required by bona fide purchasers and equities and defenses against them. |
| 4. "Creditors and purchasers for a valuable consideration without notice." | 20. Evidence.                                                                                 |
| 5. Bona fide purchasers—In general.                                        | 21. — Presumptions and burden of proof.                                                       |
| 6. Mode and form of conveyance—In general.                                 | 22. Questions for jury.                                                                       |
| 7. — Quitclaim.                                                            | 23. Mortgages as bona fide purchasers—In general.                                             |
| 8. Notice—In general.                                                      | 24. — Notice and effect of notice in general.                                                 |
| 9. — Actual notice.                                                        | 25. — Record as notice.                                                                       |
| 10. — Effect of notice.                                                    | 26. — Pre-existing debt as consideration.                                                     |
| 11. — Constructive notice and facts putting on inquiry.                    | 27. — Rights acquired in general.                                                             |
| 12. — Recitals in conveyance.                                              | 28. — Purchase from mortgagee.                                                                |
| 13. — Records and facts of which record is notice.                         | 29. — Sufficiency of evidence.                                                                |
| 14. — Possession.                                                          | 30. Chattel mortgagees.                                                                       |
| 15. Consideration—In general.                                              |                                                                                               |
| 16. — Payment of value.                                                    |                                                                                               |

**1. Article not retroactive.**—This article was enacted in 1887 as an amendment of the act of 1881. It has reference only to the future and does not affect the validity of registrations theretofore made. *Stark v. Harris* (Civ. App.) 106 S. W. 890.

**2. Laws do not apply to trusts, etc., arising by operation of law.**—An equitable lien, arising by operation of law and independent of any contract, verbal or written, between the parties, such as the vendor's lien, is not within the statute. *Senter v. Lambeth*, 59 T. 259.

When a debtor held the legal title to property in trust for another, a purchaser at a sheriff's sale under a recorded judgment, with notice of the rights of the cestui que trust before his purchase, acquires no title as against them. *Calvert v. Roche*, 59 T. 463.

A creditor who levies upon property held by the husband in trust for his wife cannot be protected as an innocent purchaser since such trust is not within the registration laws. *Parker v. Coop*, 60 T. 111.

The registration laws do not apply to titles by inheritance, as they cannot be placed upon record, and a purchaser is bound to take notice of the relations of the parties through whom his title passes; especially so where all the parties reside in the immediate neighborhood where the conveyances are made. *Trammel v. Neal*, 1 U. C. 61.

A parcel partition is not affected by the registration laws. Subsequent to such partition a levy of an execution upon lands allotted to others than the defendant in execution

would not affect the rights of those holding under the partition. *Aycock v. Kimbrough*, 71 T. 330, 12 S. W. 71, 10 Am. St. Rep. 745.

Where a guardian purchases land partly with funds belonging to her wards and takes a deed in her own name, a resulting trust is created to the extent of the wards' interest in the purchase money, and a purchaser from the guardian during the wards' minority would not be an innocent purchaser simply for the want of notice, as the transaction does not fall within the registration statute. *Hix v. Armstrong* (Civ. App.) 108 S. W. 797.

3. **Patents not within article.**—Patents are not within the provisions of this article. A patent is notice to the world; the record of it is in the general land office. *Evitts v. Roth*, 61 T. 81; *Byrne v. Fagan*, 16 T. 391.

4. **"Creditors and purchasers for a valuable consideration without notice."**—This article applies only to creditors who have acquired some character of lien upon or interest in the land. *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657; *Grace v. Wade*, 45 T. 522; *Linn v. Le Compte*, 47 T. 440; *McKamey v. Thorp*, 61 T. 648. The equity of the statute can only be appropriated by creditors not charged with notice. *Parker v. Coop*, 60 T. 111; *Wright v. Lassiter*, 71 T. 640, 10 S. W. 295; *Blum Land Co. v. Harbin* (Civ. App.) 33 S. W. 153; *Brown v. Chancellor*, 61 T. 437-444.

Creditors and purchasers include bona fide purchasers at execution sales. *Ante*, Art. 3768; *Ward v. League* (Civ. App.) 24 S. W. 986.

The subsequent purchasers who are meant are only those the origin of whose title is subsequent to the title of the grantee in the recorded deed, and where a grantor conveyed to his mother who conveyed to another and he to plaintiff, and all the conveyances are recorded when they are executed, and subsequent to the conveyance and registration of the deed to the mother, but prior to the conveyance to plaintiff, the land was sold on execution against the first grantor, and the sheriff's deed recorded, the registry of the sheriff's deed, is not as against plaintiff who purchased in good faith and for a valuable consideration, notice of the existence of such deed. The defendant claimed that the first grantor conveyed to his mother with intent to defraud his creditors and therefore the deed was void, but plaintiff could not be charged with constructive notice of the sheriff's deed (of which he had no actual notice) and then charged with the suggestion of fraud which that deed implied, because this would be to build presumption upon presumption, which the law never allows. *White v. McGregor*, 92 T. 556, 50 S. W. 564, 71 Am. St. Rep. 875.

Whether or not a junior mortgagee is to be classed as a creditor and not as a purchaser only, under the law regulating registration of instruments affecting titles to lands for any purpose, is a question which admits of doubt under the decisions. *Turner v. Cochran*, 94 T. 480, 61 S. W. 924.

5. **Bona fide purchasers—In general.**—An unrecorded deed is valid as to subsequent purchasers with notice. *Parks v. Willard*, 1 T. 350.

A bona fide purchaser for a valuable consideration from a fraudulent grantee will be protected. *Sydnor v. Roberts*, 13 T. 598, 65 Am. Dec. 84; *Hardy v. Broaddus*, 35 T. 668; *Hartley v. Frosh*, 6 T. 208, 55 Am. Dec. 772; *Shelby v. Burtis*, 18 T. 644; *Wiley v. Prince*, 21 T. 637; *Williams v. Pouns*, 48 T. 146; *Kocourek v. Marak*, 54 T. 205, 38 Am. Rep. 623; *Davis v. Kennedy*, 58 T. 517; *Pierce v. Fort*, 60 T. 464; *Webb v. Burney*, 70 T. 322, 7 S. W. 841; *Stallings v. Hullum*, 79 T. 421, 15 S. W. 677. See *Hurt v. Cooper*, 63 T. 362; *Heidenheimer v. Stewart*, 65 T. 321; *Love v. Breedlove*, 75 T. 649, 13 S. W. 222; *Eylar v. Eylar*, 60 T. 315.

One claiming as a bona fide purchaser must exhibit a deed to himself and prove payment of the consideration without notice, at the time of the delivery of the deed, and payment. *Watkins v. Edwards*, 23 T. 447; *Huyler v. Dahoney*, 48 T. 238; *Taylor v. Harrison*, 47 T. 459, 26 Am. Rep. 304. His equity would be defeated by notice of a superior equity at any time before the date of the deed to him for the land. *Whitsett v. Miller*, 1 U. C. 203.

Parties claiming under a superior outstanding title, on the ground of want of notice of a trust deed, must, in order to defeat the trust deed, show themselves to have been bona fide purchasers without notice and for valuable consideration paid before such notice. *Morton v. Lowell*, 56 T. 643.

An attaching creditor of the community estate, or one who, through operation of law, has acquired an apparent lien upon land which has been purchased in whole or in part with the separate means of the wife, does not occupy such position as will preclude the wife from proving her separate interest, and thereby having it protected. *Parker v. Coop*, 60 T. 111.

A bona fide purchaser for value of the legal title to property, whether land or a land certificate, without notice of the rights of others, is entitled to protection as against those who may have an equitable interest in the property purchased. Equity will protect a bona fide purchaser for value, even when his vendor, having the legal title, may not possess the equitable title, the property having been bought by the vendor with partnership funds. One who in good faith, for value and without notice, purchases an equitable interest in property, and afterwards acquires the legal title to the same, is also entitled to protection as against a prior equity. *Hill v. Moore*, 62 T. 610.

To entitle a subsequent vendee to have a prior unregistered deed postponed to his subsequent conveyance, it must appear: 1. That he was a purchaser bona fide. 2. That he purchased without actual or constructive notice of the title of the prior vendee, and that the purchase money has been paid; a recital of that fact in the deed is not sufficient. *Fletcher v. Ellison*, 1 U. C. 661; *Watkins v. Edwards*, 23 T. 447.

One who has in good faith purchased the absolute right to land in contradistinction to that of the title, or claim of title, of the grantor, and by outside proof has shown that he paid a valuable consideration therefor, may claim as an innocent purchaser against any adverse title or equities of which he had no notice. *Richardson v. Levi*, 67 T. 359, 3 S. W. 444. See *Finch v. Trent*, 3 C. A. 568, 22 S. W. 132, 24 S. W. 679.

A person may be an innocent purchaser at an administrator's or executor's sale. *White v. Dupree*, 91 T. 66, 40 S. W. 962; *Jackson v. Berliner* (Civ. App.) 127 S. W. 1160.

One buying land, having no notice of an outstanding unrecorded homestead right,

held a bona fide purchaser. *Curlin v. Canadian & American Mortgage & Trust Co.* (Civ. App.) 42 S. W. 313.

Purchaser by a deed of a grantor's interest with covenants of seisin held a bona fide purchaser. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

A purchaser of land for value and without notice acquires the title as against a person holding under a deed that had not been filed for record to be recorded as required by law. *La Pice v. Caddenhead*, 21 C. A. 363, 53 S. W. 66.

An heir can become an innocent purchaser for value of the interest of his coheirs as against the unrecorded deed of his ancestor. The purpose of the statute is evidently to protect the innocent who have parted with value as a result of the failure of the real owners to take advantage of the registration laws or otherwise to advertise their claims. *Branch v. Weiss*, 23 C. A. 84, 57 S. W. 902.

Essential elements constituting a bona fide purchaser are consideration, want of notice, and good faith; and, if these are shown, it is immaterial, as to a third person, whether the deed of the purchaser is properly acknowledged or not. *Derrett v. Britton*, 35 C. A. 485, 80 S. W. 562.

A purchaser from the grantee in a deed which has never been delivered or placed on record by the grantors is not entitled to protection as an innocent purchaser. *Garner v. Risinger*, 35 C. A. 373, 81 S. W. 343.

Bad faith purchasers of property which had been transferred to their vendors by an insolvent in fraud of creditors held not entitled to retain the property by reason of the fact that at the time of the last sale the vendors therein had recovered the property from attaching creditors of the insolvent by giving a bond. *Horstman v. Little* (Civ. App.) 88 S. W. 286.

A purchaser of land held not an innocent purchaser without notice of a third person's claims. *Diffe v. Thompson* (Civ. App.) 90 S. W. 193.

Purchasers of land must account to equitable title holder for so much of the purchase money as remains unpaid when they received notice of the latter's rights. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

A lease for a term of years with an option to purchase, which the lessee exercised, held not to constitute him a bona fide purchaser. *Storms v. Mundy*, 46 C. A. 83, 101 S. W. 258.

Facts which constitute an innocent purchaser stated. *Downs v. Stevenson*, 56 C. A. 211, 119 S. W. 315.

The good faith of a purchaser of land must be measured by his intent at the time, and it is error to assume that he is entitled as such if a certain deed of a remote vendor was made. *Id.*

A claimant of land may be a purchaser in good faith notwithstanding a break in the chain of title back of the common source. *Id.*

One is not a bona fide purchaser of land; the records of the county showing a sale to a predecessor in title by an attorney in fact for less and on different terms than authorized by the power of attorney. *Lightfoot et al. v. Horst et al.* (Civ. App.) 122 S. W. 606.

To entitle a subsequent purchaser to have a prior unregistered conveyance postponed to his conveyance, it must appear that he was a bona fide purchaser without notice, actual or constructive, of the title of the prior purchaser, and that the purchase money was bona fide and truly paid, and the facts must be consistent with the conduct of ordinary men supposed to act with reference to their own interest. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

To constitute one an innocent purchaser of land, there must be a valuable consideration, absence of notice of adverse claims, and good faith. *Houston Oil Co. of Texas v. Hayden*, 104 T. 175, 135 S. W. 1149.

A mere beneficiary of the legal title held in trust by another cannot maintain the defense of innocent purchaser, unless the holder of such title took as such. *Id.*

Purchasers whose deeds except a warranty deed in 1894 to the common source of title were recorded prior to the registration of earlier deeds from the common source of title were innocent purchasers, since they might deraign title and defend an action to try title both under the warranty deed and under their quitclaim deeds back of the common source of title, or both. *Tobin v. Benson* (Civ. App.) 152 S. W. 642.

Where a purchaser from a vendee indebted to the original vendor had no notice of such claim, and paid adequate consideration, he was a bona fide purchaser. *Masterson v. Rcss* (Civ. App.) 152 S. W. 1156.

A person, who obtained a deed to the land in controversy from a person who had no interest in it and made no claim to it, was not entitled to be protected as an innocent purchaser against the person for whom the land was held in trust. *Mortimer v. Jackson* (Civ. App.) 155 S. W. 341.

**6. Mode and form of conveyance—In general.**—A contract in writing which purports to convey an interest in land after its location and before patent issues cannot affect a subsequent innocent purchaser from the vendor, or his creditors, unless it is authenticated for record and recorded. *Lewis v. Johnson*, 68 T. 448, 4 S. W. 644.

A deed held a warranty deed, and a sufficient basis on which to found the character of innocent purchaser. *Thompson v. Rust*, 32 C. A. 441, 74 S. W. 924.

One held a bona fide purchaser freed from equitable claims. *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

In an action to recover land upon the ground that the title was not in defendants' remote grantor when he conveyed, it cannot be claimed that because the deed to defendants contained a covenant of general warranty and a recital that a vendor's lien was reserved to secure payment of bonds representing the unpaid purchase money, and that the bonds had not been paid, that the legal title still remained in defendants' grantor. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

**7. — Quitclaim.**—A quitclaim vendee cannot be an innocent purchaser, because his deed serves him with notice that he is only purchasing the chance of title—such title as the vendor had, and no more. Such notice, or any notice of the fact that there is a better title, excludes good faith from the transaction. *Rodgers v. Burchard*, 34 T.

441, 7 Am. Rep. 283; James v. Drake, 39 T. 143; Carter v. Wise, 39 T. 273; Milam County v. Bateman, 54 T. 153; Thorn v. Newsom, 64 T. 161, 53 Am. Rep. 747; Lumber Co. v. Hancock, 70 T. 312, 7 S. W. 724; Tate v. Kramer, 1 C. A. 427, 23 S. W. 255; Hill v. Grant (Civ. App.) 44 S. W. 1016; Woody v. Strong, 45 C. A. 256, 100 S. W. 802; McMurrey v. Columbia Lumber Co., 56 C. A. 199, 120 S. W. 246; Smith v. Cook (Civ. App.) 142 S. W. 26; Clark v. Altizer, 145 S. W. 1041; Rule v. Richards, 149 S. W. 1073.

A deed which recites that the grantor conveys "all my right, title, claim and interest in and to the following described tract of land" (describing it); "and do forever quitclaim all my claim and interest in and to the above-named tract of land," is only a quitclaim deed, and passes no title to the land as against a prior unrecorded conveyance of the property. Rodgers v. Burchard, 34 T. 452, 7 Am. Rep. 283; Harrison v. Boring, 44 T. 256; Taylor v. Harrison, 47 T. 460, 26 Am. Rep. 304; Wright v. Lancaster, 48 T. 255; Shepard v. Hunsacker, 1 U. C. 578; Fletcher v. Ellison, 1 U. C. 661.

If a deed on its face contains evidence that the absolute right to the land, and not the title or chance of title, is sought to be sold, and if this fact appear from the adequacy of the price given, or other circumstances attending the purchase, then the purchaser may be a bona fide purchaser, notwithstanding the deed may have, in some other respects, the qualities of a quitclaim deed. Harrison v. Boring, 44 T. 255; Taylor v. Harrison, 47 T. 454, 26 Am. Rep. 304; Holmes v. Johns, 56 T. 41.

While the lien acquired by a judgment creditor by a levy of an execution upon land of the judgment debtor is superior to the title of one claiming under an unregistered deed, yet the lien only attaches to such title as may be in the debtor, and if he has only a quitclaim deed to the land he can have no title thereto as against a prior unrecorded conveyance of his vendor, and a sale by the sheriff passes no title to the property. Borden v. McRae, 46 T. 396; Cavanaugh v. Peterson, 47 T. 197; Grace v. Wade, 45 T. 523; Shepard v. Hunsacker, 1 U. C. 578.

A purchaser at bankrupt sale acquires only a quitclaim deed. In this case the bankrupt held under a quitclaim deed from heirs whose ancestor had conveyed the land to another. Renick v. Dawson, 55 T. 102; John v. Battle, 58 T. 591; Fletcher v. Ellison, 1 U. C. 661.

Where a deed purports to convey the land, and not the mere right or title of the grantor, and the vendee pays the purchase-money without notice, he will be protected against a prior unrecorded conveyance, though his deed contains the word "quitclaim." Dycus v. Hart, 2 C. A. 354, 21 S. W. 299. See Garrett v. Christopher, 74 T. 453, 12 S. W. 67, 15 Am. St. Rep. 850.

The vendee knowing the facts, and agreeing to take a quitclaim, but by mistake taking a deed with special warranty "by, through or under" the vendor, cannot claim the benefit of his own mistake, and be exempt from notice imparted by the quitclaim. Tate v. Kramer, 1 C. A. 427, 23 S. W. 255.

One claiming under a partition deed which is in the form of a quitclaim is an innocent purchaser. Kempner v. Beaumont Lumber Co. (Civ. App.) 49 S. W. 412.

A quitclaim deed held not to signify an intention to convey only a chance of title, so as to preclude the grantee from the defense of bona fide purchaser. Moore v. Swift, 29 C. A. 51, 67 S. W. 1065.

A purchaser of land relying on a quitclaim deed executed as a substitute for a lost deed held protected, as an innocent purchaser, from the claim of the grantee in a prior unrecorded deed. Waggoner v. Dodson (Civ. App.) 71 S. W. 400.

Quitclaim deed to land from a third person held not notice that the grantee also had a deed from the real owner. Thompson v. Rust, 32 C. A. 441, 74 S. W. 924.

A deed held not a mere quitclaim, but sufficient to support a plea of bona fide purchaser as against one claiming under a prior unrecorded deed from the same grantor. Wynne v. Ward, 41 C. A. 232, 91 S. W. 237.

A deed held more than a quitclaim deed and to convey the premises to the grantee entitling him to the protection of a bona fide purchaser. Allen v. Anderson & Anderson (Civ. App.) 96 S. W. 54.

Transfer by grantee in quitclaim deed of railroad property given to secure a debt held not to pass title by his transfer thereof to a new company organized to acquire the property. Texas Southern Ry. Co. v. Harle (Civ. App.) 101 S. W. 878.

A quitclaim deed covering parts of a survey not previously conveyed gave the grantee and his successors no better title against those claiming under a prior deed than the original grantor would have. Raley v. Magendie (Civ. App.) 116 S. W. 174.

A conveyance, reciting that grantor sells, releases, and quitclaims unto the grantee all his right, title, and interest, is not a conveyance of the land, but merely of the grantor's right and title, and the grantee cannot claim to be an innocent purchaser for value. Hudman v. Henderson (Civ. App.) 124 S. W. 186.

A grantee of one holding by quitclaim held not a bona fide purchaser as against persons for whom the grantor in the quitclaim held on a parol trust. Schmittou v. Dunham (Civ. App.) 142 S. W. 941.

**8. Notice—In general.**—Sufficiency of notice of facts to charge purchaser with fraud, in an action to set aside a deed for fraud, defined. Goree v. Goree, 22 C. A. 470, 54 S. W. 1036.

One who purchases land, believing it to be community property of the vendor and his deceased wife, and having no notice that it is her separate property, held chargeable with notice that his vendor can only convey the legal title to one-half interest therein. Hunt v. Matthews (Civ. App.) 60 S. W. 674.

In trespass to try title, charge held to properly submit the issue of defendant's notice of plaintiff's equitable title. Derrett v. Britton, 35 C. A. 485, 80 S. W. 562.

A notice to a purchaser of a defect in the title held not notice to him of another defect. Allen v. Anderson & Anderson (Civ. App.) 96 S. W. 54.

The vendee of land from a county judge holding title in trust for the county held entitled to protection only to the extent of the amount of the price paid before acquiring notice of the county's claim. Bell County v. Felts (Civ. App.) 120 S. W. 1065.

Purchasers of land held innocent purchasers for value. Whittaker v. McWhorter (Civ. App.) 129 S. W. 370.

The holder of purchase-money notes and her assignee held chargeable with notice that the original grantor of a homestead claimed the land as her homestead, and that her deed was intended as a mortgage. *Chamberlain v. Trammell* (Civ. App.) 131 S. W. 227.

A railroad company purchasing, as authorized by law, the property of another railroad company held not charged with notice of an unrecorded contract alleged to have been made with the latter company. *Southern Kansas Ry. Co. of Texas v. Logue* (Civ. App.) 139 S. W. 11.

A payment by a grantee for the value of land purchased when he was chargeable with notice that another owned it would not entitle him or his grantees to claim protection against the claim of the real owner or her heirs. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

9. — **Actual notice.**—A person purchasing land at an execution sale, and having before such sale actual notice of a prior unrecorded lien or title, is not a bona fide purchaser without notice. *Price v. Cole*, 35 T. 461, citing *Fisk v. Wilson*, 15 T. 432; *Blankenship v. Douglass*, 26 T. 226, 32 Am. Dec. 608; *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657; *Orme v. Roberts*, 33 T. 768. *Price v. Cole*, 35 T. 461, so far as it related to the question above stated, was overruled by *Grace v. Wade*, 45 T. 522, in which it is held that the rights of the creditor, and hence of a purchaser, relate back to the lien on the property acquired by the record of the judgment or levy of the execution.

Notice to the agent of a purchaser of land sold under a trust deed that the land had been released is imputable to his principal. *Mansfield v. Garrison* (Civ. App.) 48 S. W. 554.

A purchaser of land from one who bought at execution sale held not to have had knowledge of the facts which rendered the judgment voidable. *Day v. Johnson*, 32 C. A. 107, 72 S. W. 426.

A purchaser of land, having actual notice of a conveyance by the common source of title, not shown by the records, held not entitled to rely on such records. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

One held not an innocent purchaser of land. *Anderson v. Delta Nat. Bank* (Civ. App.) 129 S. W. 632.

Where actual notice was given the president of a bank of the existence of a prior mortgage on certain property, although such mortgage had not been recorded, yet, after such notice, a mortgage then taken by the bank became inferior to the prior mortgage. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

Defendant held not an innocent purchaser of land for value, having actual notice of plaintiff's claim of ownership. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

10. — **Effect of notice.**—A conveyance in fraud of creditors is valid against a subsequent purchaser with notice (*Fowler v. Stoneum*, 11 T. 478, 62 Am. Dec. 490; *Weisiger v. Chisholm*, 28 T. 780; *Raymond v. Cook*, 31 T. 373; *Moreland v. Atchison*, 34 T. 351; *Lehmburg v. Biberstein*, 51 T. 457), or without valuable consideration. (*Lewis v. Castleman*, 27 T. 407; *Morton v. Lowell*, 56 T. 643).

And the same rule applies to a purchaser under an execution levied before the creditor had notice, who, before the purchase at such sale, had notice of the wife's separate interest in the land. *Bonner v. Stephens*, 60 T. 616.

Where the certificate does not state the essential facts, the registration does not constitute notice. *Hayden v. Moffatt*, 74 T. 647, 12 S. W. 820, 15 Am. St. Rep. 866.

One claiming under a sheriff's deed held to have a superior right to one claiming under a prior unrecorded sheriff's deed, though he had notice at the time of purchase of the other's rights. *Wiggins v. Sprague*, 15 C. A. 590, 40 S. W. 1019.

The grantees of one taking property subject to a restriction as to engaging in a particular business, who have notice thereof, take no better rights than their grantor had. *Anderson v. Rowland*, 18 C. A. 460, 44 S. W. 911.

When a debtor conveys his land but his creditor attaches before the deed is recorded, the creditor's lien is good, but if the creditor knew that the land was paid for by another and therefore that the debtor held the land as a resulting trust, the creditor gets no title as against the cestui que trust. *Caldwell v. Bryan's Ex'r*, 20 C. A. 168, 49 S. W. 240.

A purchaser held to acquire no title as against a prior grantee of a deed containing a defective description, where the former knew of the equities in favor of the latter. *Regan v. Milby*, 21 C. A. 21, 50 S. W. 587.

Notice of an unrecorded deed to a judgment creditor at the time he fixes his lien, is fatal to his rights; the same rule applies as in case of a subsequent purchaser. *Barnett v. Squyres* (Civ. App.) 52 S. W. 612.

Grantee of land held not an innocent purchaser, as matter of law, where he paid consideration after actual notice of defect in title. *Bullock v. Sprowls* (Civ. App.) 54 S. W. 657.

Where a vendor's lien note on a homestead is purchased with knowledge that the sale is simulated, the fact that there is afterwards a reconveyance, and a surrender of the first note and the taking of a second vendor's note, executed by the original vendor, and indorsed by the original vendee, does not validate the transaction, so as to warrant a recovery on the latter note. *Felsher v. Halenza* (Civ. App.) 68 S. W. 838.

Purchasers of land from a vendee of the original owner held to be bona fide purchasers, even though having notice of a subsequent deed from the original owner to a third party. *Fullenwider v. Ferguson*, 30 C. A. 156, 70 S. W. 222.

A purchaser of land subject to a vendor's lien, charged with notice thereof, held not entitled to the value of his improvements as against the holder of the lien. *Runge v. Gilbough* (Civ. App.) 87 S. W. 332.

One receiving property with knowledge that it is subject to a trust, and that it has been transferred in violation of the duty of the trustee, takes it subject to the rights not only of the cestui que trust, but also of the trustee to reclaim possession. *Mansfield v. Wardlow* (Civ. App.) 91 S. W. 859.

Where a lease is subsequent to a mortgage of which the lessee had notice, the latter holds subject to the mortgagee's right to terminate the lease and take possession by foreclosure. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

Junior purchasers of land acquire no title to land against former unrecorded deeds, unless they purchase without notice of the prior deeds. *Whitaker v. Farris*, 45 C. A. 378, 101 S. W. 456.

A grantee acquires no interest as against a prior unrecorded deed of which he has notice. *Parks v. Worthington* (Civ. App.) 104 S. W. 921.

A deed of lots to defendants by the original owners after defendants had actual knowledge of a prior deed under which plaintiff deraigned title added nothing to defendants' rights as alleged innocent purchasers. *Cunningham & Stringfellow v. Buckingham*, 50 C. A. 44, 111 S. W. 766.

A purchaser who has notice of a fact that will avoid the title of his grantor accepts the risk of having his title defeated. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

Expenses incurred by an attorney under a power conveying an undivided interest in certain land after notice of a deed cutting off the donor's interest was not value paid for the land by the attorney without notice. *Davis v. Bell* (Civ. App.) 128 S. W. 658.

Defendant was not an innocent purchaser of land for value if for several years before he purchased, and at that time he had actual notice of plaintiff's claim of ownership. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

No title held to pass under the conveyance of an agent having power to transfer land. *Clark & Boice Lumber Co. v. Duncan* (Civ. App.) 143 S. W. 644.

Where a wife executed with her husband a deed to separate property, the grantee agreeing to assume the grantor's indebtedness for the balance of purchase money to the state, and the deed was executed pursuant to an agreement that the grantee was to pay a certain amount of the consideration in cash and the remainder in merchandise, and the husband placed the deed in escrow, and thereafter deposited it with the grantee as a forfeit to secure his performance of the contract to purchase the goods, the grantee was not an innocent purchaser for value, and, the husband having delivered the deed fraudulently and without authority, the grantee was not entitled to enforce it. *Carver v. Ledbetter* (Civ. App.) 147 S. W. 348.

One who when he purchased land knew that a vendor's lien was outstanding was not a purchaser without notice. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

Where land in possession of defendant under an executory contract was chargeable with the constructive trust in favor of plaintiff, the land remained so chargeable while in the possession of a third person acquiring the same with knowledge of the facts. *Miller v. Himebaugh* (Civ. App.) 153 S. W. 338.

11. — **Constructive notice and facts putting on inquiry.**—Whatever is sufficient to put a party upon inquiry, with reasonable certainty as to time, place, circumstances and persons, is equivalent to notice. *Parks v. Willard*, 1 T. 350.

Notice is either actual or constructive. The former is where the party to be affected is proved to have had actual knowledge of the fact. The latter is where the party, by any circumstance whatever, is put upon inquiry which amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. In a great variety of cases it must be a matter of doubt and difficulty to decide what circumstances are sufficient to put a party upon inquiry; and each case must depend upon its own circumstances. But vague and indeterminate rumor or suspicion is quite too loose and inconvenient in practice to be admitted to be sufficient. *Wethered v. Boon*, 17 T. 143; *Harrison v. Boring*, 44 T. 255.

It has been said it will be a sufficient answer in all cases to the allegation of notice to show that the party to be affected by it could not have obtained the necessary information by an investigation conducted in the usual course of business. And even where circumstances are brought home to the knowledge of the party, which would have been sufficient in themselves to put him on inquiry, and thus amount to notice, he will be entitled to rebut the presumption of notice, which would otherwise arise, by showing the existence of other attendant circumstances of a nature to satisfy the mind that further inquiry was unnecessary. *Wilson v. Williams*, 25 T. 54.

Notice of an unrecorded deed to one interested with a subsequent purchaser, but whose name does not appear in the conveyance, is notice to him to whom the conveyance is made. *Littleton v. Giddings*, 47 T. 109.

Constructive notice of an adverse claim to land cannot extend to deeds in the chain of title prior to an unrecorded mesne conveyance. *Thompson v. Westbrook*, 56 T. 265. Nor to deeds under which the party does not claim. *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452.

Whatever is sufficient to put a prudent man upon inquiry as to the facts binds him to the consequences of the facts which inquiry would have disclosed. *Faulkner v. Warren*, 1 App. C. C. § 662; *Walton v. Compton*, 28 T. 569.

Deed executed by husband to wife reciting consideration of one dollar and love and affection held to put subsequent purchaser on inquiry. *New England Loan & Trust Co. v. Avery* (Civ. App.) 41 S. W. 673.

Where a purchaser claims under a deed containing no warranty, information that the land is the homestead of a person other than the grantor is sufficient to put the purchaser on inquiry. *Richerson v. Moody*, 17 C. A. 67, 42 S. W. 317.

A purchaser held to have sufficient notice of adverse ownership, though a mesne conveyance was not properly acknowledged. *Rork v. Shields*, 16 C. A. 640, 42 S. W. 1032.

Notice to grantor of adverse title is not notice to his grantee, where parties have dealt at arm's length. *Root v. Baldwin* (Civ. App.) 52 S. W. 586.

That grantee of prior unrecorded deed was agent in charge to rent the property held not to put a purchaser on inquiry. *Phoenix Ins. Co. v. Neal*, 23 C. A. 427, 56 S. W. 91.

Proceeding in administration of a decedent's estate held not constructive notice that land belonging to the estate and situated in another county had been sold to defendants. *Thompson v. Rust*, 32 C. A. 441, 74 S. W. 924.

Deed construed, and held to put subsequent purchasers on inquiry as to the estate intended to be conveyed by a former deed to a husband and wife. *King v. Summerville* (Civ. App.) 80 S. W. 1050.

Plaintiff held charged with notice of a conveyance by the common source of title, under which defendant claimed, which would have been disclosed by inquiry. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

A purchaser of land subject to a vendor's lien, with constructive notice thereof, held not an innocent purchaser as to the holder of the lien. *Runge v. Gilbough* (Civ. App.) 87 S. W. 832.

An unrecorded deed, reserving a vendor's lien, held constructive notice to a subsequent purchaser in privity of title. *Id.*

Purchasers of land held chargeable with notice that the grantor had previously conveyed part of the land described in their deeds. *Whitaker v. Farris*, 45 C. A. 378, 101 S. W. 456.

Rule respecting priorities of junior and senior purchasers, as affected by failure to record the senior deed, stated. *J. M. West Lumber Co. v. Lyon*, 53 C. A. 648, 116 S. W. 652.

One who has notice of facts putting him on inquiry held not a purchaser in good faith. *W. L. Moody & Co. v. Martin* (Civ. App.) 117 S. W. 1015.

If a purchaser of land had knowledge of facts that would have put a prudent man upon inquiry, which if pursued with ordinary diligence would have led to actual notice of a prior conveyance to another, he would not be a bona fide purchaser for value without notice. *La Brie v. Cartwright*, 55 C. A. 144, 118 S. W. 785.

Where a fact is known sufficient to put a subsequent purchaser upon inquiry as to his grantor's title, he cannot excuse himself from pursuing the inquiry by taking the opinion of an attorney upon an abstract of the record title. *Id.*

A recorded instrument revoking a power of attorney to recover and sell lands and a conveyance of lands to the agent held sufficient to put purchasers of such lands from the agent who had examined the revoking instrument upon notice as to the agent's right to sell any land under the power of attorney. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

A purchaser of realty from a devisee thereof held chargeable with notice of the terms of the will and took only the devisee's title. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13.

One buying land held put on inquiry as to previous sale of part of it, by recital, known to him, in deed to another person. *Lowry v. McDaniel* (Civ. App.) 124 S. W. 710.

Where the mortgagee examined an abstract before accepting the mortgage, which showed that the land was community property, and the husband's will, which was copied into the abstract, showed that testator and his wife had children, in absence of a showing that the mortgagee made such inquiry as a prudent man would have made under the circumstances, he will be charged with knowledge that the property belonged to the community, and of the existence of children, and hence of the fact that the husband could not devise all of the property. *Tomlinson v. H. P. Drought & Co.* (Civ. App.) 127 S. W. 262.

Mere failure to include one of several notes for the same tract of land in the inventory and list of claims by the administratrix of the community estate held not a fact which should put a purchaser on inquiry as to the note which had been transferred by the deceased as collateral. *Thomas v. First Nat. Bank* (Civ. App.) 127 S. W. 844.

One having sufficient notice to put him on inquiry, which if fairly prosecuted would lead to actual notice, is not a bona fide purchaser for value without notice. *Crane v. Wood* (Civ. App.) 133 S. W. 444.

Bona fide purchaser for value held bound by notice up to the date of the delivery of the deed to him and payment by him of the purchase money. *Cartwright v. La Brie* (Civ. App.) 144 S. W. 725.

Where a plaintiff in trespass to try title was charged with constructive knowledge of adverse claims when he purchased, and he secured a large tract for a nominal sum, he was not an innocent purchaser, in good faith, for a valuable consideration. *Master-son v. Harrington* (Civ. App.) 145 S. W. 626.

**12. — Recitals in conveyance.**—The recital of the payment of the purchase money, in the deed of the subsequent vendee, is not evidence against the prior purchaser. *Watkins v. Edwards*, 23 T. 443; *Hawley v. Bullock*, 29 T. 216; *Moore v. Curry*, 36 T. 668; *Hamman v. Kelgwin*, 39 T. 34; *Bremer v. Case*, 60 T. 151; *Harle v. Langdon's Heirs*, 60 T. 555; *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581.

A purchaser is chargeable with knowledge of everything disclosed by the deeds forming his chain of title. *Peters v. Clements*, 46 T. 123; *Jackson v. Elliott*, 49 T. 68; *Bryan v. Crump*, 55 T. 1; *Gaston v. Dashiell*, 55 T. 508; *Russell v. Kirkbride*, 62 T. 455; *Moore v. Scott* (Civ. App.) 38 S. W. 394; *O'Connor v. Vineyard*, 43 S. W. 55; *William Carlisle & Co. v. King*, 122 S. W. 581; *Davidson v. Ryle* (Sup.) 124 S. W. 616; *Hawkins v. Potter* (Civ. App.) 130 S. W. 643; *Atteberry v. Burnett*, *Id.* 1028.

A purchaser holding under a conveyance which recites that a bond to convey the land to another had been made, that the party in whose favor it was made had failed to comply with its conditions, was dead, and the bond lost, is not, in the absence of actual notice, bound by such recitals to take notice of a prior unrecorded deed to the land. In the absence of evidence charging a purchaser with notice beyond the recitals of his deed, he has only notice of the facts which its contents import. A subsequent purchaser is bound by facts appearing as recognized by the recitals in the deed by his vendors, but he is not required to dispute their correctness; and if charged with notice of what does appear, he is authorized to assume the proposition contradictory to such recitals to be untrue. Notice by recitals in a deed is not notice of a state of facts contradictory to such recitals. *Graham v. Hawkins*, 1 U. C. 514.

Recitals in deeds held not sufficient to put an ordinarily prudent man on inquiry as to whether the money used in the purchase of land was the separate estate of the purchaser's wife. *McDaniel v. Harley* (Civ. App.) 42 S. W. 323.

A recital in a recorded will that testator held a vendor's lien on certain property held insufficient to put a reasonable man on inquiry, where it failed to sufficiently describe the land, or to indicate how testator acquired the lien. *Williams v. Slaughter* (Civ. App.) 42 S. W. 327.

Two deeds construed as not entitling one claiming under them to the defense of an innocent purchaser without notice as against a prior unrecorded conveyance. *Jemison v. Scottish-American Mortg. Co.*, 19 C. A. 232, 46 S. W. 886.

Recitals in a deed and record of a related instrument held insufficient to constitute notice of rights of holder of a purchase-money note, nor sufficient to put subsequent purchaser on inquiry. *Smith v. Smith*, 23 C. A. 304, 55 S. W. 541.

A deed reciting that same is to take effect only after death of grantor is notice of its testamentary character. *De Bajligethy v. Johnson*, 23 C. A. 272, 56 S. W. 95.

Purchasers of land held bound by a prior exchange made by the vendor, whereby he acquired certain land on east end of his lot in exchange for land conveyed from the west end of the lot. *Scott v. City of Marlin*, 25 C. A. 353, 60 S. W. 969.

Where defendant was charged by recitals in its deed with notice of plaintiff's title, it was not error to exclude testimony that it was an innocent purchaser. *Texas Tram & Lumber Co. v. Gwin*, 29 C. A. 1, 67 S. W. 892, 68 S. W. 721.

Where a deed recited that the grantor had previously executed a deed to the land in controversy, which he was informed was lost, but did not recite to whom such deed was executed, the grantee in such subsequent deed, and his privies, were charged with notice that the grantor had no title at the time of executing it. *Waggoner v. Dodson*, 96 T. 415, 73 S. W. 517.

Recital in a deed held sufficient to put one purchasing from the grantee's husband after her death on inquiry as to whether the land was her separate property. *O'Mahoney v. Flanagan*, 34 C. A. 244, 78 S. W. 245.

Defendant held not charged with notice of an unrecorded conveyance of a part of a tract of land by deeds in defendant's chain of title conveying the unsold portions of such tract and purporting to identify the portions sold. *Pierson v. McClintock*, 34 C. A. 360, 78 S. W. 706.

A recital in a deed that the land had been conveyed by A. to S. and then to G. held to put a subsequent purchaser from the heirs of S. on inquiry to ascertain whether the land had not been conveyed by S. to G. *Masterson v. Harris*, 37 C. A. 145, 83 S. W. 428.

A married woman, who had executed with her husband a power to sell land, held not necessarily affected with notice of a conveyance thereunder. *Stephens v. Herron*, 99 T. 63, 87 S. W. 326.

Where land in Texas belonging to a nonresident testator was sold in spite of his will to pay debts, such will was not within the chain of title of a subsequent purchaser, so as to charge him with notice of outstanding equities. *Nelson v. Bridge*, 39 C. A. 283, 87 S. W. 885.

Subsequent purchasers cannot acquire greater interests than passed between the original parties to an ambiguous deed, unless the subsequent purchasers are innocent purchasers for value without notice that the language was not used in its usual and commonly accepted meaning. *West v. Hermann*, 47 C. A. 131, 104 S. W. 428.

A recital in a deed to defendants held sufficient to put them upon inquiry, so as to charge them with knowledge that the property was community property. *Veatch v. Gilmer* (Civ. App.) 111 S. W. 746.

A deed purporting to convey the grantor's interest as an heir held not to apprise the purchaser that the property might have been acquired by the grantor's ancestor when married. *Gilmer's Estate v. Veatch*, 102 T. 384, 117 S. W. 430.

A deed executed under a power of attorney authorizing sale of heirs' interest in estate of their grandfather held to pass the entire interest of heirs in community property of their grandparents. *Gilmer v. Veatch*, 56 C. A. 511, 121 S. W. 545.

A provision in the deed of a junior grantee held not evidence that he had knowledge of a senior conveyance of the land by his grantor to a third person or to show that he suspected it was forged. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

A certain deed containing errors in field notes, filed for record, held constructive notice to subsequent purchaser. *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581.

Purchasers claiming under the grant of a headright reciting that the grantee was a married man held not entitled to rely on presumption that his predecessors in title had made such inquiry as to rebut presumptions of notice. *Hardy Oil Co. v. Burnham* (Civ. App.) 124 S. W. 221.

Effect of statement in grant of a headright to the effect that the grantee was a married man, as to subsequent purchasers, stated. *Id.*

A warranty in a deed held not to excite suspicion in the mind of the purchaser, and not to justify a finding that he was not a bona fide purchaser without notice of a prior unregistered conveyance. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

A declaration in an act of sale by a grantee held to authorize a finding that the real ownership remained in the original grantor until the sale. *Id.*

A purchaser held chargeable with knowledge of the identity of a person conveying land under different names. *Hawkins v. Potter* (Civ. App.) 130 S. W. 643.

Purchasers from a trustee take with notice of limitation in the trust deeds as to the duration of the trust. *Montgomery v. Trueheart* (Civ. App.) 146 S. W. 284.

Recitals in a deed of land belonging to a wife that she, joined by her husband, in consideration of a certain amount in hand paid by the grantee, receipt whereof was acknowledged and the further assumption of the grantee of the balance of the sum due the state, granted, sold, and conveyed to the grantees, etc., were sufficient to impart notice to the grantee that the property was the separate property of the wife, and that the husband had no authority to deposit the deed as a forfeit to secure his performance of a contract to purchase certain merchandise from the grantee. *Carver v. Ledbetter* (Civ. App.) 147 S. W. 348.

A purchaser from a vendee must take notice of the terms of the unrecorded deed from the vendor, which reserved an express lien for the price. *Woodward v. Ross* (Civ. App.) 153 S. W. 158.

13. — Records and facts of which record is notice.—See Art. 6842 and notes.

A mere filing of a conveyance which evidences the sale in the general land office does not give that constructive notice which results from registration in the proper county. *Lewis v. Johnson*, 68 T. 448, 4 S. W. 644.



Under Art. 6791, providing that an instrument shall be deemed recorded from the time of deposit for record, a deed filed by the county clerk is notice to subsequent purchasers, though not transcribed upon the records, and though the fee for filing was not paid. *William Carlisle & Co. v. King* (Sup.) 133 S. W. 864.

Where defendant, who had, upon selling to plaintiff, subject to a vendor's lien note, executed to plaintiff a note to be surrendered upon the discharge of the original note, and agreed to pay the original note, fraudulently procured a release of the lien note after it was transferred without plaintiff's knowledge, held, that defendant's liability on the indemnity contract was not discharged because the transferee of the note did not procure a written transfer of the lien and have it recorded, or because of the execution of the release. *Davidson v. McKinley* (Civ. App.) 152 S. W. 1142.

14. — Possession.—The possession, by tenants of the prior purchaser, of parts of a tract of land is sufficient to put a second purchaser upon inquiry as to the prior title. *Watkins v. Edwards*, 23 T. 443.

The notice of title given by possession is equivalent to the constructive notice afforded by the registration of the deed. *Mann v. Falcon*, 25 T. 271; *Watkins v. Edwards*, 23 T. 443; *Hawley v. Bullock*, 29 T. 216; *Mullins v. Wimberly*, 50 T. 466; *Mainwarring v. Templeman*, 51 T. 212; *Wimberly v. Bailey*, 53 T. 222.

Possession of land by tenants is notice of the ownership of the landlord. *Brownson v. Scanlan*, 59 T. 222; *Bowles v. Brice*, 66 T. 725, 2 S. W. 729; *Allison v. Pitkin*, 11 C. A. 655, 33 S. W. 293; *Collum v. Sanger Bros.*, 98 T. 162, 32 S. W. 459, 83 S. W. 184; *Tolar v. South Texas Development Co.* (Civ. App.) 153 S. W. 911.

B. and his wife, C., by deed properly acknowledged and recorded, conveyed to D. land which they had occupied as a homestead. D. afterwards conveyed to E. B. and C. continued in possession, paying rent to D., and to E. after his purchase. B., C. and D., contemporaneously with the first sale, executed an agreement for a reconveyance, of which E. had no actual notice. E. having brought suit for rent, B. and C. resisted payment on the ground that the original sale was intended as a mortgage, and was therefore void. Held, that under the facts of this case the possession of B. and C. was not constructive notice of the agreement for reconveyance. *Alstin v. Cundiff*, 52 T. 453.

While, as a general rule, possession of real estate is constructive notice of the title of the possessor, yet the bare fact of continued possession of land by a vendor for a time less than would be reasonably necessary to remove from the place after the execution and record of his deed will not charge a subsequent purchaser from his vendee with notice of a secret trust whereby an absolute deed of the vendor would be inoperative. *Cameron v. Romele*, 53 T. 238.

The possession of land by a purchaser through his tenant, though his deed is unrecorded, operates as notice of the purchaser's rights to a creditor in whose favor a levy is made of an execution on the property. *Glendenning v. Bell*, 70 T. 632, 8 S. W. 324.

Possession was taken under a title bond not recorded. That part occupied is not in dispute. As to that part which was in dispute, such possession was not notice. There being no record of the title bond, nor possession of the land sold, nor evidence of notice by a purchaser of the land sold, such purchaser would hold against the elder unrecorded title bond. *Wright v. Lassiter*, 71 T. 641, 10 S. W. 295.

Open, actual and visible possession under an unrecorded deed is notice. *League v. Buena Ventura Stock Co.*, 2 C. A. 448, 21 S. W. 307.

Where a grantee has possession under an unrecorded deed, and the grantor lives with him as a member of his family, such possession is not notice to a subsequent incumbrancer. *Puckett v. Reed*, 3 C. A. 350, 22 S. W. 515.

The possession of land under a contract of lease is not notice of claim of title against one who purchased the land from the owner of the record title. *Hamilton v. Ingram* (Civ. App.) 35 S. W. 748.

The possession by a lessee of a part of a tract owned by the lessor is notice to a subsequent purchaser of the latter's title to the entire tract. *Mattfeld v. Huntington*, 17 C. A. 716, 43 S. W. 53.

Possession by grantee of unrecorded deed held notice to purchaser, though he had formerly been in possession as tenant. *Smith v. James*, 22 C. A. 154, 54 S. W. 41.

Possession by heirs of lessee held notice to subsequent purchaser of title of lessor. *Huntington v. Mattfeld* (Civ. App.) 55 S. W. 361.

Evidence held to show that the possession of a third person was not held under such circumstances as to put the purchaser on inquiry as to whether he had an adverse claim. *Ramirez v. Smith* (Civ. App.) 56 S. W. 254.

A finding that one acquired a lien on land from the record owner while a third person was in possession without knowledge of an adverse claim involves a finding that he was not put on inquiry of a claim by the possessor. *Id.*

One who purchases real estate of one not in possession must take notice of the title of the occupant to such lands, as against such occupant. *Smith v. Olson*, 23 C. A. 458, 56 S. W. 568.

One's claim can not be defeated on the ground that those under whom he claims were not possessors in good faith, unless he has notice of that fact, and where one in good faith takes possession as an heir and not by purchase he is entitled to his improvements. *Rowan v. Ramey*, 25 C. A. 593, 63 S. W. 1031.

A purchaser of premises in possession of a tenant is chargeable with notice as to the tenant's rights. *Howell v. Denton* (Civ. App.) 68 S. W. 1002; *Fred v. Moseley*, 146 S. W. 343.

Purchaser of property held affected with notice of title of occupant, irrespective of the fact that deed from her to vendor was on record. *Jinks v. Moppin* (Civ. App.) 80 S. W. 390.

Purchaser of land is charged with notice of interest of person in possession, but his inquiry is sufficient where he finds in the records a deed from the possessor to the vendor. *Id.*

The fact that one boards on premises is not such possession as to constitute of itself notice of an equitable title. *Derrett v. Britton*, 35 C. A. 485, 80 S. W. 562.

A purchaser of land held charged with notice of the equitable right of one in possession to specific performance. *Kuteman v. Carroll* (Civ. App.) 80 S. W. 842.

That the possession of land by the person claiming it is consistent with the recorded title does not relieve a purchaser from the duty of inquiry of the one in possession. *Colburn v. Sanger Bros.*, 98 T. 162, 82 S. W. 459, 83 S. W. 184.

Occupancy consistent with a deed executed by the occupant is not notice to strangers of defects in the grantee's title. *Eastham v. Hunter*, 98 T. 560, 86 S. W. 323.

Possession of a purchaser from a vendee under an executory contract is on the same footing as that of the original purchaser. *Runge v. Gilbough* (Civ. App.) 87 S. W. 832.

Acceptance by lessee of lease from adverse claimant held not to charge a grantee of the original lessor with notice as a matter of law, of the adverse claim. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1056.

A purchaser of land must take notice, of the character of title under which persons in possession of any portion of the land claim an interest therein. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

Abandonment of possession of the property by a vendee held not to constitute a breach of a contract for the sale of land. *Pfeiffer v. Wilke* (Civ. App.) 107 S. W. 361.

Possession of land as tenant is not, as a matter of law, notice to a purchaser of the land of the tenant's claim of title to a building. *Denison Lumber Co. v. Milburn* (Civ. App.) 107 S. W. 1161.

Plaintiff held to have had notice of an outstanding unrecorded title from actual knowledge of occupancy thereunder of a portion of the land. *Hayward Lumber Co. v. Bonner*, 56 C. A. 208, 120 S. W. 577.

Occupancy of land under a specific claim is constructive notice of the title on which the claim is based, though unrecorded. *Id.*

Where, prior to the filing by a judgment creditor of his abstract of judgment, the judgment debtor had conveyed his land by unrecorded deed, and the land was in the possession of a tenant holding under a written lease from the debtor, and the tenant attorned to the purchaser and paid to him the rent notes, and the judgment creditor knew that the tenant was the debtor's tenant at one time, he was chargeable with notice of the purchaser's title to the land. *Garth v. Stewart* (Civ. App.) 125 S. W. 611.

Possession of land by defendant at the time of the execution of a deed thereof to plaintiff was notice to her of his title under a parol sale, but not of his rights under an unrecorded deed of trust. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

Where parties living on land had conveyed it by deed of general warranty on its face, made to P., the continued possession of the parties was not notice to the grantee in a deed of trust from P. of any claims of title on their part inconsistent with their deed to P., and the trust deed was not affected by their homestead claim. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

Where defendant, to plaintiff's knowledge, was in possession, claiming under a verbal contract of sale from the common grantor, and had made valuable improvements and paid all of the purchase money, the question of the record of the deeds of the common grantor to those through whom plaintiff claimed and of the deed to plaintiff was immaterial. *Hudson v. Jones* (Civ. App.) 143 S. W. 197.

Possession by defendant under an oral contract of purchase, known to plaintiff, who purchased from the common grantor, held notice to plaintiff of whatever right the defendant possessed. *Id.*

The fact that persons who had previously granted land by an unrecorded deed, absolute on its face, were in possession when their grantee conveyed to another, "exhibiting his deed from his grantors to the purchaser," would not put the purchaser on notice that the first deed was only intended as a mortgage. *Bryant v. Grand Lodge Sons of Herman* (Civ. App.) 152 S. W. 714.

A fence around property does not constitute such possession as will cause notice of any possessory or proprietary rights by the person erecting the fence, not being an actual and visible appropriation of the land. *Tolar v. South Texas Development Co.* (Civ. App.) 153 S. W. 911.

15. Consideration—In general.—If a purchaser has paid part of the purchase money before notice of a lien on the land, he will be protected pro tanto, provided that in making any further payment, after notice, he sees to its application in satisfaction of the lien. But if after notice he makes a further payment without seeing to its application in satisfaction of the lien, it is an act of bad faith which contaminates the whole transaction from the beginning, and he will not be protected even as to such payments as he made before notice. *Fraim v. Frederick*, 32 T. 294.

One who buys in ignorance of a prior unrecorded deed, and who has not paid the contract price for the property, cannot be a bona fide purchaser. He can assert no equity arising from the alleged negligence of the former purchaser, whose deed had once been recorded and the record thereof burned, in failing to have his title established and his deed again recorded. *Evans v. Templeton*, 69 T. 375, 6 S. W. 843, 5 Am. St. Rep. 71.

Lessee, under a lease providing for no other rent than a part of the natural products of the land, held not an innocent purchaser for value, entitled to have his interest protected in a suit to vacate the decree of foreclosure and cancel the deed under which his lessor claimed. *Fox v. Robbins* (Civ. App.) 62 S. W. 815.

The giving of a note for the price of community property sold by a surviving husband is as effectual as payment in money, to show a purchase in good faith. *Davis v. Carter*, 55 C. A. 423, 119 S. W. 724.

The equity of a bona fide purchaser without notice of title in another by a prior conveyance will be protected only to the extent of his payment of the purchase price by cash, or negotiable promissory notes; the giving of nonnegotiable notes not being payment within the rule. *Beavers v. Baker* (Civ. App.) 124 S. W. 450.

To entitle a subsequent purchaser to have a prior unregistered conveyance postponed, it must appear that he paid the purchase price. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

Where an undivided interest in certain land was conveyed by a power of attorney, services rendered by the attorney and expenses incurred prior to the granting of the power held unavailable to constitute the attorney a bona fide purchaser for value, as against an adverse claim. *Davis v. Bell* (Civ. App.) 128 S. W. 658.

A grantee who paid part of the purchase price at the time and delivered its unpaid bonds for the part unpaid was entitled to claim as an innocent purchaser as to the whole

amount of the purchase price. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

A payment by a grantee on land purchased when he was chargeable with notice that another owned it would not entitle him or his grantees to claim protection against the claim of the real owner or her heirs. *Id.*

A purchaser, taking a conveyance in pursuance of a contract for legal services to be rendered to the vendor, which were duly rendered, was a purchaser for valuable consideration, notwithstanding his failure to pay back taxes as stipulated in the vendor's deed to him. *Tobin v. Benson* (Civ. App.) 152 S. W. 642.

16. — **Payment of value.**—As to fraudulent conveyances, see Art. 3966. While to support a plea of bona fide purchaser it is necessary to prove payment of a valuable consideration, it is not necessary that such payment should be adequate. *Johnson v. Newman*, 43 T. 628.

Giving a negotiable note for the purchase money of land, which has been assigned to an innocent holder, is equal to the payment of money, but it must appear that the land was purchased and not the title to it. *Case v. Jennings*, 17 T. 673. Where the defendant pleads innocent purchase in good faith, the plaintiff is entitled to recover to the extent that the purchase money remains unpaid at the institution of the suit. *Fletcher v. Ellison*, 1 U. C. 661.

It appearing by the evidence that the defendant's grantors, who bought of the partner, had knowledge of the claim by the plaintiff of the entire tract from the partner to whom it had been allotted in the partition, and it not appearing that defendant had paid the purchase money, he cannot be considered a bona fide purchaser. *Murrell v. Mandelbaum*, 85 T. 22, 19 S. W. 880, 34 Am. St. Rep. 777.

Purchaser for inadequate consideration not an innocent purchaser, entitled to protection against unrecorded deed. *Huff v. Maroney*, 23 C. A. 465, 56 S. W. 754.

A surety on a note secured on land of the principal held a purchaser for value in buying the land at the foreclosure sale. *Sullivan v. McLane*, 96 T. 144, 70 S. W. 949.

Attorney in fact, who performed services in consideration of conveyance of half interest in land, held bona fide purchaser. *Garner v. Boyle*, 34 C. A. 42, 77 S. W. 987.

Junior purchasers of land acquire no title to land against former unrecorded deeds, unless they purchase for value. *Whitaker v. Farris*, 45 C. A. 378, 101 S. W. 456.

While the amount paid for land may be considered in determining whether the purchaser bought the land or a mere chance of title, the mere fact that he paid less than the market value thereof would not affect his status as a bona fide purchaser. *Eastham v. Hunter*, 102 T. 145, 114 S. W. 97, 132 Am. St. Rep. 854.

Payment of value in good faith by the purchaser to his immediate vendor is all that is demanded, and he need not prove payment of a valuable consideration by other parties in the chain of title to establish his claim as an innocent purchaser. *Downs v. Stevenson*, 56 C. A. 211, 119 S. W. 315.

Ten dollars paid by the donee of a power for the investigation of two surveys held so grossly inadequate as to be insufficient to support a plea of innocent purchaser. *Davis v. Bell* (Civ. App.) 128 S. W. 658.

Where a power of attorney to recover certain land contained a grant of an undivided half interest to the attorney for his expenses and services, expenses incurred by him after notice of a deed cutting off all interest of the donor in the land were not "value" paid by the attorney for the land without notice of an adverse claim under such deed. *Id.*

A recital in a deed to land that it was conveyed in consideration of a payment is not conclusive that the vendee is a bona fide purchaser for value. *Hussey v. Titterington* (Civ. App.) 146 S. W. 714.

A purchaser of land who gives negotiable instruments in payment is a purchaser for value. *Nellius v. Thompson Bros. Lumber Co.* (Civ. App.) 156 S. W. 259.

17. — **Pre-existing debt.**—Crediting on a pre-existing debt due the firm by his vendor the price of land conveyed by the debtor to one of the members is, as against prior equities of third parties therein, a sufficiently valuable consideration to support a conveyance of land to the vendee, where he has no notice of such equities. *Greneaux v. Wheeler*, 6 T. 528; *Blum v. Loggins*, 53 T. 121; *Planters' Bank v. Evans*, 36 T. 592; *Alstin v. Cundiff*, 52 T. 464; *Johnson v. Newman*, 43 T. 642; *Rice v. Soders*, 1 U. C. 615.

In *Wallace v. Campbell*, 54 T. 87, it was held that a judgment creditor who purchases at execution sale, and has the amount of his bid credited on the execution, may be considered a bona fide purchaser, so that an unrecorded trust could not be engrafted on a deed to the judgment debtor to his detriment. A creditor who has taken a mortgage on property to secure his pre-existing indebtedness is not entitled to the protection accorded to a bona fide purchaser for a valuable consideration, and therefore his mortgage cannot supplant prior equities of third parties, though he had no notice of such equities when he took his mortgage. *Spurlock v. Sullivan*, 36 T. 511.

In *Bailey & Pond v. Tindall*, 59 T. 540, it is held that one who acquires a deed of trust on land to secure a pre-existing indebtedness, in ignorance that the maker of the deed held the land subject to a vendor's lien for unpaid purchase money, and afterwards bought under a sale under such deed, paying no new consideration, took title subject to the vendor's lien. A creditor who takes a deed of trust to secure a pre-existing debt upon property with no notice, actual or constructive, of the existence of a former deed made by the debtor, may subject the property to the payment of his debt, and such former deed, which has not been duly acknowledged or proved up and lodged with the clerk of the proper county for record prior to the execution of the trust deed, is void as to such creditor. *McKeen v. Sultenfuss*, 61 T. 325.

A judgment creditor of the husband, buying property at execution sale under execution against the husband, the apparent title to which is vested in the community, but with a resulting trust in favor of the wife, though he purchases, with no notice of such resulting trust, cannot be a purchaser for value if the amount of his bid is credited on the execution. He acquires no title as against the equity of the wife, as such a trust is not within the registration laws. And a creditor claiming a mere statutory lien by judgment or execution is not protected by want of notice. *Parker v. Coop*, 60 T. 111. Hence, also, an execution or judgment lien, obtained without notice of the resulting trust, cannot inure to the benefit of one buying at the sheriff's sale under execution with

notice. It is otherwise in reference to a creditor by mortgage or deed of trust or similar instruments, which are regarded as standing upon the same footing with conveyances by deed. *Bailey & Pond v. Tindall*, 59 T. 540; *Parker v. Coop*, 60 T. 111; *McKamey v. Thorp*, 61 T. 648.

An antecedent deed is not a sufficient consideration for a purchase of land to support the claim of a bona fide purchaser. *Overstreet v. Manning*, 67 T. 657, 4 S. W. 248; *Caviness v. Black* (Civ. App.) 33 S. W. 712; *Hirsch v. Jones*, 42 S. W. 604; *Pride v. Whitfield*, 51 S. W. 1100; *Huff v. Maroney*, 23 C. A. 465, 56 S. W. 754; *Catrett v. J. S. Brown Hardware Co.* (Civ. App.) 86 S. W. 1045; *Sparks v. Taylor*, 87 S. W. 740; *Holland v. Ferris*, 107 S. W. 102; *Buckley v. Runge*, 136 S. W. 533.

A judgment creditor, who, buying at the execution sale, does not pay cash, but credits the amount of his bid on the judgment, is not an innocent purchaser. *Lightfoot v. Horst* (Civ. App.) 122 S. W. 606.

Past services as an attorney for the grantor by one taking a conveyance without knowledge or notice of the grantor's previous unrecorded deed of trust are such a valuable consideration in law as to enable the grantee to hold as a bona fide purchaser for value, as against parties thereafter purchasing under the unrecorded deed of trust. *Masterson v. Crosby* (Civ. App.) 152 S. W. 173.

While a purchaser's surrender of a pre-existing debt does not make him a purchaser for valuable consideration, yet, where he is placed in a worse condition than before, as by a surrender without notice of an adverse claim, and bars his right of action on the notes evidencing the indebtedness, he is a purchaser for a valuable consideration. *Tobin v. Benson* (Civ. App.) 152 S. W. 642.

**18. Purchasers from bona fide purchasers.**—A subsequent purchaser with notice, acquiring title from a former purchaser for value and without notice, succeeds to all the rights of his grantor. *Grace v. Wade*, 45 T. 522; *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452; *Lewis v. Johnson*, 68 T. 450, 4 S. W. 644; *Peterson v. McCauley* (Civ. App.) 25 S. W. 826; *Light v. Brown*, 26 S. W. 886; *Burnham v. McMichael*, 6 C. A. 496, 26 S. W. 887; *Garner v. Boyle*, 34 C. A. 42, 77 S. W. 937; *Allen v. Anderson & Anderson* (Civ. App.) 96 S. W. 54; *Thomason v. Berwick*, 52 C. A. 153, 113 S. W. 567; *R. E. Godley Lumber Co. v. Teagarden* (Civ. App.) 135 S. W. 1109; *Phillips v. Campbell*, 146 S. W. 319; *Masterson v. Crosby*, 152 S. W. 173; *Long v. Shelton*, 155 S. W. 945.

A bona fide purchaser may make a valid sale to a third person, though the latter had knowledge of fraudulent intent by the seller. *Sanger v. Thomasson* (Civ. App.) 44 S. W. 408.

If in fact one is a purchaser for value and without notice of avowed equities in another, he takes the legal title free from such equities, and his vendee of course, irrespective of whether he had such notice by transfer to him, acquires all the rights of the vendor. *Long v. Fields*, 31 C. A. 241, 71 S. W. 775.

A purchaser of land by quitclaim deed from a bona fide purchaser without notice acquires the rights of such bona fide purchaser, regardless of his own knowledge of outstanding equities or the price paid for the land. *Laffare v. Knight* (Civ. App.) 101 S. W. 1034.

Defendant in trespass to try title cannot rely on want of notice to his predecessor of a judgment as constituting him an innocent purchaser, where the judgment does not affect the title conveyed. *Houston Oil Co. of Texas v. Bayne* (Civ. App.) 141 S. W. 544.

One who purchased the rights of an original purchaser of land held not a bona fide purchaser entitled to specific performance of the contract. *Harper v. Hughes* (Civ. App.) 143 S. W. 715.

To entitle one to claim in his grantor's right as an innocent purchaser, the grantee must show by other testimony than recitals in the deed to his grantor that such grantor paid a valuable consideration for the land. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

**19. Title and rights acquired by bona fide purchasers, and equities and defenses against them.**—The conveyance of one holding land in trust to a purchaser without notice for a valuable consideration passes the legal title discharged of the trust. *Wethered v. Boon*, 17 T. 146, 147; *Ranney v. Hogan*, 1 U. C. 253.

A purchaser of land for a valuable consideration, and without notice, takes a good title, though his vendor be chargeable with notice of an outstanding unrecorded title. *Moore v. Curry*, 36 T. 668.

The doctrine of innocent purchasers, which ordinarily can only be invoked in favor of the legal title, applies to the holder of an equitable title purchased without notice in a case of conflicting equities; in such cases the court of equity will decide upon the very equity of the case as presented. *Johnson v. Newman*, 43 T. 628. Bona fide purchaser defined. *Key v. La Pice*, 88 T. 209, 30 S. W. 867.

Under the registration laws (Early Laws, art. 748, § 13), the lien fixed by a creditor, by the levy of an execution upon land, is superior to the title conveyed by a prior unregistered deed, even if the deed should be recorded between the levy and sale; and a subsequent purchaser without notice for a valuable consideration is entitled to a like protection. The title of a bona fide purchaser cannot be destroyed by the subsequent registration, and before the registration of his deed, of the prior claim or title. *Grace v. Wade*, 45 T. 527; *Simpson v. Chapman*, 45 T. 564; *Grimes v. Hobson*, 46 T. 419; *Borden v. McRae*, 46 T. 396; *Watson v. Chalk*, 11 T. 94; *Guilbeau v. Mays*, 15 T. 415; *Watkins v. Edwards*, 23 T. 447; *Ayres v. Duprey*, 27 T. 606, 86 Am. Dec. 657; *Hawley v. Bullock*, 29 T. 222; *Flannagan v. Oberthier*, 50 T. 333; *Ranney v. Hogan*, 1 U. C. 253.

A conveyance made bona fide by the heir, whose title by descent is not of record, conveys title as against a prior unrecorded deed by the ancestor, if the purchaser from the heir had no actual notice of the prior deed. *Zimpelman v. Robb*, 53 T. 274.

S. and wife conveyed their homestead to A. by deed duly executed. On the same day A. reconveyed the land to S., reciting the payment of a certain sum in cash, and a note for the balance of the purchase money, and for the payment of which the vendor's lien was retained. The object of this transaction between S. and wife and A. was to secure a previous indebtedness to A. equal to the amount expressed in the note. A. afterwards assigned the note to H. for a valuable consideration and without notice

of the character of the transaction. Held, that H. could enforce the lien against the homestead. *Heidenheimer v. Stewart*, 65 T. 321.

A contract in relation to land may be recorded, and that it is but the evidence of an equitable title, and not of equal dignity to a deed, does not protect it against the rights of a subsequent purchaser. *Early Laws*, art. 748 (7); *Ranney v. Hogan*, 1 U. C. 253.

One who purchases, pays a valuable consideration, and receives a deed from another who is in possession of land under a deed which by mistake conveyed a larger quantity of land than was intended by the parties, is protected against the remote vendor in a suit brought to correct the mistake, if he had no notice at the time of his purchase, and there was nothing on the face of the deed to suggest inquiry regarding a mistake. *Garrison v. Crowell*, 67 T. 626, 4 S. W. 69.

C. and wife regularly executed a deed, defective in description, for their homestead, to K. It was intended as security for money advanced. C. sold to L., after pointing out the corners, and put him in possession, and K., at C.'s request, made the deed to L. L. remained in possession until his sale to R. C. and wife had never abandoned the land as homestead, and sued R., who at his purchase was ignorant of the homestead character of the property. Held, that R., buying from L. in possession, under legal title perfect on its face, without notice of the homestead rights of C. and wife, and paying the purchase money, would be protected against the claim for homestead. *Coker v. Roberts*, 71 T. 598, 9 S. W. 665.

A. purchased land under a judgment foreclosing an attachment lien, but failed to have his sheriff's deed recorded until after B. had acquired an attachment lien, without notice of the sale to A. Held, that although B. purchased under the foreclosure sale of his lien with notice of A.'s rights, he took the superior title. *Wiggins v. Sprague*, 15 C. A. 590, 40 S. W. 1019, citing *Grace v. Wade*, 45 T. 522.

A conveyance by one holding the legal title to one ignorant of any trust conveys a paramount title. *Settegast v. O'Donnell*, 16 C. A. 56, 41 S. W. 84.

The grantee of a deed not recorded until after a trust deed held by defendant was recorded, held not to be ousted of his rights by a foreclosure of said trust deed under proceedings to which he was not a party. *Hays v. Tilson*, 13 C. A. 610, 45 S. W. 479.

Notice to a grantor of adverse title is not notice to his grantee. *Root v. Baldwin* (Civ. App.) 52 S. W. 586.

A trustee's grantee held not entitled to claim protection as an innocent purchaser, as against a prior recorded title of the beneficiaries. *Tinsley v. Magnolia Park Co.* (Civ. App.) 59 S. W. 629.

Where a husband and wife convey realty occupied by them as a homestead, and in-dorse the purchase-money notes to a third party, without notice that the sale was merely a pretended one, the wife cannot claim a homestead as against such third party. *Noel v. Clark*, 25 C. A. 136, 60 S. W. 356.

Purchasers held not affected by fraud in the procurement of judgments on which their title depends, if it only appears from evidence dehors the record, and they had no notice thereof. *Schneider v. Sellers*, 25 C. A. 226, 61 S. W. 541.

Bona fide purchaser from party claiming under forged deed held to take no title. *Abee v. Bargas* (Civ. App.) 65 S. W. 489.

Where two purchase-money notes are equal as to priority, the sale of one note under an agreement that it shall be prior to the other, which agreement is not recorded, does not give priority thereto as against a subsequent purchaser of the other note, who has no knowledge of such agreement, though he knows the existence of both notes. *Lewis v. Ross*, 95 T. 358, 67 S. W. 405.

Where parties in trespass to try title claimed from a common source, held that plaintiff, having failed to connect himself with such source, could not avoid the effect of the deed to defendant on the ground that plaintiff was a bona fide purchaser without notice. *Estes v. Turner*, 30 C. A. 365, 70 S. W. 1007.

A purchase of land for value from one holding by deed absolute, and without notice that the deed was executed as security for a debt, takes the title free from the equities of the grantor in such deed. *Long v. Fields*, 31 C. A. 241, 71 S. W. 774.

Where plaintiff's grantor held title free from the equities of a third party, plaintiff by the transfer acquired title free from such equities, whether plaintiff had notice of their existence or not. *Id.*

Where land is conveyed by a deed absolute in form, but in fact a mortgage, and the mortgagee sells to a bona fide purchaser for value on the faith of the absolute deed, the purchaser gets title by estoppel, and not because the mortgagee had the legal title and the right to convey. *Stafford v. Stafford*, 29 C. A. 73, 71 S. W. 984.

A purchaser at foreclosure sale of attachment lien gets good title as against one holding under unrecorded deed, if he has no notice of such deed. *R. E. Bell Hardware Co. v. Riddle*, 31 C. A. 411, 72 S. W. 613.

An innocent purchaser from one holding land on a secret trust is protected against it. *Magnolia Park Co. v. Tinsley*, 96 T. 364, 73 S. W. 5.

One holding title to land under an unrecorded deed held estopped to claim the land, as against one induced by him to purchase the land from a third person. *Henry v. Thomas* (Civ. App.) 74 S. W. 599.

A release of lien filed by an original vendor, intended only to release from liability his immediate grantee, and not subsequent grantees, held not a waiver of his lien in favor of a second lienholder with notice. *Maas v. Tacquard's Ex'rs*, 33 C. A. 40, 75 S. W. 350.

One having an equitable title to land is not protected as a purchaser in good faith against the equities of the vendor of his grantor. *Slaughter v. Coke County*, 34 C. A. 598, 79 S. W. 863.

A power of attorney giving power to recover land and also conveying part of the land in payment for services in the premises, gives the grantee in the power of attorney and his vendee who were bona fide purchasers without notice, a title superior to that of beneficiaries in a prior unrecorded deed of trust covering the same land. The services rendered in recovering the land constituted a valuable consideration. *Garner v. Royle*, 97 T. 460, 79 S. W. 1067.

See note to Art. 6784.

Bona fide purchaser without notice of equitable title of heirs of deceased member of community takes title free from the claim of such heirs. *Derrett v. Britton*, 35 C. A. 485, 80 S. W. 562.

Defendants, in an action of trespass to try title, held entitled to the land as innocent purchasers for value. *Lyster v. Leighton*, 36 C. A. 62, 81 S. W. 1033.

Defense of purchase without notice and for value held available to purchaser of community property against a claim of beneficial interest therein. *Id.*

Purchaser of land formerly conveyed by an unrecorded deed held to take title as a bona fide purchaser. *Greer v. Willis* (Tex. Civ. App.) 81 S. W. 1185.

Defendants held bona fide purchasers of certain land, and entitled to protection against an equity claimed by plaintiff. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

One selling a hotel subject to a lease, reserving as rent 15 per cent. of its gross receipts, held entitled as against the purchaser to 15 per cent. of the earnings of the previous month, though not collected till after the sale. *Tremont & Windsor Hotel Co. v. Gammon*, 41 C. A. 1, 91 S. W. 337.

Vendee held not entitled to protection as innocent purchaser against one whose deed was older, though unrecorded until after plaintiff acquired title. *Houston Ice & Brewing Co. v. Henson* (Civ. App.) 93 S. W. 713.

The act of one disclaiming title made subsequent to his conveyance of the land held not to affect the rights of his purchaser or those claiming under him. *Davis v. Ragland*, 42 C. A. 400, 93 S. W. 1099.

Where community property was sold by a husband after his wife's death without the heirs joining, purchasers under such title would be protected as innocent purchasers, unless notice was brought home to them that the land was community property. *Milby v. Hester* (Civ. App.) 94 S. W. 178.

A grantor who, with knowledge of a fraud practiced on him, induced a third person to purchase the land from the grantee, held not entitled to recover the same. *White v. White* (Civ. App.) 95 S. W. 733.

The lessor of ground upon which a building was maintained held estopped to assert an unrecorded contract forbidding the removal of the building unless accrued rent was paid, against a mechanic's lien attaching thereafter. *Allen v. Houston Ice & Brewing Co.*, 44 C. A. 125, 97 S. W. 1063.

In an action to cancel a deed plaintiff held only entitled to recover from a purchaser of land from a broker installments of rent which the purchaser paid to the broker after notice that plaintiff was the owner of the property. *Storms v. Mundy*, 46 C. A. 83, 101 S. W. 258.

An unrecorded deed to land or timber thereon is void as to a subsequent purchaser for value without notice. *Lodwick Lumber Co. v. Robertson* (Civ. App.) 102 S. W. 141, 142.

An intending purchaser of land, finding nothing of record indicating an adverse claim and having no notice of facts putting him on inquiry as to matters not of record, may presume that no adverse claim exists. *Drumm Commission Co. v. Core*, 47 C. A. 216, 105 S. W. 843.

Mortgagee of certain land and a purchaser on foreclosure, being both ignorant that plaintiff was the common-law wife of the mortgagor, who was sui juris and represented that he was unmarried when the mortgage was executed, the mortgagee and the purchaser were entitled to hold the land free from plaintiff's claim of homestead. *Steves v. Smith*, 49 C. A. 126, 107 S. W. 141.

A bona fide purchaser from the heirs is entitled to hold as against one claiming under an unrecorded deed from the ancestor. *Clark v. Hoover*, 51 C. A. 181, 110 S. W. 792.

The retransfer to a bona fide purchaser after the record of a prior conveyance does not affect the title of the purchaser. *Id.*

A purchaser for value in good faith and without notice of an unrecorded deed acquires title free from the deed. *Rushing v. Lanier*, 51 C. A. 278, 111 S. W. 1089.

Purchasers of legal title of land, acquiring it without notice of any equitable title thereto or of any equity existing against it, upon payment of valuable consideration, held innocent purchasers for value. *Lewright v. Davis* (Civ. App.) 115 S. W. 599.

Where a link in the title of purchasers of land was a deed from an agent which was void because of the prior death of his principal, the purchaser could not claim protection as an innocent purchaser, since he was holding under a void title. *Wall v. Lubbock*, 52 C. A. 405, 118 S. W. 886.

A party's title under an unrecorded deed of trust cannot be sustained against the grantee in a deed based on a valuable consideration executed subsequent to the trust deed, where the grantee had no notice of the trust deed. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

Where parties living on land had conveyed it with warranty to P., the continued possession of the parties was not notice to the grantee in a deed of trust from P. of any claims on their part inconsistent with their deed, and the trust deed was not affected by the homestead claim of the grantors to P. *Girardeau v. Perkins* (Civ. App.) 126 S. W. 633.

If a subsequent purchaser of an after-acquired title received no notice of the prior deed, the estate in his hands is freed from the estoppel. *Breen v. Morehead* (Civ. App.) 126 S. W. 650.

If a vendor releases his lien, and, after such release is recorded, the purchaser sells to a purchaser for value without notice of the rights of the bank acquiring a purchase-money note as collateral, the subsequent purchaser would be protected against the lien asserted by the bank, and one who acquired title through a sale by the administratrix of the original vendor after a reconveyance to her is likewise protected. *Thomas v. First Nat. Bank* (Civ. App.) 127 S. W. 844.

The equity of a bona fide purchaser held superior to the rights of a bank claiming a lien as the holder of a purchase-money note as collateral, where the bank did not, as it might have done, take a written assignment of the vendor's lien, and place it on record. *Id.*

In view of this article, a deed not filed for record, made subsequent to a mortgage lien on the land conveyed, was void as to the lienholder. *Jackson v. Berliner* (Civ. App.) 127 S. W. 1160.

A purchaser of land without notice of an agreement which preserved a lien on the property in the hands of his vendor held to take title free therefrom. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

Secret equities held not to affect title of a subsequent grantee without notice. *Ken-non v. Miller* (Civ. App.) 143 S. W. 986.

The transferee of vendor's lien note cannot foreclose it as against an owner who has recorded a release from the transferror without knowledge of the unrecorded transfer, and hence, if owner suffered a foreclosure and paid the judgment, he could not recover from an indemnitor. *McKinley v. Davidson* (Civ. App.) 146 S. W. 576.

Where a conveyance is voidable on account of the insanity of the grantor, the gran-tee cannot pass title to an innocent purchaser. *Mitchell v. Inman* (Civ. App.) 156 S. W. 290.

20. Evidence.—See, also, notes under Art. 3687.

Evidence held to justify a finding that one claiming to be a bona fide purchaser paid only a nominal sum for the land. *Richerson v. Moody*, 17 C. A. 67, 42 S. W. 317.

Facts held to show one an innocent purchaser, entitled to protection against a prior unrecorded deed from his vendor, and a vendor's lien. *Johnson v. Dyer*, 19 C. A. 602, 47 S. W. 727.

Evidence held insufficient to show grantee of deed from his father a bona fide pur-chaser, as against purchaser at execution sale under judgment against the father. *Kerr v. Oppenheimer*, 20 C. A. 140, 49 S. W. 149.

Evidence held to authorize a verdict finding that defendant had notice of plaintiff's interest in land. *Scripture v. Copp* (Civ. App.) 57 S. W. 603.

Evidence held insufficient to show plaintiff a bona fide purchaser as against a re-corded bond executed by one stating in the body of the deed that he was acting as agent for plaintiff's grantors. *Marlin v. Kosmoroski*, 25 C. A. 335, 60 S. W. 788.

Facts held sufficient to affect a bona fide purchaser of lands with notice of an out-standing interest therein in a third person. *McCoy v. Cunningham*, 27 C. A. 476, 65 S. W. 1084.

To entitle a junior purchaser of real property to recover against the holder of a prior legal title thereto, the evidence must show that the prior deed of patent was not registered, and that the junior purchaser was without notice of the prior title. *Keachele v. Henderson* (Civ. App.) 78 S. W. 1082.

Evidence in an action of trespass to try title examined, and held insufficient to show that plaintiff's ancestor was without notice of a prior appropriation of the land in con-troversy at the time it was patented to him. *Id.*

Certain evidence held not to outweigh presumption that a deed had been taken in good faith. *Dean v. Gibson*, 34 C. A. 508, 79 S. W. 363.

In trespass to try title, evidence held to show that plaintiff's ancestor was not an innocent purchaser for value, but took with notice of the invalidity of the conveyance of the land to his grantor. *Hunter v. Eastham* (Civ. App.) 81 S. W. 336.

Evidence held sufficient to authorize a finding that the grantor did not communicate to the grantee notice of a certain defect in the title. *Eastham v. Hunter*, 98 T. 560, 86 S. W. 323.

In an action by a wife to enforce a trust as to certain land, evidence held to estab-lish that subsequent purchasers were purchasers with notice. *Sparks v. Taylor* (Civ. App.) 87 S. W. 740.

Evidence held to show that a grantee of county school lands purchased without no-tice of defects in his grantor's title. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1056.

Prima facie case made by defendants showing the plaintiff not a purchaser of land for value held not rebutted. *J. S. Brown Hardware Co. v. Catrett*, 45 C. A. 647, 101 S. W. 559.

On an issue as to whether one who purchased certain land from the heirs of a de-cedent had paid value for the same, evidence held insufficient to show such to have been the case. *Holland v. Ferris* (Civ. App.) 107 S. W. 102.

In trespass to try title, evidence held sufficient to prove that defendant was a bona fide purchaser of the land and improvements. *North v. Coughran*, 49 C. A. 101, 108 S. W. 165.

Circumstances to establish notice to the purchaser of an outstanding equity must point with some probative force to the existence of such equity. *Wallis, Landes & Co. v. Dehart* (Civ. App.) 108 S. W. 180.

In an action to try title to land, where defendants claimed title to the land on the ground that the person through whom they claimed was a bona fide purchaser for value, the evidence held to show that the consideration recited in the deed to him was the true consideration, and that the purchase price was paid by him in cash to his grantor. *Eastham v. Hunter* (Civ. App.) 109 S. W. 237.

In an action to try title to land, the evidence held to warrant a finding that the per-son through whom defendants claimed title took the land with knowledge that his gran-tor did not pay a present consideration therefor, and with knowledge of the defect in his grantor's title. *Id.*

In an action to try title to land which defendant claimed was purchased with her money by her putative husband, certain statements by the husband at the time of sale held insufficient to impute to plaintiff knowledge that defendant had any equities in the land by having paid part of the purchase price thereof, and hence plaintiff was a bona fide purchaser of the land. *Middleton v. Johnston* (Civ. App.) 110 S. W. 789.

In trespass to try title, the evidence held sufficient to sustain a finding that a pur-chaser of the land from heirs had no notice of title acquired by a prior administrator's sale, and that he paid the purchase money when he bought the land. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, *Id.*

In trespass to try title in which plaintiff and defendants deraigned title from a com-mon source, evidence held to show that a purchaser from the common grantor recording his deed before a prior deed from the common grantor was recorded was not a pur-chaser for value without notice. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

Evidence, in trespass to try title, held to show that a former owner of the property,

through whom plaintiff claims, was a purchaser for a valuable and adequate consideration. *McCollum v. Buckner's Orphans' Home*, 54 C. A. 348, 117 S. W. 886.

The purchase of a defective title would be a circumstance to determine good faith, but standing alone does not necessarily establish bad faith. *Downs v. Stevenson*, 56 C. A. 211, 119 S. W. 315.

Evidence held to show that a subsequent purchaser without notice of a prior unregistered conveyance paid the price. *Davidson v. Ryle* (Sup.) 124 S. W. 616.

The character of the warranty in a deed may be considered on the question whether the grantee therein purchased in good faith without notice of a prior unregistered conveyance, but it is not conclusive. *Id.*

Evidence held to justify a finding that a grantor conveyed land in good faith, justifying a presumption that the grantee was a bona fide purchaser without notice of an unregistered conveyance. *Id.*

In determining whether a subsequent purchaser was a good-faith purchaser without notice of a prior unregistered conveyance the good or bad faith of the vendor may be considered. *Id.*

In trespass to try title, evidence held insufficient to show that one of defendant's remote grantors was an innocent purchaser without knowledge of an adverse claim. *Houston Oil Co. of Texas v. Hayden*, 104 T. 175, 135 S. W. 1149.

Evidence, in trespass to try title, held insufficient to show that defendant was a bona fide purchaser. *Wilkerson v. Ward* (Civ. App.) 137 S. W. 158.

Evidence in an action for trespass to try title held sufficient to justify a finding that a deed to defendants' predecessors was made after a deed to plaintiff's grantors in pursuance of a prior contract by the common grantor known to plaintiff's grantors. *Hermann v. Thomas* (Civ. App.) 141 S. W. 574.

Evidence in trespass to try title on issue of good faith of purchaser held sufficient to sustain a verdict for plaintiff. *Cartwright v. La Brie* (Civ. App.) 144 S. W. 725.

In an action to recover land, evidence held to sustain a finding that defendant did not have notice that the land had been theretofore conveyed by the owner when it was conveyed to one through whom defendant claimed title. *Haley v. Sabine Valley Timber & Lumber Co.* (Civ. App.) 150 S. W. 596.

21. — Presumptions and burden of proof.—See notes under Art. 3687, Rule 12.

22. Questions for jury.—See notes under Art. 1971.

23. Mortgagees as bona fide purchasers—In general.—A mortgage executed by a fraudulent grantee to secure a debt of the grantor created after the fraudulent conveyance to a creditor having notice of the fraud is invalid as to creditors of the fraudulent grantor existing at the time of the fraudulent conveyance. *Rilling v. Schultze*, 95 T. 352, 67 S. W. 401.

A mortgagee, claiming under a deed delivered without authority, held not entitled to protection as an innocent incumbrancer. *Houston Land & Trust Co. v. Hubbard*, 37 C. A. 546, 85 S. W. 474.

Certain facts held not to prevent a grantee in a deed of trust from being a bona fide purchaser. *Smith v. Wofford* (Civ. App.) 97 S. W. 143.

A grantee in a deed of trust held a lien holder for value as against a third person. *Id.*

24. — Notice and effect of notice in general.—Where plaintiff purchased after maturity a note secured by vendor's lien and mortgage, held, that he was charged with notice of equities of a holder of another note included in the security. *Columbia Ave. Saving-Fund, Safe-Deposit, Title & Trust Co. v. Roberts* (Civ. App.) 41 S. W. 111.

Person holding under trustee, with the knowledge that deed to himself individually was voidable, held not an innocent purchaser. *Canadian & American Mortgage & Trust Co. v. Edinburgh-American Land Mortgage Co.*, 16 C. A. 520, 41 S. W. 140, 42 S. W. 864.

Actual notice to mortgagee purchasing from vendee of mortgagor, that vendee had assumed mortgage, held unnecessary. *Harris v. Masterson*, 91 T. 171, 41 S. W. 482.

The right of mortgagee, purchaser at his foreclosure sale, to recover part of the land from third persons, held governed by his knowledge of the boundaries at the execution of the mortgage, and not at the time of foreclosure. *Colonial & U. S. Mortg. Co. v. Tubbs* (Civ. App.) 45 S. W. 623.

A recital in a mortgage that the mortgagor had a homestead in the half of the survey not mortgaged held sufficient to put the mortgagee on inquiry which would have shown that the title to half of all the survey was vested in the children of the mortgagor. *Keyser v. Clifton* (Civ. App.) 50 S. W. 957.

The fact that the tenants of a vendor remained in possession as tenants of a person for whose benefit the land was sold held no notice to one who in good faith took a mortgage from the purchaser that he held the title as trustee for such person. *Montague County v. Meadows*, 21 C. A. 256, 51 S. W. 556.

A mortgage is good on a homestead, the grantee from the owner having obtained a loan on it, the deceit not being known to the mortgagee or his agent. *Forbes v. Thomas* (Civ. App.) 51 S. W. 1097.

Possession held sufficient to charge person taking mortgage on land with notice of title. *Pride v. Whitfield* (Civ. App.) 51 S. W. 1100.

Notice to judgment creditor of unrecorded mortgage, either actual or constructive, held fatal to his right as against the holder of the unrecorded mortgage. *Barnett v. Squyres* (Civ. App.) 52 S. W. 612.

Facts held insufficient to put purchaser of notes secured by deed of trust on inquiry as to rights of holder of another note secured by same deed. *Smith v. Smith*, 23 C. A. 304, 55 S. W. 541.

A mortgagee is charged with notice of the recitals in the deed under which the mortgagor claims. *Wells v. Houston*, 23 C. A. 629, 57 S. W. 584.

The mortgagee is not released from duty to investigate an adverse title by recitals in the judgment in favor of a grantor of the mortgagor. *Ramirez v. Smith*, 94 T. 184, 59 S. W. 258.

Where a portion of mortgaged premises is occupied by another than the mortgagor, the mortgagee is bound to investigate the adverse title. *Id.*



A lien for attorney's fees reserved in a purchase money note secured by trust deed cannot be asserted against subsequent purchasers, where the deed did not refer to the provision in the note as to attorney's fees, and such purchasers did not otherwise have notice of the lien. *Hall v. Read*, 28 C. A. 18, 66 S. W. 809.

Leases exhibited to a mortgagee on making application for the mortgage loan held not to charge the mortgagee with notice of an unrecorded conveyance to the lessor in leases surrendered in consideration of those shown. *W. C. Belcher Land Mortg. Co. v. Norris*, 29 C. A. 361, 68 S. W. 548.

A mortgagee whose mortgage was subsequent to an assignment of rents to accrue under a lease of the mortgaged premises held not entitled to such rents as accrued subsequent to foreclosure, provided such mortgagee had notice of the assignment. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

A party taking a trust deed held chargeable with knowledge that a purchase-money note secured by a vendor's lien reserved in a prior deed was a claim against the land. *W. L. Moody & Co. v. Martin* (Civ. App.) 117 S. W. 1015.

In absence of a showing that the mortgagee of property made such inquiry as a prudent man would have made, held that he would be charged with notice that it was community property, and of the existence of children, and hence of the fact that the husband could not devise all of it. *Tomlinson v. H. P. Drought & Co.* (Civ. App.) 127 S. W. 262.

Where actual notice was given the president of a bank of the existence of a prior unrecorded mortgage on certain property, after such notice a mortgage taken by the bank became inferior to the prior mortgage. *Hampshire v. Greeves* (Civ. App.) 130 S. W. 665.

Where the recorded deed under which a grantor held conveyed both the legal and equitable title, in the absence of circumstances sufficient to give the mortgagee notice that another claimed an interest in the land, she could rely upon the trust deed as conveying both the legal and equitable title. *Weaver v. Emison* (Civ. App.) 153 S. W. 923.

25. — **Record as notice.**—See Art. 1842 and notes.

26. — **Pre-existing debt, as consideration.**—A mortgagee, purchasing the premises on the foreclosure without paying any money, but merely crediting the amount of the bid on the judgment against the mortgagor, is a purchaser for value. *Barrett v. Eastman Bros.* (Civ. App.) 86 S. W. 1057.

Mortgagee with notice of equities, who took the mortgage to secure an antecedent debt, held to acquire no lien. *Rogers v. Tompkins* (Civ. App.) 87 S. W. 379.

One taking a trust deed to secure a note given as additional security for a pre-existing debt held not a purchaser in good faith. *W. L. Moody & Co. v. Martin* (Civ. App.) 117 S. W. 1015.

27. — **Rights acquired in general.**—A recorded mortgage covering future advances has priority over subsequent incumbrances. *Willis v. Sanger*, 15 C. A. 655, 40 S. W. 229.

Mortgagee without notice of unrecorded transfer of vendor's lien note held to have superior equity, the holder of the lien note alone being chargeable with negligence. *Southern Building & Loan Ass'n v. Brackett*, 91 T. 44, 40 S. W. 719.

Where defendant bought under foreclosure which was void, held, that an innocent purchaser of one mortgage note could share in the security. *Columbia Ave. Saving-Fund, Safe-Deposit, Title & Trust Co. v. Roberts* (Civ. App.) 41 S. W. 111.

An assignee of a mortgage on real estate has a paramount lien, as against a purchaser after the mortgage, but prior to the assignment. *Smith v. Smith*, 23 C. A. 304, 55 S. W. 541.

In trespass to try title, plaintiff's title, acquired under an agreement with a grantor in a trust deed, held superior to the title acquired by the grantees in the trust deed. *Stacey v. Henke & Pilot*, 32 C. A. 462, 74 S. W. 925.

Plaintiff held entitled to maintain action to recover value of land conveyed by him in trust and fraudulently sold by trustee to innocent purchaser. *Espey v. Boone*, 33 C. A. 83, 75 S. W. 570.

A grantee, whose deed is recorded, held not affected by foreclosure of prior trust deed. *Cates v. Field* (Civ. App.) 85 S. W. 52.

A mortgagee, taking a mortgage and making advances to the mortgagor without notice that the property is the separate property of the mortgagor's wife, held not affected by a subsequent notice. *Barrett v. Eastham Bros.* (Civ. App.) 86 S. W. 1057.

A finding that mortgaged property belonged to the mortgagor, or, if it was his wife's separate property, plaintiff did not know that fact, authorized a judgment of foreclosure of the mortgage. *Goode v. Pierce* (Civ. App.) 112 S. W. 688.

The trustee of a deed of trust held to have acquired a prior right to the land as against grantees holding under unrecorded conveyances. *Anderson v. Casey-Swasey Co.* (Civ. App.) 120 S. W. 918.

A mortgage of a homestead held valid as against the transferee without notice of the purchase money note, so as to entitle her to have the vendor's lien reserved foreclosed and the land sold to satisfy the debt. *Chamberlain v. Trammell* (Civ. App.) 131 S. W. 227.

28. — **Purchaser from mortgagee.**—The bona fide of the mortgagee as to the title passes to the purchaser at the foreclosure sale, regardless of the knowledge of the latter. *Keyser v. Clifton* (Civ. App.) 50 S. W. 957.

29. — **Sufficiency of evidence.**—Evidence held to show that the assignee of a vendor's lien mortgage took it with notice that there was other security for the debt, sufficient to satisfy it. *Interstate Building & Loan Ass'n v. Tabor*, 21 C. A. 112, 51 S. W. 300.

Matter to be shown by a mortgagee claiming land against an unrecorded deed stated. *Anderson v. Casey-Swasey Co.*, 103 T. 466, 129 S. W. 349.

30. **Chattel mortgagees.**—See Art. 5654 et seq.

Our registration statutes relating to mortgages upon real property have not declared that a reservation of title in the maker of a deed conveying land, which has been actually recorded is void as to creditors as has been done as to personal property in the chattel mortgage act. *Long v. Fields*, 31 C. A. 241, 71 S. W. 776.

**Art. 6825. [2322] Located lands have priority over unrecorded titled lands, when.**—Titles to land which may have been deposited in the general land office subsequently to the time when the land embraced by such titles had been located or surveyed, by virtue of valid land warrants or certificates, shall not be received as evidence of superior title to the land against any such location or survey, unless such elder title had been duly recorded in the office of the county clerk of the county where the land may have been situated prior to the location and survey, or unless the party having such location or survey made had actual notice of the existence of such elder title before he made such location or survey. [Acts 1866, p. 32. P. D. 5825.]

*In general.*—Title acquired under a transfer of a bounty warrant certificate could not be asserted against a purchaser for value, who acquired title of the heirs of the original owner of the certificate to whom the land was patented without any notice, actual or constructive, of the transfer of the certificate, the land being located under a certificate for the unlocated balance of the bounty warrant certificate. *Ingalls v. Orange Lumber Co.*, 56 C. A. 543, 122 S. W. 53.

**Art. 6826. [4640a] English language to be used.**—No deed, conveyance or other instrument, whether relating to real or personal property, if in any other than the English language, shall be admitted to record; provided, that all such instruments executed prior to the twenty-second day of August, 1897, may be filed and recorded if accompanied by a correct translation thereof, the accuracy of which is sworn to before some officer authorized to administer oaths. Such translations shall be recorded with the original, and if correct shall operate as constructive notice from and after the date of its filing, if the original be authenticated in the manner required by law. [Acts 1897, p. 11.]

**Art. 6827. [4641] Deeds, etc., to be recorded in county where land is situated.**—All deeds, conveyances, mortgages, deeds of trust, or other written contracts relating to real estate, which are authorized to be recorded, shall be recorded in the county where such real estate, or a part thereof, is situated; provided, that all such instruments, when relating to real estate situated in an unorganized county, shall be recorded in the county to which such unorganized county is attached for judicial purposes; in a well-bound book, or books, to be kept for that purpose, separately from the records of the county to which it is attached and from other unorganized counties; and it shall be the duty of the clerk or other officer having the custody of such books, when such unorganized county shall be organized, or has been detached therefrom and attached to another county for judicial purposes, to deliver such book, or books, without charge, to the proper officer of such newly organized county, or of the county to which it is attached for judicial purposes, when demanded by him; and, where such records have been heretofore kept in separate books, they shall also be delivered in like manner as above, and in each case the same shall become archives of the county to which it is so delivered. Where such records have not heretofore been kept separately, upon the organization or attachment of such unorganized county to another organized county, a certified transcript from the records of such instruments so recorded shall be obtained by such new clerk or officer; and when so made the same shall in like manner become archives of such newly organized county, or county to which such unorganized county may be attached, as the case may be. [Acts 1887, p. 94.]

*Historical.*—The amended article, March 30, 1881 (17th Leg., p. 72), reads as follows: "Article 4333. All deeds, conveyances, mortgages, deeds of trust, or any other written contract relating to real estate, which are authorized to be recorded, shall be recorded in the county where such real estate, or a part thereof, is situated; provided, that all such instruments, when relating to real estate situated in an unorganized county, shall be recorded in the county to which such unorganized county is attached for judicial purposes; and when an unorganized county shall be organized, it shall be the duty of the commissioners' court of such newly organized county to procure from the county to which it was attached for judicial purposes, within two years from the date of organization, a transcript of all such records, which shall be taken and held as notice to all persons of the existence of such instruments; provided further, that nothing

in this act shall be construed to affect the registration of any such instruments heretofore made, in either a land district to which any unorganized county may have been attached, or any county to which any unorganized county may have been attached for judicial purposes."

**Does not apply to chattel mortgages.**—See Art. 5654 et seq.

This article does not include chattel mortgages on personality, but by its terms excludes them. *First Nat. Bank v. McElroy*, 51 C. A. 284, 112 S. W. 803.

**Place of record—in general.**—Deeds and instruments respecting the titles to lands, executed before the passage of our registration laws, should be recorded in the counties in which the lands are situated. *Hawley v. Bullock*, 29 T. 216; *Hutchins v. Bacon*, 46 T. 408. And if not registered, they will meet with the consequences prescribed by the law, and have no effect as to the interests and rights of third parties acquired for a valuable consideration and without notice. *Hawley v. Bullock*, 29 T. 216, citing *Paschal v. Perez*, 7 T. 348; *Watson v. Chalk*, 11 T. 89; *Guilbeau v. Mays*, 15 T. 413; *Lambert v. Weir*, 27 T. 359. A party having properly filed a deed is not prejudiced by the clerk's neglect of his duty in recording. *Throckmorton v. Price*, 28 T. 605, 91 Am. Dec. 334.

A deed describing the land conveyed as "situated in the land districts of Milam and Bexar" is not properly recorded in Bexar county, so as to be admissible in evidence, unless it be shown that the land, or some part of it, was situated in Bexar county, or a county attached to it for registration purposes, or subsequently created out of it. *League v. Thorp*, 22 S. W. 179, 24 S. W. 685, 3 C. A. 573.

A power of attorney with reference to a sale of land is not entitled to record in a county in which none of the land is situated. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

Statement as to notice from proper registration of deed when the land is afterwards embraced in a new county. *Stark v. Harris* (Civ. App.) 106 S. W. 887.

**Governed by statute.**—The registration of deeds for lands in unorganized counties is determined by the statutes prescribing the place of such record. *Alford v. Jones*, 71 T. 519, 9 S. W. 470.

**Land in unorganized county not attached to another.**—In August, 1875, the county of Archer was not attached to Clay county, and registration of deeds for land in Archer county in the records of Clay county was of no legal effect as notice, although by common consent such registration was made. *Alford v. Jones*, 71 T. 520, 9 S. W. 470.

Deeds to lands in an unorganized county which is not attached for judicial purposes to an organized county must be registered in the mother county. *Broussard v. Dull*, 3 C. A. 59, 21 S. W. 937.

**In either of two counties.**—Where a deed is placed on record in a county at a time when the law permitted it to be recorded there, and a certified copy was recorded properly in a county where the law permitted it to be recorded, a certified copy of either record is admissible in evidence both to show its contents and the fact of registration upon proof of the loss of the original. *Turner v. Cochran* (Civ. App.) 63 S. W. 154.

**Land in two or more counties.**—When a tract of land is situated in two or more counties, a record in either of such counties constitutes notice as to all. *Brown v. Lazarus*, 5 C. A. 81, 25 S. W. 71.

**Where county lines have never been established.**—When county lines have never been established, the person recording a deed must ascertain, at his peril, in what county the land thereby conveyed is situated. When the lines have been legally established in accordance with law, they will, for the purposes of registration, be regarded as the true boundaries between counties. *Jones v. Powers*, 65 T. 207.

**Land in Paschal county.**—Paschal county was one of the counties created for judicial and other purposes January 23, 1841. This act was held unconstitutional. *Allen v. Scott*, *Dallam*, 615. The records of the county were directed to be transferred to Red River county. Act Feb. 1, 1844. The proceedings of the land board of Paschal county should be in the records of Red River county, and a certified copy of such records by the county clerk of that county would be evidence. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

**Certificate after location.**—After a certificate for land has been located, its transfer is governed by the law for transfer of land as to mode of conveyance, registration, etc. *Simpson v. Chapman*, 45 T. 560; *Renick v. Dawson*, 55 T. 102; *Hearne v. Gillett*, 62 T. 23; *Adams v. Railway Co.*, 70 T. 252, 7 S. W. 729.

**Effect of record in wrong county.**—The record of a deed conveying land in a county in which no part of the land is situated is worthless as notice. *Adams v. Hayden*, 60 T. 223. See Art. 6828, note.

**Titles to chattels, where recorded.**—See Art. 6841.

**Art. 6828. [4642] Deed, etc., valid, against subsequent creditors from, etc.**—Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, or certified copies of any such original conveyance, covenant, agreement, deed, deed of trust or mortgage copied from the deed or mortgage records of any county in the state where the same has been regularly recorded, although the land mentioned may not have been situated in the county where such instrument was recorded, and which shall have been acknowledged, proved or certified according to law, may be recorded in the county where the land lies; and when delivered to the clerk of the proper court to be recorded shall take effect and be valid as to all subsequent purchasers for a valuable consideration without notice, and as to all creditors from the time when such instrument shall have been so acknowledged, proved or certified and delivered to such clerk to be recorded, and from that

time only; provided, however, that all certified copies filed and recorded under the provisions of this article shall take effect and be in force from the time such certified copy was filed for record; and provided, further, that nothing in this shall be construed to make valid any instrument which was at the time of its execution from any cause invalid. [Acts 1895, p. 157. P. D. 4994.]

**Historical.**—The amended article reads as follows:

"Art. 4334. Every conveyance, covenant, agreement, deed, deed of trust or mortgage in this chapter mentioned, which shall be acknowledged, proved or certified according to law, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid as to all subsequent purchasers for a valuable consideration, without notice, and as to all creditors, from the time when such instrument shall be so acknowledged, proved or certified, and delivered to such clerk to be recorded, and from that time only." [Act Feb. 5, 1840; 4th Cong., sec. 13, p. 153.]

**In general.**—By the act of December 20, 1836, the owners of land claiming by deed, lien or other color of title were required to have the same proven in open court and recorded on or before the 1st of April, 1838, in the county where the land or a part thereof was situated. If not so recorded the deed, etc., would not be valid against a subsequent purchaser. 1st Cong., p. 148; *Watson v. Chalk*, 11 T. 89. By the act of May 10, 1838 (2d Cong., p. 146), so much of the former act as required the record to be made on or before the 1st of April, 1838, was repealed, the effect of which was to postpone a prior unrecorded deed to that of a subsequent purchaser for value and without notice. *Guilbeau v. Mays*, 15 T. 410; *Hawley v. Bullock*, 29 T. 216.

Compare this article with Art. 6824. The filing for record in the proper office is equivalent to proper registration as to notice. *Land Co. v. Chisholm*, 71 T. 523, 9 S. W. 479.

This article gives verity to the first record, and that being true, certified copies thereof are admissible as of any other valid record. The certified copy is used for the double purpose of supplying proof of the original and to show the record of the copy in the proper county; that is, in the county in which the land is situated. *Moody v. Ogen*, 31 C. A. 395, 72 S. W. 254.

Where a deed has been recorded in the wrong county and afterwards under this article recorded in the proper county, the defect in registration if any is cured. This being a remedial statute should be liberally construed in aid of the object sought to be attained by the law-making power. *Logan's Heirs v. Logan*, 31 C. A. 295, 72 S. W. 417.

Under Art. 6791 and this article, a deed properly acknowledged or proved and certified is as effectual as notice as if it had been duly and properly recorded, from the date it is properly deposited for record. *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581.

**Bona fide purchasers.**—See notes under Art. 6824.

**Art. 6829. [4643] Marriage contract, when valid.**—No covenant or agreement made in consideration of marriage shall be good against a purchaser for a valuable consideration, or any creditor not having notice thereof, unless such covenant or agreement shall be duly acknowledged or proven and recorded in manner and form as provided by law for deeds and other conveyances. [Acts 1887, p. 94, sec. 2. P. D. 4987.]

**Art. 6830. [4644] Recorder shall record, etc.**—Each recorder shall also record in books to be provided for that purpose all marriage contracts and powers of attorney, and all official bonds required to be recorded in his office, and all other instruments of writing authorized or required to be recorded in his office, which shall be proved or acknowledged according to law and delivered to him for record. [Act May 12, 1846, p. 236, sec. 5. P. D. 5005.]

**Art. 6831. [4645] Copies from land office to be recorded.**—Each recorder shall record all copies of titles recorded in the general land office presented for record; provided, such copies are attested with the seal of the general land office. [Id. sec. 6. P. D. 5006.]

**Art. 6832. [4646] Judgments to be recorded when.**—Each recorder shall also record all judgments and abstracts of judgments rendered by any court of this state presented to him for record; provided, such judgments or abstracts of judgments are attested under the hand and seal of the clerk of the court where such judgment was obtained. [Id. P. D. 5006.]

**In general.**—The due record and indexing of a judgment will not affect a levy made under a valid judgment, the levy being followed by sale. Nor is the purchaser at said sale required to place his sheriff's deed on record, as against the rights of the original parties to the recorded judgment. *Brackenridge v. Cobb*, 85 T. 448, 21 S. W. 1034.

Record of a judgment not affecting a prior grantor's title is not constructive notice to a mortgagee, where the mortgagor has a complete legal title. *Ramirez v. Smith*, 94 T. 184, 59 S. W. 258.

A record of judgment and deeds filed in a certain county held constructive notice of defendant's claim to a portion of a parcel of land which lay in another county. *Haines v. West* (Civ. App.) 102 S. W. 436.

A judgment concerning land, rendered in a county other than where the land lies, is not constructive notice to one purchasing before the judgment is recorded in the latter county. *Houston Oil Co. of Texas v. Bayne* (Civ. App.) 141 S. W. 544.

**Art. 6833. [4647] Transfers of judgment to be recorded, etc.—**The sale of a judgment, or any part thereof, of any court of record within this state, or the sale of any cause of action, or interest therein, after suit has been filed thereon, shall be evidenced by a written transfer; which, when acknowledged in the manner and form required by law for the acknowledgment of deeds, may be filed with the papers of such suit, and when thus filed by the clerk it shall be his duty to make a minute of said transfer on the margin of the minute book of the court where such judgment of said court is recorded; or, if judgment be not rendered when said transfer is filed, the clerk shall make a minute of such transfer on the court trial docket where the suit is entered, giving briefly the substance thereof; for which services he shall be entitled to a fee of twenty-five cents, to be paid by the party applying therefor; and this article shall apply to any and all judgments, suits, claims and causes of action, whether assignable in law and equity or not. When said transfer is duly acknowledged, filed and noted as aforesaid, the same shall be full notice and valid and binding upon all persons subsequently dealing with reference to said cause of action or judgment, whether they have actual knowledge of such transfer or not. [Acts 1889, p. 103.]

See *Missouri, K. & T. Ry. Co. of Texas v. Wood* (Civ. App.) 152 S. W. 487.

In general.—A purchaser of a tax title, invalid for want of jurisdiction of the owner in the foreclosure proceedings, acquired no rights as a bona fide purchaser under a judgment valid on its face. *Scanlan v. Campbell*, 22 C. A. 505, 55 S. W. 501.

Owners with a defective title are not forbidden to purchase a judgment lien against the property by reason of having formerly sought to establish a fraudulent title thereto. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

Where a judgment creditor accepts a note from his debtor, secured by trust deed executed by the debtor and his wife, and the judgment is assigned to the wife, the acceptance of such additional security divests all the interest of the judgment creditor in the judgment. *Branch v. Wilkens* (Civ. App.) 63 S. W. 1083.

A positive assertion of ownership of a judgment in open court four months after the purchase thereof held an election, and a waiver of the right to rescind. *Hume v. John B. Hood Camp Confederate Veterans* (Civ. App.) 69 S. W. 643.

The assignee of a judgment alone has the right to sue on it. *Bond v. Carter* (Civ. App.) 73 S. W. 45.

Defendants' right to proceeds collected by sheriff on execution held to have become absolute by virtue of contract with plaintiffs on purchase of a judgment, sale of the property, and payment of consideration to sheriff. *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Civ. App.) 78 S. W. 239.

Defendants, as assignees of a judgment, held to have complied with contract by which they were to have land sold on execution without expense to plaintiffs. *Id.*

The assignment of a satisfied judgment gives no rights thereunder to the assignee. *Tarleton v. Orr*, 40 C. A. 410, 90 S. W. 534.

As a rule, the assignee of a judgment takes such interest as the assignor has, and the assignment is subject to such legal and equitable defenses as existed against the judgment in the hands of the assignor. *McManus v. Cash & Luckel*, 101 T. 261, 108 S. W. 800.

The fraudulent purpose of a judgment creditor and his transferee in assigning the judgment will not entitle the debtor to have the transfer set aside, where at the time it is made the debtor holds no claims against the original judgment creditor. *Trammell v. Chamberlain* (Civ. App.) 128 S. W. 429.

One having an interest in an action for specific performance could transfer such interest. *Tolar v. South Texas Development Co.* (Civ. App.) 153 S. W. 911.

**Purpose of article.**—This article does not purport to make a rule as to admission of transfers of choses in action in evidence, but is merely making a rule as to notice to third parties of the assignment of a cause of action. *Standifer v. Bond Hardware Co.* (Civ. App.) 94 S. W. 145.

The purpose of this article is merely to furnish parties dealing with the cause notice of assignments, and where, upon the trial of an action on an assignment in a former cause, and in its brief, defendant admitted that it had actual notice of the assignment before a compromise with the plaintiff in the original suit, a substantial compliance with the statute is all that is necessary to be shown, so that a failure to allege or show a compliance therewith will not preclude the assignee from recovering the amount of his claim. *Trinity County Lumber Co. v. Holt* (Civ. App.) 144 S. W. 1029.

**Does not apply to transfer before suit.**—The provisions of the above article do not apply to cause of action on which suit has not been filed. *Railway Co. v. Wooten*, 10 C. A. 54, 30 S. W. 684; *G. C. & S. F. Ry. Co. v. Miller*, 21 C. A. 609, 53 S. W. 709; *Southern Pac. Co. v. Winton*, 27 C. A. 503, 66 S. W. 480.

— **Equitable assignment.**—This statute does not prevent a party from making an equitable assignment in any other lawful way; and such assignment, as to all persons having notice thereof, is as effective as the statutory assignment. *Putnam v. Capps*, 6 C. A. 610, 25 S. W. 1024; *Smith v. T. & P. Ry. Co.* (Civ. App.) 39 S. W. 969.

**Assignment of cause of action—To attorney.**—Although this article provides that attorneys, filing an acknowledgment by the client that they are entitled to a certain part of the recovery, etc., are protected from purchasers, etc., this statute does not make them such parties to an action that they can come in and resist a motion by their client to dismiss the appeal, in the absence of an intervention filed in the lower court setting up their rights. *Marschall v. Smith* (Civ. App.) 132 S. W. 812.

— **Dismissal by client.**—The dismissal of an appeal by the party seeking to recover will not deprive his attorney, who is interested in the recovery, of any right which he might assert, provided the attorney has complied with this article. *Marschall v. Smith* (Civ. App.) 132 S. W. 812.

**Effect of compromise.**—In a suit against a railway company for damages for personal injuries, an instrument, duly signed, witnessed and acknowledged, was filed among the papers of the case, which purported to sell and convey to plaintiff's attorney "one-half of whatever sum may be realized out of and collected from said railroad company, whether through compromise or by judgment of the courts," etc. The proper entries were also made by the clerk on the docket. Held, that the attorney was not bound by a settlement made by the plaintiff with the company, but had the right to prosecute the suit for his own benefit to the extent of his interest. *T. & P. Ry. Co. v. Vaughan*, 16 C. A. 403, 40 S. W. 1065.

While persons acquiring an interest in the subject-matter of a suit by assignment after the bringing of the suit are bound by the final judgment entered, under this article a judgment upon a compromise with the plaintiff therein merely fixed the pro tanto liability of the defendant to the assignee, and did not release it from all liability in a later suit for the amount due under the assignment. *Trinity County Lumber Co. v. Holt* (Civ. App.) 144 S. W. 1029.

Under this article the assignee of a part of a cause of action obtained his right immediately upon compliance with the statutory requirements, and a compromise or settlement of the original cause after notice of his rights will not release a defendant from liability for a pro tanto amount of the settlement. *Id.*

**Assignment valid and binding, though not recorded, when.**—A party can assign to his attorneys a part of his claim for damages for injuries before suit is brought for such injuries, and if the party liable for the injuries has actual notice of the assignment he is bound, whether such assignment was filed among the papers in the case and noted on the judgment or trial docket or not. *Galveston, H. & S. A. Ry. Co. v. Ginther*, 96 T. 295, 72 S. W. 167.

Where interest in a cause of action under Art. 5686 is assigned, it is not essential that this article be complied with in order to charge the railway company with notice of the right and interest of the assignees. The burden, however, is on the assignees to show that the railway company had notice of the assignment when it settled with the assignor. *G., C. & S. F. Ry. Co. v. Eldredge*, 35 C. A. 467, 80 S. W. 556.

An assignment of an interest in a claim for damages made to an attorney in consideration of services performed in bringing the suit, is valid against the defendant with notice thereof, whether it is noted on the docket or not. *McLaury v. Watelsky*, 39 C. A. 394, 87 S. W. 1049.

Where a part of a cause of action for personal injuries is assigned to an attorney before suit is brought, it is not essential, in order to charge the person liable for such injuries with notice of the assignee's rights, that the assignment be filed and recorded as required by this article, where an interest in a cause of action is sold after suit has been filed thereon. *San Antonio & A. P. Ry. Co. v. Sehorn* (Civ. App.) 127 S. W. 246.

**Partial assignment.**—An assignment of one-half of cause of action pending suit held valid. *Texas & P. Ry. Co. v. Vaughan*, 16 C. A. 403, 40 S. W. 1065.

Under this article a partial assignment of a cause of action, based upon an injury resulting in death, was valid and enforceable, if the statutory requisites were observed. *Trinity County Lumber Co. v. Holt* (Civ. App.) 144 S. W. 1029.

A partial assignee of a cause of action who has complied with the requirements of this article held entitled to a pro tanto amount on a compromise. *Id.*

An assignee of part of a cause of action pending suit held entitled to enforce his claim by intervention in the original suit or by separate suit. *Id.*

**"Judgment" or "cause of action."**—Our statute makes provision for the sale of a judgment, or the sale of a cause of action. The statute seems to recognize that a sale may be made of one without necessarily embracing a sale of the other. *St. Louis S. W. Ry. Co. v. Parks*, 90 S. W. 348.

**Assignee can receive from clerk amount of plaintiff's interest.**—Where a judgment has been paid to the clerk of the court and the plaintiff has duly assigned his interest in the judgment in accordance with law the assignees of such interest have the right to receive from the clerk the amount of plaintiff's interest although they were not parties to the suit. *Roberts v. Powell*, 22 C. A. 211, 54 S. W. 643.

**Only transferee may apply for execution.**—The duty to issue an execution imposed on the clerk by Art. 3714, providing that after the adjournment of the court the clerk shall issue executions on all final unpaid judgments, does not arise until application is made for the writ by the owner of the judgment, and where a judgment has been transferred in writing and filed and entered on the margin of the minutes of the court where the judgment was recorded in accordance with this article, only the transferee may apply for the issuance of an execution, and Arts. 2032-2034, giving officers of court a remedy for collection of their costs by execution, do not give any officer of the court any interest in the judgment. *Arthur v. Driver* (Civ. App.) 127 S. W. 891.

**Art. 6834. [4648] Judgment in justice courts, how recorded.**—Whenever land is sold under execution or order for sale issuing out of a justice court in this state, upon the application of any party inter-

ested in said land, it shall be the duty of the justice of the peace having the custody of the execution and judgment upon which said execution issued to make from said records a complete transcript of said judgment and the execution issued thereon and levied on land, together with the levy and return of the officer executing the same thereon indorsed, and to certify to the correctness thereof officially; then said transcript shall be admitted to record in the county where the land is situated in the same manner in which deeds are recorded and with like effect; which said transcript, or certified copy thereof, under the hand and seal of the county clerk of the county where said transcript has been recorded, shall be admitted in evidence in all the courts of this state in like manner and with like effect that the original judgment and execution with indorsements thereon would have if offered. [Acts 1889, p. 133.]

**In general.**—An original justice's court judgment is admissible in evidence, though not registered or recorded, as required by this article. *Rule v. Richards* (Civ. App.) 149 S. W. 1073.

**Art. 6835. [4649] Partition to be recorded.**—Every partition of any tract of land or lot, made under any order or decree of any court, and every judgment or decree by which the title of any tract of land or lot is recovered shall be duly recorded in the clerk's office of the county court in which such tract of land or lot or part thereof may lie; and until so recorded, such partition, judgment or decree shall not be received in evidence in support of any right claimed by virtue thereof. [Act Feb. 9, 1860, p. 75, sec. 4. P. D. 5023.]

**Construction and application.**—Recital in decree for partition that it is without prejudice to the rights of a certain party puts purchaser from one of the persons among whom the property is partitioned on inquiry. *Gray v. Cockrell*, 20 C. A. 324, 49 S. W. 247.

Except as against bona fide purchasers, a decree of partition that has not been recorded in the records of deeds may be proved by certified copy from the court rendering it. *Baylor v. Tillebach*, 20 C. A. 490, 49 S. W. 720.

A purchaser from grantee of deed conveying land absolutely may rely on the warranty and consideration, he having no notice that it was given in partition. *Chaney v. Sanders*, 24 C. A. 379, 59 S. W. 836.

Persons who purchase land, relying on judgments in partition purporting to be regular on their face, having no notice of any fraud in their procurement, held innocent purchasers. *Schneider v. Sellers* (Civ. App.) 81 S. W. 126.

This article does not declare all unrecorded judgments to be void as to subsequent purchasers in good faith without notice, as in case of unrecorded deeds, but that they shall not be admissible in evidence against innocent purchasers in good faith. *Haines v. West*, 101 T. 226, 105 S. W. 1118, 130 Am. St. Rep. 839.

Where defendant did not claim title to land under an unrecorded judgment, this article had no application to the question whether the judgment was available to identify and describe the land claimed under certain deeds referring thereto. *Kimbell v. Powell*, 57 C. A. 57, 121 S. W. 541.

**Decree competent evidence, though not recorded, when.**—A decree of partition not recorded is competent evidence, save as against one claiming to be a good-faith purchaser. *Fossett v. McMahan*, 74 T. 546, 12 S. W. 324; *Russell v. Farquhar*, 55 T. 355; *Henderson v. Lindley*, 75 T. 185, 12 S. W. 979; *Rodriguez v. Haynes*, 76 T. 225, 13 S. W. 296; *Thornton v. Murray*, 50 T. 161. See *Secrest v. Jones*, 21 T. 121, and *Secrest's Ex'rs v. Jones*, 30 T. 596.

A decree awarding each party to a suit an undivided half interest in land is admissible to support a title, though such decree was recorded before the commissioners appointed to divide the land had reported. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

**Art. 6836. [4650] Decree may be abbreviated.**—It shall not be necessary in the cases mentioned in the preceding article to record the proceedings or the decree rendered in such cases in full; but a brief statement by the clerk of the court in which the same is made, under his hand and seal, setting forth the case in which the partition or decree was made, and the date thereof, and the names of the parties in the suit for partition, and the particular land or lot lying in the county in which the record is made and the name of the party to whom the same is decreed, shall be deemed and held to be a sufficient record of such partition, judgment or decree. [Id.]

**Art. 6837. Suit for land; notice to be filed.**—During the pendency of any suit or action, legal or equitable, involving the title to real estate, or seeking to establish any legal or equitable estate, interest or right, present or future, vested or contingent, therein, or to enforce any lien,

charge or encumbrance against the same, any party plaintiff, as also any party defendant seeking affirmative relief therein, may file with the county clerk of each county where such real estate, or any part thereof, is situated a notice of the pendency of such suit, to be signed by the party filing the same, or his agent or attorney, setting forth the number and style of the cause, the court in which pending, the names of the party thereto, the kind of suit and a description of the land affected. [Acts 1905, p. 316, sec. 1.]

See *Sanborn v. Nelson* (Civ. App.) 134 S. W. 855.

**Lis pendens—In general.**—Notice may be inferred from *lis pendens*. *Briscoe v. Bro-nough*, 1 T. 326, 46 Am. Dec. 108. But the doctrine does not apply to negotiable instruments. *Faulkner v. Warren*, 1 App. C. C. § 660.

Action by heir to remove administrator is not *lis pendens* as to a purchaser of decedent's land from the heir. *Bowen v. Kirkland*, 17 C. A. 346, 44 S. W. 189.

Action to recover vendor's lien notes held not to create notice by *lis pendens*. *Mansur & Tebbetts Implement Co. v. Beer*, 19 C. A. 311, 45 S. W. 972.

The doctrine of *lis pendens* held inapplicable in determining the rights of a mechanic's lien claimant and a grantee in a deed of trust. *Kinsey v. Spurlin* (Civ. App.) 102 S. W. 122.

During the pendency of a suit, neither party can alienate the property in controversy, so as to affect the rights of the other party. *Maes v. Thomas* (Civ. App.) 140 S. W. 846.

— **Presumptions as to jurisdiction.**—See Art. 3687, Rule 12.

— **Service of summons or appearance.**—*Lis pendens* held to operate only from the time of defendant's appearance. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

A suit to set aside a deed does not affect a purchaser from the grantee with notice as a purchaser pendente lite, unless the grantee was duly served with summons. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

The doctrine of *lis pendens* does not apply to a conveyance made prior to the service of citation in a suit on account of which the doctrine is sought to be invoked. *Sparks v. Taylor*, 99 T. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381.

Failure of clerk of court to enter object of suit on docket held not to affect rule of *lis pendens*. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

*Lis pendens* in order to bind a purchaser from a party to the suit does not begin until service on or such voluntary appearance by the grantor as would give the court jurisdiction of him. *Humphrey v. Beaumont Irrigating Co.*, 41 C. A. 308, 93 S. W. 180.

— **Change of venue.**—Change of venue by agreement of a suit for land, brought in the county in which it is situated, held not to destroy the force of the suit as *lis pendens* in such county. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

Change of venue held not to affect conclusiveness of judgment as to purchasers pendente lite. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

— **Prosecution of action.**—Failure to press a suit for four years just after the civil war held not such negligence as to destroy its force as a pending suit. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

Purchaser from plaintiff pending litigation held not relieved from rule of *lis pendens* by defendant's failure to prosecute his claim in reconvention, where judgment is against plaintiff on his petition. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

Purchaser of property pendente lite cannot avoid the operation of the doctrine of *lis pendens* because of vendor's delay in prosecution of suit. *Id.*

— **Termination.**—Rule of *lis pendens* held to continue till termination of case, notwithstanding loss of papers in the case. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

Purchasers of property in litigation between the date of a judgment and the suing out of a writ of error within the time provided held purchasers pendente lite. *Bryson & Hartgrove v. Boyce*, 41 C. A. 415, 92 S. W. 820.

Dismissal of an original suit for want of prosecution held not to deprive a cross-bill filed of its effect as *lis pendens* during the time when plaintiff could legally sue out a writ of error on a judgment on such cross-bill. *Id.*

*Lis pendens* does not necessarily terminate on the rendition of judgment. *McLean v. Stith*, 50 C. A. 323, 112 S. W. 355.

A party purchasing under a judgment at a time when it is subject to vacation, loses his title on the destruction of the judgment, and this notwithstanding a sale by him to an innocent purchaser. *Id.*

— **Pleadings.**—Notice by *lis pendens* held not chargeable as to matters subsequently raised by amendment to pending suit. *Mansur & Tebbetts Implement Co. v. Beer*, 19 C. A. 311, 45 S. W. 972.

To ascertain whether an action was notice as to purchasing land pending the action, it is proper to introduce the pleadings as they stood at the time of the purchase. *Letcher v. Reese*, 24 C. A. 537, 60 S. W. 256.

— **Operation and effect.**—Suit is *lis pendens* only as to the particular relief demanded. *New England Loan & Trust Co. v. Miller* (Civ. App.) 40 S. W. 646.

That judgment for defendant in an action for land was by agreement held not to prevent his subsequent vendee getting good title against the purchaser pendente lite of the plaintiff; the judgment not reciting the fact of the agreement. *Jones v. Robb*, 35 C. A. 263, 80 S. W. 395.

One buying land of A., pending a suit therefor by A. against G., held affected by the *lis pendens* none the less because the judgment was for C., who became a party after the purchase; his recovery being by virtue of G.'s right. *Id.*

Compromise judgment vesting title to land in plaintiff held conclusive as to purchaser pending the suit. *Mayer v. Rust*, 42 C. A. 423, 94 S. W. 110.

Judgment divesting one plaintiff of title and vesting it in the other held not conclusive as to purchaser of land pending the suit. *Id.*



— **Purchasers pendente lite.**—Grantee in trust deed held charged with notice of pending suit against the grantor. *New England Loan & Trust Co. v. Miller* (Civ. App.) 40 S. W. 646.

A conveyance pendente lite does not affect the result of a suit, where the grantee is not made a party. *Mealy v. Lipp*, 91 T. 182, 42 S. W. 544.

One buying land after the rendition of a judgment against the vendor foreclosing an attachment lien, and before issuance of order of sale, purchases pendente lite. *Davis v. John V. Farwell Co.* (Civ. App.) 49 S. W. 656.

A mortgagee is affected with notice of the character of the conveyances of the premises to the mortgagor, as shown by a suit to set them aside, where he took the mortgage pendente lite. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

A purchaser of real property, during the pendency of an action involving the title thereto in which lis pendens has been filed, takes subject to the decree. *Wille v. Ellis*, 22 C. A. 462, 54 S. W. 922.

Plaintiff recovered land in an action against defendant, who, pending the action, filed suit against a third person for a part of the same land. Held that, though plaintiff recovered part of the land for such third person's benefit, the latter was not a purchaser pendente lite. *Cooper v. Mayfield*, 94 T. 107, 58 S. W. 827.

Petition held to state facts sufficient to constitute an action against a purchaser of property pendente lite. *Southern Rock Island Plow Co. v. Pitluk*, 26 C. A. 327, 63 S. W. 354.

The holder of a vendor's lien note held entitled to acquire the legal title by conveyance from the purchaser, as against the holder of an alleged judgment lien on the land, pending suit to foreclose the same. *Austin v. Lauderdale* (Civ. App.) 83 S. W. 413.

One who purchases land at a tax sale with knowledge of the pendency of a suit for possession thereof is a purchaser pendente lite, and is concluded by the judgment therein. *Hicks v. Porter*, 38 C. A. 334, 85 S. W. 437.

Purchaser of property actually in litigation for consideration and without notice held bound by judgment or decree. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

A purchaser of land in controversy by an unrecorded contract of sale of which the plaintiff in the action had no notice at the time suit was brought held a purchaser pendente lite. *Bryson & Hartgrove v. Boyce*, 41 C. A. 415, 92 S. W. 820.

The grantees of a voluntary deed made pending action against the grantor held to take subject to the subsequent judgment in the action against her. *Frey v. Myers* (Civ. App.) 113 S. W. 592.

A purchaser from part of the tenants in common during the pendency of their suit to partition the property is bound by the judgment rendered in that case, though not actually a party. *Rosborough v. Cook* (Civ. App.) 148 S. W. 1120.

A purchaser of land from an administrator after suit was brought against the administrator to try title and notice of the pendency thereof filed was chargeable with notice of the title of the plaintiff in such suit, although the suit was not filed until after the county court ordered the sale by the administrator, and although the purchaser was not made a party thereto until after his purchase. *Groesbeck v. Wiest* (Civ. App.) 157 S. W. 258.

— **Rights and liabilities of purchasers.**—When facts existed authorizing intervention in a suit pending by a lis pendens purchaser, the failure to intervene will not conclude the rights of such purchaser when he did not know the necessity for such intervention, and the facts were withheld by the parties alleged to have collusively agreed upon a judgment not authorized by the facts. *Wolf v. Butler*, 81 T. 86, 16 S. W. 794.

A purchaser pendente lite held not entitled to improvements made by him, as against the judgment creditor. *Davis v. John V. Farwell Co.* (Civ. App.) 49 S. W. 656.

Where replevied goods were purchased pendente lite, the fact that the purchase was made for others held to constitute no defense to an action to make the purchaser liable for the judgment in the replevin suit. *Southern Rock Island Plow Co. v. Pitluk*, 26 C. A. 327, 63 S. W. 354.

A person paying money on land after the institution of a suit to recover it from his grantor was not to that extent an innocent purchaser. *Home Inv. Co. v. Strange* (Civ. App.) 152 S. W. 510.

**Art. 6838. Record of, how made.**—The county clerk shall record such notice of pendency in a well-bound book, to be styled, "Lis Pendens Record," and at the same time index the same, both direct and reverse, under the names of each and all parties to the suit. For such performance of duty, the clerk shall be allowed a fee of fifteen cents per hundred words recorded, not to be less than fifty cents. [Id. sec. 2.]

**Art. 6839. Transfers without notice, valid.**—The pendency of such suit or action shall not prevent effective transfers or encumbrances to a third party for a valuable consideration and without other notice, actual or constructive, by a party to the suit of any such real estate as against a subsequent decree for the adverse party, unless such notice shall have been properly filed under the name of the party attempting to transfer or encumber in the county or counties in which said land is situated. [Id. sec. 3.]

**Art. 6840. Effect of notice.**—Such notice of pendency shall not be deemed constructive notice, but merely a memorandum that shall refer all intending purchasers and encumbrancers to an examination of the court records and pleadings to determine whether there is in fact a lis

pendens concerning the real estate in question, and it shall be effective for such purpose from the time of its filing. [Id. sec. 4.]

**Art. 6841. [4651] Titles to chattels, where recorded.**—Every deed, mortgage, or other writing, respecting the title of personal property hereafter executed, which by law ought to be recorded, shall be recorded in the clerk's office of the county court of that county in which the property shall remain; and if afterwards the person claiming title under such deed, mortgage, or other writing, shall permit any other person in whose possession such property may be to remove with the same, or any part thereof, out of the county in which the same shall be recorded, and shall not, within four months after such removal, cause the same to be recorded in the county to which such property shall be removed, such deed, mortgage, or other writing, for so long as it shall not be recorded in such last mentioned county, and for so much of the property aforesaid as shall have been removed, shall be void as to all creditors and purchasers thereof for valuable consideration without notice; provided, that written contracts for the conditional sale, lease or hire of railroad rolling stock and equipments by which the purchase money is therein agreed to be paid at any time or times after the date of such contract, with a reservation of title or lien in the vendor, lessor or bailor, until the same has been fully paid, shall be recorded in the office of the secretary of state in a book of records to be kept by him for that purpose; and on payment in full of the purchase money and the performance of the terms and conditions stipulated in any such contract a declaration in writing to that effect may be made by the vendor, lessor or bailor, or his or its assignee, which declaration may be made on the margin of the record of the contract, duly attested, or it may be made by a separate instrument to be acknowledged by the lessor, vendor, or bailor, or his or its assignee, and recorded as aforesaid; and for such services the secretary of state shall be entitled to a fee of five dollars for recording each of said contracts, and each of said declarations, and a fee of one dollar for entering such declaration on the margin of the record. [Act Feb. 5, 1840, p. 12. P. D. 4993. Amended Acts 1897, p. 209.]

This article is not inconsistent with Art. 5655. *Reed v. Spikes*, 4 App. C. C. § 169, 15 S. W. 122.

**Removal to another county.**—Husband and wife resided in Mason county, and a stock of cattle conveyed to the separate estate of the wife was there registered. A failure to register the bill of sale in Lipscomb county, to which they removed with their cattle, did not subject the cattle to levy under execution against the husband. *Blum v. Light*, 81 T. 414, 16 S. W. 1090.

**Consent or knowledge of removal by mortgagee.**—This statute does not apply where the mortgagee does not know of the removal and does not consent thereto. *Spikes v. Brown* (Civ. App.) 49 S. W. 725.

Registration is necessary only where the mortgagee consented to the removal or at least had knowledge thereof. *Thos. Goggan & Bros. v. Synnot* (Civ. App.) 134 S. W. 1184.

**Original registration, etc., of chattel mortgages.**—See Arts. 5654, 5655, et seq.

**Art. 6842. [4652] Record of any grant, etc., when notice.**—The record of any grant, deed or instrument of writing authorized or required to be recorded, which shall have been duly proven up or acknowledged for record and duly recorded in the proper county, shall be taken and held as notice to all persons of the existence of such grant, deed or instrument.

**Record as notice—In general.**—A purchaser from a fraudulent vendee must take notice of the record of a constable's deed under an execution sale to enforce a judgment against the original grantor. *McGregor v. White*, 15 C. A. 299, 39 S. W. 1024.

Where a grantor recorded the deed before delivery, held, that subsequent delivery did not convey title as against an intervening attachment. *Croom v. Jerome Hill Cotton Co.*, 15 C. A. 328, 40 S. W. 146.

A record of a deed in which the clerk neglects to copy the acknowledgment, as required by law, is not constructive notice to subsequent purchasers. *Dean v. Gibson* (Civ. App.) 48 S. W. 57.

The interest created by a valid recorded contract to convey lands to be selected from the grantor's interest, to be ascertained in a pending partition suit, cannot be restricted

by grantor's subsequent conveyances or mortgages. *Hanrick v. Gurley*, 93 T. 458, 54 S. W. 347, 55 S. W. 119, 56 S. W. 330.

Where plaintiff purchased the land in suit and recorded his deed prior to the purchase by defendant, the latter is not an innocent purchaser. *Carnes v. Swift* (Civ. App.) 56 S. W. 85.

Purchasers of land with notice of mortgage not satisfied of record held not innocent purchasers. *Griffin v. Stone River Nat. Bank* (Civ. App.) 80 S. W. 254.

The filing in the general land office of a conveyance of the land or of the certificate by virtue of which it has been or is to be surveyed, will not operate as constructive notice to subsequent purchaser of the land as will the filing of the conveyance with the clerk of the county in which the land lies. *Clark v. Hoover*, 51 C. A. 181, 110 S. W. 793.

Facts held to charge defendants with notice of a deed to the land from F. to S. *McDonald v. Hanks*, 52 C. A. 140, 113 S. W. 604.

A deed is superior to another deed expressly conveying subject to previous deeds, where the first-mentioned deed was executed first, and was recorded when made. *Raley v. Magendie* (Civ. App.) 116 S. W. 174.

One purchasing from an attaching creditor held bound to take notice of a recorded deed. *Folkes v. Wyatt* (Civ. App.) 126 S. W. 958.

A purchaser of land belonging to a community estate held not charged with knowledge of the omission from the inventory and list of claims of a note held by a bank as collateral and affecting his title if he knew thereof. *Thomas v. First Nat. Bank* (Civ. App.) 127 S. W. 844.

A subsequent purchaser of land is bound to take notice of the recitals in a deed appearing on a title index record. *Davis v. Bell* (Civ. App.) 128 S. W. 658.

Defendant was not an innocent purchaser of land for value under the statute where, when he purchased from an independent executrix, deeds were on record, showing that decedent did not own the lands when his will was executed. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

Recitals in a judgment for intervener, in a suit to cancel a deed, held, as to a purchaser on the faith of the judgment, who had no notice of an agreement between the defendant and the intervener in such action, not sufficient to charge him with notice of such agreement, whatever its effect on the judgment. *Gabb v. Boston* (Civ. App.) 149 S. W. 569.

Purchasers whose deeds, except a warranty deed in 1894 to a common source of title, were recorded prior to the registration of earlier deeds from the common source of title, were innocent purchasers. *Tobin v. Benson* (Civ. App.) 152 S. W. 642.

Purchaser of realty held charged with constructive notice of a recorded deed of trust executed by the grantor. *Sherk v. First Nat. Bank* (Civ. App.) 152 S. W. 832.

— **Facts of which record is notice.**—A recital in a deed that the consideration was secured to be paid to the grantors by the grantee is sufficient notice to subsequent purchasers that the purchase money is unpaid. *Willis v. Gay*, 48 T. 463, 26 Am. Rep. 328.

C. D., by her will duly probated in 1867, devised her estate to her children, making her husband, W. D., executor, with full power to manage, sell and dispose of the estate for the benefit of her children. In April, 1876, W. D. applied to defendants to borrow money, which they agreed to loan on realty as security. On the 10th of April, 1876, W. D., by deed reciting a cash consideration, conveyed the land, the separate property of C. D., to J. B. On the 12th of April, 1876, J. B., by deed reciting a cash consideration, reconveyed the same property to W. D. On the 17th of April, 1876, W. D. borrowed money of defendants, and secured the payment by a mortgage on the land mentioned. The mortgage was accompanied by a certificate of the county clerk that the record showed a perfect title in W. D. of the land mentioned, and a certificate of a law firm to the same effect. The defendants testified that they relied solely on the certificates, and had no knowledge of any defect of title, or what the chain of title was. In January, 1879, under a power contained in the mortgage, the land was sold to S., who on the same day conveyed it to defendants. In a suit of trespass to try title brought by the devisees of C. D., held, that by the recitals in the will and in the several conveyances the defendants as a matter of law were charged with notice of the fraudulent character of the conveyances, and took no title to the land conveyed. *Gaston v. Dashiell*, 55 T. 508.

The registration of a bond for title is constructive notice to a purchaser of the land under execution of the rights and equities of the obligee. *Schuster v. La Londe*, 57 T. 28.

Where the description of land is uncertain on account of a substantial discrepancy the record will not operate as notice; but if it is merely ambiguous or inconsistent a subsequent purchaser is affected with notice. *Carter v. Hawkins*, 62 T. 393.

The registration of a mortgage in form a deed, in the record book for deeds, gives notice of whatever adverse rights exist in the grantee. *Kennard v. Mabry*, 78 T. 151, 14 S. W. 272.

Deed free from ambiguity held to create no equitable ownership in other property, as against a purchaser without notice of alleged misdescription. *Balfour v. Cleveland* (Civ. App.) 41 S. W. 143.

Where a recorded deed recites that a vendor's lien is reserved, a subsequent purchaser is charged with notice. *Lindley v. Nunn*, 17 C. A. 70, 42 S. W. 310.

The fact that a deed absolute on its face was intended to operate only as a mortgage is not binding upon a good-faith purchaser for value without notice. *Lynn v. Sims* (Civ. App.) 43 S. W. 554.

Purchasers of land sold under a released trust deed, before the release was recorded, are not innocent purchasers, where they acquired title after the release was placed on record. *Mansfield v. Garrison* (Civ. App.) 48 S. W. 554.

Registration of a sheriff's deed after a conveyance of the property by the debtor held not notice to a subsequent purchaser of the fraudulency of the transfer by the debtor. *White v. McGregor*, 92 T. 556, 50 S. W. 564, 71 Am. St. Rep. 875.

A recorded deed containing a defective description held sufficient to charge the grantor's creditor with notice that the grantee claimed land formerly owned by the grantor. *Regan v. Milby*, 21 C. A. 21, 50 S. W. 587.

Persons buying land held chargeable with notice of a vendor's lien note and its assignment, where recorded deed refers to the note and recites its assumption. *Smith v. Farmers' Loan & Trust Co.*, 21 C. A. 170, 51 S. W. 515.

Recorded deed from heir, though notice sufficient to put purchasers on inquiry as to existence of other heirs, is not notice that grantee claimed by unrecorded conveyances from them. *Root v. Baldwin* (Civ. App.) 52 S. W. 586.

Where a recorded mortgage contained a certificate of a notary showing due acknowledgment, a purchaser at the mortgage sale without notice that notary was disqualified held an innocent purchaser, as against lienor subsequent to the mortgage. *Southwestern Mfg. Co. v. Hughes*, 24 C. A. 637, 60 S. W. 684.

Purchasers of land from a vendee of the original owner held not affected with notice of outstanding rights by reason of the record of a subsequent deed from the original owner to a third party. *Fullenwider v. Ferguson*, 30 C. A. 156, 70 S. W. 222.

Where the owner has given an agent authority to sell land by a simple memorandum in writing, and afterwards sells the land himself, and the deed is placed on record, this is notice to the agent and a subsequent would be purchaser of the land through the agent that the agency has been revoked, as they have thus been notified that the subject matter of the agency has been destroyed and that the agency did not and could not longer exist. *Donnan v. Adams*, 30 C. A. 615, 71 S. W. 584.

That a patent to land showed that it was issued on an assigned certificate held not to put a subsequent purchaser on notice of defects in assignment. *Bogart v. Moody*, 35 C. A. 1, 79 S. W. 633.

A recorded deed, by virtue alone of the record, is constructive notice only of what appears on the face of the deed. *San Augustine County v. Madden*, 39 C. A. 257, 87 S. W. 1059; *William Carlisle & Co. v. King* (Civ. App.) 122 S. W. 581; *Thompson v. Cole*, 126 S. W. 923; *William Carlisle & Co. v. King*, 103 T. 620, 133 S. W. 241.

The record of an instrument creating a trust is constructive notice of the existence of the instrument and of its contents, together with rights created by it. *Mansfield v. Wardlow* (Civ. App.) 91 S. W. 859.

Record of deed showing that grantor had retained a lien for the purchase money held to charge a purchaser from heirs of the grantee with notice of that fact. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017.

Bona fide purchaser of land conveyed to his grantor by instrument intended as mortgage, but which was a deed of general warranty on its face, held to have acquired good title to the land. *Causey v. Handley*, 44 C. A. 340, 98 S. W. 431.

A purchaser of vendor's lien notes held charged with notice by the record of the conveyances affecting the property that they constituted a simulated attempt to encumber the homestead, and that the lien was void. *Brooks v. Sanger Bros.*, 101 T. 115, 105 S. W. 37.

An instrument of adoption properly executed and filed for record held to charge a purchaser of land which had belonged to the adopting parent with notice that the adopted child was one of such parent's legal heirs. *J. M. Guffey Petroleum Co. v. Hooks*, 47 C. A. 560, 106 S. W. 690.

Where decedent died in another state where he had resided, and the estate was administered in A. county in this state, the probate proceedings in that county was not notice, to a subsequent purchaser from heirs, of the administrator's sale of land belonging to the estate located in M. county. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, Id.

Facts held to justify an assumption that a deed in plaintiffs' chain of title related to the N. league, and that its registration was constructive notice of a conveyance affecting such league. *Houston Oil Co. of Texas v. Kimball* (Civ. App.) 114 S. W. 662.

The owner of a recorded title, cannot be said to be an "unknown owner," so as to give state a good title in a foreclosure suit and sale for taxes, without making the owner a party to the suit. *Wren v. Scales*, 55 C. A. 62, 119 S. W. 880, 881.

Where the record title to property was in defendants' ancestor, plaintiffs were not required to look further in purchasing the property from defendants to discover whether it was community property unless they had notice of that fact; defendants being heirs. *Merrill v. Bradley*, 52 C. A. 527, 121 S. W. 561.

The existence of two recorded deeds, viz., a warranty deed from A. to B. of "all lots now owned by" A. in a certain block, and a quitclaim deed from B. to A.'s wife of certain lots in the block, is notice to a subsequent purchaser from A. and wife of the rights of one claiming under a recorded, but not duly acknowledged, deed made by A. prior to A.'s deed to B. *Abernathy v. Pickett*, 57 C. A. 552, 122 S. W. 579.

Where from the recitals of a recorded deed, taken in connection with the field notes of the patent to the land and the lines of abutting surveys, an error in the field notes clearly appeared, and the only way in which the calls could harmonize and the survey be made to close was to take the call "east to the east line" as intended for "west to the west line," which would make clear the grantor's intention to convey certain land, the deed was constructive notice of the conveyance of that land, to a subsequent purchaser. *William Carlisle & Co. v. King et al.* (Civ. App.) 122 S. W. 581.

One held to have notice from records of a sale by an attorney in fact unauthorized by his power, and so not a bona fide purchaser. *Lightfoot v. Horst* (Civ. App.) 122 S. W. 606.

Where the records show a conveyance to a woman and a recital that she is married, a purchaser from her husband, after divorce, is not entitled to protection as an innocent purchaser. *Barrett v. Weimar* (Civ. App.) 130 S. W. 181.

Scope of recorded deed as notice to subsequent purchaser of land determined. *Wilkinson v. Ward* (Civ. App.) 137 S. W. 158.

Where a contract between an attorney and a claimant of land, entitling the attorney to a part of the land if successful, was recorded, it was constructive notice of the interests of the attorney. *Hussey v. Titterington* (Civ. App.) 146 S. W. 714.

Where the calls of a recorded deed placed the property conveyed to the east of a line, except that the last course called for a line running "east" to the point of beginning on the first-mentioned line, there was nothing to notify a subsequent purchaser that the

land conveyed was west of such line; the call for the point of beginning prevailing over the direction called for. *Dickerson v. McFarland* (Civ. App.) 152 S. W. 1140.

Where a prior recorded deed from plaintiff's vendor of part of the property conveyed to plaintiff described the land conveyed as beginning on a line which was plaintiff's east line, thence running north along that line, thence "east," thence south, and thence "east" to the place of beginning, there was nothing to charge plaintiff with notice that the second call should have been west instead of east, since the call of the last course for the beginning point would naturally prevail over the direction stated therein; registration being constructive notice only of what appears on the face of the deed. *Id.*

Record of deed expressly retaining a vendor's lien for purchase-money notes is constructive notice, putting a subsequent purchaser on inquiry as to provisions of the notes allowing them to be matured for default in interest, and for payment of 10 per cent. attorney's fees in case of suit thereon. *Housman v. Horn* (Civ. App.) 157 S. W. 1172.

— **Persons affected with notice and notice of instruments not in chain of title.**— Where the deeds constituting the chain of title under which the last purchaser holds show that the purchase-money has not been paid, as that one or more of the notes is not due, he will be held to have notice of the lien. *McAlpine v. Burnett*, 23 T. 649.

A purchaser from the husband is chargeable with notice of a prior recorded deed to the community property executed by the wife after her desertion by the husband. *Zimelman v. Robb*, 53 T. 274.

Although the language used in this article gives countenance to the doctrine, that the proper record of an instrument is notice to all the world, yet it has been decided by the supreme court that the proposition is subject to important qualifications. For example in *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452, the court quote with approval the following language: "The registry of a deed is notice only to those who claim through or under the grantor by whom the deed was executed." *White v. McGregor*, 92 T. 556, 50 S. W. 564, 71 Am. St. Rep. 875.

A deed of record from the vendee of a vendor is not notice to a subsequent purchaser from the same vendor if the first deed is not of record; and the record of a conveyance is only notice to after-purchasers under the same grantor. *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452; *Jenkins v. Adams*, 71 T. 4, 8 S. W. 603; *Lumpkin v. Adams*, 74 T. 96, 11 S. W. 1070; *Frank v. Heidenheimer*, 84 T. 642, 19 S. W. 855.

Registration of a deed is notice only to one claiming under the grantor in the recorded deed. A junior purchaser of land is chargeable not only with notice of the contents of the registered deeds in the chain of title, but when the mesne conveyances contain that which should put a prudent man on inquiry, he is chargeable with notice of whatever an inquiry would have revealed. *Jenkins v. Adams*, 71 T. 1, 8 S. W. 603.

A purchaser is not charged with notice of the record of a deed made by a vendee of the same vendor, if such vendee's deed is not itself on the record so as to complete the chain of his title. *Lumpkin v. Adams*, 74 T. 96, 11 S. W. 1070.

The record of a conveyance from the grantee in a deed not recorded is not constructive notice to a subsequent purchaser from the grantor. *Ward v. League* (Civ. App.) 24 S. W. 986; *Holmes v. Buckner*, 67 T. 107, 2 S. W. 452.

A recorded deed of an insolvent grantor is notice to judgment creditors and defeats a judgment lien on the debtor's estate of inheritance. *Hale v. Hollon*, 14 C. A. 96, 35 S. W. 843, 36 S. W. 238.

Record of a trust deed to secure part of the purchase money, where the deed from the vendor was unrecorded, held not notice to a subsequent purchaser from such vendor. *McCreary v. Reliance Lumber Co.*, 16 C. A. 45, 41 S. W. 485.

The registry of a will, if constructive notice at all, would affect only those claiming through testator, unless there should be something in the chain of title leading out to the will. *Williams v. Slaughter* (Civ. App.) 42 S. W. 327.

Registry of a sheriff's deed held not notice of its existence as against a bona fide purchaser from a prior grantee of the execution defendant. *White v. McGregor*, 92 T. 556, 50 S. W. 564, 71 Am. St. Rep. 875.

A purchaser of land is not required to go behind the patent in his investigation of title, unless put on inquiry. *Bogart v. Moody*, 35 C. A. 1, 79 S. W. 633.

Subsequent grantees of a purchaser having notice of a prior deed held themselves to have notice of the prior deed. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

A purchaser need only examine the record for conveyances made prior to his purchase by his immediate or remote vendor. *Houston Oil Co. of Texas v. Kimball*, 103 T. 94, 122 S. W. 533, 124 S. W. 85.

A recorded deed held not to charge the purchaser of adjoining land with constructive notice that the land bought by him was subject to a water right claimed under the deed. *Thompson v. Cole* (Civ. App.) 126 S. W. 923.

Purchaser from husband, after divorce, of land conveyed to wife, held not entitled to protection as an innocent purchaser. *Barrett v. Weimar* (Civ. App.) 130 S. W. 181.

One buying land from the patentee thereof held not required to search the record for a deed of the patentee of such land to another, made prior to his application to purchase from the state, which was the basis of the patent. *Breen v. Morehead*, 104 T. 254, 136 S. W. 1047.

Record of the deeds of the common grantor to plaintiff and those through whom he claimed held immaterial. *Hudson v. Jones* (Civ. App.) 143 S. W. 197.

Since Art. 6824 only includes subsequent purchasers in the chain of title, the origin of whose title is subsequent to the title of the grantee in the recorded deed, plaintiff, claiming under an unrecorded conveyance from a decedent, was not charged with notice of a recorded deed subsequent in point of time from decedent's independent executrix. *Gibbs v. Eastham* (Civ. App.) 143 S. W. 323.

A recorded deed disconnected from the title is not notice. *Gamble v. Martin* (Civ. App.) 151 S. W. 327.

— **Defective records.**—The recording of an instrument which is inoperative without extrinsic evidence to support it is not constructive notice of any right asserted by any one claiming under it. *Wright v. Lancaster*, 48 T. 250.

The registration of a void deed does not affect any one with notice of its contents. *Stiles v. Japhet*, 84 T. 91, 19 S. W. 450.

Purchaser chargeable with notice though the number of the certificate in the description is incorrect. *Swearingen v. Reed*, 2 C. A. 364, 21 S. W. 383.

Defective record of trust deed examined, and held not material as to a subsequent attaching creditor. *Hart v. Patterson*, 17 C. A. 591, 43 S. W. 545.

Two recorded deeds held insufficient, as to the description of land conveyed, to charge subsequent purchasers with constructive notice of their contents. *Neyland v. Texas Yellow Pine Lumber Co.*, 26 C. A. 417, 64 S. W. 696.

Defective record of a deed held not constructive notice. *Dean v. Gibson*, 34 C. A. 508, 79 S. W. 363.

Record of deed containing description sufficient to identify and convey land held constructive notice to subsequent purchasers, notwithstanding false portions in the description. *West v. Houston Oil Co. of Texas*, 46 C. A. 102, 102 S. W. 927.

A defective record of a deed held not to aid the title of subsequent grantees from a purchaser with notice of a prior deed. *Ryle v. Davidson* (Civ. App.) 116 S. W. 823.

To be constructive notice it would seem that a registered grant must be sufficient in itself to identify the thing granted. *Thompson v. Cole* (Civ. App.) 126 S. W. 923.

A recorded deed giving grantees "the right to use water for barn, yard, and house purposes" is insufficient to charge the purchaser of adjoining land with constructive notice that the land he bought was subject to a water right claimed under such deed. *Id.*

A recorded deed, describing land by block number, held sufficient to charge with notice a subsequent purchaser under a deed bounding the land by streets. *Wilkerson v. Ward* (Civ. App.) 137 S. W. 158.

A recorded deed of trust, though misdescribing the property, held notice to a subsequent purchaser. *Wiseman v. Watters* (Civ. App.) 142 S. W. 134.

— **Destruction of record.**—When a deed has been properly recorded the subsequent removal or destruction of the records, without the fault of the party claiming under the deed, cannot prejudice his rights. *Fitch v. Boyer*, 51 T. 336.

— **Instruments not required to be recorded.**—The recording of instruments which are not required or affirmatively permitted by law to be recorded is not notice. *Burnham v. Chandler*, 15 T. 441; *Wright v. Lancaster*, 43 T. 250; *Pegram v. Owens*, 64 T. 475.

Mere recording of contract by which attorneys prosecuting suit for recovery of land were to receive a portion thereof held not sufficient to charge purchasers of the legal title to the land with notice of any equity in the attorneys. *Lewright v. Davis* (Civ. App.) 115 S. W. 599.

— **Defective acknowledgment.**—When an instrument is not proven in the mode prescribed by law, it requires no authenticity from having been, in point of fact, recorded. *Craddock v. Merrill*, 2 T. 494.

A deed is not duly registered unless the record shows that the certificate of proof or acknowledgment is sufficient. *Merriman v. Blalack*, 56 C. A. 594, 121 S. W. 552.

The existence of two recorded deeds held sufficient notice to a subsequent purchaser of the rights of one claiming under a recorded, but not duly acknowledged, deed. *Abernathy v. Pickett*, 57 C. A. 552, 122 S. W. 579.

— **Particular instruments.**—To entitle the mortgagee to recover against the purchasers of the mortgaged property, it is not necessary that he should allege and prove the insolvency of the mortgagor. When the mortgage was duly recorded prior to such purchase, the purchaser is affected by notice. *Dalian v. Hollacher*, 2 App. C. C. § 529, citing *Blum v. Conrad*, 1 App. C. C. § 1217; *Wootton v. Wheeler*, 22 T. 338; *Wright v. Henderson*, 12 T. 43; *Baker v. Clepper*, 26 T. 629, 84 Am. Dec. 591.

A mortgage duly recorded, describing the note secured thereby, save that the amount was not given, is constructive notice to subsequent mortgagees. *Clementz v. Jones Lumber Co.*, 82 T. 424, 18 S. W. 599.

Files in the land office of transfers of land before patent not notice of title. *Brown v. Henderson* (Civ. App.) 31 S. W. 315.

Recorded transfer of national road certificate held constructive notice. *Gist v. East*, 16 C. A. 274, 41 S. W. 396.

A second mortgagee, whose mortgage is recorded before notice of an unrecorded first mortgage, as against the first mortgagee, cannot acquire additional rights to the property from the mortgagor after the first mortgage is recorded. *Kerr v. Galloway*, 94 T. 641, 64 S. W. 858.

This statute is not available to a creditor as against a mortgage upon lands though a deed absolute in form which has been recorded. *Long v. Fields*, 31 C. A. 241, 71 S. W. 776.

One claiming land under a mortgage held bound to know of the invalidity of the mortgage by reason of a prior recorded instrument executed by the mortgagor. *Mansfield v. Wardlow* (Civ. App.) 91 S. W. 859.

A mortgage to secure future advances which gives sufficient information as to the extent and purposes of the contract held prior to the supervening claims of purchasers or creditors as to all advances within the terms of the mortgage, whether made before or after the claim of such purchaser or creditor arose, or before the mortgagee had notice thereof. *F. Groos & Co. v. Chittim* (Civ. App.) 100 S. W. 1006.

Where a deed intended as a mortgage was registered, the registration was sufficient to serve as notice to subsequent purchasers that the instrument was in fact a mortgage. *Hamilton v. Green* (Civ. App.) 101 S. W. 280.

A provision in a deed which was absolute on its face, to the effect that it should remain in escrow for 90 days and delivered to the grantee at the end of that time, if a sum named therein was not paid him, held sufficient to operate as notice of the character of the instrument. *Moorhead v. Ellison*, 56 C. A. 444, 120 S. W. 1049.

— **Bona fide purchasers affected by considerations other than record of instrument.**—See notes under Art. 6824.

— **Abstracts of title.**—An abstract of title made from public records before their destruction and recorded afterwards held not notice to a purchaser unless he would have learned of it and its contents by investigating as a prudent man in good faith would, and would have concluded that the deed recited therein as conveying the land was executed. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

## CHAPTER FOUR

## REGISTRATION OF SEPARATE PROPERTY OF MARRIED WOMEN

Art. 6843. Marriage contract to be recorded.	Art. 6847. In what county registration must be made.
6844. Registration of property of.	6848. Conclusive as to subsequent creditors, etc.
6845. May present and prove schedule for record.	
6846. Property acquired after marriage.	

**Article 6843. [4653] Marriage contract to be recorded.**—When the wife by a marriage contract may reserve to herself any property or rights to property, whether such rights be in esse or expectancy, for such reservation to be valid as to the subsequent purchasers or creditors of her husband, the said contract must be acknowledged by her husband or proved by at least one witness, and recorded in the clerk's office of the county court of the county in which said married parties may reside. [Act Jan. 20, 1840, p. 3, sec. 8. P. D. 4035.]

**In general.**—By deeds of marriage settlement made and recorded in Florida in 1828, A. and B., the intended husband and wife, conveyed to trustees the property of B., consisting in part of slaves, limiting the same to the separate use of B. for her life, with remainder to her issue by A., and empowering the trustees, with the consent of B., to exchange the property conveyed for other property, which should be held under like limitations. In 1836 A. and B. removed to Texas, bringing with them some of the slaves covered by the marriage contract, and two others acquired in exchange for other property named therein. In 1853 town lots were conveyed to B. in consideration of property embraced in the marriage contract, or other property received in lieu thereof. In 1854 A. and B. conveyed said lots by deed of trust to secure an indebtedness of A. to M., but before its execution the agent of M. had notice of the marriage contract, and that the property mentioned in the deed of trust was acquired with some of the property covered by it. Held, that the remainder-men could restrain the sale of the property under the deed of trust. *Lott v. Bertrand*, 26 T. 654.

**Art. 6844. [4654] Property of married women to be registered.**—All property, real and personal, which may be owned or claimed at the time of marriage by any woman, or which she may acquire after marriage by gift, devise or descent, shall be registered as herein directed. [Act April 29, 1846, p. 153, sec. 1. P. D. 4995.]

**Failure to register.**—A married woman is not prejudiced by her failure to register her separate property. *Edrington v. Mayfield*, 5 T. 367; *Le Gierse v. Moore*, 59 T. 470; *Parks v. Willard*, 1 T. 361; *Warren v. Dickerson*, 3 T. 462.

**Art. 6845. [4655] May present and prove schedule for record.**—Each woman now married, or who may be hereafter married, may present to any officer authorized by law to take acknowledgments or proof of instruments for record, a schedule particularly describing all the property, real and personal, which she now owns and possesses, or which she may own and possess at the time of her marriage, and make her statement under oath before such officer that the property described in the schedule is her separate property; and upon such statement being made, such officer shall annex to the schedule a certificate of the fact under his hand and seal of office; which certificate shall be sufficient evidence for the recorder of any county to record the same. [Id. sec. 2. P. D. 4996.]

**Effect of failure to file schedule.**—The failure of a married woman to file and record a schedule of her separate property, as provided by this article and Art. 6848, does not invalidate her right thereto as against a mortgagee of the husband; such mortgagee not being an innocent lienholder of the property. *Walker v. Farmers' & Merchants' State Bank* (Civ. App.) 146 S. W. 312.

Art. 4621, providing that a husband shall, during the marriage, have the sole management of his wife's separate property, does not invest him with a right of property in the wife's separate property, nor give him the right of disposition thereof; and he has not, by reason of such possession, the right to mortgage the property to his creditor, though the wife has failed to file a schedule of her property, as provided by this article and Art. 6848. *Id.*

**Art. 6846. [4656] Property acquired after marriage.**—Each married woman upon coming into possession of any property, real or personal, to which she had claim at the time of her marriage, or which she

may afterward acquire by gift, devise or descent, shall have the same recorded in the same manner as prescribed in the foregoing article. [Id. sec. 3. P. D. 4997.]

**Art. 6847. [4657] In what county registration must be made.**—The registration of the wife's separate property herein provided for, if real estate, shall be made in the county or counties in which the same, or a part thereof, is situated; if personal property, in the county or counties where the same remains; and in case such personal property be removed out of the county, the registration must also be made in the county to which the property is removed within four months after such removal. [Id. sec. 4. P. D. 4998.]

**Art. 6848. [4659] Conclusive as to subsequent creditors, etc.**—The registration of any schedule of a wife's separate property, made in accordance with the provisions of this chapter, shall be conclusive as against all subsequent creditors of and purchasers from her husband. [Id. sec. 6. P. D. 5000.]

## CHAPTER FIVE

### GENERAL PROVISIONS

Art. 6849. Penalty for failing to record.	Art. 6854. Effect of such judgment in such action.
6850. Conveyance heretofore made to be governed by existing laws.	6855. Record of certain titles confirmed.
6851. Recording, and as evidence, to be governed by the then existing laws.	6856. Shall be evidence, when.
6852. Party may have action to correct error when certificate is imperfect.	6857. Old registration operative after creating new county.
6853. May obtain judgment proving imperfect instrument.	6858. Attachment proceedings to be recorded, when.

**Article 6849. [4660] Penalty for failing to record, etc.**—If any recorder to whom any instrument of writing authorized to be recorded by him, and proved or acknowledged according to law, which shall be delivered for record, shall neglect or refuse to make an entry thereof, or give receipt therefor, as required by law, or shall neglect or refuse to record such instrument of writing within a reasonable time after receiving the same, or shall record any instrument of writing affecting the same property, or any part thereof, before another first deposited in his office and entitled to be recorded, or shall record any such instrument incorrectly, or shall neglect or refuse to provide and keep in his office such indexes as required by law, he shall forfeit and pay any sum not exceeding five hundred dollars, to be recovered on motion in the district court, one-half to the use of the county, and the other half to the use of the person who shall sue for the same, such clerk having three days' notice of such motion, and shall also be liable to the party for all damages he may have sustained thereby, to be recovered by suit on the official bond of such recorder, given by him as the clerk of the county court, against such clerk and his sureties. [Act May 12, 1846, p. 236, sec. 18. P. D. 5018.]

**In general.**—A party who has properly filed a deed for record is not prejudiced by the neglect of the clerk in respect to its registration. *Throckmorton v. Price*, 28 T. 605, 91 Am. Dec. 334; ante, Art. 6820 and note.

**Liability of county clerk for failing to properly register filing of a chattel mortgage, to one misled by such failure, determined.** *Morton v. Smith* (Civ. App.) 44 S. W. 683.

**Art. 6850. [4661] Conveyances heretofore made to be governed by the then existing laws.**—The legality of the execution, acknowledgment, proof, form or record of any conveyance or other instrument heretofore made, executed, acknowledged, proved or recorded, shall not be affected by anything contained in this title, but shall depend for its validity and legality upon the laws in force when the act was performed.



**Art. 6851. [4662] Recording, and as evidence, to be governed by the then existing laws.**—All conveyances of real property heretofore made and acknowledged or proved, according to the laws in force at the time of such making and acknowledgment or proof, shall have the same force as evidence, and may be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this title.

**In general.**—Where a deed was authenticated so as to entitle it to registration under the law in force at its execution, and was duly recorded in 1849, its re-registration in 1894, after the destruction of the public records, is sufficient for all purposes of notice after that date under the express provisions of this article. *Frugia v. Trueheart*, 48 C. A. 513, 106 S. W. 736.

The act of 1871 (Acts 1871, p. 77, c. 76), permitting acknowledgment of every instrument for record, when acknowledged within the United States, to be taken before some judge or clerk of a court of record having a seal, was in force when Act April 27, 1874 (Acts 1874, p. 152, c. 105), was enacted, which provided that every deed required to be registered, which shall have been heretofore acknowledged in the manner required by law, within the United States, before any officer now authorized by law to take such acknowledgments, and which shall have been duly certified by such officer, shall be held to be acknowledged with the full consequences of existing laws. Held, that since a judge of the supreme court of Louisiana could have legally taken an acknowledgment of a deed when the act of 1874 was passed, any defect in the acknowledgment of a deed, acknowledged before a judge of such court a number of years before that date, because the statute of the republic of Texas then in force required foreign acknowledgments to be taken before consular agents, etc., was cured by the act of 1874, and hence a copy of such deed was admissible in evidence. *Houston Oil Co. of Texas v. Kimball* (Sup.) 122 S. W. 533.

Act April 27, 1874 (Laws 1874, p. 152, c. 105), provides that every deed required to be registered, which shall have been heretofore acknowledged in the manner required by law, within the United States, before any officers now authorized to take such acknowledgments, and which shall have been duly certified by such officers, shall be held to be duly acknowledged with the full consequences of existing laws, provided that the act shall not affect any right acquired prior to its passage. Held, that the act only affected rules of evidence, and gave no greater effect to a deed, the defective acknowledgment of which it cured, than it had under the law existing when it was executed. *Id.*

**Art. 6852. [4663] Party may have action to correct error where certificate is imperfect.**—When the acknowledgment or proof of the execution of any instrument in writing may be properly made, but defectively certified, any party interested may have an action in the district court to obtain a judgment correcting the certificate.

**Application in general.**—The statute applies to deeds and other instruments properly executed and acknowledged by married women, but defectively certified, as well as to like instruments executed by other persons. Its effect is simply to correct or complete the informal act of an officer, where there was no defect in the actual execution and acknowledgment of an instrument. In this case suit was brought against the heirs of a married woman to correct a defective certificate of acknowledgment to a deed conveying land which was her separate property. The evidence did not show that the officer before whom the acknowledgment was made explained the deed to her. Held, that the deed was not properly executed where the officer failed to explain the instrument; and the fact that she may have stated to him that she understood the deed, that she could read, and that she and others had talked the matter over before, was not enough. *Johnson v. Taylor*, 60 T. 360.

**Correction of certificate.**—When the husband and wife join in a deed for the separate property of the wife, and the wife's privity and separate acknowledgment is properly taken, the title to the property passes to the purchaser. That the officer may fail to make a perfect certificate of such acknowledgment does not destroy the title of the purchaser, and an action can be maintained by the purchaser to correct and supply the defects in the officer's certificate. *Williams v. Ellingsworth*, 75 T. 480, 12 S. W. 746. See post, Art. 6853; *Johnson v. Taylor*, 60 T. 360; *Johnson v. Bryan*, 62 T. 623.

A registration upon a defective certificate is a nullity. While the certificate of privity acknowledgment, if defective, may be supplied or corrected, the previous defective registration is not validated. *Hayden v. Moffatt*, 74 T. 647, 12 S. W. 820, 15 Am. St. Rep. 866.

When an officer takes a wife's acknowledgment properly, but fails to make out his certificate of the fact properly, the contract is not void but takes effect as between the parties from the time that the acknowledgment is properly taken, and action will lie to correct the certificate within four years. *I. B. & L. Ass'n v. Goforth*, 94 T. 259, 59 S. W. 873.

As a registration upon a defective certificate of acknowledgment is a nullity, its subsequent correction would not relate back and validate such previous void registration. *Hughes v. Wright & Vaughan* (Cr. App.) 97 S. W. 526.

The refusal to correct the certificate of a wife's acknowledgment of an instrument held proper under the evidence. *Downs v. Peterson*, 45 C. A. 135, 99 S. W. 751.

The deed of a married woman to which the certificate of acknowledgment is insufficient is not void, if it was in fact acknowledged by her in the manner required by the statute, and by timely suit for that purpose the grantee in the deed or any one holding title thereunder may have the certificate corrected and made to conform to the facts. *Id.*

**Judgment as evidence.**—The privity examination of and acknowledgment by a married woman are absolutely essential to the passing of her title to land, and the only evidence

thereof is the certificate of the officer stating them or the judgment of a court correcting such certificate in accordance with Arts. 6852-6854, so as to show them. *Veeder v. Gilmer*, 103 T. 458, 129 S. W. 595.

**Art. 6853. [4664] May obtain judgment of proof of any instrument.**—Any person interested under any instrument in writing entitled to be proved for record may institute an action in the district court against the proper parties to obtain a judgment proving such instrument.

*In general.*—Suit was brought by a nonresident plaintiff against a nonresident defendant, both of whom had once been partners, to prove up for record an instrument in writing which on its face certified that the defendant had given up to plaintiff all claims which once belonged to both, and also all claims to land which belonged to both. The firm did own lands in Texas, but not situate in the county where the suit was brought. On plea to the jurisdiction in the nature of a plea of abatement, calling in question the power of the district court to adjudicate upon the subject-matter, held: 1. The statute in such case did not fix the venue, and the parties being nonresidents, having no domicile in Texas, the venue must be determined by general rules applicable to the matter, independent of statute. 2. The cause of action was not local, but transitory, though the result of the action might, on some future contingency, affect the title to land indirectly. 3. The cause of action was one regarding which jurisdiction could be exercised in the district court of any county in which service could be obtained on the defendant, or where he might appear, and by making defense waive service. 4. The instrument was such as, in so far as it conveyed land, was entitled to be admitted to record if properly authenticated; and the fact that on its face it attempted to dispose of choses in action could not affect the right to have it recorded as an entirety. *Pegram v. Owens*, 64 T. 475.

**Art. 6854. [4665] Effect of judgment in such action.**—A certified copy of the judgment in a proceeding instituted under either of the two preceding articles, showing the proof of the instrument, and attached thereto, shall entitle such instrument to record, with like effect as if acknowledged.

**Art. 6855. [4666] Record of certain titles confirmed.**—Any grant, deed, or other instrument of writing, for the conveyance of real estate or personal property, or both, or for the settlement thereof in marriage, or separate property, or conveyance of the same in mortgage, or trust to uses, or on conditions, as well as any and every other deed or instrument required or permitted by law to be registered, and which shall have been prior to the ninth day of February, 1860, registered or recorded, shall be held to have been lawfully registered, with the full effect and consequences of existing laws; provided, the same shall have been acknowledged by the grantor or grantors before any chief justice, or associate justice, or clerk of the county court, or notary public in any county within the late republic or the now state of Texas, or judge of the department of Brazos, or any primary judge, or judge of the first instance in 1835 or 1836, or proven before any such officer by one or more of the subscribing witnesses thereto, and certified by such officer, whether such acknowledgment or proof shall have been made before any such officer of the county where such instrument should have been recorded or not. [Act Feb. 9, 1860, sec. 2. P. D. 5021.]

*Historical.*—The act of February 5, March 17, 1841, reads as follows:

"Any grant, deed, or instrument for the conveyance of real estate, or personal, or both, or for the settlement thereof in marriage, or separate property, or conveyance of the same in mortgage, on trust to uses, or on conditions, as well as any and every other deed or instrument required or permitted by law to be registered, and which shall have been heretofore registered, shall, from the passage of this act, be held to have been duly registered, with the full effects and consequences of the existing laws; provided, the same shall have been acknowledged by the grantor or grantors, maker or makers, before any chief justice of the county court, or before any notary public, or before the clerk of the county court in whose office such record is proposed to be made, or proved before such officer by one or more of the subscribing witnesses, and certified by such officer; any obscurity or conflict in the existing laws to the contrary notwithstanding." [5th Cong., sec. 20, p. 163.]

*Validating acts of 1874 and 1876:*

"Every grant, deed, mortgage, power of attorney, or other instrument of writing, for the conveyance of real or personal estate, required or permitted by law to be registered, that shall have been heretofore acknowledged or proven in the manner prescribed by law, without the state and within the United States and their territories, before any one of the officers in such cases now authorized by law to take such acknowledgments or proofs, and which shall have been duly certified by such officer, shall be held to be duly acknowledged or proven with the full effects and consequences of existing laws; and any such instrument, which shall have been so acknowledged or proven before either of such officers, and which shall have been heretofore registered, shall be held to be duly

registered with like full effects and consequences of existing laws; provided, however, that this act shall not be so construed as to give it any retroactive operation, or to affect any right acquired prior to its passage." [Act April 27, 1874, p. 152; Early Laws, art. 3942.]

"Any certificate of acknowledgment of any married woman to any deed of conveyance, letter of attorney, or other written instrument, purporting to convey, or to confer on others the power to convey, her separate estate, or her interest in the homestead, heretofore taken by any chief justice, district clerk, notary public, or other officer, authorized by the laws of this state to take such acknowledgment, whenever such certificate of acknowledgment is invalid, because the same is wanting in any word, or words, necessary to be contained in such certificate of acknowledgment by the requirements of the statutes in such cases made and provided, shall, nevertheless, be as valid and as binding on the person or persons making such written instrument, as if such certificate of acknowledgment was in strict conformity to law; provided that said certificate shall show, on its face, that the married woman was examined, by the officer taking the acknowledgment, separate and apart from her husband, and having the same fully explained to her, she declared that she had willingly signed the same, and that she wished not to retract it, or words to that effect; and, provided further, that nothing contained in this act shall prevent the parties interested from setting up and pleading fraud." [Act July 28, 1876, p. 61; Early Laws, art. 4203.]

**In general.**—Where it was admitted that A. acted as judge in 1835, and a deed was produced which purported to have been made before him as second judge of the first instance in that year, with two instrumental and two assisting witnesses, there is a presumption in favor of his authority to act, although the facts are not stated. *McKissick v. Colquhoun*, 18 T. 148.

A power of attorney was acknowledged before a primary judge on the 14th of July, 1836, and was properly admitted to record in December, 1845. *Butler v. Dunagan*, 19 T. 559.

The healing act of 1860 legalized the registration of a conveyance of land lying in G. county, which was proven for record before the county clerk of T. county, and afterwards recorded in the proper county. *Crayton v. Hamilton*, 37 T. 269.

The registration, in 1855, of a deed authenticated in 1838 by the county clerk, without the seal, was good by force of various validating acts. *Waters v. Spofford*, 58 T. 115.

The act of February 5, 1841, did not validate a previous defective acknowledgment. *McCelvey v. Cryer*, 8 C. A. 437, 28 S. W. 691. The act of February 9, 1860 (*Sayles' Early Laws*, art. 2854), validated a registered deed illegally acknowledged before a notary public in 1839. *Id.*

**Art. 6856. [4667] Shall be evidence, when.**—All such instruments which shall have been acknowledged or proven before any officer named in the preceding article, and which shall have been afterward recorded in the proper county, or certified copies thereof, shall be evidence in the courts, as full and sufficient as if such acknowledgment had been taken or proof made in accordance with existing laws; but this article and the article preceding shall not be construed so as to affect or bind, in any manner, any person or party with constructive notice of the existence of any deed or other instrument of writing as a recorded deed or instrument, except after the ninth day of February, 1860, and in the future. [*Id.* sec. 3. P. D. 5022.]

**Art. 6857. [4668] Old registration operative after creating new county.**—Where an instrument in writing has been duly registered in the proper county, and any property conveyed or incumbered by such instrument shall fall within another county subsequently created, the prior registration shall not be deemed to be thereby invalidated or in any manner affected, but shall still continue to be equivalent to an actual notice of its contents to all persons whomsoever; and it shall be the duty of the county court of the new county (and at the expense thereof) to cause a transcript of the record of all such instruments to be made and duly certified and deposited in the recorder's office of said new county, for public inspection, and indexes of the same to be made.

**In general.**—The registration of a deed in the proper county is operative in a new county subsequently created in which the land mentioned in the instrument shall be. *Art. 6857; McKissick v. Colquhoun*, 18 T. 148; *Frizzell v. Johnson*, 30 T. 31; *Herrington v. Williams*, 31 T. 448; *Melton v. Turner*, 38 T. 81.

There is no authority for recording in the new county a certified copy of the record of a deed in the parent county, and a certified copy of such record in the new county is not admissible. *Williamson v. Work*, 33 C. A. 369, 77 S. W. 267.

**Art. 6858. [4669] Attachments to be recorded, when.**—Whenever an attachment is levied upon real estate, the officer levying the writ shall immediately file with the county clerk of the county or counties in which the real estate so levied upon is situated, a copy of the writ, together with a copy of so much of his return as relates to the land in said county. Said clerk shall enter in a book, to be kept for that pur-

pose, the names of the plaintiffs and defendants in attachment, the amount of the debt and the return of the officer in full. Should the writ of attachment be quashed or otherwise vacated, the court in which the attachment suit is pending shall cause a certified copy of said order to be sent to the county clerk of the county or counties in which the real estate levied upon is situated. Said clerk shall, upon the receipt of the same, enter in the book aforesaid the names of the plaintiffs and defendants and record the order of the court in full. If the real estate levied upon is situated in any county other than the one in which the suit is pending, then, in case of failure to make the record aforesaid, the attachment lien shall not be valid against subsequent purchasers for value and without notice and subsequent lienholders in good faith. The county clerk of every county in this state shall keep a well-bound book for the record of the matters aforesaid, and shall keep a direct and reverse index thereto in which shall be entered the names of all the plaintiffs and defendants in the various attachments recorded by him; and the order of the court aforesaid shall be indexed in the same manner; and certified copies of such records shall be admissible in lieu of the original writ and entries. Clerks of the county court shall receive the same fees for recording the matter herein provided for as they are now allowed by law for recording deeds, to be paid by the plaintiff, and said fees to be taxed as a part of the costs in the case in which the attachment is issued and paid and collected as other costs. Sheriffs shall receive a fee of one dollar for making the copy and return herein provided for, to be taxed and collected as other costs in the suit. [Acts 1889, p. 80.]

**Failure to record writ and return.**—A writ of attachment is not invalidated because a copy is not returned to county clerk for registration. *Woldert v. Nedderhut Provision & Packing Co.*, 13 C. A. 602, 46 S. W. 378.

The failure to record the writ of attachment and return in the county where the land is situated will not affect the lien by virtue of the levy. The failure to record applies only to counties other than those in which the land is situated. *Davis v. John V. Farwell Co.* (Civ. App.) 49 S. W. 656.

## TITLE 119

## ROADS, BRIDGES AND FERRIES

[See Appendix for list of local road laws.]

## Chap.

1. Establishment of Public Roads.
2. Appointment of Overseers.
3. Persons Liable to Work on Roads and Their Rights and Duties.
4. Powers and Duties of Overseers.
5. Road Commissioners.
6. Road Superintendents.

## Chap.

7. Road Law for Counties Having Forty Thousand Inhabitants or Over.
8. Drainage of Public Roads.
9. Bridges.
- 9a. Causeways Across Arms of Gulf of Mexico.
10. Ferries.
11. Special Road Tax.

## CHAPTER ONE

## ESTABLISHMENT OF PUBLIC ROADS

## Art.

6859. What roads declared public.
6860. Commissioners' courts to open.
6861. Not to be changed unless, etc.
6862. Roads in towns, etc.
6863. First class roads from county seat to county seat, etc.
6864. Jury of view to be appointed, etc.
6865. Damages, how assessed, etc.
6866. When damage excessive, etc.
6867. Owner of inclosed lands shall have nine months to remove, etc.
6868. Compensation, etc.
6869. In unorganized counties, etc.
6870. Such roads to be changed, when.
6871. General classification of roads.
6872. First class roads, etc.
6873. Second class, etc.
6874. Third class, etc.
6875. Application not until, etc.
6876. How made, etc.
6877. How laid out, etc.
6878. Oath of jury, etc.
6879. Duty of jury, etc.
6880. Notice to owner, etc.
6881. Statement of damages, etc.
6882. If report approved, to be paid, etc.

## Art.

6883. May order opening, but damages to be paid first, etc.
6884. Established if no objection made.
6885. May change roads, when.
6886. Duty of clerk as to jury of view.
6887. Service of order of appointment.
6888. Defaulting juror to be punished.
6889. Roads on line between different owners, etc.
6890. Ten freeholders may make application for.
6891. Requisites of application.
6892. Clerk shall issue notice, etc.
6893. Service of, etc.
6894. May open on line, when.
6895. Notice served, etc.
6896. Not required to be controlled by the public, etc.
6897. Costs, etc.
6898. Neighborhood roads discontinued, how.
6899. Right to erect gates.
6900. Damages, how assessed.
6901. Commissioners as supervisors.
6902. Not to be discontinued, unless.
6903. Reports, etc.
6904. Across public lands, etc.

[In addition to the notes under the particular articles, see also notes of decisions relating to establishment of public roads in general, at end of chapter.]

**Article 6859. [4670] What roads are declared to be public.**—All public roads and highways that have heretofore been laid out and established agreeably to law, except such as have been discontinued, are hereby declared to be public roads. [Act July 29, 1876, p. 64, sec. 6.]

Cited, *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**What are public roads in general.**—A road open to the public is a public road, although one person is most benefited. *Galveston, H. & S. A. Ry. Co. v. Boudat*, 13 C. A. 595, 45 S. W. 939.

The mere failure of the commissioners' court to comply with all the statutes relating to laying out public roads will not per se render the land taken not a public road. *Race v. State*, 43 Cr. R. 438, 66 S. W. 560.

**Prescription.**—The public use for a less period of time than will give a right by prescription will not appropriate the way used beyond that designated in the order establishing it. *Wooldridge v. Eastland Co.*, 70 T. 630, 8 S. W. 503.

Before a highway can be established by prescription it must appear that the general public, under a claim of right and not by mere permission of the owner, used some defined way, without interruption or substantial change, for the longest period of limitation prescribed by the statute. Where the use is merely permissive, there is no basis on which the right of way by prescription can vest. The use of vacant uninclosed lands for twenty years by the public in passing and repassing will give no prescriptive rights. *Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941.

Permissive use of road over another's land held not sufficient to establish prescriptive right in public. *Smith v. State* (Cr. App.) 40 S. W. 736.

Where a road crossed a railroad, a right by prescription to a crossing held shown by the evidence. *Texas & P. Ry. Co. v. Kaufman County*, 17 C. A. 251, 42 S. W. 586.

Prescriptive use of road by public, which may ripen into control by county, inures to benefit of any person who may have interest in maintaining it. *Hall v. City of Austin*, 20 C. A. 59, 48 S. W. 53.

Building of a railroad across a highway held not to prevent the public acquiring title by prescription. A railroad, having maintained a crossing for 40 years over a road, held estopped to say the public had not acquired a prescriptive right therein. *Galveston, H. & S. A. Ry. Co. v. Raudat*, 21 C. A. 236, 51 S. W. 541.

The rule that a public road cannot be established by prescription where it runs over a prairie does not apply where it is fenced on each side. *Raven v. Travis County (Civ. App.)* 53 S. W. 355.

Land deeded subject to have street from neighboring town opened through it, said land being occasionally used as public way, held not a public way by prescription. *Jefferson County v. Plummer (Civ. App.)* 53 S. W. 711.

A road which has been recognized and worked by the public authorities as originally laid out for 15 years, and which has been traveled during the entire time, is a public road. *Ward v. State*, 42 Cr. R. 435, 60 S. W. 757.

A road recognized and worked by the public for some 25 years, and used by it for over 20 years, held a public road. *Race v. State*, 43 Cr. R. 433, 66 S. W. 560.

A road becomes a public road when the commissioners' court recognizes it by assigning hands to work it, and the public use it as a public road. *Id.*

A road may be shown to be a public road by evidence of long-continued use, assignment of hands to work it by the proper authorities, and the like. *Id.*

Where the prescriptive period to establish the public right to a road is not fixed by statute, the longest period of limitations in actions for land, which is 10 years, will control. *Evans v. Scott*, 37 C. A. 373, 83 S. W. 874.

Use of a street by the public without recognition of any right superior to that of the person dedicating it held, if uninterrupted, to give a highway by prescription. *City of Ft. Worth v. Cetti*, 38 C. A. 117, 85 S. W. 826.

To establish a right by prescription in a strip of land for a street, there must have been uninterrupted adverse use for 10 years such as would put owner on notice as to the claim. *Cockrell v. City of Dallas (Civ. App.)* 111 S. W. 977.

A highway may be established by user by the public in such manner and for such a length of time as to give the public a right therein by prescription or limitation. The use by the public, without objection, of an uninclosed portion of a railway's right of way in a manner that did not interfere with its use by the railroad did not make the way so used a public highway by prescription. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

The public may by adverse use for the prescriptive period acquire right of highway in a road, though the county authorities have not recognized it as a public road. *Porter v. Johnson (Civ. App.)* 151 S. W. 599.

Dedication.—Mere acquiescence by the owner of uninclosed land in its use as a road is not sufficient evidence of its dedication. *Ramthun v. Halfman*, 58 T. 551; *Gilder v. City of Brenham*, 67 T. 345, 3 S. W. 309; *Worthington v. Wade*, 82 T. 26, 17 S. W. 520.

See, also, notes under Art. 1103.

Evidence of existence of highway.—The existence of a public road may be shown by its long continuance and its being worked under orders of the commissioners' court. *Woodridge v. Eastland Co.*, 70 T. 680, 8 S. W. 503; *Click v. Lamar County*, 79 T. 121, 14 S. W. 1048; *Vogt v. Bexar County*, 5 C. A. 272, 23 S. W. 1044; *Albert v. Railway Co.*, 2 C. A. 664, 21 S. W. 779.

Proof that a road had been used by the public as a highway for 40 years, that a jury had been appointed by the commissioners' court of the county to locate a public road along the roadway, that a public road had been marked out, and that thereafter overseers had been appointed and hands apportioned, and the road worked under the supervision of the county, is a sufficient prima facie showing of the existence of a public road. *Ballard v. Bowie County (Civ. App.)* 126 S. W. 56.

Validity of highway.—It is not essential to the validity of a highway that the record of the commissioners' court should show affirmatively a compliance with all the requirements preliminary to the establishment of the road. *Sneed v. Falls County (Civ. App.)* 42 S. W. 121.

Streets and alleys in cities.—See Title 22, Chapter 10.

Macadam and plank road corporations.—See Title 25, Chapter 19.

Militia entitled to right of way.—See Title 91, Chapter 3.

**Art. 6860. [4671] Commissioners' courts to open, etc.**—The commissioners' courts of the several counties shall have full powers and it shall be their duty to order the laying out and opening of public roads when necessary, and to discontinue or alter any road whenever it shall be deemed expedient as hereinafter prescribed. [Acts 1889, p. 21.]

Cited, *Middleton v. Presidio County (Civ. App.)* 133 S. W. 812.

In general.—This article applies only to such roads as are described in Art. 6859. *Morriss v. Cassady*, 78 T. 515, 15 S. W. 102.

Legislative authority to establish.—The authority conferred upon the legislature to "pass local laws for the maintenance of public roads," etc., authorizes that body to confer on a county power to do everything to which the taxes raised for the purpose may be lawfully applied, e. g., laying out and constructing roads. *Dallas County v. Plowman*, 99 T. 509, 91 S. W. 221.

Jurisdiction and powers of commissioners' court.—The commissioners' court cannot open a road through land within the corporate limits of a town. *Norwood v. Gonzales County*, 79 T. 218, 14 S. W. 1057.

The commissioners' court may establish a road which is a cul-de-sac. It may connect with a road for general use leading to a county seat. *Decker v. Menard County* (Civ. App.) 25 S. W. 727.

The commissioners' court has general jurisdiction and power over the subject-matter of laying out and establishing public roads, and the limitation of this power by the concluding phrase of this article applies to the discontinuance or alteration of a road already established. *Allen v. Parker County*, 23 C. A. 536, 57 S. W. 705.

In such matters as changing highways the county authorities do not act for their own benefit, but, in a sense, as trustees for the public, and their powers and duties are prescribed by law. *Hall v. Houston & T. C. R. Co.*, 52 C. A. 90, 114 S. W. 891.

Under the statute conferring on the commissioners' court the power to lay out public roads over lands, including public lands, except when actually used by the state or public for public purposes, as prescribed by this article, a commissioners' court may establish a road over public school lands of the state subject to sale, by entering on its minutes an order to that effect and by actual use, and the statutory provisions for condemnation relate solely to the proceedings against property of individuals. *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

— **Acquisition of land for widening road.**—Under this article and Art. 2241, the commissioners' court has power to condemn a strip of land to alter a highway by widening it. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.

The commissioners' court had power to institute condemnation proceedings on its own motion to widen a highway acquired by purchase. *Id.*

— **Granting right to build railroad.**—The commissioners' court of a county has authority to grant a railroad a right to build a track in a public road or highway. *Texarkana & Ft. S. Ry. Co. v. Texas & N. O. R. Co.*, 28 C. A. 551, 67 S. W. 525.

**Procedure in general.**—Where the power to lay out and establish public roads exists, acts of procedure may be waived and a departure therefrom will not render void an order establishing a road. *Allen v. Parker County*, 23 C. A. 536, 57 S. W. 703.

That a majority only of the commissioners' court consented to a condemnation order to acquire land for the widening of a highway did not invalidate the judgment of condemnation, the highway being one acquired by purchase and not by statutory proceedings. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.

Where land was condemned to widen a highway, the fact that the jury of view did not act in conjunction with the county surveyor did not render the proceedings void. *Id.*

**Discontinuance of road.**—Under this article and Arts. 6861–6876, a substantial compliance with the statutes, including those provisions as to qualification of the signers to the application, investigation, etc., was essential in order to legally discontinue a part of a public road. *Porter v. Johnson* (Civ. App.) 140 S. W. 469.

**Art. 6861. [4672] Shall not be changed, except, etc.**—No public roads shall be altered or changed, except for the purpose of shortening the distance from the point of beginning to the point of destination, unless the court upon a full investigation of the proposed change finds that the public interest will be better served by making the change; that said change shall be by unanimous consent of all the commissioners elected. [*Id.*]

**Changing character of road.**—Where the original order established a third-class road, the commissioners' court cannot change its classification arbitrarily, without notice or further proceedings, to a second-class road, and require the removal of gates, thereby imposing an additional burden without compensation. Such action would be violative of the seventeenth section of the bill of rights. *Wooldridge v. Eastland County*, 70 T. 680, 8 S. W. 503.

An application to change a third-class road need only be signed by one freeholder in the precinct. *Smith v. Ernest*, 46 C. A. 247, 102 S. W. 130.

That the order provides that the change in the course of a road shall be made at the expense of the party procuring the order does not affect the validity of the order. *Id.*

Under this article and Art. 6885, a change made by some one at the instance of the commissioners of the precinct in which the road is located, without any order of the court, is not binding on the public, though thereafter hands apportioned worked the new road and bridges were constructed on it. *Ballard v. Bowie County* (Civ. App.) 126 S. W. 56.

**Art. 6862. [4673] Roads in towns and cities where no incorporation.**—In all cities and incorporated towns in the state of Texas in which from any cause there is not a de facto municipal government in the active discharge of their official duties, the commissioners' court of the county in which such city or incorporated town is situated shall assume and have control of the streets and alleys thereof, and shall have the same worked under the law and regulations for the working of public roads; and such streets and alleys for the purposes of this article shall be held and denominated public roads; provided, that all residents of any city or town, having no de facto city government, not otherwise exempt from road duty, shall be liable to road service as in other cases. [Acts 1885, p. 25.]

**Art. 6863. [4674] First class roads from county seat to county seat, etc.**—The commissioners' courts of the several counties shall see that at least one first class road of the width prescribed by law is laid out and opened from the county seats of their respective counties on the most direct and practicable route to the lines of their county in the direction of the county seats of each adjacent county, where no part of another county intervenes between the county seats of such counties; or, if a border county, to meet the nearest road to the border; and, if any adjacent county is not organized, then in the direction of the center of such county. And the commissioners' court of a county to which one or more unorganized counties are attached for judicial purposes shall lay out and open at least two first class roads sixty feet in width through the extent of each such unorganized county to intersect at right angles as nearly as may be at the center of the county, and to meet at the county lines similar roads of the adjacent counties. In counties now having public roads substantially complying with the preceding requirement as to course, the court shall be required only to give such roads the width of sixty feet and clear them of obstructions; such roads, however, shall not be laid out across orchards, yards, lots or graveyards, or within one hundred feet of a residence, without the consent of the owner; provided, that this law shall not apply to counties where there already exists a sufficiency of public roads. [Acts 1884, p. 63, sec. 1.]

**Character of road.**—Under this article a public road between county seats is a first-class road, and the commissioners' court may not designate it a second-class road. *Midleton v. Presidio County* (Civ. App.) 138 S. W. 812.

**Notice to landowners.**—Where a road is laid out under the authority of this and subsequent articles no notice to the owners of lands to be crossed is contemplated by the law. This cannot be held a taking of property without compensation, as provision is made for the payment of damages for lands thus taken. *Morgan v. Oliver* (Civ. App.) 80 S. W. 112.

The owner must have notice of the matter of assessing damages to make the condemnation of his land for a public road legal. *Morgan v. Oliver*, 98 T. 218, 82 S. W. 1028, 4 Ann. Cas. 900.

**Jurisdiction of appeal.**—An appeal from the commissioners' court denying damages to one whose land has been taken for a first-class road from the county seat to county line in direction of another county seat lies to the district court and not to the county court. *Northington v. Taylor County* (Civ. App.) 62 S. W. 936.

**Art. 6864. [4675] Jury of view to be appointed.**—It shall be the duty of each commissioners' court on their own motion to appoint a jury of view to lay out the roads required in the preceding article, and to mark and define them, and to report in writing such marks and any prominent natural objects that may aid in defining the route selected. And upon the report of the jury of view such roads shall be declared public highways of the first class; and the court shall order the overseer to open the same, and where the country is open prairie to plow a furrow on each side of the road and establish monuments at convenient intervals. [Id. sec. 2.]

Cited, *Powell v. Carson County* (Civ. App.) 131 S. W. 235; *Hankamer v. County Com'rs Court*, 154 S. W. 623.

**Former law.**—It was held under the act of February 5, 1884, that previous application and published notice were not essential to the appointment by the commissioners' court. *Kopecky v. Daniels*, 9 C. A. 305, 29 S. W. 533.

**Appointment of jury.**—The appointment of some of the petitioners for the road on the jury of view does not render void the judgment of the commissioners' court laying out such road. *Vogt v. Bexar County*, 16 C. A. 567, 42 S. W. 127.

A statute is not unconstitutional which provides that a jury of view shall be appointed by the commissioners' court without the concurrence of property owners. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

**Necessity for acting with county surveyor.**—That the jury of view in proceedings to widen a highway did not act in conjunction with the county surveyor did not invalidate the proceedings. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.

**Authority to change route.**—The commissioners' court may approve or reject the report, but cannot lay out a different road except as specified in the statute. *Cummings v. Kendall County*, 7 C. A. 164, 26 S. W. 439.

A road held not lawfully located, so as to warrant prosecution for the obstruction, where a road overseer under authority of the county judge changed the location of the road, as the commissioners' court alone has jurisdiction to locate a public road. *Ehlers v. State*, 44 Cr. R. 156, 69 S. W. 148.

**Time for making report.**—That a jury of view in highway proceedings did not report to the next regular term of the commissioners' court, after their appointment, held not to vitiate the proceedings. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.



**Notice of time for consideration of report.**—In proceedings to open a road, notice of the time when the commissioners' court will take up the report of the jury of view is not necessary. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

**Defective report as basis for order.**—An order in condemnation proceedings for road purposes held not defective because the jury designated a part of the tract to be taken for an easement only. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 590.

**Art. 6865. [4676] Damages, how assessed.**—If damages are claimed by any owner of land so appropriated for public highways, or by any person where inclosed premises are crossed, a jury to assess such damages shall be appointed as now provided in article 6877 of the Revised Statutes. [Id. sec. 3.]

**Appointment of jury.**—Article 4371, R. S. 1879, is not expressly referred to in Acts 1884, ch. 29 (now Arts. 6863-6870); but it is clearly to be implied therefrom that the written consent of the owner was to be applied for and if not obtained then that five freeholders should be appointed to assess the damages. *Morgan v. Oliver*, 98 T. 218, 82 S. W. 1028, 4 Ann. Cas. 900.

**Art. 6866. [4677] When damages are excessive, etc.**—If the damages assessed be excessive, the court may appoint another jury to assess them; and upon the second report, if the damages are deemed excessive, the court may change the road so as to avoid the property so greatly damaged; provided, such change will not divert the road more than one-quarter of a mile from a direct line; provided, further, that in all cases where the owner or owners of lands over which such roads shall pass shall have the right of appeal to the district court where the same shall be tried (by first giving a bond in a sufficient amount to cover all costs); and, if a greater amount of damages is there obtained, the county shall pay the excess and the costs, but if no greater damages are obtained the party taking the appeal shall pay all costs; provided, that such appeal shall in no case delay or prevent the immediate opening of such road after the damages assessed as above have been tendered. [Id. sec. 4.]

**Art. 6867. [4678] Owners of inclosed lands shall have nine months, etc.**—Persons through whose inclosed premises such roads are laid out shall have nine months to remove and adapt their fences to the road. Where the county is unorganized, the owners of fences shall not be required to remove them until such county shall become organized, and not then until fifty residents of such county shall petition the commissioners' court for the removal of such fences; provided, that at all times the owners of such fences shall have at the crossing of such road convenient gates not less than twelve feet wide. [Id. sec. 5.]

**Art. 6868. [4679] Compensation of jurors.**—The juries of view and the juries to assess damages shall, for the organized counties, be allowed such compensation as is now provided by law; and, for the unorganized counties, the sum of two dollars per day for the actual time employed, and five cents per mile for the actual distance traveled to mark and lay out the road or to assess the damages, which amounts, on sworn accounts, shall be paid out of the respective county funds. And any person summoned as a viewer as provided in this chapter who shall fail or refuse to perform the service required of him by law as such viewer shall be fined for contempt by the commissioners' court for every such failure not less than five dollars nor more than ten dollars, to be collected as other fines are collected; provided, that all reasonable excuses shall be heard. [Id. sec. 6.]

**Art. 6869. [4680] In unorganized counties, etc.**—Where there are no persons in the unorganized counties to act or willing to serve on the jury of view or jury to assess damages, the court shall designate citizens of their own county to perform the service. [Id. sec. 7.]

**Art. 6870. [4681] Such roads to be changed, when.**—Nothing in the preceding article shall be construed to prohibit the opening of other roads as is now provided by law. Roads laid out under the provisions of article 6863 shall not be changed, except for the purpose of securing

a better and more direct route, and then only after an actual view by a majority of the commissioners' court of that portion of the road sought to be changed. [Id. sec. 8.]

**Art. 6871. [4682] To classify all public roads.**—It shall be the duty of the commissioners' courts to classify all public roads in their counties into first, second and third class roads, and to act as supervisors of roads in their respective precincts, as hereinafter provided, and commissioners' courts may, on their own motion, where it is deemed necessary, open new roads or straighten existing ones. [Acts 1884, p. 20.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**In general.**—This article does not affect Art. 6864, requiring the appointment of a jury of view, or authorize the courts to change the report made by such jury as to the location of the road or as to the damages, without a hearing or without complying with Arts. 6879–6884. *Cummings v. Kendall County*, 7 C. A. 164, 26 S. W. 439; *Floyd v. Turner*, 23 T. 293; *McIntire v. Lucker*, 77 T. 259, 13 S. W. 1027; *Vogt v. Bexar County*, 5 C. A. 272, 23 S. W. 1044.

**Art. 6872. [4683] First class roads.**—First class roads shall be clear of all obstructions, and not less than forty feet nor more than sixty feet wide; all stumps over six inches in diameter to be cut down to six inches of the surface and rounded off, all stumps six inches and under to be cut smooth with the ground, and all causeways made at least sixteen feet wide. [Id. sec. 2.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Extent of road.**—A "first-class road" is not less than 40 nor more than 60 feet wide. *Craighead v. State*, 55 Cr. R. 386, 117 S. W. 128.

**In view of this article,** when the width of a road is not stated in the order therefor, the proper construction of the order is that the road extends 20 feet on each side of the line given. *Scaling v. Denny* (Civ. App.) 125 S. W. 351.

**Under the statute,** the court held authorized to direct the opening of a road of the first class to the width of 40 feet. *Ballard v. Bowie County* (Civ. App.) 126 S. W. 56.

**Liability for failure to properly cut stumps.**—Under a statute requiring stumps in public highways to be cut off to a certain height, a railroad which opened up a road to take the place of a part of a public road taken for its right of way held liable for injuries resulting from its failure to cut down the stumps in the new road as required by statute, though the county accepted it. *Hall v. Houston & T. C. R. Co.*, 52 C. A. 90, 114 S. W. 891.

**Art. 6873. [4684] Second class roads.**—Second class roads shall be clear of all obstructions and not less than thirty feet wide; stumps six inches and over in diameter to be cut down to six inches of the surface and rounded off; and all stumps less than six inches in diameter to be cut smooth with the ground; all causeways to be made at least sixteen feet wide. [Id. sec. 3.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6874. [4685] Third class roads.**—Third class roads shall be clear of all obstructions, and not less than twenty feet wide; stumps six inches and over in diameter to be cut down to six inches of the surface and rounded off; all stumps less than six inches in diameter to be cut smooth with the ground, and all causeways made at least twelve feet wide. [Id. sec. 4.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6875. [4686] Application for new road, etc., shall not be granted until notice has been given, etc.**—The commissioners' court shall in no instance grant an order on an application for any new road, or to discontinue an original one, unless the persons making application therefor, or some one of them, shall have given at least twenty days' notice by written advertisement of their intended application, posted up at the court house door of the county and at two other public places in the vicinity of the route of the proposed new road, or the road proposed to be discontinued. [Id. sec. 6.]

**Requisites of record.**—It is not essential to the validity of the proceedings that the record should show that the petitioners had given the required notice, or that the landowner was served with or waived notice of the time of meeting of the jury of view. The statute requires some of the proceedings to be in writing, and evidently contemplates that they should be preserved as a part of the record; e. g., the application, the order appointing a jury of view, the sheriff's return showing service of same on the

jurors, the report of the jury, including the owner's claim for damages, and their assessment thereof, and the court's action thereon. *Sneed v. Falls County*, 91 T. 168, 41 S. W. 481.

**Art. 6876. [4687] Application, how made.**—All applications for a new road, and all applications to discontinue an existing one, shall be by petition to the commissioners' court, signed by at least eight freeholders in the precinct or precincts in which such road is desired to be made or discontinued, specifying in such petition the beginning and termination of such road proposed to be opened or discontinued; provided, that where one or more persons live within an inclosure either or all of them may petition the commissioners' court for a third class road or neighborhood road to their nearest trading points, mills, gins, school and church houses and county seats, and the courts shall open such roads, as hereinafter provided in the opening of third class roads; and provided, further, that no part of a public road shall be discontinued unless a new road connecting that part of such road not discontinued shall first be opened; and provided, further, that no part of a first or second class road shall be reduced to a road of a lower class. [Acts 1884, p. 20.]

**Application.**—See Arts. 6860, 6877.

An order for a first-class road may be made on a petition for a second-class road. *Hamilton County v. Garrett*, 62 T. 602.

On an application to open a road, it is not essential to the jurisdiction of the court that the petition shows on its face that the petitioners are citizens of the county and that eight of them are freeholders. *Sneed v. Falls County*, 91 T. 168, 41 S. W. 481.

Bill to enjoin laying out of highway because of insufficient description of the land to be taken held properly refused. *Sneed v. Falls County (Civ. App.)* 42 S. W. 121.

A description in proceedings to open a road across a railroad track, which makes the place certain by reference to a point where an old road had crossed, held sufficient. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

The statute does not require an application to open a public road to do more than to specify its beginning and termination. If it goes further and specifies the section lines along which it was to run, this fact does not deprive the commissioners' court of the power to open it, upon the recommendation of the jury of view upon different lines. *Kelly v. Honea*, 32 C. A. 220, 73 S. W. 847.

The description of a proposed road held sufficient. *Scaling v. Denny (Civ. App.)* 125 S. W. 351.

**Construction of statute.**—Statute for laying out highways must be strictly followed in all material respects. *Missouri, K. & T. Ry. Co. of Texas v. Austin (Civ. App.)* 40 S. W. 35.

**Requisites of record.**—It is not essential to the validity of the proceedings establishing a road that the record shows that the persons appointed as a jury of view possessed the statutory qualification, or took the statutory oath. *Sneed v. Falls County*, 91 T. 168, 41 S. W. 481.

**Authority of jury to act.**—The provision in regard to the county surveyor is merely directory. *Onken v. Riley*, 65 T. 468.

The statute requiring the appointment in highway proceedings of a jury of view of five freeholders of the county, a majority of whom may act, is material and not merely directory; and an owner disclosing in the commissioners' court that two of the jurors were not freeholders of the county, and that a third failed to act, and objecting to the proceedings on that ground, may appeal to the equitable powers of the court, though he appeared before the commissioners' court and asked compensation for his damages. *Middleton v. Presidio County (Civ. App.)* 138 S. W. 812.

Under a petition and order for the laying out of a new road as nearly as practicable on the grade of an old road, the jury of view were authorized to go outside the line of the old road in laying out the new one. *Hankamer v. County Com'rs' Court (Civ. App.)* 154 S. W. 623.

— **Width of road.**—In view of this article, when the width of a road is not stated in the order therefor, the proper construction of the order is that the road extends 20 feet on each side of the line given. *Scaling v. Denny (Civ. App.)* 125 S. W. 351.

**Art. 6877. [4688] How laid out.**—All roads hereafter ordered to be made shall be laid out by a jury of freeholders of the county to be appointed by the commissioners' court. Said jury shall consist of five persons, a majority of whom may proceed, with or without the county surveyor, as ordered by the commissioners' court, to lay out, survey and describe such road to the greatest advantage to the public, and so that the same can be traced with certainty; and the field-notes of such survey or description of the road shall be included in the report of the jury; and, if adopted, shall be recorded in the minutes of the commissioners' court. [Id.]

Cited, *Lewis v. State*, 64 Cr. R. 110, 141 S. W. 532.

**Art. 6878. [4689] Oath of jury.**—The jurors provided for in the preceding article shall, before proceeding to act as such, take the following oath before some officer authorized to administer oaths, to-wit:

“I, \_\_\_\_\_, do solemnly swear that I will lay out the road now directed to be laid out by the order to us directed from the commissioners’ court, according to law, without favor or affection, malice or hatred, to the best of my skill and knowledge. So help me God.” [Id.]

*In general.*—It is no objection to a statute providing for the opening of roads that it does not require the members of the jury of view to swear that they will assess the damages properly. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

*Necessity of record showing oath of jury.*—It is not essential to the validity of the proceedings that the record shows that the persons appointed a jury of view took the statutory oath. *Sneed v. Falls County*, 91 T. 168, 41 S. W. 481.

*Reducing oath to writing.*—The oaths of the members of a jury of view need not be reduced to writing. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

**Art. 6879. [4690] Duty of jury to perform the work and report.**—It shall be the duty of such jurors, when qualified as provided in the preceding article, to proceed to lay out and mark the road in accordance with the order of the court and the law, and to report their proceedings in writing to the next regular term of the commissioners’ court. [Id.]

*Description of road.*—Where the beginning corners and lines in the description of a proposed road were those commonly accepted as correct, and plaintiff, a landowner, was present when the jury of view surveyed the line, which followed in part a line marked by old fence posts, supposed to be the line between surveys, and no uncertainty by plaintiff or those laying out the road as to the exact location of the road was expressed, plaintiff is not entitled to restrain the opening of the road for uncertainty in the description. *Scaling v. Denny* (Civ. App.) 125 S. W. 351.

**Art. 6880. [4691] Notice to owner.**—The jury of freeholders provided for in article 6877 shall issue a notice in writing to the land owners through whose lands such proposed road may run, or to his agent or attorney, of the time when they will proceed to lay out such road, or when they will assess the damages incidental to the opening of the same, which notice shall be served upon such owner, his agent or attorney, at least five days before the day therein named. If such owner is a non-resident of the county the notice may be given by publication in a newspaper published in the county, as notices are required to be given to non-resident defendants as to actions in the district or county court, and the road may be established after four weeks’ publication, the cost of publishing to be paid as directed by judgment of the court. [Acts 1884, p. 21.]

See *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

*In general.*—Service of notice on plaintiff of proceedings to establish a highway held personal and sufficient. *Vogt v. Bexar County*, 16 C. A. 567, 42 S. W. 127.

The meaning of this article and Arts. 6881, 6882, read in connection with the constitution, seems to be that if the notice is given as required by the statute the landowner may file a claim for the value of the land taken and for such other damages as he thinks he is entitled to, which would make it the duty of the jury of view to hear evidence as to the value of the land taken, and the commissioners’ court, it seems, may consider such claim waived (if none is filed) and proceed to open the road without allowing any compensation or damages whatever before so proceeding. *Asher v. Jones County*, 29 C. A. 353, 68 S. W. 552, 553.

This article means that notice of the time when the jury will proceed to lay out the road is only required—as is usually the case when the damages are then to be assessed, since the clause “when they will assess the damages,” etc., indicates that a different time may be selected for assessing the damages. The notice is only important to the owner of the land on the question of damages. *Kelly v. Honea*, 32 C. A. 220, 73 S. W. 847.

*Condemnation of land in general.*—See Title 18, Chapter 2.

*Necessity of notice.*—Condemnation proceedings, when notice is not given the owner will not affect his rights. *Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941.

The action of a jury of view in laying out a public road is void as to landowners not served with notice. *M., K. & T. Ry. Co. v. Austin* (Civ. App.) 40 S. W. 35.

Where a public road is laid out upon petition of citizens, as authorized by Arts. 6863–6870, notice to the owners of land to be crossed is specifically required. *Morgan v. Oliver* (Civ. App.) 80 S. W. 112.

Under this article, notice of the assessment of damages is jurisdictional, and a mere recital of such notice in the report of the jury, or knowledge by the owner that the jury has laid out the road over his property, is not sufficient to confer jurisdiction. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

*Waiver of notice or objections.*—When the owner of land through which a road is laid out was present when so laid out, the fact that he had no notice of the proceedings is immaterial. *Onken v. Riley*, 65 T. 468.

Where defendant appears and puts in a claim for damages, he cannot complain of a defect in the notice in condemnation proceedings. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

The laying out of a highway over plaintiff's land, on consent of his attorney without authority, held invalid, as without due process of law. *Fayssoux v. Kendall County* (Civ. App.) 55 S. W. 583.

Notice of proceedings to open a highway may be waived. *McCown v. Hill* (Civ. App.) 73 S. W. 850.

Under the statute providing that in proceedings to open public roads service of notice may be had on the agent of the owner, the agent has power to waive service, but has no power to waive the owner's claim for damages. *Dees Bros. v. Harrison* (Civ. App.) 95 S. W. 1093.

The notice of the time when the jury of view will assess damages incidental to the opening of a road, required by this article, may be waived, but affirmative proof of such waiver must be made by the party relying thereon. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

**Service of notice on agent.**—Where a landowner is a nonresident, notice of condemnation proceedings for a highway across his land is properly served on his agent. *Watkins v. Hopkins County* (Civ. App.) 72 S. W. 872.

**Proof of giving of notice.**—Proof of the placing of a letter in a post office addressed to the landowner, unaccompanied by proof showing its receipt, would not be evidence of the notice required by this article, no presumption of delivery being made. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

In a landowner's suit to enjoin a county from opening a road over his land, the burden is on defendant to show affirmatively that notice of the time for assessing damages was given to the landowner, as required by this article. *Id.*

The mere recital, in the report of the jury of view, of service of notice of when damages incidental to the opening of a highway will be assessed, is not sufficient to show prima facie service of such notice on the landowner. *Id.*

**Necessity of record showing service or waiver of notice.**—It is not essential to the validity of the proceedings that the record shows the landowner was served with or waived notice of the time and place of meeting of the jury of view. *Sneed v. Falls County*, 91 T. 168, 41 S. W. 481.

**Sufficiency of notice.**—Notice in proceedings to open a road that the jury of view would lay out the "old county road" and assess damages incidental to the "opening of the road through your land" held insufficient to give a landowner notice that the new road would cross his land, where such land was not crossed by the "old county road." *Hankamer v. County Com'rs' Court* (Civ. App.) 154 S. W. 623.

**Parties in condemnation proceedings.**—The mortgagee or beneficiary in a trust deed of land taken in the exercise of the right of eminent domain should be made a party to the condemnation proceedings. Proceedings against the mortgagor will not affect the rights of the mortgagee. *Aggs v. Shackelford Co.*, 85 T. 147, 19 S. W. 1085.

**Collateral attack for want of notice.**—The action of the commissioners' court in establishing a road cannot be questioned in a collateral proceeding by showing want of notice of the setting of the jury of review, even though the judgment of the commissioners' court establishing the road does not show that notice was served. *Kelly v. State*, 46 Cr. R. 23, 80 S. W. 333.

**Remedy for locating road without notice.**—When a road has been located without notice to the owners, damages incident to the opening of the road may be recovered by suit (*McIntire v. Lucker*, 77 T. 259, 13 S. W. 1027; *Evans v. Santana, L. S. & L. Co.*, 81 T. 622, 17 S. W. 232), or the land taken may be recovered (*Cunningham v. San Saba County*, 1 C. A. 480, 20 S. W. 941; *Llano County v. Scott*, 2 C. A. 408, 21 S. W. 177; *Vogt v. Bexar County*, 5 C. A. 272, 23 S. W. 1044).

The opening of a public road, without compliance with this article may be enjoined. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

The vendor in an executory contract for the sale of land cannot enjoin the laying out of the road on the ground that the notice to owners of the time when damages would be assessed required by this article was not given him, where the purchaser was in possession, and not in default, and the road would not injure the land itself, the presumption being that the purchaser will obtain title by performing his part, and, in case of nonperformance by the purchaser and the foreclosure or other cutting off of his interest, the laying out of the road would be ineffective as against the vendor if no notice of the assessment of damages was given him. *Id.*

— **Evidence.**—Proof of the placing of a letter in a post office addressed to the landowner, unaccompanied by proof showing its receipt, would not be evidence of the notice required by this article; no presumption of delivery being made. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

In a landowner's suit to enjoin a county from opening a road over his land, the burden is on defendant to show affirmatively that notice of the time for assessing damages was given to the landowner as required by this article. *Id.*

**New proceedings pending injunction.**—Pending injunction to restrain the opening of a road located without notice to the owner, new proceedings to open the road may be regularly taken. *McIntire v. Lucker*, 77 T. 259, 13 S. W. 1027; *Evans v. L. S. & L. Co.*, 81 T. 622, 17 S. W. 232.

**Art. 6881. [4692] Statement by owner of damages.**—The owner of any such land may, at the time stated in such notice, or previously thereto, present to the jury a statement in writing of the damages claimed by him, if any, incidental to the opening of such road, and thereupon the jury shall proceed to assess the damages, returning their

assessment and the claimant's statement with their report, to the commissioners' court. [Id.]

**Necessity of compensation.**—The change of a third-class road to a second-class imposes greater burdens upon the land, for which compensation must be made. *Bounds v. Kirven*, 63 T. 159.

A change of a road from a second-class to a first-class road entitles the owner to compensation for the additional land taken. *Llano County v. Scott*, 2 C. A. 408, 21 S. W. 177; *Parker County v. Jackson*, 5 C. A. 36, 23 S. W. 924.

Digging wells on a public road for the benefit of the public is not a right incidental to the road's use and maintenance as a highway since it creates an additional easement entitling the owner of the fee to compensation. *Clutter v. Davis*, 25 C. A. 532, 62 S. W. 1107.

**Measure of damages in general.**—Damages incurred in opening a road are to be measured by the permanent injury inflicted. *Hamilton County v. Garrett*, 62 T. 602.

When the building of new fences is necessary, the measure of damages is the reasonable cost of sufficient fences to enable the owner to enjoy his land in uses to which it was adapted and to which he had applied it. *Morris v. Coleman County* (Civ. App.) 28 S. W. 380.

Before a road can be opened the intrinsic value of the land taken without reference to the benefits of the improvements must be paid or secured. *Travis County v. Trogden* (Sup.) 31 S. W. 358.

Where land is not enhanced in value by the laying out of a road over it, the owner is entitled to the cost of fences necessitated by the road. *Anderson v. Wharton County*, 27 C. A. 115, 65 S. W. 643.

In condemnation proceedings for a road, the fact that after contest filed the county constructed the fences made necessary by the road, if pleaded, may be shown to prevent a recovery by the landowner of the expense of fencing. *Watkins v. Hopkins County* (Civ. App.) 72 S. W. 872.

The value of plaintiff's land, appropriated for a road, is not to be based on its peculiar condition, brought about by the act of appropriation. *Caruthers v. Johnson County* (Civ. App.) 94 S. W. 912.

In condemnation proceedings to obtain a roadway, defendant's instruction as to what should be considered in determining the depreciated value of the land not taken held properly refused. *Kennedy v. Travis County* (Civ. App.) 130 S. W. 844.

In condemnation for a road through pasturage land, the measure of damages to be awarded for injury to the land not taken is the difference in market value before construction and immediately afterwards; and, where its value for farming purposes would be much increased, no damages should be awarded. *Id.*

The amount to be paid for land taken for a roadway is its actual value. *Id.*

**Deductions for benefits.**—The owner is entitled to the value of land taken for a public road, regardless of its effect upon the value of the land not so taken. It is error to set off against such value an estimate of increased value from the road to the land not taken. *Dulaney v. Nolan Co.*, 85 T. 225, 20 S. W. 70.

Damages occasioned by opening a public road, other than the value of the land taken, may be set off against increased value caused to the remaining tract. For example, the cost of running a fence may be so offset. *Id.*

**Evidence of benefits.**—On an issue whether a farm had been benefited by the opening of a road, certain facts held too remote to afford a basis for a finding of a benefit; and where several witnesses testified that the land had been enhanced in value, but there was no evidence to show the amount of benefit, a verdict for benefits will be reversed; and where it was shown that the landowner had an outlet before the road was built, the opening of the road could not be considered as conferring a benefit. *Anderson v. Wharton County*, 27 C. A. 115, 65 S. W. 643.

In condemnation to obtain a roadway over land, in determining whether the value of the land not taken was increased by the road in considering the question of damages, the general increased value of surrounding property is not to be considered, but only the particular tract in question. *Kennedy v. Travis County* (Civ. App.) 130 S. W. 844.

**Persons entitled to damages.**—The damages caused by laying out a public road belong to the owners of the land over which it passes. A subsequent lessee of the land inclosing it, between the order establishing and the order opening it up, cannot recover damages for injury to his inclosure, or for improvements rendered necessary to the use of the land, and occasioned by the opening up of the road. *Dulaney v. Nolan Co.*, 85 T. 225, 20 S. W. 70.

Where, in proceedings for the laying out of a road, an owner of land taken for the road was represented by an agent, it was immaterial whether the damages awarded for such land were allowed to the agent or the owner. *Dunman v. Nall* (Civ. App.) 87 S. W. 177.

Prima facie the right to damages resulting from the opening of a road through lands which the owner has contracted to sell is in the purchaser in possession. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**Remedy of aggrieved owners.**—A. and B. were served with notice of proceedings for the establishment of a road, and they appeared through an attorney, both before the jury of view and the commissioners' court, who finally passed on the claim for damages. The damages were assessed in the name of A. alone, pursuant to representations by the attorney; his authority to represent A. and B. and act as he did not being denied. There was nothing to show that A. denied B.'s interest in the amount of the damages allowed, or that A. and B. were unable to agree on a division. Held, that, if A. and B. or either of them were not satisfied with the manner of awarding the damages, they could appeal from the judgment of the commissioners' court, and they could not resort to equity to restrain the opening of the road. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**Art. 6882. [4693]** If report approved, damages to be paid, etc.—If the commissioners' court shall approve of the report and order such

road to be opened, they shall consider the assessment and damages by the jury and the claimant's statement thereof, and allow to such owner just damages and adequate compensation for the land taken, and when paid or secured by deposit with the county treasurer to the credit of such owner they may proceed to have such road opened. If the owner of the land is not satisfied with the assessment by the commissioners' court he may appeal therefrom as in cases of appeal from judgment of justice's court, but such appeal shall not prevent the road from being opened, but shall be only to fix the amount of damages. If no claim of damages is filed with such jury after notice as provided in the preceding article the same shall be considered as waived.

**Acquisition of land for drains.**—In a proceeding to condemn land for a ditch to drain a highway the court in its judgment should not undertake to divest the title of the owner, but only to subject the land to the use required. *Palmer v. Harris County*, 29 C. A. 340, 69 S. W. 229.

**Reduction by commissioners' court of damages awarded by jury.**—The damages reported by the jury of view may be reduced by the commissioners' court. *Hopkins v. Cravey*, 85 T. 189, 19 S. W. 1067.

**Appeal.**—When the commissioners' court has transcended or grossly abused its powers, its action may be revised by the court having jurisdiction. *Bourgeois v. Mills*, 60 T. 76.

An appeal may be taken to the county court from an order of the commissioners' court allowing or refusing damages in a proceeding to establish an ordinary public road. *Miller v. Wilbarger County* (Civ. App.) 26 S. W. 245; *Taylor v. Travis County*, 77 T. 333, 14 S. W. 137.

A statute regulating proceedings to open roads would not be unconstitutional, even if no appeal from the commissioners' court were provided. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

The county court has appellate jurisdiction in proceedings to open roads, and the procedure is the same as in justices' courts. *Id.*

A party, having knowingly accepted the damages awarded him by the county commissioners' court in the case of establishment of a road, cannot afterwards appeal from such award. *Karnes County v. Nichols* (Civ. App.) 54 S. W. 656.

Remedy of owner dissatisfied with award of damages by commissioners' court for opening of public road is by appeal to county court. *Huggins v. Hurt*, 23 C. A. 404, 56 S. W. 944.

The determination by the commissioners' court that the laying out of a highway is necessary is valid, unless it is shown that the court either grossly abused or exceeded its authority or neglected some requirement of law. *Schlinke v. De Witt County* (Civ. App.) 145 S. W. 660.

— **Perfecting appeal.**—No appeal bond or notice of appeal is necessary in the case of an appeal from the decision of the county commissioners' court as to the amount of damages sustained in the establishment of a road. *Karnes County v. Nichols* (Civ. App.) 54 S. W. 656.

**Trial of opposition in county court.**—A railroad company having, under this article, waived its claim for damages from the laying out of a highway across the railway by failure to file the claim with the jury of view, it may not, on trial of its opposition filed in the county court to the action of the commissioners' court in approving said jury's report laying out the road, show that as laid out, at an acute angle with the railroad, it would involve the railroad in more litigation for injuries than would one at right angles to the railroad. *Quanah, A. & P. Ry. Co. v. Hardeman County* (Civ. App.) 146 S. W. 683.

Demurrer by a county to opposition filed by a railroad with the county court to action of the commissioners' court approving the report of a jury of view laying out a public road, across the railroad, and assessing damages, said demurrer being that under this article it is provided that, if the owner is not satisfied with the assessment of damages by the commissioners' court, he may appeal from its judgment as in cases of appeal from judgments of a justice's court, but such appeal shall not prevent the road being opened, but shall be only to fix the amount of damages; therefore defendant specially excepts to the part of plaintiff's petition wherein it protests against defendant opening the road across plaintiff's right of way—not only raises the question of the limitation placed by the statute on the company's right of appeal from the action of the commissioners' court to the county court, but also the sufficiency of the allegations of the company's opposition to show such arbitrary and abusive exercise by the commissioners' court of its discretionary powers in the matter of opening the road as to authorize review of its action in opening it, apart from the question of damages awarded. *Id.*

The opposition filed by a railroad to an action of the commissioners' court approving the report of a jury laying out public road across the railroad, alleging that the proposed road will be within 400 feet of another crossing, no necessity exists for such crossing, and that the crossing will be dangerous, does not show such arbitrary exercise and gross abuse of the discretionary powers of the commissioners' court as to render its action in ordering the road opened reviewable by the courts. *Id.*

**Payment of damages.**—Bill of Rights, § 17, and this article, are satisfied by an award of damages for a right of way for a public road, the issue and deposit with the county treasurer of a warrant for the amount, and notice thereof to the landowner; there being funds in the treasury available for payment of the warrant. *Scaling v. Denny* (Civ. App.) 125 S. W. 351.

**Payment or security for payment before opening road.**—See notes under Art. 6883.

**Effect of payment.**—The owner of a strip of land on which a public road has been established cannot recover it from the county, where he has been fully paid therefor. *Brewer v. Doose* (Civ. App.) 146 S. W. 323.

**Laches barring right to open road.**—Damages were assessed November, 1888, by the commissioners' court in favor of an owner of land through which a public road was established. A road overseer was appointed and ordered to open the road one year after. In December, 1889, the overseer was proceeding to open the road when an injunction was sued out. Subsequently the money allowed the owner was deposited for his use. Held, that the right to proceed and open the road was not lost by such delay. *Hopkins v. Cravey*, 85 T. 189, 19 S. W. 1067.

**Restraining opening of road.**—Under this article a landowner to whom an award of damages has been made and a warrant therefor issued and tendered, and who has not appealed, cannot restrain the opening of the road, on the grounds that the award of damages is insufficient, and that he does not want the road opened. *Scaling v. Denny* (Civ. App.) 125 S. W. 351.

Where a landowner appeared before the jury of view in proceedings to open a road, and made his claim for damages which was not allowed, and subsequently appeared before the commissioners' court, when the jury's report was adopted, and gave notice of appeal as provided by this article, but failed to prosecute such appeal, he could not thereafter maintain a suit to enjoin the laying out of the road across his land. *Hankamer v. County Com'rs Court* (Civ. App.) 154 S. W. 623.

In an action to enjoin the opening of a new road, the petition and order for the laying out of the new road as nearly as practicable on the grade of an old road were conclusive as to where the road should be located. *Id.*

**Art. 6883. [4694] Court may order opening of road, but damages assessed must be first paid, etc.**—If, in the judgment of the commissioners' court, from the report of the commissioners named in the two preceding articles, the road should be deemed of sufficient importance, the court may order the survey or opening of the same; but the court shall first order the payment of the damages assessed, if any, by the commissioners of view to be made to the owner of the land out of the county treasury, and the county treasurer shall have paid the same or secured its payment by a special deposit of the amount in his office, subject to the order of such owner, and shall notify such owner by mail or otherwise of such deposit. [Acts 1876, p. 64.]

**In general.**—The provisions of this article and Art. 6882 are limitations on the right of the court to open a road. *Hamilton County v. Garrett*, 62 T. 202.

The statutes as to the payment of damages before the opening of roads over the lands of individuals held substantially complied with. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**Payment or security for payment before opening road.**—Before a road can be opened the intrinsic value of the land taken without reference to the benefits of the improvements must be paid or secured. *Travis County v. Trogden* (Sup.) 31 S. W. 358.

The county treasurer should have paid the damages awarded the owner or secured its payment by a special deposit of the amount in his office subject to order of the owner and notified him of the deposit to authorize the opening of the road. *McCown v. Hill* (Civ. App.) 73 S. W. 851.

Where owners of land over which a road was established were tendered in open court on the trial of the case the amount of damages allowed by the commissioners' court, in the name of one pursuant to their agreement, and the county clerk offered to draw a warrant in favor of that one for the sum allowed, and the offer was refused, and the warrant would have been paid if drawn, there was a substantial compliance with the statutes as to the payment of damages before the opening of the road. *Powell v. Carson County* (Civ. App.) 131 S. W. 235.

**Sufficiency of order.**—An order of a commissioner's court opening a road, reciting selection of the road after review and report by a majority of its members, held to show review by the entire court. *Allen v. Parker County*, 23 C. A. 536, 57 S. W. 703.

A road held not illegal because of a variance between the calls of the order directing it to be laid out and the report of the jury of view. *Cator v. Hays* (Civ. App.) 122 S. W. 953.

**Restraining opening of road until compensation is made.**—The owner of land through which a public road has been surveyed is entitled to an injunction against the opening up of such road until adequate compensation be made for the land to be taken. The compliance with the statute by making the necessary deposit of the value of the land will be ground for dissolving such injunction at costs of the county or road overseer. *Hopkins v. Cravey*, 85 T. 189, 20 S. W. 1067.

Where the county treasurer does not pay the damages awarded, or secure payment by a special deposit of the amount in his office subject to the owner's order, the opening of the road can be enjoined. *McCown v. Hill* (Civ. App.) 73 S. W. 851.

**Effect of delay in paying damages and opening road.**—Delay of county in paying damages and opening road held not to deprive it of any rights acquired by an order for its opening. *Fehrenkamp v. Mansfield* (Civ. App.) 50 S. W. 140.

Where land has been taken for a public road, the landowner cannot obstruct the same, though he has not been paid for such taking. *Race v. State*, 43 Cr. R. 438, 66 S. W. 560.

**Art. 6884. [4695] Road shall be established, etc., if no objection be made.**—If no objection be filed, upon the report of a jury appointed upon an application to open a new road, the court shall proceed to establish and classify such road and order the opening out of the same,



and shall appoint an overseer and apportion hands for the same, as in other cases. [Id. sec. 13.]

**Manner of making objections.**—Where the commissioners of view have made their report, a proposition by a landowner (over whose land the road is made to run in the report) that he will remit part of the damages allowed him, if they will change the road as marked out by the jury to a location suggested by him, may be treated as an objection to the report. No form of objection is required, but any written statement that indicates that the landowner does object is sufficient to authorize the court to approve or disapprove the report. *Howe v. Rose*, 35 C. A. 328, 80 S. W. 1023.

**Discretion of commissioners' court.**—The action of the commissioners' court as to necessity of road, its proper location, the form of the petition, the qualifications of its signers, and all issues save that relating to the damages, is conclusive, and cannot be controlled by mandamus. The statutes on the subject of opening and establishing roads are not arbitrary, but give the court some latitude and discretion. *Howe v. Rose*, 35 C. A. 328, 80 S. W. 1023.

**Art. 6885. [4696] May change roads, when.**—The commissioners' court may alter or change the course of any public road, in accordance with article 6861 of this chapter, after notice and upon application in the same manner as provided in this chapter for the discontinuance of a road, except that the application need not be signed by more than one freeholder of the precinct in which such alteration or change is proposed to be made.

**Authority to change roads.**—See notes under Art. 6861.

Under this article and Art. 6861, a change made by some one at the instance of the commissioners of the precinct in which the road is located, without any order of the court, is not binding on the public, though thereafter hands apportioned worked the new road and bridges were constructed on it. *Ballard v. Bowie County* (Civ. App.) 126 S. W. 56.

**Purpose of widening.**—It was no objection to the condemnation of land to widen a highway that the commissioners' court intended to permit the highway, as widened, to be used for street railway purposes. *Stewart v. El Paso County* (Civ. App.) 130 S. W. 690.

**Art. 6886. [4697] Duty of clerk when jury of view is appointed.**—When juries of view are appointed, it shall be the duty of the clerk of the court to make out copies of the order appointing them in duplicate, and to deliver such copies to the sheriff of the county within ten days after such order of appointment was made, indorsing on such copies the date of such order. [Id. sec. 14.]

**Art. 6887. [4698] Service of order of appointment on juror.**—The sheriff receiving such copies shall serve the same upon the jurors by delivering to each of them in person a copy of the order of appointment provided for in the preceding article, or by leaving one of said copies at the usual place of abode of such juror. Service shall be made within twenty days after the sheriff receives said copies, and he shall make his return to the clerk on the duplicate copies, stating the date and manner of service, or if service has not been made, stating the cause of his failure to make the same. [Id.]

**Art. 6888. [4699] Defaulting juror shall be punished, how.**—Any juror of view, summoned as such, who shall fail or refuse to perform the service required of him by law as such juror, shall forfeit and pay for every such failure the sum of ten dollars, to be recovered by judgment on motion of the district or county attorney, in the name of the county, in any court of competent jurisdiction of the county in which such defaulter may reside. [Id.]

**Art. 6889. [4700] Roads on lines.**—For the further and better providing for public roads, any lines between different persons or owners of land, any section line, or any direct line through an inclosure containing twelve hundred and eighty acres of land or more, may, upon the conditions provided for in the following articles of this chapter, be declared public highways, and left open and free from all obstructions for fifteen feet on either side of said lines, but the marked trees and other objects used to designate said lines, and the corners of surveys, shall not be removed or defaced. [Acts 1884, p. 22.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6890. [4701] Ten freeholders may make an application for.**—Whenever ten freeholders may desire the boundary lines between different persons or owners of land to be declared a public highway, in order to give them a nearer, better or more practicable road to their church, county seat, mill, timber or water, they may apply to the commissioners' court for an order establishing such road. [Acts 1876, p. 65.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Number of signers.**—A petition for the opening of a neighborhood road held sufficient, where signed by one person who lived in an inclosure. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

**Art. 6891. [4702] Requisites of application.**—The application provided for in the preceding article shall be in writing, and shall be signed and sworn to by the applicants. It shall designate the lines sought to be opened and the names and residences of the persons or owners to be affected by such proposed road, and shall state the facts which show a necessity for such road. [Id.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6892. [4703] Clerk shall issue notice.**—Upon the filing of such application the clerk shall issue a notice reciting the substance thereof, directed to the sheriff or any constable of the county commanding him to summon the owners of the land, naming them, whose lines are proposed to be left open, to appear at the next regular term of the commissioners' court and show cause why said lines should not be declared public highways. [Id.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6893. [4704] Service of notice and return of same.**—The notice provided for in the preceding article shall be served in the manner and for the length of time provided for the service of citations in civil actions in justices' courts, and shall be returned in like manner as such citation.

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6894. [4705] May open lines, when.**—At a regular term of the court, after due service of notice as provided in the preceding article, the commissioners' court may, in its discretion, should it deem the road of sufficient public importance, issue an order declaring the lines designated in the application to be public highways, and direct the same to be opened by the owners thereof and left open for a space of fifteen feet on each side of said line. [Acts 1884, p. 24.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6895. [4706] Notice of the order of the court shall be served upon the owners of the land.**—When an order as provided in the preceding article is made, the clerk shall, without delay, issue a notice reciting said order or its substance, directed to the sheriff or any constable of the county, commanding him to serve the owners of such lines named in such notice with a true copy thereof, and the officer to whom said notice is delivered shall, without delay, serve the same as therein directed and return the same to the clerk, indorsing thereon the manner and date of such service. [Id.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6896. [4707] Such roads not required to be controlled by the public.**—The commissioners' court shall not be required to keep any such road as is mentioned in the last seven articles worked by the road hands as in the case of other public roads. [Id.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6897. [4708] Costs, etc.**—All costs attending the proceedings provided for in relation to opening of neighborhood roads shall be paid by the county if the application be granted. [Acts 1884, p. 24.]

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6898. [4709] Neighborhood road may be discontinued, how.**—The commissioners' court may discontinue any neighborhood road which has been established as a public highway in the same manner provided in this chapter for discontinuing other public roads.

Cited, *Bennett v. Gulf, C. & S. F. Ry. Co.* (Civ. App.) 146 S. W. 353.

**Art. 6899. [4710] Right to erect gates.**—The owners of the land whose lines have been or may be declared public highways, and also any person through whose land a third class road may run, shall have the right to erect a gate or gates across said road or roads when necessary, said gate or gates to be not less than ten feet wide and free of obstructions at the top; provided, that when the right of way for any third class road or neighborhood road has been granted to the county without cost the owner of such land shall have the right to put a gate across such road or roads, but where such right of way has been condemned and paid for according to existing law the county commissioners' court shall have the right to prevent any obstruction of such a road by a gate. [Acts 1884, p. 24.]

**Art. 6900. [4711] Damages, how assessed.**—The amount of damages to be allowed to the owners of said lands for opening the line of a neighborhood road, as provided in this chapter, shall be assessed as provided for in the case of first, second and third class roads in this chapter. [Id.]

**In general.**—The measure of damages is the value of the land taken at the time of the appropriation, the depreciation in value of the remaining land and the cost of building fences made necessary by the proceedings, with interest from the time of appropriation. *Bexar County v. Herff* (Civ. App.) 23 S. W. 409.

**Deduction.**—The cost of running a fence may be set off against the increased value caused to the remainder of the tract by the opening of a road. *Dulaney v. Nolan County*, 85 T. 225, 20 S. W. 70.

**Art. 6901. [4712] Commissioners as supervisors.**—The county commissioners of the several counties are hereby constituted supervisors of public roads in their respective counties, and each commissioner shall supervise the public roads within his commissioner's precinct once each month, and shall receive as compensation therefor three dollars per day for the time actually employed in the discharge of his duties, to be paid out of the road and bridge fund of the county; provided, that no commissioner shall receive pay for more than ten days in any one month. He shall also make a report to each regular term of the commissioners' court held in his county during the year, said report to be made under oath, and to state:

1. The condition of all roads and parts of roads in his precinct.
2. The condition of all culverts and bridges.
3. The amount of money remaining in the hands of overseers subject to be expended upon the roads within his precinct.
4. The number of mile posts and finger boards defaced and torn down.
5. What, if any, new roads of any kind should be opened in his precinct, and what, if any, bridges, culverts or other improvements are necessary to place the roads in his precinct in good condition and the probable cost of such improvements; also, the name of every overseer who has failed to work on the road, or in any way neglected to perform his duty.

Said report shall be spread upon the minutes of the court, to be considered in improving public roads and determining the amount of taxes levied therefor. [Acts 1884, p. 24. Acts 1913, p. 255, sec. 1, amending Art. 6901, Rev. St. 1911.]

**Art. 6902. [4713] Not to be discontinued, unless.**—No entire road of the first or second class shall hereafter be discontinued except upon vacation by orders of the commissioners' court or non-use for a period of three years. [Acts 1884, p. 24.]

**Art. 6903. [4714] Reports, etc.**—The report made by the supervisors of public roads to the commissioners' court, as provided for in article 6901, shall be submitted, together with all contracts made by said court since its last report for any work on any road, to the grand jury, at the first term of the district court hereafter. [Id.]

**Art. 6904. [4715] Across public lands, etc.**—No public road shall be opened across lands owned and used or for actual use by the state, educational, eleemosynary, or other public state institutions for public purposes and not subject to sale under the general laws of the state, without the consent of the trustees of said institution and the approval of the governor of the state; and the roads heretofore opened across such lands may be closed by the authorities in charge of any such lands whenever they deem it necessary to protect the interests of the state, upon repayment to the county where the land is situated, with eight per cent interest, the amount actually paid out by said county for the condemnation of said lands as shown by the records of the commissioners' court.

**Proceedings to establish road.**—Under the statute conferring on the commissioners' court the power to lay out public roads over lands, including public lands, except when actually used by the state or public for public purposes, as prescribed by this article, a commissioners' court may establish a road over public schools lands of the state subject to sale, by entering on its minutes an order to that effect and by actual use, and the statutory provisions for condemnation relate solely to the proceedings against property of individuals. *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

#### DECISIONS RELATING TO ESTABLISHMENT OF PUBLIC ROADS IN GENERAL

**In general.**—The law providing for the opening of public roads held not to authorize the taking of property without due process of law. *Vogt v. Bexar County*, 16 C. A. 567, 42 S. W. 127.

Where a special road law passed subsequently to the general road law differs materially from the latter, and furnishes a complete and independent method of opening and working public roads and mode of procedure by which property may be condemned to a public use, it must be held to be a substitute for the general road law and not merely cumulative of the remedy provided therein. *Plowman v. Dallas County* (Civ. App.) 88 S. W. 256.

**Validity of proceedings.**—Condemnation proceedings to open a road are void where they take property without compensation. *Galveston, H. & S. A. Ry. Co. v. Baudat*, 18 C. A. 595, 45 S. W. 939.

**Accrual of right of action for unauthorized establishment.**—The county court, on the 30th of September, 1876, adopted the report of a jury of view laying out a public road. The overseer who was ordered to lay out the road in accordance with the report adopted another line, on which a road was opened and used until November 22, 1884, when the road so opened across the land of A. was recognized by the court as a public road. Held, that A. could not have brought an action against the county for the unauthorized establishment of the road in 1876, and that a cause of action did accrue when the court by its order in 1884 asserted a claim to the use of the land. *Franklin County v. Brooks*, 68 T. 679, 5 S. W. 819.

**Establishment by owner of fee.**—A public highway may be established by the owner of the fee by setting it apart for public use. *Heilbron v. St. Louis Southwestern Ry. Co. of Texas*, 52 C. A. 575, 113 S. W. 610, 979.

**Liability for damages in opening road.**—Where sheriff, in opening county road, cut fences not in line of road, the county, the commissioners' court, and the county judge held not liable therefor. *Morgan v. Oliver* (Civ. App.) 80 S. W. 111.

**Record of proceedings to establish road.**—Record of proceeding to establish highway need not show on its face a compliance with all the statutory requirements. *Sneed v. Falls County* (Civ. App.) 42 S. W. 121.

**Estoppel to object.**—One consenting to route of projected highway as reported cannot complain that it varies from that ordered. *McCown v. Hill* (Civ. App.) 73 S. W. 850.

One who recognizes public road by petitioning for its change is estopped from questioning the legality of its establishment. *Kelly v. State*, 46 Cr. R. 23, 80 S. W. 382.

An owner of land appearing before the commissioners' court and maintaining an objection in proceedings to establish a highway held entitled to appeal to the equitable powers of the court. *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

A property owner's presence while the jury of view were surveying the highway estopped him from afterwards denying that he had waived notice of the survey so as to make the statutory notice of that proceeding unnecessary. *Crawford v. Frio County* (Civ. App.) 153 S. W. 388.

**Ownership of fee.**—The owner of property abutting on a public highway owns the fee to the center thereof, unless otherwise restricted in the grant. *City of Houston v. Finnigan* (Civ. App.) 85 S. W. 470.

**Rights of subsequent purchaser of land.**—Where land is actually appropriated under an order of the commissioners' court requiring a jury to lay out and mark a public road, a subsequent purchaser of the tract of land crossed by the road takes it subject to the easement thereby created. *Wooldridge v. Eastland Co.*, 70 T. 680, 8 S. W. 503.

Road actually used as true road.—Where the line of road as actually used by the public differs from the line laid out, the former is the true road. *Dodson v. State* (Cr. App.) 49 S. W. 78.

Highway by prescription.—See notes under Art. 6859.

## CHAPTER TWO

### APPOINTMENT OF OVERSEERS

<p>Art. 6905. County to be laid off into road pre- cincts, etc. 6906. Overseers to be appointed, when. 6907. May be made at any time. 6908. Vacancy, how filled, etc. 6909. Clerk to make copies of appointment. 6910. Order shall show what. 6911. Service of order, etc.</p>	<p>Art. 6912. Term of service of, etc. 6913. Persons not compelled to serve, etc. 6914. Overseer shall notify clerk. 6915. County shall appoint another. 6916. Non-refusal considered as accepting. 6917. Clerk shall insert what on copies of appointment, etc. 6918. Clerk shall post list.</p>
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**Article 6905. [4716] County shall be laid off into road precincts.**—The commissioners' courts of the several counties shall lay off their respective counties into convenient road precincts, and shall number each precinct; and in the order establishing the same shall specify as definitely as practicable the boundaries thereof. [Act July 29, 1876, p. 63, sec. 5.]

**Art. 6906. [4717] Overseers to be appointed, when.**—An overseer shall be appointed and hands apportioned by said court for each road precinct at the time of establishing the same; and at the first regular term of court in each year the said court shall appoint an overseer for each road precinct in the county, and shall at the same time designate all the hands liable to work on public roads, and apportion them to the several overseers; provided, that hands shall as nearly as practicable be apportioned to work on the road precinct nearest to their place of abode; and provided further, that the supervisor of public roads shall at any time apportion any hands in his precinct who from any cause may not have been apportioned as otherwise provided in this chapter. [Acts 1884, p. 25.]

**Art. 6907. [4718] Appointment of overseers, etc., may be made at any time.**—If from any cause the said court should fail to perform the duties required of it by the preceding article at its first regular term in each year, it shall be competent and legal for said court to perform said duties at any subsequent term, whether the same be a regular or called term. [Acts 1876, p. 63.]

**Art. 6908. [4719] Vacancy in overseership, how filled.**—In case of the death, removal or other inability to act, of any road overseer, it shall be the duty of the county judge, immediately upon information of the fact, to appoint an overseer to fill such vacancy, who shall be notified on his appointment as in other cases. [Id.]

**Art. 6909. [4720] Duty of clerk to make out copies of order of appointment, etc.**—It shall be the duty of the clerk of said court to make out copies of all orders appointing overseers of roads in duplicate, and deliver the same to the sheriff of the county within ten days after any such order shall have been made, indorsing on such copies the date of the orders of appointment. [Id. sec. 14.]

**Art. 6910. [4721] Order of appointment of overseer shall show what.**—All orders appointing overseers shall embrace the designation of hands liable to work under such overseer, as far as known, and shall specify the boundaries of such overseer's road precinct as laid off by the court. [Id.]

**Art. 6911. [4722] Service of order and return.**—The sheriff shall, within twenty days after the reception of the copies of any order appointing an overseer, deliver to or leave at the usual place of abode of such overseer one of such copies, and shall return duplicate of such copy to the clerk of the county court, indorsing thereon the date and manner of service, and if not served the cause of his failure to serve the same. [Id.]

**Art. 6912. [4723] Term of service of overseer.**—The term of service of a road overseer shall be from the time of the service of the order of appointment until the first regular term of the commissioners' court in the succeeding year. [Id. sec. 5.]

**Art. 6913. [4724] Persons not compelled to serve as overseers, when.**—No person shall be compelled to serve as an overseer who is lawfully exempt from road duty, nor shall any one be compelled to serve as overseer more than one year in every three successive years. [Id. sec. 23.]

**Art. 6914. [4725] Overseer not liable shall notify clerk of non-acceptance.**—It shall be the duty of every person appointed overseer of a road who is lawfully exempt from road duty to notify the clerk of the county court of his non-acceptance within ten days after his being notified of his appointment. [Id.]

**Art. 6915. [4726] County judge shall thereupon appoint another.**—If any person appointed overseer of a road who is lawfully exempt from road duty shall notify the clerk of his non-acceptance as provided in the preceding article, the clerk shall forthwith report the same to the county judge, who shall immediately appoint another overseer for said road precinct. [Id.]

**Art. 6916. [4727] Unless overseer give notice of non-acceptance shall be considered as accepting.**—Should any person appointed overseer, and who is lawfully exempted from road duty, fail to notify the clerk of his non-acceptance within ten days after being notified of his appointment, it shall be considered an acceptance of the appointment, and he shall not be permitted thereafter to plead his exemption from road duty as a defense against any neglect or failure to perform any of the duties of such overseer. [Id.]

**Art. 6917. [4728] Clerk shall insert what on copies of appointment.**—It shall be the duty of the clerk to insert on the copies of all orders of appointments of overseers issued by him the duties required of overseers in regard to their non-acceptance of such appointment. [Id.]

**Art. 6918. [4729] Clerk shall post list of overseers, etc.**—The clerks of the county courts of the several counties shall post up in their respective court houses, on the first day of each term of the district court held in his county, a list of the names and the road precincts of all the overseers of roads in the county. [Id. sec. 29.]

## CHAPTER THREE

### PERSONS LIABLE TO WORK ON ROADS, AND THEIR RIGHTS AND DUTIES

Art. 6919. Who are liable to work on roads, and who are exempt.	Art. 6922. Substitute may be furnished.
6920. Age limitation of workers on public roads, etc.	6923. Payment of money shall be required.
6921. Liability to road service.	6924. Hand shall furnish tool.
	6925. Duty of hand to work, etc.
	6926. Five days' work only can be required.

**Article 6919. [4730] Who liable to road duty.**—All male persons between the ages of eighteen and forty-five years shall be liable, and it is hereby made their duty, to work on, repair and clean out the public roads, under provisions and regulations of this title, except ministers of the gospel in the active discharge of their ministerial duties, invalids, members of the Texas national guard organized under provisions of the title "Militia," and the members of all volunteer fire companies in the active discharge of their duties as firemen, who shall be exempt. [Acts 1885, p. 43.]

*In general.*—This article is an amendment of Art. 854 and simply affects the limitation upon the age of the party liable to work the road. *Ex parte Drake*, 55 Cr. R. 233, 116 S. W. 50.

**Art. 6920. [4730a] Age limitation of workers on public roads, etc.**—No person in this state under the age of twenty-one years, or over the age of forty-five years, shall be required to work upon the public roads of this state or upon the streets and alleys of any city or town of this state. [Acts 1895, p. 160.]

**Art. 6921. [4731] Fifteen days' residence fixes liability to work on road.**—No person shall be compelled to work on a road who has not been residing in the county in which he is summoned to work for the space of fifteen days immediately preceding such summons. [Acts 1876, p. 65.]

**Art. 6922. [4732] Substitute may be furnished.**—Any person liable to road duty, and who has been summoned to do such duty, shall have the privilege to furnish an able-bodied substitute to work in his place, which substitute shall be accepted by the overseer if he is capable of performing a reasonable amount of work; otherwise, he shall not be accepted. [Id.]

**Art. 6923. [4733] Payment of money will exempt.**—Every person liable to work on roads, by paying to his road overseer at any time before the day appointed to work on his road, the sum of one dollar for each day that he is summoned to work, shall be exempt from working for each day paid for, and also exempt from any penalties for failure to work for the time for which he has so paid. [Id. sec. 26.]

**Art. 6924. [4734] Hand shall take working tool with him.**—Each person summoned to work on a road shall take with him an ax, hoe, pick, spade or such tool as may be desired and directed by the overseer, or if he have no such tool as he is desired and directed by the overseer to take with him, he shall take such other suitable tool as he may have. [Id. sec. 17.]

**Art. 6925. [4735] Duty of hand, etc.**—It shall be the duty of each road hand to perform his duties as such in accordance with the directions of his overseer, and a day's work, within the meaning of this law, shall be eight hours' efficient service, when said service is voluntarily performed. [Acts 1889, p. 21.]

**Art. 6926. [4736] Five days' work only.**—No person shall be compelled to work on any public road or roads more than five days in each year. [Acts 1883, p. 22.]

*Cited, Bluit v. State*, 56 Cr. R. 525, 121 S. W. 168.

## CHAPTER FOUR

### POWERS AND DUTIES OF OVERSEERS

**Art.**  
6927. Roads shall be worked twice each year.  
6928. Power to call out hands.  
6929. Hands not designated shall be summoned.

**Art.**  
6930. Mode of summoning hands.  
6931. Summons in writing, service of.  
6932. Overseer may appoint some one to summon hands.

Art. 6933	Overseer shall report defaulting road hands.	Art. 6940.	Overseer may exchange labor for index boards and mile posts.
6934.	Timber for causeways and bridges.	6941.	Overseer shall apply money, how.
6935.	Construction of causeways.	6942.	Overseer shall report to commissioners' court when.
6936.	Overseer may exchange labor for wagons, etc.	6943.	Compensation, etc., of overseers.
6937.	Measuring roads and mile posts.	6944.	Money shall be expended how.
6938.	Index boards shall be placed where.	6945.	May dismiss hands, when.
6939.	Mile posts and index boards shall be replaced when removed, etc.		

**Article 6927. [4737] Roads shall be worked twice each year.**—Every overseer shall cause the roads through his precinct to be worked twice in each year. [Act July 29, 1876, p. 68, sec. 16.]

**Art. 6928. [4738] Power to call out hands.**—Overseers of roads shall have the power to call out all persons liable to work upon public roads at any time such overseer may deem it necessary, or when ordered by the commissioners' court or other competent authority, and such hands may be called out in detail, or the whole force at any one time, as may be deemed best, or as they may be directed, for the better improvement of the public roads. [Acts 1889, p. 21.]

**Art. 6929. [4739] Hands not designated shall be summoned.**—In case any person liable to work on roads shall not have been designated and apportioned by the commissioners' court, the overseer of the road nearest to which such person lives shall summon such person to work on such road the same as if such person had been designated and apportioned to such overseer. [Id. sec. 5.]

**Art. 6930. [4740] Mode of summoning hands.**—It shall be the duty of the overseer to give three days' previous notice, by summons in person or in writing, to each person within his road precinct liable to road duty in said precinct, of the time and place when and where such person is required to appear to work on the road, and the number of days such person will be required to work. [Id. sec. 17.]

**Art. 6931. [4741] Summons in writing may be served how.**—If the summons be in writing it may be served by leaving the same at the usual place of abode of the person summoned, with some person residing at such place who is not less than ten years of age, or if no person ten years of age or over can be found at such place of abode, the overseer may serve the same by posting it on the door of such place of abode.

**Art. 6932. [4742] Overseer may appoint some one to summon hands.**—The overseer shall have the power to appoint some one to summon the hands to work on the road, and such person shall be exempt from working on the roads as many days as he was actually engaged in summoning the hands. [Id.]

**Art. 6933. [4743] To file complaints, where, etc.**—It shall be the duty of the overseer, within ten days after he has had his road worked, to file with the county attorney of his county, or the justice of the peace of his precinct, a complaint in writing and under oath against each person who has been summoned to work and who has failed to work and failed to furnish a substitute, and has failed to pay one dollar for each day he has so failed to work or furnish a substitute, and also against each person so summoned who has refused to do a reasonable amount of work on the road or who has refused to perform the reasonable directions of the overseer. [Acts 1884, p. 26, sec. 3.]

**Art. 6934. [4744] Timber for causeways and bridges.**—When to the overseers it may appear expedient to make causeways and build bridges, or to gravel any public road, the timber, gravel, earth, stone or other necessary material most convenient therefor may be used, but in such case the owner of such timber, or gravel, earth, stone or other necessary material shall be paid out of the county treasury a fair compensa-



tion for the same, to be determined by the commissioners' court upon the application of such owner. [Acts 1876, p. 68. Amended Acts 1897, p. 84.]

**In general.**—The principle upon which this statute seems to rest is the rightful exercise of the right of eminent domain, and authority therein given is restricted to the taking under such right of that character of material named, found within and adjacent to such highway, and is no warrant for the making of contracts by road overseers for the purchase of material to be used in the improvement of public roads. The commissioners' courts only can make such contracts, and parties dealing with road overseers must take notice that they have no authority to bind the county, except as such authority is conferred upon them by law, or by order of such court. *Matthews Lumber Co. v. Van Zandt County* (Civ. App.) 77 S. W. 960.

**Art. 6935. [4745] Construction of causeways; ditches may be cut on land of adjacent owners, when.**—The earth necessary to construct a causeway shall be taken from both sides, so as to make a drain on each side of such causeway. Whenever it is necessary to drain the water from any public road, the overseer shall cut a ditch for that purpose, having due regard to the natural water flow, and with as little injury as possible to the adjacent land owner; provided, that in such cases the commissioners' court shall cause the damages to such premises to be assessed and paid out of the general revenues of the county, and in case of disagreement between the commissioners' court and such owner, the same may be settled by suit as in other cases. [Id. Acts 1884, p. 27.]

**Liability of county.**—A county is liable for injury to the drainage ditch of a landowner caused by the cutting of ditches by the road overseer for the purpose of draining a public road. *Voss v. Harris County*, 33 C. A. 249, 76 S. W. 601, 602.

**Right to sue.**—The county is required to take the initiative and assess the damages. The owner of the land can accept or reject the offer made by the county. Having rejected it the disagreement is complete and suit can then be brought. *Holt v. Rockwall County*, 27 C. A. 366, 65 S. W. 390.

**Art. 6936. [4746] Overseer may exchange labor for wagons, etc.**—When it may be necessary to use a wagon for any purpose in working a road, or a plow or scraper, the overseer of such road is authorized to exchange the labor of any hand or hands bound to work on such road, for the use of a wagon or wagons, plows or scrapers, and the necessary teams to operate the same, at reasonable rates, to be employed as aforesaid. [Acts 1876, p. 68.]

**Art. 6937. [4747] Road shall be measured and mile posts set up.**—It shall be the duty of all overseers of roads to measure such parts of roads as are in their respective precincts in continuation, and set up posts of good lasting timber or stone at the end of each mile leading from the court house or some other noted place, and to mark on said posts in legible and enduring figures the distance in miles to said court house or other noted place. [Id. sec. 22.]

**Art. 6938. [4748] Index boards shall be placed where.**—It shall also be the duty of overseers to place conspicuously and permanently at the forks of all public roads in their respective precincts, and at all roads crossing or leading away from such public roads, index boards, with directions plainly marked thereon, stating the most noted place to which each of said roads leads. [Id.]

**Art. 6939. [4749] Mile posts and index boards to be replaced when removed.**—When a mile post or index board shall be removed or defaced by any means whatever, the overseer shall cause the same to be replaced immediately by another, marked as the original one. [Id.]

**Art. 6940. [4750] Overseer may exchange labor for index boards and mile posts.**—The overseer is authorized to exchange the labor of any hand or hands bound to work on his road, for the making of index boards or mile posts, or either. [Id. sec. 21.]

**Art. 6941. [4751] Overseer shall apply money how.**—Overseers of roads shall apply all money coming into their hands as such overseers to the improvement of their roads in an impartial manner, by repairing or

building bridges, hiring hands or teams to work on the road, or in such other manner as he may deem best. [Id. sec. 27.]

**Art. 6942. [4752] Overseer shall report to commissioners' court, when, etc.**—It shall be the duty of each overseer to report in writing and under oath to the commissioners' court of his county, at the first regular term thereof in each year, giving the number of the hands and their names in his precinct liable to work on the roads; the number of days he has caused his road to be worked; the condition of such road; the amount of the funds received by him for his road; from whom received, and for what purpose, and to whom and for what purpose said funds have been paid out, and the amount of such funds, if any, that remain in his hands; and he shall at the same time pay over to said court any such funds which may remain in his hands. [Id. sec. 28.]

**Art. 6943. [4753] Compensation, etc., of overseers.**—Overseers shall retain out of money that may come to their hands as such overseers ten per cent thereof as compensation for their services, and during their term of service they shall be exempt from serving upon juries. [Id. sec. 31.]

**Art. 6944. [4754] Money shall be expended under order of court, etc.**—All moneys appropriated by law, or by order of the commissioners' court, for working public roads or building bridges, shall be expended under the order of the commissioners' court, except when otherwise herein provided, and said court shall from time to time make the necessary orders for utilizing such money and for utilizing convict labor for such purposes. [Const., art. 16, sec. 24.]

**Art. 6945. [4755] Overseers to dismiss hands, when.**—Overseers shall dismiss from the road any hand or hands, whether working for themselves or as substitutes for others, who shall fail to do good and efficient work, or who shall hinder other hands from doing their work properly, or dismiss any hand who may be intoxicated, or who shall refuse to obey any reasonable order of the overseers; and the overseer shall proceed against such hand or hands so dismissed in the same manner as if they had refused to obey the summons to work upon the road. [Acts 1889, p. 22.]

## CHAPTER FIVE

### ROAD COMMISSIONERS

Art. 6946. Commissioners' court may employ four road commissioners, etc.	Art. 6950. May make rules, etc., for working roads, etc.
6947. Powers and duties, etc.	6951. May accept donations, etc.
6948. Expenditures of money by, etc.	6952. Law cumulative, etc.
6949. Court to see to expenditures.	

**Article 6946. [4756] Commissioners' court may employ four road commissioners.**—Each county commissioners' court of this state may employ not exceeding four road commissioners for their respective counties, who shall be resident citizens of the district for which they are employed, and when more than one is employed, the district that each road commissioner is to control shall be defined and fixed by the court; such road commissioners when employed shall receive such compensation as may be agreed upon by the court, not to exceed two dollars per day for the time actually engaged. Each road commissioner when employed, before he enters upon his duties, shall execute a bond, payable to the county judge of the county and his successors in office, in the sum of one thousand dollars, with one or more good and sufficient sureties,

to be approved by the county judge, and conditioned for a faithful performance of his duties. [Acts 1889, p. 134.]

Improvements of city streets.—See Title 22, Chapter 11.

**Art. 6947. [4757] Powers and duties.**—A road commissioner when employed shall have control over all overseers, hands, tools, machinery and teams to be used upon the roads in his district; and shall have the power to require overseers to order out his hands in any number he may designate for the purpose of opening, working or repairing the roads or building or repairing bridges or culverts of his district; and it shall be the duty of such road commissioner to see that all the roads and bridges of his district are kept in good repair, and he shall, under the direction and control of the commissioners' court, inaugurate a system of grading and draining public roads in his district, and see that such system is carried out by the overseers and hands under his control, and shall obey all orders of the commissioners' court; and he shall be responsible for the safe keeping and liable for the loss or destruction of all machinery, tools or teams placed under his control, unless such loss is without his fault, and when he shall be discharged he shall deliver them to the person designated by the court. [Id. sec. 2.]

**Art. 6948. [4758] Expenditure of money by, etc.**—He shall expend such money as may be placed in his hands by the commissioners' court under its direction in the most economical and advantageous manner on the public roads, bridges and culverts of his district; and all his acts shall be subject to the control, supervision, orders and approval of the commissioners' court; he shall work the convicts and such other labor as may be furnished him by the commissioners' court; and when the road commissioner shall have funds in his hands to expend for labor on the roads, and when it shall be necessary for any overseer or overseers in his district to work more than five days during any one year upon the public roads, he may employ such overseers to continue their duties as such for such a length of time as may be necessary, and pay them for their services not more than one dollar and fifty cents per day for the time actually employed after the five days; provided, that hands shall not be required to work when there shall be on hand, after building and repairing bridges, a sufficient road fund to provide for the necessary work on the roads; and said road commissioner shall report to the commissioners' court at each regular term under oath, showing an itemized account of all money he has received to be expended on roads and bridges and what disposition he has made of the money, and showing the condition of all roads, bridges and culverts in his district, and such other facts as the court may desire information upon, and shall make such other reports and at such time as the court may desire. [Id. secs. 3 and 4.]

**Art. 6949. [4759] Commissioners' court to see to expenditure of road fund.**—The commissioners' court shall see that the road and bridge fund of their county is judiciously and equitably expended on the roads and bridges of their county, and, as nearly as the condition and necessity of the roads will permit, it shall be expended in each county commissioners' precinct in proportion to the amount collected in such precinct; and in expending money in building permanent roads the money shall first be used only on first or second class roads, and on those which shall have the right of way furnished free of cost to make as straight a road as is practicable to obtain and having the greatest bonus offered by the citizens of money, labor or other property. [Id. sec. 6.]

**Art. 6950. [4760] May make rules and regulations for working roads.**—The commissioners' courts are authorized to make all reasonable and necessary rules and orders for the working and repairing of public roads, and to utilize the labor to be used and money expended thereon, not in conflict with the laws of this state, and enforce such

rules and orders; and they are further authorized to purchase or hire all necessary road machinery, tools or teams, and hire such labor as may be needed in addition to the labor now required of citizens to build or repair the roads. [Id. sec. 7.]

**Art. 6951. [4761] May accept donations of money, etc.**—Commissioners' courts or road commissioners may accept donations of money, lands, labor of men, teams or tools, or any other kind of property or material to aid in building roads in their counties, and may authorize any person to make a drain along any public road for the purpose of draining his land, and require the person draining his land to do such work under the direction of the road commissioner. [Id. sec. 8.]

**Art. 6952. [4762] Law cumulative.**—This chapter shall not be construed to repeal any existing law, but it is cumulative and in aid of existing law; provided, that when road commissioners are employed the county commissioners are not required to supervise the roads as required by article 6901 of the Revised Statutes; provided, nothing in this law shall be construed so as to require more than five days' service in one year of any citizen. [Id. sec. 9.]

## CHAPTER SIX

### ROAD SUPERINTENDENTS

Art. 6953. Commissioners' court shall appoint road superintendents.	Art. 6966. Commissioners' court may let contract for work; advertisement for bids; bond of contractor; appropriation.
6954. Commissioners' court to determine what superintendents shall be appointed.	6967. Convict labor.
6955. Oath and bond of superintendent; recovery on bond.	6968. Donations for road purposes; drains.
6956. Superintendent, qualifications, term, penalties, etc.	6969. System of working hands under road overseers may be retained.
6957. Salary of road superintendent.	6970. Method of work in counties where special road tax is levied.
6958. Duties and liability of.	6971. Accounts of superintendent, and payment of moneys collected by him.
6959. Other duties of road superintendent.	6972. Penalty for injury to any bridge, culvert, drain, etc.
6960. Superintendent to divide county into road districts; keep record, etc.	6973. Delinquent poll tax payers subject to road duty; requirement is cumulative; penalty.
6961. May summon hands, appoint deputy, and contract for use of teams.	6974. Terms "road," "work," and "working" defined.
6962. Reports of road superintendent.	6975. This law cumulative of general laws.
6963. Commissioners' court, powers of.	6976. Counties exempt.
6964. Superintendent shall do what under direction of commissioners' court.	
6965. Superintendent to certify payments, etc.; his certificate and liability.	

**Article 6953. [4763] Commissioners' court may employ superintendent\* for county.**—The commissioners' court of any county in this state may appoint one road superintendent for such county, or one superintendent in each commissioners' precinct, and such courts are authorized by an order made at any regular term thereof to determine whether there shall be one road superintendent for the county or one for each of the commissioner's precincts therein. Such order shall be entered on the minutes of such court, and shall not be void for want of form, but a substantial compliance with the provisions of this chapter shall be sufficient; provided, no county shall be under the operation of this law whose commissioners' court does not appoint a road superintendent or superintendents as herein provided. [Acts 1891, p. 149, sec. 1.]

**Art. 6954. [4764] May determine number to be appointed.**—In case such commissioners' court shall determine that there shall be one road superintendent, as provided in the preceding article, such court shall appoint a competent road superintendent for such county, and

in case it is determined that there shall be four superintendents, then such court shall appoint a competent person as road superintendent for each commissioner's precinct in such county. [Id. sec. 2.]

**Art. 6955. [4765] Oath and bond of superintendent.**—Each road superintendent, whether county or precinct, shall within twenty days after his appointment take and subscribe the oath required by the constitution, and enter into bond payable to the county judge and his successors in office, with good and sufficient sureties, to be approved by the county judge, in such sum as may be fixed by the commissioners' court, conditioned that he will faithfully do and perform all the duties required of him by law or the commissioners' court and that he will pay out and disburse the funds subject to his control as the law provides, or the commissioners' court may direct, which bond shall be filed and recorded as other official bonds and shall not be void for the first recovery, but may be sued on from time to time until the full amount is exhausted. [Id. sec. 3.]

**Art. 6956. [4766] Qualifications.**—Every road superintendent shall be a qualified voter in the county or precinct, as the case may be, for which he is appointed, and shall hold his office for two years or until his successor is appointed and qualified, but in all cases where the condition of the roads does not demand the continued services of the superintendent, his salary may in the discretion of the commissioners' court be suspended. The commissioners' court may for good cause remove any road superintendent, and in case of vacancy from any cause may appoint a successor, who shall hold his office for the unexpired term. [Id. sec. 4.]

**Art. 6957. [4767] Salary.**—Each road superintendent shall receive such salary as may be fixed by the commissioners' court, to be paid on the order of said court at stated intervals, but the salary of the county superintendent, in counties of less than fifteen thousand inhabitants, shall never exceed one thousand dollars per annum, and in counties of more than fifteen thousand inhabitants, it shall not exceed twelve hundred dollars per annum. The salary of precinct superintendents in counties of less than fifteen thousand inhabitants shall not exceed three hundred dollars per annum, and in counties of over fifteen thousand inhabitants it shall never exceed four hundred dollars per annum. [Id. sec. 5.]

**Art. 6958. [4768] Shall have supervision, etc., over roads subject to commissioners' court.**—The road superintendent, subject to the orders and directions of the commissioners' court, shall have the general supervision over all the public roads and highways of his county or precinct, as the case may be, and shall superintend the laying out of new roads, the making and changing of roads therein, the building of bridges therein (except where otherwise contracted), the working of the roads therein and all repairs to be made on the same, and over all county convicts worked on such roads, but this shall not prevent the commissioners' court from employing a person to watch and manage such convicts and direct the work to be done by them. Said road superintendent shall take charge of all tools, machinery, implements and teams placed under his control by the commissioners' court, and execute his receipt therefor, which shall be filed with the county clerk, and he shall be responsible for the safe keeping of all such machinery, tools, implements and teams, and the proper expenditure and paying out of all money belonging to the road fund that may come into his hands, and shall be liable for the loss, injury or destruction of any such tools, teams, implements or machinery, unless such loss occurred without his fault, and for the wrongful or improper expenditure of any such money, and upon the expiration of his term of office, or in case of his resignation or removal, he shall deliver all such money and property to his

successor or such other person as the commissioners' court may direct. [Id. sec. 6.]

**Art. 6959. [4769] Roads and bridges to be kept in repair; his duty, etc.**—It shall be the duty of each road superintendent to see that all of the roads and bridges in his county or precinct, as the case may be, are kept in good repair, and he shall, under the direction of the commissioners' court, inaugurate and carry out a system of working, grading and draining the public roads in his county or precinct, and shall see that every person subject to road duty in his county or precinct performs the work to which he is liable under the law. He shall act as supervisor of the roads in his county or precinct, as the case may be, and perform all the duties of supervisor that now devolve on the county commissioners under the existing laws in counties not adopting this law, and he shall do and perform such other service as may be required of him by the commissioners' court. [Id. sec. 7.]

**Art. 6960. [4770] County shall be divided into precincts or districts.**—Each road superintendent in counties where the commissioners' court so directs, as soon as practicable, shall divide his county or precinct, as the case may be, into road districts of convenient size, to be approved by the commissioners' court, and define the boundaries thereof and designate the same by number, which boundaries shall be recorded in the road minutes of the commissioners' court; and he shall ascertain the names of all persons subject to road duty in each district and keep a record thereof and report the same to the commissioners' court. [Id. sec. 8.]

**Art. 6961. [4771] Shall call out all persons liable to work, etc.**—Every road superintendent shall have power, and it shall be his duty, to call out all persons liable to work on the public roads at any time and in such numbers as he may deem necessary to work the roads in their respective districts, and he shall utilize all such labor to the best advantage in connection with other labor on the roads. The call shall be summons served in the manner and for the length of time prescribed by the law regulating the calling out of hands by overseers, but no person shall be compelled to work outside of his road district. The road superintendent may appoint any person subject to road duty in any district to summon the hands to work the roads therein, and such person shall be exempt from road service as many days as he was actually engaged in summoning the hands, and in case of emergency he may appoint a deputy to supervise any particular work. He may also contract with any person subject to road duty for the use of teams, and permit such person to discharge his road duty by the use of such double team, but he shall never allow more than two dollars a day for any team, nor more than three dollars for any hand and double team. [Id. sec. 9.]

**Art. 6962. [4772] Shall make reports.**—Each road superintendent shall make a report, under oath, to the commissioners' court at each regular term thereof, showing an itemized account of all money belonging to the road fund he has received, from whom received, and what disposition he has made of the same, the condition of all roads and bridges in his county or precinct, as the case may be, and such other matters as the court may desire information upon, and shall make such other report at such times as such court may require. [Id. sec. 10.]

**Art. 6963. [4773] Commissioners' court may hire or purchase all machinery, etc., for working roads.**—The commissioners' court of any such county is authorized to purchase or hire all necessary road machinery, tools, implements, teams and labor required to grade, drain or repair the roads of such county, and said court is authorized and empowered to make all reasonable and necessary rules, orders and regulations not in conflict with law for laying out, working and other-

wise improving the public roads, and to utilize the labor and money expended thereon, and to enforce the same. But no change in any road shall be made that lengthens the same without it is to the benefit of the traveling public or for the protection of private property, and then only upon the unanimous consent of the commissioners' court. [Id. sec. 11.]

**Art. 6964. [4774] May employ sufficient force, etc.**—Each road superintendent shall employ sufficient force to enable him to do the necessary work in his county or precinct, as the case may be, having due regard for the condition of the county road and bridge fund and the quality and durability of the work to be done, and shall buy or hire such tools, teams, implements and machinery as the commissioners' court may direct, and he shall work such roads in such manner as the commissioner may direct, and such work shall at all times be subject to the general supervision of the commissioners' court. [Id. sec. 12.]

**Art. 6965. [4775] Shall make the best contracts, etc.**—Each road superintendent shall make the best contract possible for all labor, tools, implements or machinery that he is authorized to hire or purchase, and in payment therefor he shall issue to the person entitled thereto his certificate, showing the amount due and the purpose for which it was given, and upon approval by the commissioners' court a warrant shall issue therefor to the holder thereof on the county treasurer, to be paid by him out of the proper fund as other warrants. All such certificates shall be dated, numbered and signed by the road superintendent, and he and his sureties on his official bond shall be liable for all loss or damages caused by the wrongful issue of any such certificate or any extravagance in the amount thereof. [Id. sec. 13.]

**Art. 6966. [4776] May improve roads and bridges by contract.**—The commissioners' court of any such county may, when deemed best, construct, grade, gravel or otherwise improve any road or bridge by contract. In such case said court or the county judge may advertise, in such manner as said court may determine, for bids to do such work and the contract shall be awarded to the lowest responsible bidder, who shall enter into bond with good and sufficient sureties for the faithful compliance with such contract, but said court shall have the right to reject any and all bids. At the time of making any such contract the said court shall direct the county treasurer to pass the amount of money stipulated in such contract to a particular fund for that purpose, and the treasurer shall keep a separate account of such fund; and the same shall not be used for any other purpose, and can only be paid out on the order of said court. [Id. sec. 14.]

**Art. 6967. [4777] May require county convicts to work on roads.**—The commissioners' court may require all county convicts not otherwise employed to labor upon the public roads under such regulations as may be most expedient. Each county convict worked on the public roads in satisfaction of any fine and costs shall receive a credit thereon of fifty cents for each day he may labor. And the commissioners' court may order that the county pay to the officers of court as much as one-half of the costs due them and adjudged against such convict, and upon such order such payment shall be made. But no such costs nor any part thereof shall ever be paid until such convict has worked out the entire amount of such fine and costs as provided by law, and then only upon a certificate from such county or precinct superintendent to the effect that such costs have been so worked out. The commissioners' court may grant a reasonable commutation of time for which a convict would be compelled to work to pay his fine and costs, or for which he is committed, as a reward for faithful services and good behavior, and such court shall make proper rules and regulations under which such commutations may be granted. [Id. sec. 15.]

**Art. 6968. [4778] May accept donations, etc.**—The commissioners' court may accept donations of money, land, teams, tools or labor, or any other kind of property or material, to aid in building or keeping up roads in the county, and said court or any road superintendent, by and with the concurrence of the commissioners, may authorize any person to make a drain along any public road, the same to be done under the direction of the road superintendent, or such other person as said court may direct. [Id. sec. 16.]

**Art. 6969. [4779] May retain old system of working roads.**—The commissioners' court of any county may retain the system of working hands under road overseers as provided by general laws, and place such overseers under control of a county or precinct superintendent, under such lawful regulations as said court may prescribe, or may work with overseers without any superintendent, as may be deemed best. [Id. sec. 17.]

**Art. 6970. [4780] May, in counties levying special tax, exempt persons from working roads.**—The commissioners' court of any county in any county in which a special tax for the maintenance of the public roads is levied and collected, as provided for in section 9 of article 8 of the constitution, shall not be compelled to require persons subject to road duty to work on the roads, as prescribed in existing general laws, but in such counties the roads shall be worked wholly by taxation, or by taxation in connection with road service, as such court may deem best. In any such county such court may reduce the number of days that persons liable to road duty may be required to work on the roads, but can never increase the number above five days in any one year. [Id. sec. 18.]

**Art. 6971. [4781] Superintendent to keep accounts.**—Each road superintendent shall keep an accurate account of all moneys received by him on account of the road or bridge fund, and pay the same over to the county treasurer within ten days after its collection, taking his receipt for the same. [Id. sec. 19.]

**Art. 6972. [4782] Parties misplacing bridge shall be liable, etc.**—Any person who shall knowingly or wilfully destroy, injure or misplace any bridge, culvert, drain, sewer, ditch, signboard, mile post or tile, or anything of like character, placed upon any road for the benefit of the same, shall be liable to the county and any person injured for all damages caused thereby. [Id. sec. 22.]

**Art. 6973. [4783] Delinquent poll tax payers to be subject to three days' road duty.**—The county superintendent or the precinct superintendent, as the case may be, shall obtain from the tax collector of their counties as soon after the first day of January of each year as practicable, and before the first day of May thereafter, a full list of the delinquent poll tax payers of such county for the previous year, and the persons so appearing on said list and who are such delinquent poll tax payers shall be subject to road duty for the period of three days during such year, and they shall be summoned, as in other cases, to work the roads in the road district or precinct in which such person may reside; and the performance of the road service provided for in this article shall not exonerate the persons from any other road duty to which the persons performing the same may be subject, but this shall be taken as cumulative. The persons required to do road duty under the provisions of this article shall be subject to prosecution as provided in this chapter or other law of this state, and subject to the same liabilities and punishments provided for in other cases for failing to appear or do good work, when summoned so to do, as provided for by this chapter or other law of this state, and all such laws shall apply to parties required to work under the provisions of this article. And when they are convicted for so failing to work the roads, shall satisfy the fine and costs as in other misdemeanor convictions. But any person summoned to work on the



road under the provisions of this article may satisfy such summons and be relieved from such duty by paying to the county road or precinct superintendent, as the case may be, three dollars; one-third of which sum shall go to the free school fund, and the balance to the road and bridge fund. [Id. sec. 23.]

**Art. 6974. [4784] "Roads," "work" and "working" defined.**—The term, "road," as used in this chapter, includes roadbed, ditches, drains, bridges, culverts, and every part of such road, and the terms, "work" and "working" include the opening and laying out of new roads, widening, constructing, draining, repairing, and everything else that may be done in and about any road. [Id. sec. 24.]

**Art. 6975. [4785] Law cumulative.**—This law shall be cumulative of all other general laws on the subject of roads and bridges not in conflict herewith, and where not otherwise provided herein such general laws shall apply; but in case of conflict with other general laws the provisions of this chapter shall govern. [Id. sec. 25.]

**Art. 6976. Counties exempt.**—The counties of Grayson, Travis, Houston, Dallas, Limestone, Fayette, Galveston, Cherokee, Wood, Rains, Harrison, Shelby, San Augustine, Sabine, Newton, Jasper, Tyler, Morris, Victoria, Refugio, Aransas, Calhoun, Jackson, De Witt, Hopkins, Comal, Upshur, Blanco, Camp, Gillespie, Lavaca, Parker, Panola, Milam, Lamar, Hill, Smith, Gregg, McLennan, Harris, Washington, Titus, Cass, Franklin, Delta, Angelina, Nacogdoches, Bowie, Montgomery, Trinity, Red River, Henderson, Van Zandt, Tarrant and Jack counties are exempted from the provisions of this chapter; provided, that the county commissioners court of Dallas and Collin counties may accept and adopt the provisions of this Act in lieu of the special acts for Dallas, Collin, Grayson and other counties, if in their judgment its provisions are better suited to Dallas and Collin counties than the said special laws. [Acts 1911, p. 234, sec. 1.]

**Note.**—Acts 1911, p. 234, sec. 1, enacts that Acts 1909, ch. 134 (p. 82), be amended so as to read as above. Said chapter 134 was contained in Rev. Civ. St. 1911, art. 6976, which is superseded hereby.

See Appendix for list of local road laws.

## CHAPTER SEVEN

### ROAD LAW FOR COUNTIES HAVING FORTY THOUSAND INHABITANTS OR OVER

[For list of local road laws, see Appendix.]

<p><b>Art.</b> 6977. Members of commissioners' court to be ex officio road commissioners; their duties; bonds.</p> <p>6978. Their powers.</p> <p>6979. May work convicts.</p> <p>6980. Shall have control over overseers.</p> <p>6981. Shall direct work in progress.</p> <p>6982. May cause road hands to be called out, when; credit allowed for use of teams; penalty for non-compliance with instructions.</p> <p>6983. Persons exempted from road duty, how.</p>	<p><b>Art.</b> 6984. May take material for road work; compensation; condemnation proceedings.</p> <p>6985. County not to give bond; compensation of commissioners appointed to condemn.</p> <p>6986. Penalty for failure to comply with call for road duty.</p> <p>6987. Compensation of commissioners.</p> <p>6988. This chapter cumulative.</p> <p>6989. Certain counties excepted.</p>
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**Article 6977. Members of commissioners' courts to be ex officio road commissioners; their duties; bond.**—In all counties of this state, as shown by the United States official national census of 1900 to contain as many as forty thousand inhabitants, the members of the commissioners' court shall be ex officio road commissioners of their respective precincts; and under the direction of the commissioners' court shall have charge of the teams, tools and machinery belonging to the county

and placed in their hands by said court; and it shall be their duty, under such rules and regulations as the commissioners' court may prescribe, to superintend the laying out of new roads, the making or changing of roads and the building of bridges. Each of the county commissioners shall, before entering upon the duties of road commissioner, execute a bond of one thousand dollars, with two or more good and sufficient sureties, payable to the county judge, and his successors in office and to be approved by the county judge for the use and benefit of the road and bridge fund, conditioned that he will perform all the duties required of him by law, or by the commissioners' court, and that he will account for all money or other property belonging to the county that may come into his possession. [Acts 1901, p. 277, sec. 1.]

**Art. 6978. Their powers.**—The commissioners' court shall have full power and authority, and it shall be their duty, to adopt such system for working, laying out, draining and repairing the public roads as they may deem best, and, from time to time, said court may change their plan or system of working. The commissioners' court shall have the power to purchase such teams, tools and machinery as may be necessary for the working of public roads. Said court shall have the power to construct, grade, or otherwise improve any road or bridge by contract. In such cases, said court or county judge may advertise in such manner as said court may determine for bids to do the work; and the contract shall be awarded to the lowest responsible bidder, who shall enter into a bond, payable to the county judge and his successors in office, for the use and benefit of the road and bridge fund, with two or more good and sufficient sureties, to be approved by the commissioners' court, and in such sum as said court may determine, for the faithful performance of the terms of said contract, but said court shall have the right to reject any or all bids. At the time of making any such contract the court shall direct the county treasurer to pass the amount of said contract to a particular fund for that purpose; and the treasurer shall keep a separate account of said fund, and the same shall not be used for any other purpose, and can only be paid out on the order of said court; and the said court shall have authority to employ any hands and teams on the public roads under such regulations and for such prices as they may deem best. [Id. sec. 2.]

**Art. 6979. May work convicts.**—The commissioners' court shall require all male county convicts, not otherwise employed, to labor on the public roads, under such regulations as they may prescribe, and each convict so worked shall receive a credit of fifty cents on his fine first, and then on the costs, for each day he may labor. The commissioners' court shall at each term allow the officers and witnesses such amount of their costs as have been satisfied in full by labor of such convicts, for the arrest and conviction of said convicts as it may deem best, not to exceed one-half of such costs; which amount shall be paid to the officers and witnesses out of the road and bridge fund on the warrant of the county judge; provided, that this shall not be so construed as to relieve any convict from the payment of all costs for which he may be liable under the laws of this state. The commissioners' court may grant a reasonable commutation of time for which a convict is committed as a reward for faithful service and good behavior; provided, that such commutation shall in no case exceed one-tenth of the whole time. The commissioners' court may provide the necessary houses, prisons, clothing, bedding, food, medicine, medical attention and superintendents and guards for the safe and humane keeping of the convicts. The commissioners' court may provide such reasonable regulations and punishment as may be necessary to require such convicts to perform good work, and to provide a reward not to exceed ten dollars, to be paid out of the road and bridge fund, for the recapture and delivery of any escaped convict, to be paid

to any person other than the guard or person in charge of such convict at the time of his escape. [Id. sec. 3.]

**Art. 6980. Shall have control of overseers.**—Each road commissioner shall have control of all road overseers in his precinct, and shall deliver to each of them such teams, tools and machinery necessary in working the roads in the precinct of said overseer, so far as he has been supplied therewith by the commissioners' court, taking a receipt therefor, specifying each item and giving its value, which receipt shall be a full answer for the liability of the road commissioner, and shall fix the liability of the road overseer; and the road commissioner or road overseer, who shall have been intrusted with any teams, tools or machinery belonging to the county, shall be liable for all damages that may occur to the same while in his possession caused by his negligence or want of due care of same. It shall be the duty of the road overseer, when he has finished work on his road, to return to said road commissioner all teams, tools and machinery received from him and take up the receipt given therefor. [Id. sec. 4.]

**Art. 6981. Shall direct work.**—It shall be the duty of each county commissioner, when acting as road commissioner, to inform himself of the condition of the public roads in his precinct, and shall determine what character of work shall be done on said roads, and shall direct the manner of grading, draining or otherwise improving the same, which directions shall be followed and obeyed by all road overseers of his precinct. [Id. sec. 5.]

**Art. 6982. May cause road hands to be called out, when; credit allowed for use of teams; penalty for non-compliance with instructions.**—The road commissioner may require each road overseer in his precinct to call out the hands in such numbers as may be sufficient to perform the work, but no road hand shall be required to work exceeding five days in any one year, unless the term of service as now provided by law shall be extended beyond that time; and provided, that all road hands in a particular road precinct shall as far as practicable be worked a uniform time. Each road overseer shall have full control of all road hands in his precinct, and shall see that each hand, when called out, shall perform a good day's work; and, if any hand when so called out shall fail or refuse to do a good day's work, or to work in the manner the overseer may direct, he shall be liable to the same penalty as if he had failed to appear in obedience to the summons. And the road overseer may, when he deems expedient or when so directed to do by the road commissioner of said commissioner's precinct, and at the time of notifying any hand to work upon the road, also summon such hand as may be the owner of a team suitable for road work, to bring such team with him to be used in working upon the public roads during such time as the hand may be notified to work upon the public roads; and, after such notice given, if such hand shall fail or refuse to bring his team with him as notified to do, he shall be liable to the same penalty as if he had failed to appear in obedience to the summons; provided, that any hand for so doing shall be credited with and allowed two and one-half days upon his time for which he is liable for road duty for each day he may work in connection with and while furnishing such team, and one and one-half days for his team without such hand. [Id. sec. 6.]

**Art. 6983. Persons exempted from road duty, how.**—A person liable for road duty, who shall, on or before the first day of February of any year, pay to the county treasurer the sum of three dollars, shall be exempt from road duty for such year, beginning on the first day of February. The county treasurer shall receive and receipt for all money so paid him and place the same to the credit of the road and bridge fund, and he shall keep a separate account for each precinct from which it is

received. The county treasurer shall, on the third day of February, or as soon thereafter as practicable, furnish to each road commissioner a list of all persons in their respective precincts that have paid said sums, as provided in this article. [Id. sec. 7.]

**Art. 6984. May take material for road work; compensation; condemnation proceedings.**—When to the commissioners' court it may appear expedient to build, repair or maintain any public road in their county, the timber, earth, stone, gravel, or other necessary material, most convenient therefor may be used; but in such case the owner thereof shall be paid out of the road and bridge fund of such county a fair compensation for the same as may be agreed upon by the owner thereof, or his agent, and the commissioners' court; provided, however, that should said owner, or his agent, and the said commissioners' court fail to agree upon the compensation to be paid therefor, then the county, upon the order of said court, shall proceed to condemn the same in the same manner that a railroad company can condemn lands for right of way; and the same proceedings shall be had as would exist if the proceedings were by a railroad company, except as hereinafter provided. [Id. sec. 8.]

**Art. 6985. County not to give bond; compensation of commissioners appointed to condemn.**—The county shall not be required, in proceedings to determine the compensation to be paid for material to build, repair or maintain public roads, in any case to give bond for costs, and the commissioners appointed to condemn such property necessary as aforesaid shall receive for their services two dollars for each and every day that they may be necessarily engaged in the performance of their duties as such commissioners, to be paid out of the road and bridge fund on the order of the commissioners' court, and the compensation awarded by said commissioners for the necessary material shall be paid to the owner or deposited with the county treasurer to the credit of such owner, and when so paid or deposited the county shall have the right to enter upon and use said material. If the owner of such material, or said county, is not satisfied with the compensation awarded said owner, he or said county may appeal therefrom as in cases of appeal in proceedings by railroad companies to condemn right of way. [Id. sec. 9.]

**Art. 6986. Penalty for failure to comply with road duty.**—If any person liable to work upon the public roads, after being legally summoned, shall fail or refuse to attend, either in person or by able and competent substitute, or fail or refuse to furnish his team or tools at the time and place designated by the person summoning him, or to pay to such road overseer the sum of one dollar for each day he may have been notified to work on the public roads, or to pay to such overseer the sum of one dollar and fifty cents for each day he may have been notified to furnish his team for road work, or having attended shall fail or refuse to perform good service, or any other duty required of him by law, or the person under whom he may work, or if any one shall fail to comply with any duty required of him as provided by law, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof, punished as provided in the Penal Code. [Id. sec. 10.]

**Art. 6987. Compensation of commissioners.**—Each county commissioner, as compensation for his services as ex officio road commissioner of his precinct, shall be entitled to such sum as may be prescribed by the commissioners' court of his county, not to exceed four dollars per day for the services actually performed; provided, that he shall not receive more than fifty dollars per month; which amount shall be paid monthly out of the road and bridge fund, when the account shall have been allowed by the commissioners' court; and said court shall not approve said account unless the road commissioner presenting it shall sign an

oath that the account is just, true and unpaid, and specifying the number of days' work actually performed by him, nor shall he be entitled to any other or further compensation for supervising public roads, except what is allowed by this act. [Id. sec. 11.]

**Art. 6988. This chapter cumulative.**—The provisions of this chapter shall be held and construed to be cumulative of all general laws of this state on the subject of roads, when not in conflict therewith, but in case of such conflict this chapter to control; and provided, this chapter shall not be in operation in any county of this state, unless the commissioners' court thereof in their judgment may deem it advisable, and then only by an order of the commissioners' court when all the members are present, made at some regular term thereof, accepting the provisions of this chapter. Such order shall be entered on the minutes of said court, and shall not be void for want of form, but a substantial compliance with the provisions thereof shall be sufficient. [Id. sec. 12.]

**Art. 6989. Certain counties excepted.**—The provisions of this chapter shall not apply to the counties of Fannin, Lamar, Grayson, Collin, Hunt, Dallas and Bell. [Id. sec. 13.]

## CHAPTER EIGHT

### DRAINAGE OF PUBLIC ROADS

Art.	Art.
6990. What roads are public; commissioners to cause drains to be constructed.	7002. Appeals.
6991. Shall not change natural course of streams.	7003. Trial on appeal.
6992. Petition.	7004. Appropriation; construction.
6993. Notices.	7005. Special overseer employed, when; duties, powers and compensation.
6994. Protests, hearing.	7006. List of assessments; certificates to issue.
6995. Surveyor employed.	7007. County treasurer to collect on certificates.
6996. Survey made; report.	7008. Enforcement by suit.
6997. Jury of viewers; duties; report.	7009. Operates a lien.
6998. Oath of viewers.	7010. Compensation of viewers and surveyor.
6999. Assessment of abutting owners.	7011. Abutting owners may construct lateral ditches.
7000. Action of commissioners' court on protests final.	7012. This act cumulative.
7001. Objections and claims submitted in writing to viewers; failure to submit same a waiver of claim.	

**Article 6990. What roads are public; commissioners to cause drains to be constructed.**—For the purpose of this chapter, all public roads and highways that have been heretofore, or that may hereafter be, laid out and established agreeable to law, and all roads and highways that have been opened to and used by the public for a period of ten years prior to March 25, 1897, and which have not been discontinued or closed to the use of the public agreeably to law, are hereby declared to be public roads.

The commissioners' court of any county in this state, at any regular session thereof, may, in the manner hereinafter provided, and the said court shall have power to cause to be constructed and maintained, as hereinafter provided, ditches, drains and watercourses on and within the exterior lines of all public roads situated within any of the said counties, sufficient in capacity to carry off and into the natural waterways of the county, all surface water reasonably adjacent and liable to collect in said ditch, drain, or watercourse from natural causes, or by means of the construction of private lateral ditches as hereinafter provided for, and shall also have power to construct, in connection with such drain or watercourse any side, lateral, spur or branch ditch or watercourse necessary to the accomplishment of the purposes of this act; provided, however, that no ditch, drain or watercourse shall be constructed along

any public road without there being constructed, at the same time, a ditch, drain, or watercourse as an outlet to a natural waterway, sufficient in capacity to carry off all water that may collect therein; provided, further, that the word, "ditch," in this chapter hereafter shall be construed to embrace any ditch, drain, or watercourse that may be constructed under the provisions of this act. [Acts 1897, p. 66, secs. 1 and 2.]

**Burdens on streets and highways for sea walls.**—See Title 83, Chapter 3.

**Art. 6991. Shall not change natural course of stream.**—No road overseer, or any court, shall, on petition or otherwise, have the power to change the natural course of any branch, creek or water stream, but such volume of water shall always enter and cross said road at its natural crossing; and overseers shall always, in draining their roads, provide a culvert sufficiently broad and tall to permit said stream to flow at high tide, from its intersection with said road, across its natural outflow at the opposite natural channel. [Id. sec. 21.]

**Art. 6992. Petition.**—Before the commissioners' court of such county shall have the power to order the construction or establishment of any ditch, drain, or watercourse, provided for in this chapter, there shall be filed with the county clerk of the county court of said county a petition signed by at least one hundred taxpayers and voters of said county, which petition shall set forth the necessity and availability for such drainage system, and the number of miles of public roads within such county, as accurately as the same may be known, and as near as practicable, the width and depth required for the ditches to be constructed along the first class roads of the county. Said petition shall, also, separately state the name and location of each of the natural waterways of such county crossed by each of the first-class public roads of the said county, and the distance of said natural waterways, one from the other, along said road; said petition shall also state the names and residences, if known, of the owners of the lands adjacent to each of said first class public roads, and within one mile thereof, and, if unknown, the same shall be stated therein. [Id. sec. 3.]

**Art. 6993. Notices.**—Upon the filing of said petition with the clerk of the county court, he shall issue five notices in writing, containing a brief statement of the contents of said petition, commanding all persons interested to appear at the next regular term of the commissioners' court of such county and contest the same. One of said notices shall be posted at the court house door of such county, and one each at four other public places in such county, no two of which shall be in the same town or city, for twenty days prior to the first day of the next regular term of the commissioners' court after the issuance thereof. Said notices shall be posted by the sheriff of the county, who shall make due returns to the clerk of the county court of such notices, on or before the said first day of the term; and for such services the sheriff shall receive a fee of three dollars, and the clerk shall receive a fee of one dollar and fifty cents. [Id. sec. 4.]

**Art. 6994. Protests, hearing.**—At the next regular term after the filing of the petition and issuance of notices, the commissioners' court shall hear and determine the same in connection with all protests, remonstrances or objections thereto; and, if they find that the adoption of the drainage system provided for herein is necessary, advisable, or for the public benefit, or for the best interest of the county, the said court shall so order, and the order shall be entered at length upon the minutes of the court, and become a part of the record thereof, and the same shall recite the time, character, and manner of service of notice; and, if it appears therefrom that notice has been given as provided for herein, the said order shall be final, and thereafter no question shall be raised

as to the power of the court to hear and determine said application. [Id. sec. 5.]

**Art. 6995. Surveyor employed.**—At the same or any succeeding term of the commissioners' court after the entry of the order adopting the drainage system provided for herein, the commissioners' court shall employ a competent surveyor, who shall be an engineer, to run a line of levels along the public roads of the county, and to measure the same from the beginning to the terminus of said road, and to measure the distance of each waterway crossed by said roads from the beginning point, together with the frontage of each tract of land abutting on said road, and also the distance from said road of any adjacent natural waterway, with line of levels thereto; provided, that the said survey and the drainage system herein provided for shall be first applied to the first class roads of such county, and thereafter to roads of the second and third class; and provided, further, that nothing herein shall be construed to prohibit the said court from constructing one or more ditches at the same time, as the financial condition of the county will permit. [Id. sec. 6.]

**Art. 6996. Survey made; report.**—The surveyor shall, as soon as practicable after his employment, proceed to make an accurate survey and system of levels as provided for in the preceding article, and shall cause stakes or monuments to be placed along said line at intervals of one hundred feet, together with such intermediate stakes as may be necessary, numbered progressively, and shall establish permanent bench marks along said lines at intervals of one mile or less, as may be necessary, and shall establish, by stake or monument of a different character and appearance from all other stakes or monuments, the highest point upon said road between each of the natural waterways crossed by the road; said surveyor shall also measure and establish, by suitable marks, the frontage of each tract of land abutting on said road; and, if there be a natural waterway adjacent to the line of said road and ditch and the same is necessary to be utilized as an outlet for the water at any point on said ditch, the surveyor shall measure the distance to same, and run the line of levels thereto, at the nearest practicable point on said road and ditch. He shall prepare a map showing the location of said ditch or ditches, together with the position of stakes or monuments with numbers corresponding with those on the ground, and the position of bench marks, with their elevations referred to an assumed or previously determined datum. Said map shall also show the lines and boundaries of adjacent land, and the courses and distances of any adjacent watercourse, together with a profile of the line of the ditch, which shall show the assumed datum and the grade line of the bottom of the same, and the elevation of each stake, monument, or other important feature along the line, such as top of banks, and bottom of all ditches or watercourses, and surface of water, top of rail, and bottom of tie, foot of embankment, bottom of borrow pits of all railroads. And said map, or the explanation accompanying the same, shall, in tabular form, give the depth of cut, width at bottom and width at top, at the source, outlet, and at each one hundred feet stake or monument to said ditch, drain or watercourse. Said map, or the explanation accompanying the same, shall show the total number of cubic yards of earth to be excavated and removed from said ditch between each natural waterway into which the water is to be conveyed, and an estimate of the cost of each portion of the said ditch or ditches lying between natural waterways crossed by said road, together with an estimate of total cost of the whole work. The surveyor shall, as soon as the survey is completed, prepare and file, together with his report and map as herein provided for, specifications in detail for the execution of the same; and, whenever in the opinion of the surveyor it may be advantageous to run said

ditch underground through drainage tiles, he shall so state in said report, map and specifications, together with the statement of the locality of said underground ditch, and length thereof, and the dimensions or character of tiling or other material required therefor. The survey, report, map, explanation and estimate herein provided for shall be made and filed with the county clerk of the county by the surveyor as soon after his employment as may be practicable, having in view an accurate and complete report upon the physical conditions to be met in the construction of said ditch or ditches. [Id. sec. 7.]

**Art. 6997. Jury of viewers, duties; report.**—At any regular or called session of the commissioners' court after the filing of the report, map, explanation, specifications and estimate of the surveyor, provided for in the preceding article, the court shall appoint a jury of five freeholders of the county not interested directly in the construction of the proposed work as a land owner adjacent to or abutting on said ditch or ditches, and not of kin to any of the parties so directly interested therein, who shall constitute a jury of viewers who shall meet at a time and place to be specified by the said court in the order appointing them; and it shall be the duty of the county clerk thereupon to issue to the said viewers a certified copy of the petition and order of the court, together with the original report, map, explanation, specifications and estimate of the surveyor; and, if said jury of viewers shall fail or refuse from any cause to perform the duties required under such appointment, or if their report, from any cause should not be adopted, the court may, at any succeeding term, appoint another jury of viewers, whose appointment and duties shall be the same as required in the first instance. The jury of viewers shall proceed at the time and place specified in the order of the court appointing them, after having given notice to each abutting land owner, and owner of land within one mile of said ditch, as herein-after provided, and after viewing the line of the proposed ditch, and after hearing all protests, claims and remonstrances offered, they shall take the several partial estimates, and the estimate of the total cost of the work as made by the surveyor as a basis, and they shall set apart and apportion to each parcel of land abutting on said road and ditch, or within one mile of the same, and to each person, firm or corporation owning the same, the proportionate share chargeable to such tract of the one-half of the total cost of the said ditch, drain and watercourse, taking into consideration the relative amount of benefit derived by said land from the construction thereof; and they shall assess the amount of damages or compensation due to each land owner through whose land any spur, branch, or lateral ditch, is or may be constructed under the order of appointment, which sum shall be paid by the county before the opening of such ditch is begun; provided, that said jury of viewers shall have lines run parallel to the line of said ditch at a distance of one mile upon either side of the same; and no lands lying outside of said lines shall be assessed with any portion of the cost of such ditch and drain, but all lands and tracts of land lying within said lines may be assessed their proportionate share of said one-half of the total cost, taking into consideration the amount or value of benefits derived by said lands, or tracts of land, from the construction of such ditch. The jury of view shall make a report to the commissioners' court, under oath, as soon as practicable after their meeting, signed by at least three of said jury, and duly verified under oath, and shall return with their report a description, as accurate and complete as may be, of each tract or parcel of land assessed by them, together with the number of acres and the name of the owner or owners thereof, and the amount by them assessed against each tract, and the owner thereof. The jury of viewers shall also return with their report the map, profile, explanation and estimates of the surveyor, together with a copy of the specifications; and the same shall be filed with the clerk, and shall become a public



record and be preserved as such, and the court shall act upon said report at the next regular or called term, and approve or reject the same; provided, that the court may appoint separate juries of view for each road and ditch to be constructed, if deemed desirable or of advantage to the public. [Id. sec. 8.]

**Inadequate damages.**—In a proceeding to condemn land for a ditch to drain a highway, a verdict assessing the value of the land at a certain sum held clearly inadequate, and should be set aside. *Palmer v. Harris County*, 29 C. A. 340, 69 S. W. 229.

**Art. 6998. Oath of viewers.**—The said jury of viewers, before proceeding to act as such, shall take the following oath before an officer authorized to administer the same, to-wit: "I do solemnly swear that I am not directly interested in the construction of the proposed ditch, either as the owner or otherwise, of adjacent land lying within one mile thereof, and that I am not of kin to any person who is so interested. I further swear that I have no bias or prejudice towards any person directly interested in said ditch, and that I will assess the amount of expense due on and by all adjacent lands lying within one mile of said ditch, according to law, without fear, favor, hatred or hope of reward, to the best of my knowledge and ability. So help me God." [Id. sec. 9.]

**Art. 6999. Assessment of abutting owners.**—The said jury of view, as provided for in this chapter, shall issue a notice in writing to the land owner of each abutting tract along said ditch, and to each land owner, any part of whose land lies within one mile of the line of said ditch, or to his or their agent or attorney, of the time and place when they will assess the one-half of the expense incidental to the construction of the ditch or ditches specified in the order of appointment; which notice shall be served upon such owner, his agent or attorney, at least five days before the day named therein; said notice may be served by any person competent to testify; and a duplicate of said notice, together with the returns of said service, shall be returned and filed with the report of the jury of viewers. If such owner is a non-resident of the county, and has no resident agent or attorney therein, the notice shall be given by publication in a newspaper published in the county, as notices are required to be given to non-resident defendants in actions in the district courts; and said notice shall be complete after four weeks publication thereof prior to the date named for the meeting of the jury of view; and at any time thereafter the jury of viewers may proceed to assess the proportionate part of such expense against said non-resident land owner, and the land owned by him subject thereto. The cost of such publication shall be paid by the county, on an order of the commissioners' court. [Id. sec. 10.]

**Art. 7000. Action of commissioners court on protests final.**—Any person who may be affected by such ditch, drain, or water course, or any citizen of the county, shall have the right to appear before the commissioners' court on the hearing of the petition for the establishment of the drainage system, and shall have the right to be heard upon their protest, remonstrances and objections thereto; but the action of the court thereon shall be final; and, in case the court shall refuse to adopt the drainage system provided for herein, no application therefor shall be filed or heard by said court for one year thereafter. [Id. sec. 11.]

**Art. 7001. Objections and claims submitted in writing to viewers; failure to submit same a waiver of claim.**—Any person whose land may be affected by such ditch, drain or water course shall have the right to appear before said viewers and freely express their opinions on all matters pertaining to the assessment of expense against them; and the owner of any such lands may at the time stated in such notice, or previously thereto, present to the jury a statement in writing of any objections to, or dissatisfaction therewith, and any claim for damages which he may have sustained by reason of the making of said ditch or

drain; and a failure to make such objection or claim for damages or compensation in writing as herein specified shall be deemed a waiver of all claim or right thereto, all of which said claim or objection shall be returned to the commissioners' court in connection with the report of the viewers; provided, that any adjacent land owner shall have the right to appear before and be heard by the commissioners' court on his protest or remonstrance or claim against the action of the jury of viewers. [Id. sec. 12.]

**Art. 7002. Appeals.**—Any person, firm, or corporation, aggrieved by the assessment of expense for construction of any ditch or ditches by the jury of view, or any person, firm, or corporation, aggrieved by the assessment of damages or compensation allowed by the jury for land taken or applied to the construction of any lateral spur, or branch ditch, may appeal from the final order of the commissioners' court approving the report of said jury to any court within the county having jurisdiction of the amount of such assessment, by giving notice of appeal in open court and having the same entered as a part of the judgment of the court, and by filing, within ten days thereafter, a transcript of the proceedings had in the commissioners' court, with the justice or clerk of the court to which appeal is taken, together with an appeal bond with at least two good sureties, to be approved by such clerk or justice, in double the amount of the probable costs to accrue, conditioned that the appellant will prosecute his appeal to effect, and pay all costs that may be adjudged against him in said court; and, if the appeal is taken from an assessment of expense levied by the jury of viewers against the appellant, the said appeal shall be heard upon the following issue, to-wit: Whether the assessments made against the appellant for the construction of such ditch are in proportion to the benefits to be derived therefrom. And if the appeal is taken from an assessment of compensation made by the jury of viewers in favor of appellant for land taken and applied to the construction of such ditch, or any portion of the same, the said appeal shall be heard upon the following issue, to-wit: Whether the assessment of compensation made by the jury is adequate to the injury occasioned and to the value of the land. [Id. sec. 13.]

**Art. 7003. Trial on appeal.**—In the trial of all cases so appealed from the order of the commissioners' court, the burden of proof shall rest upon the appellant; and the court or jury trying the cause shall state the correct amount of expense chargeable to appellant, or the correct amount of compensation due to appellant, as found by them, and the same shall be entered as the judgment of the court thereon, and from such judgment no further appeal shall be allowed to either party; and, if the verdict of the jury shall find the appellant chargeable with a less amount of expense, or that the appellant is entitled to a greater amount of compensation as damages than was found by the jury of viewers, the costs shall be adjudged against the county; otherwise the same shall be adjudged against the appellant. Within five days after the entry of such judgment, the clerk or justice shall issue and return to the commissioners' court a certified copy of such judgment, to be filed with the papers pertaining to such ditch, and the same shall be entered by the commissioners' court as the judgment of said court, and thereafter the appellant shall be holden for, or claim, as the case may be, the amount specified in said judgment. [Id. sec. 14.]

**Art. 7004. Appropriation; construction.**—The commissioners' court of such county may, at the next term thereof, after the filing of the report of the jury of viewers and the entry of the order approving the same, if the report be approved, make an order setting aside such portion of the road and bridge fund, and such portion of the special road and bridge fund, if any, as may be necessary for the construction of the ditch or ditches described in the report of the jury of viewers, and shall

also enter an order to the overseer or overseers of the road adjoining said ditch or ditches, or to the supervisor of the road, or to the road commissioner, commanding him to construct such ditch or ditches in accordance with the specifications of the surveyor, which shall be turned over to him for his information, and that the earth taken therefrom shall be used in making a raised road adjoining said ditch or ditches; and the court shall further order that all the road hands apportioned to said road, and that any teams, tools or materials belonging to the county, and necessary to the execution of such work, be apportioned to said overseer, supervisor, or commissioner, for the completion thereof; and shall authorize such overseer, supervisor, or commissioner, to employ such additional labor and teams, and to purchase tools and implements as may be necessary, to be paid for out of the road and bridge fund set aside therefor, on the order of the commissioners' court, and the said order shall further show the amount of compensation to be allowed to the said overseer, supervisor, or road commissioner for his services. [Id. sec. 15.]

**Art. 7005. Special overseer employed, when; duties, powers and compensation.**—The commissioners' court may employ some suitable and competent person, other than the overseer, road commissioner or supervisor, if to the best interest of the county, and such person shall have the same powers, duties, and responsibilities as provided for overseers, road commissioners, and supervisors in the preceding article, and the court shall enter an order showing the amount of compensation to be paid him for his services. [Id. sec. 16.]

**Art. 7006. List of assessments; certificates to issue.**—At the same or at any succeeding term after the entry of the order for the construction of the ditches and roadway, as provided in article 7004 of this chapter, the commissioners' court shall make and enter upon the minutes of the court a list showing the names of the owners, amounts due, the tract of land, original grantees, number of acres covered by each assessment of expense, as made and reported by the jury of viewers, and as approved by the court; and the county clerk shall issue a certificate against each person on said list showing the amount of such assessment, and for what ditch or road the same was issued, and the tract of land on which said amount was assessed; which certificate shall be signed by the county judge in open court, and attested under the hand and seal of the said county clerk, which fact shall be noted upon the minutes of said court. [Id. sec. 17.]

**Art. 7007. County treasurer to collect on certificates.**—The county judge shall deliver the certificate to the county treasurer, taking his receipt therefor, which shall be filed with the papers and archives concerning such ditch; and the county treasurer shall collect the sums due on such certificates, and deposit the amount so collected to the credit of the road and bridge fund. [Id. sec. 18.]

**Art. 7008. Enforcement by suit.**—In case any person against whom any such certificate may be issued shall fail or refuse to pay the same to the county treasurer on demand therefor, such treasurer shall turn same over to the county attorney, who shall at once file suit thereon, and have the lien on said land, herein provided for, foreclosed, or for a personal judgment, as may be lawful. [Id. sec. 19.]

**Art. 7009. Operates a lien.**—All assessments, sums, and charges by the said viewers, or order of court, assessed against any lands or land and the owner or owners thereof, shall be a lien thereon, unless prohibited by the constitution of this state, and the same shall be collected in the manner provided in the preceding article; and any damages for compensation awarded by said jury of viewers to any land owner, on the order of the court, shall be paid out of the county treasury on the

order of said court, from the fund set aside for the construction of such ditch or ditches. [Id. sec. 20.]

**Art. 7010. Compensation of viewers and surveyor.**—The said jury of viewers shall each receive the sum of three dollars per day as compensation for their services for each day so actually engaged; and said surveyor and engineer shall receive as compensation such sum as may be allowed by the commissioners' court. [Id. sec. 21.]

**Art. 7011. Lateral ditches.**—Any owner of lands or tracts of land abutting on said road or ditch, or the owner of any tract of land lying wholly or partially within one mile of such road or ditch, may construct lateral drainage ditches and connect the same with such main ditch or ditches as shall be constructed under the provisions of this chapter, provided the same be done at his own cost. [Id. sec. 22.]

**Art. 7012. This chapter cumulative.**—The provisions of this chapter shall be cumulative to all other provisions of law, and shall not be held to repeal any existing law upon the subject of drainage. [Id. sec. 23.]

## CHAPTER NINE

### BRIDGES

[For taxes for bridge purposes, see title "County Finances," Title 29, Chapter 1.]

Art. 7013. Overseers shall have bridges built, when, etc.	Art. 7017. When stream forms line of counties, expense of bridge to be joint.
7014. Commissioners' court, power to have bridges built.	7018. Tolls assessed to pay bonds.
7015. May contract for building of toll bridges.	7019. Coast counties may lease, etc., causeways, etc.
7016. Shall take security from contractors to keep bridges in repair, etc.	7020. Funds available for the purpose.

[In addition to the notes under the particular articles, see also notes of decisions relating to bridges in general, at end of chapter.]

**Article 7013. [4791] Overseer shall have bridges built, when, etc.**  
—Overseers of roads shall cause bridges to be erected across all such water courses and other places as may appear to them necessary and expedient; and should there be a water course or other place that requires a bridge, dividing any two road precincts, the overseer of each of such precincts, together with their hands, shall meet at the same time and place to construct such bridge, and the overseer chosen by a majority of the hands present shall superintend the building of such bridge until finished. [Act July 29, 1876, p. 67, sec. 20.]

Duties of cities to construct.—See Title 22, Chapter 4.

Bridges over drains.—See Title 47, Chapter 4.

**Art. 7014. [4792] Commissioners' court, power to have bridges built, etc.**—The commissioners' court shall have full power and authority to cause all necessary bridges to be built and kept in repair in their respective counties, and to make appropriations of money of the county therefor, when necessary. [Act July 22, 1876, p. 51, sec. 4.]

**In general.**—A county is authorized by this article to cause all necessary bridges to be built. Where plans for a bridge have been adopted by the commissioners' court and bids asked for, and afterwards other plans have been substituted for the original without the knowledge of the county authorities and are on file when the contract is made and the contract is made with reference to the "plans on file" the county is bound by the contract in the absence of proof of fraud on the part of the other party to the contract as to the illegal substitution. *Webb County v. Hasie*, 52 C. A. 16, 113 S. W. 188.

**Rights on repairing bridges over canals.**—Under this article and Art. 5006, on a canal company's refusal to comply with its duty under Art. 5006, the county can make the repairs and enforce reimbursement from the company therefor without first applying for mandamus to compel the company to make them. *Orange County v. Cow Bayou Canal Co.* (Civ. App.) 143 S. W. 963.

**Art. 7015. [4793] May contract for building of toll bridges.**—The commissioners' courts through whose county large creeks or water courses shall pass, over which it may be too burdensome for the overseers, with the hands apportioned to them to work on roads, to build bridges, may contract with a proper person or persons to build a toll bridge, for which the court shall lay the toll to be levied on all persons, cattle, horses, carriages, etc., passing over the same, to be granted to the undertaker for such a number of years as the said court may think proper, not to exceed ten years; and the builder or builders and their successors shall keep the bridge in constant repair during the term of the contract, and in default thereof shall forfeit all right and claim to the toll of such bridges. [Act Dec. 20, 1836; P. D. 5244.]

**Art. 7016. [4794] Shall take security from contractor to keep bridges in repair, etc.**—The commissioners' court, before granting a license to any person to build a toll bridge, shall take bond in the sum of one thousand dollars, with good and sufficient sureties, conditioned that the undertaker or undertakers shall build and keep in constant repair the bridges so contemplated for the term of years agreed upon between the undertaker or undertakers and the court; and, if any person or persons shall sustain damages in consequence of the owner or keeper of any toll bridge not having complied with the conditions of his bond, the person or persons so damaged may bring an action of debt against the owner or keeper of such toll bridge, on his or their bond, in the county in which such license was granted, and recover judgment for the damages so sustained. [Id. P. D. 5245.]

**Art. 7017. [4795] When streams form dividing line of counties expense of bridge to be joint, etc.**—Whenever any stream is the division line between counties, or when two or more counties are jointly interested in bridges, it shall be lawful for the counties so divided or interested to jointly erect bridges over said dividing stream, upon such equitable terms as the commissioners' court of each county interested may agree upon. [Act Nov. 28, 1871, p. 42; P. D. 5883.]

**Art. 7018. [4796] Tolls assessed to pay bonds, etc.**—Whenever any county bonds have been or may hereafter be issued for the purpose of building bridges, it shall be lawful for the commissioners' courts of the county or counties interested to assess and collect tolls on said bridges sufficient to pay the interest on bonds so issued; and, if thought proper, sufficient to pay the interest and create a sinking fund with which to pay the principal at maturity, all of which shall be done under such rules and regulations as the commissioners' courts of the counties interested may prescribe. [Id. P. D. 5884.]

**Art. 7019. Coast counties may buy and lease causeways and bridges.**—The commissioners' court of any county bordering on the Gulf of Mexico that has within its limits an island that is separated from the mainland by a bay or arm of the sea, that is over one mile in width, shall have the right and authority to purchase a roadway upon and along any causeway and bridge that may be constructed across any such bay or arm of the sea, and to operate and maintain the same as a public highway; and said commissioners' court shall also have the right and authority to lease for a period not to exceed thirty years, a roadway upon and along any such causeway and bridge for a public highway, and to make such terms and conditions, and to pay such amounts of money as may be agreed upon with the company owning or operating such causeway and bridge. [Acts 1905, p. 424, sec. 1.]

**Art. 7020. Funds available for the purpose.**—For the purpose of paying for the purchase or lease of a roadway, as provided for in the preceding article, the commissioners' court shall have the right to levy and collect such taxes as are now or may hereafter be authorized by law,

and also to appropriate out of county revenue funds, levied and collected for county revenue purposes, such additional amounts as may be necessary, from time to time, to pay the obligations that may be incurred under the provisions of this chapter. [Id. sec. 2.]

DECISIONS RELATING TO BRIDGES IN GENERAL

**Prevention of injury to bridge.**—Owners of bridge over river held not entitled to cut apart log rafts too large to pass through bridge openings, in order to prevent injury to bridge. *Meadows v. Gulf, C. & S. F. Ry. Co.*, 48 C. A. 466, 107 S. W. 83.

## CHAPTER NINE A

### CAUSEWAYS ACROSS ARMS OF GULF OF MEXICO

Art. 7020a. Authority to purchase, build, operate, etc.	Art. 7020f. Purchase or condemnation of approaches.
7020b. Authority to lease right of way to cities and towns and railroad corporations.	7020g. Land under water, etc., granted.
7020c. Lessee corporation may contract; may issue bonds, etc.	7020h. Use of tracks by railroad, how charged for.
7020d. Statement of location to be filed.	7020i. Corporations may be formed; powers; tolls and charges.
7020e. Claimant's right to relate back to time of filing statement, etc.	7020j. Powers of railroad commission.
	7020k. Federal regulations.

**Article 7020a. Authority to purchase, build, operate, etc.**—Any person, corporation or association of persons is hereby authorized to purchase, build, construct, own, maintain, and operate a combination bridge, dam, dike, causeway and roadway across any arm of the gulf of Mexico, or inlet thereof, or any of the salt water bays, wholly within the limits of the state of Texas, for the purpose of providing a causeway, roadway or highway for vehicles, teams, pedestrians, railroads, and for every character of inland transportation. [Acts 1913, p. 331, sec. 1.]

**Art. 7020b. Authority to lease right of way to cities and towns and railroad corporations.**—That any person, corporation or association of persons, that may hereafter purchase, build or construct any combination bridge, dam, dike, causeway or roadway, under the provisions of this Act, shall have the right and are hereby authorized to lease right of way over said causeway, or on or over said causeway and highway to cities and towns for public utilities owned and operated by said cities and towns, and also to corporations for the construction by such corporation or corporations of a railroad track or tracks over which steam and electric trains and cars may be operated for the transportation of freight and passengers; such right not to be granted in such way as to obstruct or interfere with the use of such causeway, roadway or highway for pedestrians teams and vehicles, or to permit a monopoly. The said grant or lease of such rights of way to railroad corporations to be for such time and on such terms and conditions as may be prescribed by the railroad commission of Texas. [Id. sec. 2.]

**Art. 7020c. Lessee corporation may contract; may issue bonds, etc.**—Any corporation or corporations contracting as provided in section 2 [Art. 7020b] of this Act with owner or owners of said roadway, causeway or highway for the right of way over any part of said structure shall have the right to make and enter into any contract or contracts with said owner or owners subject to the approval of the railroad commission of Texas for the payment to the said owner or owners of all sums of money due thereunder, and to this end for this purpose shall have the right to issue and sell its or their bonds to the extent of the amount of such corporation or corporations obligations to the said owner or owners; provided that no such bond or bonds shall be issued by any railroad company or other corporation without first obtaining the

permission, order and approval of the railroad commission of Texas. [Id. sec. 3.]

**Art. 7020d. Statement of location to be filed.**—Every person, corporation or association of persons who has begun the construction or may hereafter construct any bridge, dam, dike, causeway, roadway or highway as herein provided, in, over and across any arm of the gulf of Mexico or inlet thereof, or any of the salt water bays, wholly within the limits of the state of Texas, shall within ninety days after this Act goes into effect, or within ninety days after commencement of such construction, file and cause to be recorded in the office of the county clerk of the county where the bridge, dam, dike, causeway or roadway, or the greater part thereof may be situated, or to which said county may be attached for judicial purposes, in a well bound book to be kept by said clerk for that purpose, a sworn statement in writing showing the location of said proposed dam, dike, bridge, causeway or roadway, the name of the same, the size of the same, the name of said stream or bay or arm of the gulf or inlet thereof or salt water bay over which said bridge, dam, dike causeway or roadway is to be built, the time when the work was commenced and the name of the owner or owners thereof, together with a map showing the location of said dam, dike, bridge, causeway or roadway. [Id. sec. 4.]

**Art. 7020e. Claimant's right to relate back to time of filing statement, etc.**—By compliance with the provisions of the preceding section the claimant's right to build and construct said dam, dike, causeway and roadway will relate back to the time of filing said statement and map, as provided in the preceding section, and the first in time shall be the first in right; provided, that any location of bridges, ferries or causeways heretofore made shall not be prejudiced by the passage of this Act; and provided, further, that the filing of said statement and map shall be considered as taking "formal action." [Id. sec. 5.]

**Art. 7020f. Purchase or condemnation of approaches.**—The person, corporation or association of persons, filing the statement and map as provided in this Act, may acquire by purchase or condemnation in accordance with the method now prescribed by law for condemnation by railroads all necessary approaches to said dam, dike, causeway or roadway that he or it deems necessary. [Id. sec. 6.]

**Art. 7020g. Land under water, etc., granted.**—The land under water to be occupied by such causeway bridge structure and approaches thereto is hereby granted absolutely to the person corporation or association of persons filing said statement and map and building said causeway or roadway, (and five hundred feet more on each side of such structure is also granted with the right only to dredge therefrom or beyond same for material for causeways if required in construction and maintenance). [Id. sec. 7.]

**Art. 7020h. Use of tracks by railroad, how charged for.**—The use of such tracks on such causeway structure by any railroad shall never be charged for by the railroad company or companies except as a part of the mileage of the road at statutory rates, and be otherwise according to the general laws of the state of Texas. [Id. sec. 8.]

**Art. 7020i. Corporations may be formed; powers; tolls and charges.**—Corporations may be formed and chartered under the provisions of this Act, and of the general corporation laws of the state of Texas, for the purpose of purchasing, constructing, owning, maintaining and operating bridges, dams, dikes, causeways, roadways and highways, with appurtenances thereto, over any arm of the gulf of Mexico or inlet thereof or any of the salt water bays, wholly within the limits of the state of Texas, to be used as highways for railroads, vehicles, teams, pedestrians and for all other means of inland transportation. All such

corporations shall have full power and authority to make contracts with other persons or corporations conveying to said other persons or corporations the right of easement of user of any portion of any bridge, roadway or causeway constructed in, over and across any arm of the gulf of Mexico, or inlet thereof, or any of the salt water bays wholly within the limits of the state of Texas, and shall have full power and authority to charge, demand and receive reasonable and just tolls and charges for the use of said portions of said bridge, causeway or roadway, but all said roadways or causeways or bridges so constructed shall remain open for trains, vehicles, teams, pedestrians, railroads and for all other means of inland transportation of freight and passengers, and the tolls and charges for the use of same shall be equal, just and uniform to all persons, corporations, cities and towns as herein provided without discrimination as to the amount charged, or delay in handling same. [Id. sec. 9.]

**Art. 7020j. Powers of railroad commission.**—Any corporation organized under the provisions of this Act shall be subject to the regulation and control of the railroad commission as to all the powers and provisions of this Act. [Id. sec. 9a.]

**Art. 7020k. Federal regulations.**—That nothing in this Act shall be construed to be in conflict with or contrary to federal regulations. [Id. sec. 10.]

## CHAPTER TEN

### FERRIES

Art. 7021.	Who are entitled to license to keep.	Art. 7032.	Where ferryman delays or refuses, etc., to pass persons.
7022.	Can not be kept for hire without license.	7033.	Duties of ferryman.
7023.	When stream is part of state boundary.	7034.	Where ferryman charges more than, etc.
7024.	License, how obtained.	7035.	Penalty for keeping, etc., without license.
7025.	Rates of ferriage shall be established.	7036.	Proceedings against sureties.
7026.	Change of rates.	7037.	Suit on bond.
7027.	When owner refuses to keep ferry at established rates.	7038.	Temporary license.
7028.	License and bond to be renewed annually.	7039.	License tax.
7029.	License not to issue until.	7040.	Where stream is part of county boundary.
7030.	Rates of, to be delivered to person obtaining license.	7041.	Charge on cattle, etc., swimming stream.
7031.	Rates of, to be posted at the ferry.		

**Article 7021. [4797] Who are entitled to license to keep.**—Every person owning the land fronting upon any water course, navigable stream, lake or bay, shall be entitled to the privilege of keeping a public ferry over or across such water course, stream, lake or bay; if he owns the lands on both sides or banks, he shall be entitled to the sole and exclusive right of ferriage at such place; if he owns the lands on one side only, he shall have the privilege of a public ferry from his own shore, with the privilege of landing his boat and passengers on the opposite shore, with the consent of the owner of the land on said shore; if such consent can not be obtained, he may apply to the commissioners' court for the establishment of a public road from said opposite shore; and said court shall act on such applications as in other cases. [Act Jan. 23, 1850; P. D. 3841.]

*In general.*—As to preference right to establish ferries, see *Tugwell v. Eagle Pass Ferry Co.*, 74 T. 480, 9 S. W. 120, 13 S. W. 654.

*Franchises—Power to grant.*—The county court is authorized to establish public ferries. *Art. 2241; Tugwell v. Eagle Pass Ferry Co.*, 74 T. 480, 9 S. W. 120, 13 S. W. 654.

This chapter does not restrict the right to establish public ferries given by *Art. 2241. Burrows v. Gonzales County*, 5 C. A. 232, 23 S. W. 829.



**Necessity of acquiring franchise.**—No one is permitted to keep a public ferry and charge fees without a license. *Tugwell v. Eagle Pass Ferry Co.*, 74 T. 480, 9 S. W. 120, 13 S. W. 654.

One has no right to operate a ferry so as to charge compensation without procuring a license therefor from the commissioners' court, and hence he has no legal right to have the public road kept open for his benefit. *Parsons v. Hunt*, 98 T. 420, 84 S. W. 645.

**Exclusive license.**—Parties having an exclusive license within certain limits may by injunction restrain others operating without a license within the limits. *Tugwell v. Eagle Pass Ferry Co.*, 74 T. 480, 9 S. W. 120, 13 S. W. 654.

**Right of landing.**—The operator of a private ferry without license cannot land his boat on property condemned for a public road under the statute, without the consent of the riparian owner. *Buford v. Smith*, 2 C. A. 178, 21 S. W. 168.

**Ferryboat as exempt.**—See Title 55, Chapter 1.

**Bridge and ferry corporations.**—See Title 25, Chapter 20.

**Art. 7022. [4798] Shall not be for hire without license.**—No person shall keep any ferry over or across any water course, navigable stream, lake or bay, so as to charge any compensation for crossing the same, without first procuring a license from the commissioners' court of the county in which such ferry is situated. [Id. P. D. 3842.]

**Art. 7023. [4799] Where stream is part of state boundary.**—When a water course, navigable stream, lake or bay makes a part of the boundary line of this state, if any tax or charge shall be assessed or collected by any such adjoining state for the privilege of a ferry landing on the shore or bank of such state from this state, then the same tax or charge may be assessed and collected by the commissioners' court for the like privilege of landing on the bank or shore of this state. [Id. P. D. 3842.]

**In general.**—Construing this article and Arts. 7022, 7023, it would seem that those articles only had reference to ferries operated across streams wholly in this state, and that the commissioners' court of Lamar county would have to look alone to this article for authority to tax a ferry across Red river, the boundary between the Indian Territory and Texas. The record is silent as to whether the Indian Territory levies a tax for landing on that side and it is also silent as to whether Lamar county has levied a tax for landing on this side. It follows that appellee is not required to procure a license from Lamar county for keeping and operating a ferry. *Parsons v. Hunt* (Civ. App.) 81 S. W. 122.

This article seems to provide for a system of retaliation rather than of reciprocity and its validity may be seriously doubted. It was not intended to provide either for the establishment or regulation of ferries. *Parsons v. Hunt*, 98 T. 420, 84 S. W. 645.

**Art. 7024. [4800] License, how obtained.**—Any person wishing to establish a ferry across any water course, navigable stream, lake or bay in this state, shall apply to the commissioners' court of the county in which such ferry site may be; and, on the applicant showing that he is the lawful owner of such land as the ferry is sought to be established on, and also satisfying the court that the public convenience will be promoted thereby, such court shall grant such license. [Id. P. D. 3844.]

**Art. 7025. [4801] Rates of ferriage shall be established, etc.**—When a commissioners' court shall establish a ferry, they shall state in their record the rates of toll or ferriage which may be demanded for ferrying passengers, carriages, wagons, carts, beasts and such other property as is usually transported by ferries; and the said courts may, at their first term in each year, and shall at any other term, upon the petition of twenty respectable citizens of the county, revise, and, if deemed expedient, change the rates of toll or ferriage at all ferries that have been or may be established in their county. [Act Jan. 5, 1854; P. D. 3845.]

**Art. 7026. [4802] Change of rates.**—All changes of the rates of ferriage shall be entered of record and notice thereof furnished by the county clerks to the owners of ferries affected by such change; provided, no change of rate shall take effect until the expiration of thirty days from the day on which said change may be made. [Id.]

**Art. 7027. [4803] When owner refuses to keep ferry at the established rates.**—Where any owner of a ferry shall refuse to keep up the same at the rates allowed by the commissioners' court, said court may issue a license to any one who will do so; but in all such cases the party receiving such license shall be bound to take the ferry-boat in use at

said ferry, if desired by the owner, at such valuation as two respectable citizens of the vicinity, one to be chosen by each party, shall place upon it. [Id.]

**Art. 7028. [4804] License and bond to be renewed annually.**—The owners of all ferries shall annually obtain a renewal of their license, and shall annually enter into bond, payable to the county judge of their county, in such sum as the commissioners' court shall direct, not less than one thousand dollars, with two or more good and sufficient sureties, to be approved by such county judge, conditioned that the owner of such ferry will at all times keep good and sufficient boats for the use of such ferry, and will also keep the banks on each side of the ferry in good repair and so graded and leveled that the rise shall not exceed one foot in every seven feet from the water's edge to the top of the bank, and that said ferry shall be well attended at all times, and that he will comply with all the requisitions of the law relating to or governing ferries, which bond shall be filed and recorded in the office of the clerk of the county court. [Act Jan. 23, 1850. P. D. 3846, 3847.]

**Art. 7029. [4805] License not to issue until, etc.**—Upon producing the receipt of the county treasurer for the payment of the tax assessed by the commissioners' court for the privilege of such ferry, and executing the bond required by the preceding article, such commissioners' court shall grant a license to such applicant for the term of one year from the date of such license; and no license for any ferry that has been or may hereafter be established shall be granted until such payment shall be made and bond executed. [Id. P. D. 3848.]

**Art. 7030. [4806] Rates of, to be delivered to person obtaining license.**—In all cases where any person shall obtain a license for a ferry, the clerk of the court shall make out and deliver to such person a copy of the rates of toll or ferriage established by the court for such ferry, which shall be under his hand and official seal. [Id. P. D. 3849.]

**Art. 7031. [4807] Rates of, to be posted at the ferry.**—Every owner of a ferry licensed shall keep a list of the rates of toll or ferriage established for his ferry posted up, either at the ferry or ferry house, for the inspection of all persons. If any such owner shall fail or neglect to do so, he shall forfeit and pay the sum of four dollars for every such neglect, which may be recovered before any justice of the peace of the county on the complaint of any person, one-half of said amount to go to the county and the other half to the prosecutor; and every week that he shall so fail or neglect shall be deemed a separate offense, for which he shall be liable as aforesaid. [Id. P. D. 3850.]

**Art. 7032. [4808] Where ferryman delays or refuses, etc., to cross person.**—If any person licensed to keep a ferry shall, on being tendered his lawful fees, refuse or neglect, without any reasonable cause, to cross any person, his horse or other property usually transported by such ferry, every such ferryman shall, for every delay of thirty minutes, forfeit and pay to the person injured the sum of two dollars, to be recovered by action before any justice of the peace for the county in which the ferry is situated, with costs of suit; and the oath of the party shall be received in evidence of the fact. [Id. P. D. 3851.]

Cited. Chicago, R. I. & G. Ry. Co. v. Clark (Civ. App.) 146 S. W. 989.

**Art. 7033. [4809] Duties of ferryman.**—Every licensed ferryman shall at all times keep good and sufficient boats for the use of such ferry, and shall keep the banks on each side of the ferry in good repair, and so graded and leveled that the rise shall not exceed one foot in every seven feet from the water's edge to the top of the bank; and shall give ready and due attendance on all passengers, horses, wagons and other property. [Id. P. D. 3852.]

**Art. 7034. [4810] Where ferryman charges more than, etc.—**If any licensed ferryman shall charge and receive from any person a higher rate of toll or ferriage than has been established for his ferry by the commissioners' court, he shall forfeit and pay to such person five dollars for every such offense, to be recovered by action before any justice of the peace of the county in which the ferry is established, with costs of suit; and the oath of the complainant shall be received in evidence. [Id. P. D. 3853.]

**Art. 7035. [4811] Penalty for keeping, etc., without license.—**If any person shall keep any ferry over any water course, navigable stream, lake or bay, for which he shall charge any person any money or other valuable thing, without complying with the provisions of this chapter in relation to paying the tax, obtaining license and entering into bond, he shall forfeit and pay to every other person having a licensed ferry on the same water course, stream, lake or bay in the same county five dollars for every person so ferried, and the same sum for every wagon or other article so transported which may be subject to a separate charge, to be sued for and recovered before any justice of the peace of the county, with costs of prosecution; and shall, moreover, forfeit and pay a like sum in like manner to the county, which may be sued for and recovered in like manner by the county treasurer. [Id. P. D. 3854.]

**Art. 7036. [4812] Proceedings against sureties of ferryman.—**In all cases where a recovery shall be had against the ferryman for violation of this law, if after judgment execution shall be returned that no estate of such ferryman can be found whereon to levy and make the money demanded in such execution, the justice to whom such execution is so returned shall cite the sureties of such ferryman to appear and show cause why judgment should not be rendered against them for the amount of the execution that is not satisfied, and unless such cause is shown judgment shall be so entered and execution shall issue therefor. [Id. P. D. 3855.]

**Art. 7037. [4813] Suit on bond.—**Any person injured by breach of the bond of any ferryman shall have the right to sue thereon in his own name; and no such bond shall be void on the first recovery, but may be sued on from time to time until the whole penalty is recovered. [Id. P. D. 3856.]

**Art. 7038. [4814] Temporary license.—**Any person wishing to establish a public ferry between the regular terms of the commissioners' court may obtain a temporary license for such ferry from the county judge, which shall authorize him to keep such ferry until the next regular term of the commissioners' court for the county, and to charge and receive for such time such rates of toll or ferriage as are charged at other ferries on the same water course, stream, lake or bay. [Id. P. D. 3857.]

**Art. 7039. [4815] License tax.—**The commissioners' courts of the several counties shall have power to assess and collect an annual tax for the privilege of each and every ferry in their county, which tax shall not exceed one hundred dollars per annum. [Id. P. D. 3858.]

**Art. 7040. [4816] Where stream is part of county boundary.—**If any water course, navigable stream, lake or bay shall form a portion of the boundary of any county, so that one bank shall be in one county and the other in a different county, at the place where it is proposed to establish a ferry, or where a ferry has been established, the application for a license shall be made to the commissioners' court of the county wherein the applicant resides or has his ferry house, and upon the granting of such license by the said court, the person or persons so licensed shall have the right to own and operate a ferry upon the same terms and conditions and with the same rights and privileges as are provided by this chapter for the owners or keepers of ferries operated exclusively in one

county, and no county tax shall be assessed and collected upon a ferry by any other commissioners' court than the one granting the license therefor. [Id. P. D. 3859.]

**In general.**—The commissioners' court of one county having granted a license to operate a ferry across a river which is the boundary line of two counties and opened a public road from the county seat to the ferry, the crossing at which the ferry is operated is the crossing of a public road as that term is used in Art. 1279 and the maintenance of such ferry is not prohibited by the latter article. *Alabama Ferry Co. v. Leathers* (Civ. App.) 69 S. W. 118.

**Art. 7041. [4817] Charges on cattle, etc., swimming stream.**—The commissioners' court shall not authorize a charge of more than one cent per head on cattle or horses swimming rivers at licensed ferries, including the use of pens and boats necessary for the control of such stock. [Act Jan. 9, 1862. P. D. 3862.]

## CHAPTER ELEVEN

### SPECIAL ROAD TAX

[See "Bonds, County and Municipal," Title 18, Chapter 2, and see Appendix for list of local road laws.]

Art.	Art.
7042. Election for road tax, how ordered.	7045. Duty of commissioners' court upon obtaining result of election, etc.
7043. Same subject.	
7044. Who qualified to vote, etc.	7046. No bonds to issue.

**Article 7042. Election for road tax, how ordered; defined districts.**  
—The commissioners' court of any county shall, upon presentation to it at any regular session of a petition signed by two hundred qualified voters of said county, or a petition of fifty qualified voters of any political subdivision, or defined district, now or hereafter to be described or defined in a county; said petitioners being property tax payers of said county or said political subdivision or defined district, to order an election to determine whether there shall be levied upon the property within said county or political subdivision or defined district, now or hereafter to be described or defined, of said county, by said commissioners court, a road tax, not to exceed fifteen cents on the one hundred (\$100.00) dollars worth of property, under the provisions of the amendment of 1889 to the constitution of the state of Texas, adopted in 1890, order said election as hereinafter provided. It shall not be necessary to give any notice of such petition before the court can act on the same, but the court may act thereon without notice, and may make an order for such election, fixing the amount to be levied, not to exceed fifteen cents on the one hundred dollars, the election to take place at any time thereafter, not less than twenty nor more than ninety days from the date of making the order therefor. Upon petition signed by a majority of the qualified tax paying voters of any portion of any county or of any political subdivision of any county, to the county commissioners court, requesting that such portion of said county, or political subdivision shall be created as a defined district, the said county commissioners court shall declare such territory a defined district and spread the order for same upon the minutes of said court; provided the petition aforesaid shall define by metes and bounds the territory desired to be incorporated in such defined district. [Acts 1891, p. 51, sec. 1. Acts 1913, p. 30, sec. 1, amending Art. 7042, Rev. St. 1911.]

**Note.**—Acts 1913, p. 30, sec. 1, enacts that Chapter 11, Title 119, of the Revised Statutes be so amended that it shall read as set forth in articles numbered 7042-7046.

**Power to levy road tax.**—No election is necessary to authorize the levy by the commissioners' court of 15c on the \$100 road and bridge tax. *Jefferson Iron Co. v. Hart*, 18 C. A. 525, 45 S. W. 321.

An assessment of taxes by a county for road and bridge purposes greater than 15 cents on the \$100 was unauthorized. *State v. Fulmore* (Civ. App.) 71 S. W. 418.

**Art. 7043. Same.**—It shall not be necessary to give any formal notice of such election, except the county judge shall issue his election proclamation; and the fact that such election is to be held shall be published in the newspapers of the county or political subdivision or defined district, now or hereafter to be described or defined as fully as practicable, and tickets for the election shall be printed by the county and sent to each voting precinct by the county judge before the election opens, and as long before such time as practicable. The expenses of the election shall be paid for by the county. If an election be ordered within ninety days of a general election, it shall be held on the day of the general election, and as elections on other questions are held, but otherwise the commissioners court shall order a special election to determine whether said tax shall be levied, which shall be conducted as other elections and as the officers conduct the same shall be appointed as in other cases. [Acts 1891, p. 51, sec. 2. Acts 1913, p. 30, sec. 1, amending Art. 7043, Rev. St. 1911.]

**Art. 7044. Who are qualified to vote; manner of voting.**—Only qualified voters who pay a property tax in the county or political subdivision or defined district, now or hereafter to be described or defined shall be permitted to vote at each election. The tickets printed and to be voted shall have written or printed on them the words: For the Tax, and Against the Tax, and those who favor the tax shall vote the ticket For the Tax, and those who oppose the tax shall vote the ticket Against the Tax. [Acts 1891, p. 51, sec. 3. Acts 1913, p. 30, sec. 1, amending Art. 7044, Rev. St. 1911.]

**Art. 7045. Duty of commissioners' court upon obtaining result of election.**—If at any such election the majority of the qualified voters voting thereat shall vote for such tax, it shall not be necessary to make further proclamation of that fact than to count the votes, as in other cases, and officially announce the result, and the commissioners' court shall thereby be authorized and required to levy a road tax in the same manner that other taxes are levied, in the amount specified in said order for such election, never to exceed fifteen cents on the one hundred dollars worth of property. Such levy shall be made at the same time other county taxes are levied, if such election is held in time therefor, but otherwise it may be made at any time before the rolls are made out. If, at the election, the proposition for said tax shall carry, no petition for its repeal shall be granted in less than two years. But if it fail to carry, another petition may be granted in one year, but not sooner; and the order granting the second or any subsequent petition may fix a greater or less rate of levy, not to exceed fifteen cents on the one hundred dollars worth of property, and if no greater rate is levied for any one year the commissioners' court may lower the rate for the next year without a petition therefor. An election to repeal the levy may be ordered and held as in other cases, but there must be satisfactory proof presented to said commissioners' court that there is great dissatisfaction with such tax and that it is probable that a majority of the citizens of the county or political subdivision or defined district, now or hereafter to be described or defined, who are authorized to vote for said tax would vote for the repeal of the law, and unless such proof be made the petition to repeal shall not be granted. [Acts 1891, p. 51, sec. 4. Acts 1913, p. 30, sec. 1, amending Art. 7045, Rev. St. 1911.]

**Art. 7046. No bonds to issue.**—No bonds shall ever be issued under the provisions of this chapter. [Acts 1891, p. 51, sec. 5. Acts 1913, p. 30, sec. 1, amending Art. 7046, Rev. St. 1911.]

**Issuance of bonds.**—See Title 18, Chapter 2.

## TITLE 119 A

## RURAL CREDIT UNIONS

Art. 7046a.	Rural credit union defined; capital stock; entrance fees.	Art. 7046l.	Powers and duties of supervisory committee.
7046b.	Powers of union.	7046m.	Capital stock.
7046c.	May incorporate, how; powers of state banking board; powers and duties of state banking commissioner; penalties.	7046n.	Shares and deposits of minor or in trust.
7046d.	Who may transact business as rural credit union.	7046o.	Funds, how lent and deposited.
7046e.	Powers and duties of state bank commissioner.	7046p.	Loans may be repaid, when; fines for failure to pay.
7046f.	By-laws.	7046q.	No compensation to directors or committeemen; loans, to whom and for what purposes and amounts.
7046g.	By-laws to be approved, etc.	7046r.	Expulsion of members.
7046h.	Fiscal year; meetings; who may vote, etc.	7046s.	Repayments to members withdrawn or expelled, etc.
7046i.	Directors; credit and supervisory committees.	7046t.	Duty of supervisory committee before dividend.
7046j.	Executive officers; powers and duties of directors.	7046u.	Dividends, how declared and paid.
7046k.	Loans; powers and duties of credit committee.	7046v.	Guaranty fund.
		7046w.	Dissolution.
		7046x.	Annual report to bank commissioner.

**Article 7046a. Rural credit union defined; capital stock; entrance fees.**—In this Act the words “rural credit union” shall mean a cooperative association formed for the purpose of promoting thrift among its members, and to enable them, when in need, to obtain for productive purposes moderate loans of money for short periods and at reasonable rates of interest. The capital stock of rural credit unions organized under the provisions of this Act shall be divided into shares of twenty-five dollars. Entrance fees of rural credit unions may be fixed by the board of directors at such an amount as may be prescribed by the by-laws. [Acts 1913, p. 162, sec. 1.]

**Art. 7046b. Powers of union.**—A rural credit union may receive the savings of its members in payment for shares; may lend to its members at reasonable rates of interest not to exceed six per cent. per annum, or invest as hereinafter provided the funds so accumulated and may undertake such other activities relating to the purposes of the association as its by-laws may authorize. [Id. sec. 2.]

**Art. 7046c. May incorporate, how; powers of state banking board; powers and duties of state banking commissioner; penalties.**—Ten or more citizens of this state may associate themselves together, by articles of agreement, and form a rural credit union, and upon the approval of the state banking board may become a corporation upon complying with such provisions of the Act regulating state banks as may be applicable to the transaction of the business herein authorized to be done. The state banking board may permit the formation of such corporation when it is satisfied that the proposed field of operation is favorable to the success of a rural credit union, and that the standing of the proposed members is such as to give assurance that its affairs will be administered in accordance with the spirit of this Act, and it shall be the duty of the commissioner of banking to issue a charter to said rural credit union to do business in conformity with the provisions of this Act. The state bank commissioner, or his deputy, shall have authority to examine the accounts, books and papers of rural credit unions herein authorized to be organized. Any rural credit union violating the provisions of this Act shall be subject to the forfeiture of its charter, and any officer or member misapplying or embezzling funds belonging to such rural credit

union, shall be subject to prosecution and punishment as already provided for violating the provisions of the state banking laws. [Id. sec. 3.]

**Art. 7046d. Who may transact business as rural credit union.**—No person, partnership, association or corporation, except corporation formed under the provisions of this Act, shall hereafter transact business under any name or title which contains the three words "rural credit union," except those expressly authorized herein to be formed. [Id. sec. 4.]

**Art. 7046e. Powers and duties of state bank commissioner.**—The state bank commission shall require such rural credit unions to keep such books as he may deem necessary for the proper conduct of their business; may make examination and report of the transaction of such rural credit unions' business and institute necessary proceedings for the prosecution of any officer or director misapplying the rural credit unions' funds. The rural credit unions shall be subject to the general supervision of the state bank commissioner. [Id. sec. 5.]

**Art. 7046f. By-laws.**—The by-laws of the rural credit unions shall prescribe—

- (a) The name of the corporation.
- (b) The purpose for which it is formed.
- (c) The conditions of residence or occupation which qualify persons for membership.
- (d) The par value of the shares of capital stock.
- (e) The conditions on which shares may be paid in, transferred and withdrawn.
- (f) The conditions on which deposits may be received and withdrawn.
- (g) The method of receipting for money paid on account of shares or deposited.
- (h) The number of directors and number of members of the credit committee.
- (i) The duties of the several officers.
- (j) The fines, if any, which may be charged for failure to meet obligations of the association punctually.
- (k) The date of the annual meeting of members.
- (l) The manner in which members shall be notified of meetings.
- (m) The number of members which will constitute a quorum at meetings.
- (n) Such other regulations as may seem necessary. [Id. sec. 6.]

**Art. 7046g. By-laws to be approved, etc.**—No such credit union shall receive deposits or payments on account of shares, or make any loans until its by-laws have been approved in writing by the state bank commissioner, nor shall any amendments to its by-laws become operative until they have been so approved. [Id. sec. 7.]

**Art. 7046h. Fiscal year; meetings; who may vote, etc.**—The fiscal year of every such association shall end at the close of business on the 31st day of December. The annual meeting of the association shall be held at such time and place as the by-laws prescribe. Special meetings may be held by order of the directors or of the supervisory committee, and the clerk shall give notice of such special meetings upon request, in writing, of ten members. Notice of all meetings of the association shall be given in the manner prescribed by the by-laws. No person shall be entitled to vote who has not been a member for more than three months but this restriction shall not apply during the first twelve months of the existence of the association, nor shall any member vote by proxy or have more than one vote. At the annual meeting, the members shall upon recommendation of the board of directors, declare dividends and fix the amount of the entrance fee. At any meeting the members may decide upon any question of interest to the association,

and upon appeal of two members may reverse decisions of the credit committee or board of directors; and, by a three-fourths vote of those present, provided the notice of the meeting shall have specified the question to be considered may amend the by-laws. [Id. sec. 8.]

**Art. 7046i. Directors; credit and supervisory committees.**—At the annual meeting the members shall elect a board of directors of not less than five members from which a credit committee of not less than three members may be selected. A supervisory committee of three members shall also be elected.

No member of the board of directors shall be a member of the supervisory committee, nor shall one person be a member of more than one of said committees, and all members thereof, as well as all officers whom they may elect shall be sworn, and shall hold their several offices until others are elected and qualified in their stead; and a record of every such qualification shall be filed and preserved with the records of the association. [Id. sec. 9.]

**Art. 7046j. Executive officers; powers and duties of directors.**—At their first meeting the board of directors shall elect from their number a president, a vice-president, a clerk and a treasurer who shall be the executive officers of the association. The board of directors shall have the general management of the affairs, funds and records of the association, and shall meet as often as may be necessary.

It shall be their special duty—

- (a) To act upon all applications for membership.
- (b) To act upon the expulsion of members.
- (c) To fix the amount of surety bond which shall be required of each officer having custody of the funds.
- (d) To determine the rate of interest on loans.
- (e) To fill vacancies in the board of directors or in the credit committee of the association until the election and qualification of officers to fill said vacancies.
- (f) To make recommendations to meetings of the members relative to the amount of entrance fee; the maximum number of shares which may be held by, and the maximum amount which may be lent to, any one member; the dividend to be declared; amendments to the by-laws and any other matters which in their opinion, the members should decide. [Id. sec. 10.]

**Art. 7046k. Loans; powers and duties of credit committee.**—The credit committee shall approve every loan or advance made by the association. Every application for a loan shall be made in writing and shall state the purpose for which the loan is desired, and the security offered. No loan shall be made unless the credit committee is satisfied that it promises to benefit the borrower, nor unless it has received the unanimous approval of those members of said committee who were present when it was considered, nor if any member of said committee shall disapprove thereof; but applicant for a loan may appeal from the decisions of the credit committee to the board of directors. [Id. sec. 11.]

**Art. 7046l. Powers and duties of supervisory committee.**—The supervisory committee shall inspect the securities, cash and accounts of the association and supervise the acts of its board of directors, credit committee and officers. At any time the supervisory committee, by a unanimous vote, may suspend the credit committee or any officer elected by the board of directors, and by a majority vote may call a meeting of the shareholders to consider any violation of this act or of the by-laws, or any practice of the association which, in the opinion of said committee, is unsafe or unauthorized. Within seven days after the suspension of the credit committee the supervisory committee shall cause notice to be given of a special meeting of the members to take such action



relative to such suspension as may seem necessary. The supervisory committee shall fill vacancies in their own number until the next annual meeting. [Id. sec. 12.]

**Art. 7046m. Capital stock.**—The capital of the association shall be unlimited in amount. Shares of capital stock may be subscribed for and paid in in such manner as the by-laws shall prescribe. [Id. sec. 13.]

**Art. 7046n. Shares and deposits of minor or in trust.**—Shares may be issued and deposits received in the name of a minor and such shares and deposits may, in the discretion of the directors, be withdrawn by such minor or by his parent or guardian, and in either case payments made on such withdrawals shall be valid. If shares are held or deposits made in trust the name and residence of the beneficiary shall be disclosed and the account shall be kept in the name of such holder as trustee for such person. If no other notice of the existence and terms of such trust has been given in writing to the association, such shares or deposits may, upon the death of the trustee, be withdrawn by the person for whom the amount of such shares was paid in or for whom such deposit was made, or by his legal representative. [Id. sec. 14.]

**Art. 7046o. Funds, how lent and deposited.**—The capital, deposits and surplus funds of the association shall be either lent to the members for such purposes and upon such security and terms as the credit committee shall approve, or deposited to the credit of the association in savings banks or trust companies incorporated under the laws of this state, as in national or state banks located therein, such depositories to be approved by the commissioner of banking. [Id. sec. 15.]

**Art. 7046p. Loans may be repaid, when; fines for failure to pay.**—A borrower may repay the whole or any part of his loan on any day on which the office of the association is open for the transaction of business for failure to pay the interest or any instalment required by the terms of the loan, the borrower may be fined if the by-laws so prescribe. [Id. sec. 16.]

**Art. 7046q. No compensation to directors or committeemen; loans, to whom and for what purposes and amounts.**—No member of the board of directors or of the credit or supervisory committee shall receive any compensation for his services as a member of said board or committees, nor shall any member of the credit or supervisory committee, either directly or indirectly, borrow from or become surety for any loan or advance made by the association, except upon the approval of two-thirds of the members of the association. No loan shall be granted except for productive purposes or urgent needs, nor for a longer period than eight months; nor shall any loan be renewed for a sum as large as the original amount. Loans to any one member shall not exceed \$200.00. [Id. sec. 17.]

**Art. 7046r. Expulsion of members.**—The board of directors may expel from the association any member who has not carried out his engagements with the association, or has been convicted of a criminal offense, or neglects or refuses to comply with the provisions of this Act or of the by-laws of the association, or who habitually neglects to pay his debts, or shall become insolvent or bankrupt, or shall have deceived the association with regard to the use of borrowed money; but no member shall be expelled until he has been informed in writing of the charges against him, and an opportunity has been given to him, after reasonable notice to be heard thereon. [Id. sec. 18.]

**Art. 7046s. Repayments to members withdrawn or expelled, etc.**—The amounts paid in on shares or deposited by members who have withdrawn or have been expelled shall be paid to them, but in the order of withdrawal or expulsion, and only as funds therefor become available

and after deducting any amounts dew [due] by said members to the association; but such expulsion shall not operate to relieve a member from any remaining liability to the association. [Id. sec. 19.]

**Art. 7046t. Duty of supervisory committee before dividend.**—Immediately before a meeting of the directors called to recommend the declaration of a dividend, the supervisory committee shall make a thorough audit of the receipts, disbursements, income, assets and liabilities of the association for the fiscal year, and shall make a full report thereon to the directors, said report shall be read at the annual meeting and shall be filed and preserved with the records of the association. [Id. sec. 20.]

**Art. 7046u. Dividends, how declared and paid.**—At the annual meeting a dividend may be declared from income which has been actually collected during the fiscal year next preceding, or during the months which have elapsed since the association began business, and which remains after the deduction of all expenses, losses and the amount required to be set apart as a guaranty fund. Such dividend shall be paid on all fully paid shares outstanding at the close of the fiscal year, but shares which become fully paid during the year shall be entitled only to a proportional part of said dividend, calculated from the first day of the month following such payment in full. Dividends due to a member shall be paid to him in cash or credited to the account of partly paid shares for which he has subscribed. [Id. sec. 21.]

**Art. 7046v. Guaranty fund.**—Immediately before the payment of each dividend, there shall be set apart as a guaranty fund twenty per cent. of the net income which has accumulated during the fiscal year. Said fund and the investments thereof belong to the association and shall be held to meet contingencies or losses in its business. All entrance fees shall be added at once to the guaranty fund. But upon recommendation of the board of directors the members at an annual meeting may increase, and whenever said fund equals or exceeds the amount of capital stock actually paid in, may decrease the proportion of profits which is required by this section to be set apart as a guaranty fund. [Id. sec. 22.]

**Art. 7046w. Dissolution.**—At any meeting specially called to consider the subject the members upon the unanimous recommendation of the board of directors may vote to dissolve the association, provided at least two-thirds of the members are present at such meeting, and provided not more than ten members, either in person or by written notice, object thereto.

A committee of three shall thereupon be elected to liquidate the assets of the association, and each share of the capital stock, according to the amount paid in thereon, shall be entitled to its proportion of the proceeds after all debts of the association have been paid. [Id. sec. 23.]

**Art. 7046x. Annual report to bank commissioner.**—Within twenty days after the last business day of December in each year, ever [every] such association shall make to the bank commissioner a report in such form as he may prescribe signed by the president, treasurer and a majority of the supervisory committee who shall certify and make oath that the report is correct according to their best knowledge and belief.

Any such association which neglects to make the said report within the time herein prescribed shall forfeit to the state five dollars for each day during which such neglect continues. [Id. sec. 24.]

## TITLE 120

## SALARIES

## Chap.

1. Executive Officers.
2. Legislative Officers.
3. Judicial Officers.

## Chap.

4. Miscellaneous Officers.
5. General Provisions.

## CHAPTER ONE

## EXECUTIVE OFFICERS

## Art.

7047. Salary of governor.  
 7048. Secretary of state.  
 7048a. Attorney general.  
 7049. Comptroller, treasurer and commissioner of the general land office.  
 7050. Superintendent of public instruction.

## Art.

7051. Commissioner of agriculture.  
 7052. Commissioner of insurance and banking.  
 7053. Railroad commissioners.  
 7054. Adjutant general.

**Article 7047. [4818] Governor.**—The governor shall at stated times receive as compensation for his services an annual salary of four thousand dollars, and no more, and shall have the use and occupation of the governor's mansion, fixtures and furniture. [Const., art. 4, sec. 5.]

**Art. 7048. [4821] Secretary of state.**—The secretary of state shall receive for his services an annual salary of two thousand dollars, and no more. [Id. sec. 21.]

**Art. 7048a. [4822] Attorney General.**—The attorney general shall receive an annual salary of two thousand dollars, and no more, besides such fees as may be prescribed by law, not to exceed two thousand dollars annually. [Const., art. 5, sec. 22.]

**Art. 7049. [4820] Comptroller, treasurer and commissioner of general land office.**—The comptroller of public accounts, treasurer of the state, and the commissioner of the general land office shall each receive for their services an annual salary of two thousand and five hundred dollars, and no more. [Id. sec. 23.]

**Art. 7050. [4827] Superintendent of public instruction.**—The superintendent of public instruction shall receive an annual salary of twenty-five hundred dollars. [Acts 1884, p. 41.]

**Art. 7051. Commissioner of agriculture.**—The commissioner of agriculture shall receive an annual salary of twenty-five hundred dollars, and necessary expenses, not to exceed six hundred dollars. He shall file with the governor, on or before the first day of November of each year, an itemized sworn statement of such expenses during the fiscal year preceding, which statement shall be transmitted by the governor to the legislature. [Acts 1909, p. 127, sec. 6.]

**Art. 7052. Commissioner of insurance and banking.**—The commissioner of insurance and banking shall receive an annual salary as commissioner of insurance and banking of two thousand dollars, and as ex officio superintendent of banking five hundred dollars, and as a member of the state insurance board, five hundred dollars. [Art. 4832, Code of 1895. Acts 1905, p. 489, sec. 38. Acts 1909, p. 311, sec. 3.]

**Art. 7053. [4829] Railroad commissioners.**—The railroad commissioners shall each receive an annual salary of four thousand dollars. [Acts 1891, p. 55.]

**Art. 7054. [4834] Adjutant general.**—The adjutant general shall receive an annual salary of two thousand dollars, and no more. [Act June 24, 1870; P. D. 7143.]

**CHAPTER TWO**  
**LEGISLATIVE OFFICERS**

**Art.**  
7055. Salary of lieutenant governor.

**Art.**  
7056. Senators and representatives, mileage and per diem.

**Article 7055. [4819] Lieutenant governor.**—The lieutenant governor shall, while he acts as president of the senate, receive for his services the same compensation and mileage which shall be allowed to members of the senate, and no more; and during the time he administers the government, as governor, the same compensation which the governor would have received had he been employed in the duties of his office, and no more.

**Art. 7056. Senators and representatives, mileage and per diem.**—Members of the legislature shall receive as compensation for their services and attendance upon any regular or called session of the legislature, five dollars per day for the first sixty days of each session, and after that, the sum of two dollars per day for the remainder of the session. Members of the legislature shall receive as mileage for attendance upon any regular or called session of the legislature five dollars for every twenty-five miles in going to and returning from the seat of government, to be computed by the nearest and most direct route of travel by land, regardless of railways or water routes; and the comptroller of public accounts shall prepare and preserve a table of distances to each county seat, now or hereafter to be established, and by such table the mileage of each member of the legislature shall be computed and paid, the calculation to be based in each instance upon the distance to the county seat of the county in which such member resides; provided, that no member shall be entitled to mileage for any extra session of the legislature that may be called within one day after the adjournment of any regular or called session. [Const., art. 3, sec. 24. Acts 1907, p. 10.]

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**CHAPTER THREE**  
**JUDICIAL OFFICERS**

**Art.**  
7057. Salaries of justices of the supreme court and court of criminal appeals.

7058. [Superseded.]

7059. District judges.

7059a. Traveling expenses of district judges, district attorneys, and judge of

**Art.**  
criminal district court of Harris and Galveston counties.

7060. Assistant attorney general.

7061. Special judges, etc.

7062. Special judges elected by, etc.

7063. Of special judge, how ascertained.

7064. Pay of special judge commissioned.

7065. Pay of special judge elected.

**Article 7057. Justices of supreme court, court of criminal appeals, and courts of civil appeals.**—That from and after the passage of this Act, the judges of the supreme court and the judges of the court of criminal appeals of this state, shall each be paid an annual salary of \$5,000.00 in monthly installments of \$416<sup>2</sup>/<sub>3</sub> each; and that the judges of the several courts of civil appeals of this state shall each be paid an annual salary of \$4,000.00 in monthly installments of \$333<sup>1</sup>/<sub>3</sub> each. [Acts 1913, p. 329, sec. 1, superseding Arts. 7057, 7058, Rev. St. 1911.]

**Art. 7058.**—Superseded. See Art. 7057.

**Art. 7059. [4839] District judges.**—The judges of the district courts of this state shall each receive a salary of three thousand dollars a year, and no more. [Acts 1905, p. 399.]

**Art. 7059a. Traveling expenses of district judges, district attorneys, and judge of criminal district court of Harris and Galveston counties.**—All district judges within this state, all district attorneys of the state of Texas, and the judge of the criminal district court of Harris and Galveston counties, when engaged in the discharge of their official duties in any county in this state other than the county of their residence, shall, in addition to the compensation now provided by law for their services, be allowed their actual and necessary expenses while engaged in the discharge of such duties, not to exceed the sum of two (\$2.00) dollars per day for hotel bills, and not to exceed three cents per mile when traveling by railroad, and not to exceed fifteen cents per mile when traveling by private conveyance, in going to and returning from the place where such duties are discharged, traveling by the nearest practicable route, such sum to be paid by the state upon the sworn account of the district judge and district attorney, respectively, entitled thereto, showing the actual and necessary traveling expenses, and other actual and necessary expenses incurred in the discharge of their official duties in compliance with the provisions of this Act; provided, there shall never be paid to any such judge or district attorney more than the sum of two hundred (\$200.00) dollars in any one year under the provisions of this Act; provided, further, that the account for such services above provided for shall be recorded in the minutes book of the district court of the county in which such district judge or district attorney shall reside. [Acts 1911, p. 38, sec. 1.]

**Art. 7060. [4843] Assistant attorney general.**—The assistant attorney general shall receive an annual salary of two thousand dollars, and also for mileage and traveling expenses one thousand dollars per annum, and no more. [Act March 13, 1879, p. 90, sec. 3. Act Aug. 23, 1876, p. 285, sec. 3.]

**Art. 7061. [4841] Special judges commissioned by the governor.**—Special judges, commissioned by the governor, in obedience to section 11, article 5, of the constitution, shall receive the same pay as district judges for every day they may be necessarily occupied in going to and returning from the place where they may be required to hold court, as well as the time they are actually engaged in holding court. [Act July 12, 1876, p. 45, sec. 1.]

**Art. 7062. [4842] Special judge elected by attorneys.**—A special judge elected by the practicing lawyers, or agreed upon by the parties as provided by law, shall receive the same pay as the district judge for every day that he may be occupied in performing the duties of judge. [Act Aug. 15, 1878, p. 140, sec. 4.]

**Art. 7063. [4855] Salary of special judge, how ascertained.**—The amount of salary due any special judge shall be ascertained by dividing the salary allowed a district judge by three hundred and sixty-five, and then multiplying the quotient by the number of days actually served by such special judge. [Act July 12, 1876, p. 45, sec. 2.]

**Art. 7064. [4856] How special judge commissioned by the governor shall obtain pay.**—A special judge commissioned by the governor, in order to obtain his salary, shall present to the comptroller an account therefor, showing the number of days that such special judge was necessarily occupied in going to and returning from the place or places where such special judge presided under said appointment, which account shall be verified by the affidavit of such special judge, and certified to be correct by the judge of the district, or by the clerk of the court in which the services were performed, and shall be accompanied by evidence that he was duly commissioned as such special judge by the governor. [Id. sec. 3.]

**Art. 7065. [4857] Special judge elected, etc., how he may obtain his pay.**—A special judge elected by practicing lawyers, or agreed upon by the parties, as provided by law, shall be paid for his services out of the state treasury on the certificate of the clerk of the court in which such services were rendered, to the comptroller, of the record of such election or appointment and services, accompanied by the account of such special judge, verified by his affidavit, showing the number of days actually served by him as such special judge. [Act Aug. 15, 1876, p. 140, sec. 4.]

## CHAPTER FOUR

### MISCELLANEOUS OFFICERS

<b>Art.</b>	<b>Art.</b>
7066. Salaries of superintendents of certain asylums.	7074. State revenue agent.
7067. Same.	7075. Superintendent of public buildings.
7068. State purchasing agent for eleemosynary institutions.	7076. Commissioner of pensions.
7069. Superintendents of orphans home and Confederate home.	7077. Commissioner of labor statistics.
7070. Superintendent home for lepers.	7078. State health officer.
7071. Superintendent of state institution for juveniles.	7079. Dairy and food commissioner.
7072. Prison commissioners.	7080. State mining inspector.
7073. Prison auditor.	7081. State librarian.
	7082. Pardon advisers.
	7083. Game, fish and oyster commissioner.
	7084. Tax commissioner.
	7085. State insurance board.

**Article 7066. [4824] Salaries of superintendents of certain asylums.**—The superintendents of the blind institute, the deaf and dumb institute, the epileptic colony, the state lunatic asylum, the southwestern insane asylum, and the north Texas hospital for the insane, shall each receive an annual salary of two thousand dollars; provided, they shall each receive provisions not to exceed in value five hundred dollars a year, and fuel, lights, water and housing for himself and family.

**Art. 7067. Same.**—The superintendent of the deaf, dumb and blind asylum for negroes shall receive a salary of one thousand five hundred dollars per year.

**Art. 7068. State purchasing agent.**—The state purchasing agent for eleemosynary institutions shall receive a salary of two thousand dollars per year. [Acts 1899, p. 138.]

**Art. 7069. Superintendents of orphans and Confederate homes.**—The superintendents of the state orphans home, and the Confederate home, shall each receive a salary of one thousand five hundred dollars a year, with provisions not to exceed five hundred dollars in value per year, and fuel, lights, water and housing for himself and family. [Acts 1909, pp. 495, 496. Acts 1899, p. 303.]

**Art. 7070. Superintendent home for lepers.**—The superintendent of the home for lepers shall receive an annual salary of three thousand dollars. [Acts 1909, p. 344, sec. 5.]

**Art. 7071. Superintendent juvenile institution.**—The superintendent of the state institution for the training of juveniles shall receive a salary of one thousand eight hundred dollars per annum, with provisions not to exceed in value five hundred dollars per year, and fuel, lights, water and housing for himself and family. [Acts 1909, p. 103.]

**Art. 7072. Prison commissioners.**—Each member of the board of prison commissioners shall receive as compensation for his services the sum of three hundred dollars per month, to be paid at the end of each month; and, in addition thereto, he shall be allowed all reasonable and

necessary traveling expenses actually incurred when traveling on business of the prison system; said salary and expenses to be paid out of the funds of the prison system. Each prison commissioner shall be permitted to occupy, free of rent, one of the residence houses belonging to the state at Huntsville.

**Art. 7073. Prison auditor.**—The auditor of the prison system shall receive a salary of two hundred dollars per month, to be paid at the end of each month, together with all actual and necessary traveling expenses; said salary and expenses to be paid out of the funds belonging to the prison system.

**Art. 7074. [4830] State revenue agent.**—The state revenue agent shall receive an annual salary of two thousand dollars. [Acts 1891, p. 88.]

**Art. 7075. [4833] Superintendent of public buildings.**—The superintendent of public buildings shall receive an annual salary of not to exceed one thousand five hundred dollars. [Acts 1889, p. 22.]

**Art. 7076. Commissioner of pensions.**—The commissioner of pensions shall receive a salary of two thousand dollars per annum. [Acts 1909, p. 23, sec. 5.]

**Art. 7077. Commissioner of labor statistics.**—The commissioner of labor statistics shall receive a salary of two thousand dollars per annum. [Acts 1909, p. 59, sec. 12.]

**Art. 7078. State health officer.**—The state health officer and ex officio president of the state board of health shall receive a salary of two thousand five hundred dollars per annum. [Acts 1909, p. 340, sec. 2.]

**Art. 7079. Dairy and food commissioner.**—The dairy and food commissioner shall receive a salary of two thousand dollars per annum. [Acts 1909, p. 166.]

**Art. 7080. State mining inspector.**—The state mining inspector shall receive a salary of two thousand dollars per annum, and necessary traveling expenses not to exceed one thousand dollars per annum. [Acts 1909, p. 163, sec. 21.]

**Art. 7081. State librarian.**—The state librarian shall receive a salary of one thousand five hundred dollars per annum. [Acts 1909, p. 122, sec. 2.]

**Art. 7082. Pardon advisers.**—Members of the state board of pardon advisers shall receive a salary of two thousand dollars per annum. [Acts 1905, p. 68.]

**Art. 7083. Game, fish and oyster commissioner.**—The game, fish and oyster commissioner shall receive, in addition to his regular salary of one thousand eight hundred dollars per annum, the additional sum of seven hundred dollars per annum, and necessary expenses incurred in the discharge of his duties, the same to be paid under such limitations and out of such funds as is provided by law. [Acts 1899, p. 312, art. 2517. Acts 1907, p. 254, sec. 6.]

**Art. 7084. Tax commissioner.**—The tax commissioner shall receive a salary of two thousand five hundred dollars per annum. [Acts 1907, p. 469.]

**Art. 7085. State insurance board.**—Each member of the state insurance board, except the commissioner of insurance and banking, shall receive as compensation an annual salary of two thousand five hundred dollars. The commissioner of insurance and banking shall receive an annual salary of five hundred dollars as compensation for his services as a member of said board. [Acts 1910, 3 S. S., p. 125.]

## CHAPTER FIVE

## GENERAL PROVISIONS

<p>Art. 7086. Salaries not to be changed during term of office.</p> <p>7087. Payable monthly.</p> <p>7088. May be compelled to produce evidence of qualification, when.</p>	<p>Art. 7089. Salary to be paid to whom.</p> <p>7090. Who entitled to compensation.</p> <p>7091. Enumeration of officers and salaries in this title does not repeal provisions found elsewhere.</p>
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**Article 7086. [4853] Salaries shall not be changed during term of office.**—The salaries of officers shall not be increased nor diminished during the term of office of the officers entitled thereto.

**Application.**—This article applies to officers whose salaries are fixed by law. *Orr v. Davis*, 9 C. A. 628, 30 S. W. 249.

This article does not apply to officers whose salaries are not fixed by law, and does not apply to orders of the commissioners' courts auditing and fixing the amounts payable for ex officio services. *Collingsworth v. Myers* (Civ. App.) 35 S. W. 414.

An ordinance increasing the salary of a city attorney after his election, but before he qualified, held not an increase during his term, within the charter provision prohibiting such an increase. *Riggins v. Richards* (Civ. App.) 79 S. W. 84.

**Assignments of or liens upon salaries.**—It is against public policy for a public officer to assign or give a lien on his unearned official compensation, whether salary or fees. *National Bank v. Fink*, 36 T. 303, 24 S. W. 256, 40 Am. St. Rep. 833; *Id.* (Civ. App.) 24 S. W. 937.

**Right to salary.**—An office is property, and he who is legally its incumbent is entitled to its emoluments during the term for which he is elected or appointed. *Bastrop County v. Hearn*, 70 T. 563, 8 S. W. 302.

**Insufficient appropriation.**—The appropriation of a less sum than is fixed by law as the salary of an officer does not operate as a repeal of the statute fixing the salary. *State v. Steele*, 57 T. 200.

**Art. 7087. [4854] Salaries payable monthly.**—Officers entitled to salaries may demand monthly payment of the same; and upon filing with the comptroller of public accounts proper vouchers, the comptroller shall issue his warrant upon the treasurer for the amount of salary due to the officer applying therefor; and the treasurer shall pay such warrant out of the fund appropriated for the payment of the same.

**Effect of veto of appropriation.**—The attorney general being, under Const. art. 4, § 22, and this article, entitled to a warrant for his salary, drawn by the comptroller upon the treasury, regardless of whether there was an appropriation for the payment of such a warrant, the acts of the governor in wrongfully vetoing and mutilating the appropriation bill cannot affect this right. *Lightfoot v. Lane*, 104 T. 447, 140 S. W. 89.

**Art. 7088. [4858] Required to produce evidence of qualifications to comptroller, when.**—The comptroller of public accounts, the state treasurer, county commissioners' courts, county treasurers, and any and all other officers of this state, or of any municipal division thereof, whether herein enumerated or not, who are authorized or required by law to audit, or pay, or order to be paid, claims due from the state, or any county or municipal division thereof, to any person or persons, as a salary, or as fees, compensation, perquisites or emoluments for official services rendered by such person, as an officer thereof, shall, upon the demand of any citizen of this state, before auditing, paying, or ordering to be paid, any such claims as aforesaid, require such person presenting such claim to produce the certificate of his election or appointment to such office directed by the laws of this state to be issued to such officer; or, if his claim be founded upon the judgment or decree of a court of this state, authorized by the laws of this state to hear and determine the claims of persons to office, then a copy of the record of such judgment or decree certified under the hand and seal of the legal custodian of such record to be a true copy thereof. [Acts 1881, p. 7, sec. 1.]

**Art. 7089. [4859] Salary to be paid only, when.**—It shall not be lawful for any officer or court of this state, or of any municipal division thereof, to allow, audit, pay or order to be paid, the claim of any person for salary, compensation, fees, perquisites, emoluments, or services, as



an officer of the state, or of any municipal division thereof, except to such person as has been duly elected such officer by the qualified voters of this state, and whose election has been ascertained and certified or declared in the manner required by the laws of this state, or who has been appointed such officer by the lawful appointing power under the constitution and laws of this state, or who has been adjudged entitled thereto by a state court of competent jurisdiction of this state, and has qualified as such officer in accordance with the requirements of the laws of this state. [Id. sec. 2.]

**Art. 7090. [4860] Who entitled to compensation.**—No person shall be held by the laws of this state entitled to pay for services as an officer thereof, or of any county, or municipal division thereof, or to exercise any of the powers of jurisdiction of an officer thereof, unless he shall have been elected, appointed or adjudged entitled thereto, as specified in article 7089; and the official acts of any person claiming a right to exercise such power or jurisdiction, contrary to the provisions of this law, are and shall be held to be null and void. [Id. sec. 3.]

**Art. 7091. Enumeration in this title not to affect provisions found elsewhere.**—The enumeration of various officers and their salaries in this title shall not operate to repeal or affect provisions of law found elsewhere in the statutes, or any appropriation bills permitting or authorizing the existence, or prescribing the compensation of other officers.

## TITLE 121

## SEALS AND SCROLLS

Art. 7092. Private seals and scrolls dispensed with.

Art. 7093. Unsealed instruments held to import consideration.

**Article 7092. [4862] Private seals and scrolls dispensed with.**—No private seal or scroll shall be necessary to the validity of any contract, bond or conveyance, whether respecting real or personal property, or any other instrument of writing, whether official, judicial or private, except such as are made by corporations, nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same. [Act April 28, 1873. Act Feb. 2, 1858. P. D. 5087.]

**Conveyances prior to enactment.**—A conveyance of land, not under seal, but signed by the grantor in 1845, is not, by reason of the absence of a seal, a nullity. *Tom v. Sayers*, 64 T. 339; *Miller v. Alexander*, 8 T. 36; *Id.*, 13 T. 497, 65 Am. Dec. 73; *Martin v. Weyman*, 26 T. 460.

**Effect of article.**—The common-law rule as to deeds is not changed by the above article. The undisclosed principal is not liable for a mortgage assumed by an agent who takes the deed to himself. *Sanger v. Warren*, 91 T. 472, 44 S. W. 477, 66 Am. St. Rep. 918.

**Certificates of deposit.**—The execution and delivery of certificates of deposit pass title to them, and the right of which they are the evidences. *Cowen v. First Nat. Bank*, 94 T. 647, 63 S. W. 534.

**Assignments by corporation.**—Corporations being exempt from the operation of this statute, an assignment for the benefit of creditors executed by the president of a private corporation without attaching the corporate seal cannot convey the land of the corporation. *Shropshire v. Behrens*, 77 T. 275, 13 S. W. 1043.

**Art. 7093. [4863] Unsealed instruments held to import consideration, etc.**—Every contract in writing hereafter made shall be held to import a consideration in the same manner and as fully as sealed instruments have heretofore done.

Cited, *Harris v. Cato*, 26 T. 338.

**Written contracts import consideration.**—Bills of exchange and promissory notes import a consideration. *Jones v. Holliday*, 11 T. 412; *Williams v. Edwards*, 15 T. 41.

A written receipt, by the terms of which plaintiffs released their claim for damages for breach of contract for the sale of 200 head of cattle imports a consideration, and when pleaded is not subject to attack by demurrer, either general or special, upon the ground of failure to show consideration. *Warren v. Gentry*, 21 C. A. 151, 50 S. W. 1025.

A written contract imports a consideration, which, where none is expressed, may be shown under proper allegations. *Ash v. Beck* (Civ. App.) 68 S. W. 53.

It is presumed that county bonds rest upon a valuable consideration. *Martin County v. Gillespie County*, 30 C. A. 307, 71 S. W. 421.

An order of the commissioners' court entered on its minutes, reducing the rate of interest on a note given for school lands, held a written contract which imported a consideration. *Delta County v. Blackburn* (Civ. App.) 90 S. W. 902.

**One dollar held insufficient consideration.**—Recital of a consideration of one dollar in an oil and gas lease and payment thereof held not a sufficient consideration to support the contract. *Great Western Oil Co. v. Carpenter*, 43 C. A. 229, 95 S. W. 57.

**Presumptions and burden of proof.**—See Art. 3687, Rule 12.

**Pleading.**—See Art. 1827, § 101; Art. 1910, § 44.

**Release.**—A carrier of cattle can for a consideration imported by the written contract, as provided by this article, secure a release for damages already incurred, and the court is not authorized to assume it was without consideration, or executed under duress. *Texas Cent. R. Co. v. Shirley* (Civ. App.) 130 S. W. 687.

## TITLE 122

## SEQUESTRATION

[For venue in damage cases growing out of sequestration, see Art. 1830.]

Art.	Art.
7094. Writ of, may be issued by whom and for what causes.	7107. How judgment may be discharged.
7095. Affidavit, and what it shall state.	7108. When the property has been injured.
7096. Petition must be filed, when.	7109. Execution shall issue when.
7097. Bond for the writ.	7110. Replevy by plaintiff; bond.
7098. Writ may issue when claim is not due, when, etc.	7111. Bond shall be returned, and the proceeding thereon if forfeited.
7099. Writ of, and its requisites.	7112. Defendant not required to account for hire, etc., when.
7100. Duty of officer while he retains custody of property.	7113. Property likely to waste, etc., may be sold, when.
7101. Compensation of officer.	7114. Order of sale in such cases.
7102. Officer expending money may retain property until, etc.	7115. Return of order of sale.
7103. Defendant may replevy by giving bond.	7116. When debt is not due, property may be sold, when.
7104. Bond in case of personal property.	7117. Purchaser shall give bond, etc.
7105. In case of real estate.	7118. Bond shall be returned and judgment, etc., thereon, when.
7106. Return of bond and judgment thereon.	

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of Title.]

**Article 7094. [4864] In what cases to be issued.**—Judges and clerks of the district and county courts, and justices of the peace, shall, at the commencement or during the progress of any civil suit, before final judgment, have power to issue writs of sequestration, returnable to their respective courts, in the following cases:

1. When a married woman sues for divorce, and makes oath that she fears her husband will waste her separate property, or their common property, or the fruits or revenue produced by either, or that he will sell or otherwise dispose of the same so as to defraud her of her just rights, or remove the same out of the limits of the county during the pendency of the suit.

2. When a person sues for the title or possession of any personal property of any description, and makes oath that he fears the defendant or person in possession thereof will injure, ill-treat, waste or destroy such property, or remove the same out of the limits of the county during the pendency of the suit.

3. When a person sues for the foreclosure of a mortgage or the enforcement of a lien upon personal property of any description, and makes oath that he fears the defendant or person in possession thereof will injure, ill-treat, waste or destroy such property, or remove the same out of the county during the pendency of the suit.

4. When any person sues for the title or possession of real property, and makes oath that he fears the defendant, or person in possession thereof will make use of his possession to injure such property, or waste or convert to his own use the fruits or revenue produced by the same.

5. When any person sues for the title or possession of any property from which he has been ejected by force or violence, and makes oath of such fact.

6. When any person sues for the foreclosure of a mortgage or the enforcement of a lien on real estate, and makes oath that he fears the defendant or person in possession thereof will make use of such possession to injure such property, or waste or convert to his own use the timber, rents, fruits or revenue thereof.

7. When any person sues to try the title to any real property, or to remove cloud upon the title to any such real property, or to foreclose a

lien upon any such real property, or for a partition of real property, and makes oath that the defendant, or either of them in the event there be more than one defendant, is a non-resident of this state. [Acts 1887, p. 30.]

See Long v. Riley (Civ. App.) 139 S. W. 79.

**Historical.**—The seventh clause of this article was added by the amendment of March 17, July 4, 1887 (20th Leg., p. 30).

**Goods in transitu.**—Goods in transitu attached by the creditors of the vendee can be sequestered by the vendor. Allyn v. Willis, 65 T. 65.

**Commencement and propriety of suit.**—Splitting a cause of action on a note held not to render the actions void, and not to invalidate sequestration writs issued before consolidation against property mortgaged to secure the note. Avery v. Popper, 92 T. 337, 49 S. W. 219, 71 Am. St. Rep. 849.

**Issuance of citation is commencement of suit in justice court.** A sequestration writ issued before commencement of suit is void. Watt v. Parlin & Orendorff Co., 44 C. A. 439, 98 S. W. 429.

**Suit concerning real property.**—Sequestration may issue in any suit for title or possession of real property. Lamb v. Temp. Hall Co., 2 C. A. 289, 21 S. W. 713.

A vendor of land held not entitled to take possession thereof by writ of sequestration upon the purchaser's failure to pay a purchase-money note because of misrepresentations in inducing the sale. Buckingham v. Thompson (Civ. App.) 135 S. W. 652.

**Action for damages.**—Plaintiff, seeking damages, and not recovery of property, held not entitled to have the property sequestered. Houston v. Booth (Civ. App.) 107 S. W. 887.

**Suit to recover sequestered property.**—While an ordinary suit for the recovery of property, in which the property is seized by writ of sequestration, involves a trial of the right to such property, it is not a trial of right of property within Arts. 7769-7795, and the jurisdiction of the court of such suit is not determined by section 8, article 5, of the constitution, relating to the technical action of the trial of right of property. Morrow v. Short, 3 App. C. C. § 31.

**Divorce.**—Pending suit for divorce by a wife she may obtain a writ of sequestration. Wright v. Wright, 3 T. 168.

**Injunction.**—A party made an assignment for benefit of his creditors, but the assignee failed to qualify and tendered his resignation, whereupon the court at the instance of certain named creditors appointed plaintiff assignee who demanded the property from the assignor. The assignor refused to deliver possession and continued to sell the property. The plaintiff brought injunction suit to restrain assignor from disposing of the assigned goods. The court holds that the injunction was properly dissolved because plaintiff had an adequate remedy at law under this article and subdivision. Frazier v. Coleman (Civ. App.) 111 S. W. 663. And see Mitchell v. Burnett, 57 C. A. 124, 122 S. W. 937.

**Notice.**—A purchaser held not entitled to notice of the vendor's intention to take possession of land upon the purchaser's refusal to pay a purchase-money note. Buckingham v. Thompson (Civ. App.) 135 S. W. 652.

**Art. 7095. [4865] Affidavit, and what it shall state.**—No sequestration shall issue in any cause until the party applying therefor shall file an affidavit in writing stating:

1. That he is the owner of the property sued for, or some interest therein, specifying such interest, and is entitled to the possession thereof; or,

2. If the suit be to foreclose a mortgage or enforce a lien upon the property, the fact of the existence of such mortgage or lien, and that the same is just and unsatisfied, and the amount of the same still unsatisfied, and the date when due.

3. The property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which the same is situated.

4. It shall set forth one or more of the causes named in the preceding article entitling him to the writ. [Acts 1866, p. 120. P. D. 5095a.]

See Long v. Riley (Civ. App.) 139 S. W. 79.

**Sufficiency of affidavit.**—A sequestration proceeding will be quashed when the affidavit does not identify the property, state its value or the county in which it was to be found. Huckins v. Leitner, 4 App. C. C. § 16, 14 S. W. 1016.

An affidavit filed with the petition is not invalid because not stating who were the defendants, or who had possession of the property sought to be sequestered, these facts appearing in the petition. Watts v. Overstreet, 78 T. 571, 14 S. W. 704.

If the affidavit fails to state the value of each item of property, and the county in which the property is situated, it should be quashed; and an intervener who has purchased the property and assumed the payment of the notes sued on may move to quash. McSpadden v. La Force (Civ. App.) 39 S. W. 163.

Where a suit was commenced before a justice, and the affidavit in sequestration alleged plaintiff's ownership, held a sufficient claim or demand on the part of plaintiffs. Ball v. Chase (Civ. App.) 49 S. W. 934.

An affidavit for sequestration need not name defendants, nor allege name of person in possession. *Whitaker v. Sanders* (Civ. App.) 52 S. W. 638.

The court should quash a writ of sequestration issued on an affidavit for four plaintiffs, when the suit is for six, and when the plaintiffs failed to amend. *White v. Simon-ton* (Civ. App.) 67 S. W. 1073.

An affidavit for a writ of sequestration, alleging that defendants would make use of their possession to waste or convert the revenue of the property, held objectionable for duplicity. *Clark v. Elmendorf* (Civ. App.) 78 S. W. 538.

An affidavit in sequestration proceedings that plaintiff fears that defendant will make use of his possession to convert to his own use the fruits "or" revenues produced by the property held not to be rendered indefinite or uncertain by the use of the word "or." *Hurlbut v. Gainer*, 45 C. A. 588, 103 S. W. 409.

An affidavit for a writ of sequestration held sufficient. *Duncan v. Jouett* (Civ. App.) 111 S. W. 981.

Grounds for the writ of sequestration which are not inconsistent may be joined conjunctively in an application for the writ, but they cannot be stated in the alternative. *Id.*

An affidavit for sequestration held bad for duplicity. *Lester v. Ricks* (Civ. App.) 140 S. W. 395.

**Description of property.**—The petition for sequestration showed that the logs in controversy were cut off of certain tracts of land. One of the methods which the law has required for the identification of logs to be floated or rafted is a brand. The logs in question were described by a brand as well as otherwise, and whether the brand had, at the time, been so recorded as to make it, under the statute, evidence of ownership, it was, under the facts of this case, sufficient to identify the logs, the other matters of description required by the statute having been fully given. *Boykin v. Rosenfield Co.*, 69 T. 115, 9 S. W. 318.

An affidavit, the description in which clearly indicates that the property sued for is a stock of shoes, and they are described sufficiently to be distinguished from property of a like kind, is good. *Clopton v. Goodbar* (Civ. App.) 55 S. W. 972.

A petition for a writ of sequestration directing the seizure of an undivided one-fifth of all the rice grown by defendants on a certain tract of land held fatally defective. *Gravity Canal Co. v. Sisk*, 43 C. A. 194, 95 S. W. 724.

**Value of property.**—The value of each article must be stated with certainty. *Morgan v. Turner*, 4 C. A. 192, 23 S. W. 284.

An affidavit for sequestration sufficiently sets out the value of property sought to be seized where the debt due was the only amount mentioned, and the value of the property is alleged to be the amount "above set forth." *McMillan v. Moon*, 18 C. A. 227, 44 S. W. 414.

An affidavit in sequestration proceedings need not state the value of each acre sued for. *Caruthers v. Hadley* (Civ. App.) 115 S. W. 80.

Where the basis for a writ of sequestration was a sworn petition, which contained no allegation of value, as required by the statute to be stated in the affidavit of plaintiff in suing out the writ, the trial court erred in not quashing and dismissing the proceedings. *Cleghon v. Boxley* (Civ. App.) 123 S. W. 438.

Where the affidavit does not state the value of the property, a writ of sequestration should be quashed. *Butts v. Lucia* (Civ. App.) 153 S. W. 686.

**Affidavit by agent.**—An affidavit made by an agent of a nonresident plaintiff, alleging that "affiant" fears the removal of defendant's property, is sufficient. *Cahn v. Jaffray*, 12 C. A. 324, 34 S. W. 372.

The law requiring plaintiff, before a writ of sequestration issues, to make oath that he fears defendant or the person in possession will remove the property out of the limits of the county pending the suit, and art. 11, permitting an affidavit required of a party to be made by his agent, the affidavit of the agent of plaintiff corporation that it has such fear is sufficient. *Tyson v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 54 S. W. 1055.

**Demurrer to petition.**—The affidavit filed under this article is so far a part of the petition as to allow a general demurrer with reference to it, when the facts stated in it have reference to the allegations in regard to the same facts contained in the petition. *Johnson v. Dowling*, 1 App. C. C. § 1090.

**Supplemental petition.**—Under this article and Art. 7099, a supplementary petition asking issuance of the writ to a different county from that designated in the original affidavit and petition must be verified. *Bemis v. Wills*, 10 C. A. 626, 31 S. W. 827.

**Remedy for false affidavit.**—The truth of the allegations of an affidavit for sequestration cannot be put in issue for purpose of abating the writ; but the remedy for their falsity is by suit on the bond. *Tyson v. First State Bank & Trust Co.* (Civ. App.) 154 S. W. 1055.

**Costs.**—See Title 37, Chapter 18.

**Art. 7096. [4866] Petition must be filed, when.**—If the suit be in the district or county court, no writ of sequestration shall issue, unless a petition shall have been first filed therein, as in other suits in said courts. [Id. p. 122, sec. 4.]

**Effect of delay.**—Delay in filing suit for possession of land, after making an affidavit for a writ of sequestration thereon, held not to authorize the quashing of the affidavit for the writ. *Duncan v. Jouett* (Civ. App.) 111 S. W. 981.

**Art. 7097. [4867] Bond for the writ.**—Nor shall a writ of sequestration issue in any case until the party applying therefor has filed with the judge, clerk or justice of the peace to whom he applies, a bond payable to the defendant for a sum of money not less than double the value of the property to be sequestered, as stated in his affidavit, with

two or more good and sufficient sureties, to be approved by such judge, clerk, or justice of the peace, as the case may be, conditioned that the plaintiff or person suing out such writ will pay to the defendant all such damages as may be awarded against him, and all costs in case it shall be decided that such sequestration was wrongfully issued. [Act March 15, 1848. P. D. 5096-7.]

Cited, *Long v. Riley* (Civ. App.) 139 S. W. 79.

**Necessity of bond.**—When sequestration is sought against several who are jointly sued, it is not necessary that the plaintiff should execute bond separately to each defendant. *Boykin v. Rosenfield*, 69 T. 115, 9 S. W. 318.

The bond is an essential part of sequestration proceedings, and, where not filed until the day following the issuance of the writ, a motion to quash the sequestration proceedings should have been sustained. *Nickell v. Carter*, 23 C. A. 570, 56 S. W. 769.

**Requisites and sufficiency of bond.**—A sequestration bond for a sum less than double the value of the property sequestered is void, and on appeal by the sureties a judgment against them will be set aside. *Flynn v. Lynch*, 1 App. C. C. § 787.

The parties to the suit must be properly stated. *Rohrbough v. Leopold*, 68 T. 254, 4 S. W. 460.

The fact that the sequestration bond recites three parties as principal, and is signed by only one of them, does not vitiate the bond, it appearing that the party who did sign replevied the property. *McLeod Artesian Well Co. et al. v. Craig* (Civ. App.) 43 S. W. 934.

A sequestration bond signed by a woman as principal, conditioned to pay all charges and damages adjudged against "them" is defective. *Id.*

That plaintiff's name, "Hurlbut," was written, in that portion of a bond given in sequestration proceedings stating its condition, as "Hubert," held not to render the bond invalid. *Hurlbut v. Gainor*, 45 C. A. 588, 103 S. W. 409.

**Liability on bond.**—If the owner of property incumbered by a lien so acts as to compel the lienholder, in his own protection, to sequester it, such owner is not entitled to a credit for the value of the rents of the property during the time it is held by the officer in obedience to the writ. *Bumpass v. Morrison*, 70 T. 756, 8 S. W. 596.

The parties are bound by the terms of the bond, and their liability is not conditioned on the regularity of the sequestration proceedings. *Remis v. Wells*, 10 C. A. 626, 31 S. W. 827; *Cahn v. Jaffray*, 12 C. A. 324, 34 S. W. 372; *Filgo v. Citizens' Nat. Bank* (Civ. App.) 38 S. W. 237.

Where one asks damages for loss of time by reason of a wrongful sequestration of his crops, he must show that he sought other employment. *Brown v. Leath*, 17 C. A. 262, 42 S. W. 655.

Where a crop is wrongfully seized, and the owner afterwards buys it from the person seizing it, it is error to allow him as damages for the seizure a greater amount than he paid for the crop. *Id.*

He was not required, however, to hire out his children, in order to make up for their loss of time. *Id.*

A refusal to quash a defective sequestration bond is immaterial, where defendant has replevied the property sequestered, and plaintiff has recovered judgment. *McLeod Artesian Well Co. v. Craig* (Civ. App.) 43 S. W. 934.

Where plaintiff was awarded a chattel that he had sequestered, it was error to adjudge costs against the sureties on the sequestration bond. *Meyer v. Hill* (Civ. App.) 45 S. W. 333.

Where writ of sequestration is quashed at plaintiff's cost, and property returned to defendant, it was error to award more than nominal damages to defendant in a suit on the sequestration bond. *Lacy v. Gentry* (Civ. App.) 56 S. W. 949.

Measure of actual damages for wrongful sequestration held the value of the property seized. *Wheat v. Ball* (Civ. App.) 68 S. W. 181.

Where proceeds of a sale of sequestered property were deposited with the clerk, the amount so deposited should be deducted from the judgment recovered by defendant in an action for wrongful sequestration. *Id.*

Owner of sequestered property held entitled to damages, if the sequestration was wrongfully sued out. *Bledsoe v. Palmer* (Civ. App.) 81 S. W. 97.

In the absence of a finding that a writ of sequestration was wrongfully sued out, plaintiff is chargeable only with the net amount recovered by him from the land while in his possession. *Moore v. Brown* (Civ. App.) 89 S. W. 310.

Where a party takes possession of land under sequestration process, and judgment is subsequently rendered against him, the principal and sureties on his replevy bond are liable for rents collected by him after taking possession. *Flynt v. Taylor* (Civ. App.) 91 S. W. 864.

In a sequestration suit, if plaintiff fails to recover the property sued for, defendant is entitled to a judgment restoring the same to his possession, or for its value if the same cannot be returned. *Rea v. P. E. Schow & Bros.*, 42 C. A. 600, 93 S. W. 706.

A judgment for \$400 actual damages for the wrongful suing out of a sequestration held excessive. *Falls City Clothing Co. v. Cannon* (Civ. App.) 106 S. W. 189.

A writ of sequestration sued out by a vendee prior to the expiration of a lease of the land ejecting the lessee's wife held wrongful, entitling her to damages. *Elam v. Carter*, 55 C. A. 649, 119 S. W. 914.

If a writ of sequestration was properly sued out, the sureties on the bond would not be liable in damages for any abuse in the execution of the writ not authorized by them. *Buckingham v. Thompson* (Civ. App.) 135 S. W. 652.

Liability of surety on a sequestration bond stated. *Springer v. Riley* (Civ. App.) 136 S. W. 577.

Where a writ of sequestration is wrongfully sued out in aid of the foreclosure of a chattel mortgage and the mortgaged property is seized thereunder, the mortgagee is lia-

ble to the mortgagor in damages. *Sweeney v. Farmers' Rice Milling & Storage Co.* (Civ. App.) 137 S. W. 1147.

The bondsmen on the replevin bond of plaintiff in sequestration do not have to be cited before judgment can be rendered on the bond; they making themselves parties by making the bond and having it returned and filed in the case. *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

Where defendant's cattle were wrongfully sequestered, the measure of defendant's damages is the value of the same at trial, and not at the time of the levy. *Tiefel Bros. & Winn v. Maxwell* (Civ. App.) 154 S. W. 319.

**Actions on bonds or for wrongful sequestration.**—A party whose property has been wrongfully seized under a writ of sequestration is not confined to his action on the bond; he may recover damages in an ordinary suit against the person at whose instance the writ was issued, and who, irrespective of the bond, is liable for the damages. *Portier v. Fernandez*, 35 T. 534.

The plaintiff in a proceeding by sequestration who by his conduct ratifies the conduct of a sheriff who has abused the process of the court by the oppressive and harsh manner in which he executed it, so that injury thereby resulted to the defendant, is responsible therefor. *Casey v. Hanrick*, 69 T. 44, 6 S. W. 405.

— **Malice.**—Evidence of malice, see notes under Art. 3687.

A mortgagee in a chattel mortgage held authorized to sequester the chattels without incurring liability for maliciously suing out the writ. *Nichols v. Paine*, 52 C. A. 87, 113 S. W. 972.

In replevin to recover certain personal property, evidence that plaintiff was ignorant of defendant's claim at the time suit was brought held inadmissible. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

— **Parties.**—See Title 37, Chapter 5.

— **Pleading.**—See Art. 1827.

— **Plea in reconvention.**—See Art. 1907.

— **Burden of proof.**—See Art. 3687, Rule 12.

— **Instructions and questions for jury.**—See Art. 1971.

**Damages in general.**—In an action for damages which are not necessarily the natural or legal consequence of the seizure and detention of the property, such damages must be specially pleaded. *Harris v. Finberg*, 46 T. 79.

The value of the defendant's time while attending court or any such incidental expense is not an element of actual damage. *Harris v. Finberg*, 46 T. 79. And see *Vance v. Lindsey*, 60 T. 286.

Writs of sequestration and attachment stand upon similar footing in regard to the right of the defendant to recover damages for their wrongful use. *Simpson v. Lee* (Civ. App.) 34 S. W. 1053; *Casey v. Hanrick*, 69 T. 44, 6 S. W. 405; *Moore v. Smith* (Sup.) 19 S. W. 781; *Gentry v. Bowser*, 2 C. A. 388, 21 S. W. 569.

— **Value of property.**—To authorize a judgment on the bond, the value of the property must be shown by the evidence. *Watts v. Overstreet*, 78 T. 571, 14 S. W. 704; *Investment Co. v. Shelton*, 8 C. A. 550, 29 S. W. 494; *Filgo v. Citizens' Nat. Bank of Waco* (Civ. App.) 38 S. W. 237.

Value of property sequestered, for which plaintiff is liable where suit is decided adversely, is the value at date of trial, with 6 per cent. interest. *Norwood v. Interstate Nat. Bank* (Civ. App.) 45 S. W. 927.

Value of sequestered property, for which plaintiff is liable where decision is adverse, is the value at time and place of seizure. *Norwood v. Interstate Nat. Bank*, 92 T. 268, 48 S. W. 3.

The measure of damages for wrongful sequestration is their value at the time of the trial. *B. F. Avery & Sons v. Dickson* (Civ. App.) 49 S. W. 662.

Where defendant's staves were wrongfully seized on a writ of sequestration sued out by plaintiff and sold by the sheriff, held, that he was entitled to recover their full value at the time of seizure. *Louis Werner Stave Co. v. Pickering*, 55 C. A. 632, 119 S. W. 333.

— **Exemplary damages.**—When the issuing out and levy of the writ is malicious, exemplary damages may be awarded. Where it is merely wrongful, actual damages only can be recovered. *Harris v. Finberg*, 46 T. 79. And see *Vance v. Lindsey*, 60 T. 286.

Sureties on bonds are not liable for exemplary damages on account of malice of principal. *McArthur v. Barnes*, 10 C. A. 318, 31 S. W. 212.

Where one procures a writ of sequestration to obtain property that does not belong to him, he is liable for exemplary damages. *Land v. Klein*, 21 C. A. 3, 50 S. W. 638.

Items of damage alleged in an action for wrongful sequestration held not proper elements of actual damages, but proper on the issue of exemplary damages. *Wheat v. Ball* (Civ. App.) 68 S. W. 181.

Exemplary damages for the wrongful suing out of a writ of sequestration can only be had in case of actual damages. *Rogers v. O'Barr & Dinwiddie* (Civ. App.) 76 S. W. 593.

A verdict for exemplary damages for a wrongful sequestration is authorized only where the writ was sued out wrongfully, maliciously, and without probable cause. *Lynch v. Burns* (Civ. App.) 79 S. W. 1084.

In reconvention for damages, actual and exemplary, for a wrongful sequestration, certain evidence held admissible on the question of exemplary damages. *Falls City Clothing Co. v. Cannon* (Civ. App.) 106 S. W. 189.

Where plaintiffs had the legal title to a house and lot, the holding of possession by defendant under a void contract, which he refused to surrender, constituted probable cause for suing out a writ of sequestration, and hence defendant is not entitled to exemplary damages. *Cobb v. Johnson*, 101 T. 440, 108 S. W. 811.

To entitle a party to exemplary damages for wrongfully suing out a writ of sequestration, both malice and want of probable cause must exist. *Webb v. J. L. Wiginton & Co.*, 55-C. A. 413, 118 S. W. 856.

On the vacation of an attachment, evidence of plaintiff's good faith in suing out the same is material only as against a claim for exemplary damages. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

The obligation of a sequestration bond is that the person suing out the writ will pay to defendant all such damages as may be awarded against him, and all costs in case the court decides that the sequestration was wrongfully issued, but the surety is not liable for exemplary damages, unless based on some special conduct of plaintiff in which the surety participated. *Springer v. Riley* (Civ. App.) 136 S. W. 577.

Exemplary damages are not recoverable against sureties, as such, on a sequestration bond. *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

— **Judgment.**—Judgment for wrongful sequestration should state values separately. *B. F. Avery & Sons v. Dickson* (Civ. App.) 49 S. W. 662.

Under the statute, a judgment for wrongful sequestration should state the value of each article separately. *Lynch v. Burns* (Civ. App.) 79 S. W. 1084.

In an action on a sequestration bond, the court rendering judgment on the bond held authorized to render judgment for the surety against the principal. *Springer v. Riley* (Civ. App.) 136 S. W. 577.

**Liability of officer.**—See Art. 7130.

**Discharge of sureties.**—General questions as to sureties, see Title 109.

A writ of sequestration is only an auxiliary process, and if the plaintiff recovers in the action the refusal of the court to quash a writ of sequestration will not be revised on appeal, although the defendant may have replevied the property; but otherwise as to the sureties in the replevy bond who appeal from the judgment overruling the motion to quash the writ. *Cheatham v. Riddle*, 8 T. 162; *Trammell v. Trammell*, 20 T. 406. And see *Hendrick v. Cannon*, 5 T. 248; *Martin v. Sykes*, 25 T. Sup. 197.

The sureties on a sequestration bond are released when the writ is quashed after the goods have been replevied. *Mitchell v. Bloom*, 91 T. 634, 45 S. W. 558.

If sequestration proceedings are quashed after defendants had replevied property the sureties on the replevy bond are discharged. *Mitchell v. Bloom* (Civ. App.) 46 S. W. 406.

**Art. 7098. [4868] Writ may issue when claim is not due, when, etc.**—When any person has a mortgage or lien upon personal property of any description, and makes affidavit and gives bond as required in the two preceding articles, the writ of sequestration may issue, although the right of action upon such mortgage or lien has not accrued; and the same proceeding shall be had thereon as in other cases of sequestration, except that no final judgment shall be rendered against the defendant until the right of action on such mortgage or lien shall have accrued. [Id. P. D. 5098.]

**In general.**—When property subject to a valid lien has been sold under a subsequent judgment and execution, and the purchaser attempts, by removing the property from the county or otherwise, to impair or defeat the right of the lienholder, the latter may bring suit on his claim, whether due or not, on his making the debtor and the purchaser under execution parties to the suit, and sequester the property. *Sparks v. Pace*, 60 T. 298.

**Art. 7099. [4869] Writ and its requisites.**—The writ of sequestration may be directed to the sheriff or any constable of any county wherein the property is alleged to be situated, which allegation may be made either in the original or in a supplemental affidavit. It shall command the sheriff or any constable to take into his possession the property, describing the same as it is described in the affidavit, if to be found in the county, and keep the same subject to the future order of the judge, court or justice of the peace who issued the writ, unless the same is replevied according to law. [Act Nov. 9, 1866. Id. p. 124, sec. 4.]

**Sufficiency of writ.**—Indorsement on writ of sequestration nunc pro tunc of date of issuance held proper. *Whitaker v. Sanders* (Civ. App.) 52 S. W. 638.

A writ of sequestration issued against J. M. Peters, when defendant's name is M. J. Peters, is void. *Watt v. Parlin & Orendorff Co.*, 44 C. A. 439, 98 S. W. 429.

**Execution of writ.**—The property must be taken into actual possession by the officer. *Elliott v. Long*, 77 T. 467, 14 S. W. 145.

The officer executing the writ may remove the defendant therein, his family, goods and property, bodily, from the premises, unless he removes of his own accord. *Patton v. Slade*, 15 C. A. 156, 33 S. W. 832.

Where a sheriff takes the property described in the writ from the possession of one who owns the property, but who is not a party to the suit, he is liable on his bond for damages to the person from whom he has so taken the property. The sequestration law requires no bond to secure any person but the defendant. There is no provision for the protection of the rights of any but the parties to the suit. *Vickery v. Crawford*, 93 T. 373, 55 S. W. 560, 49 L. R. A. 773, 77 Am. St. Rep. 891.

**Motion to quash.**—A motion to quash the writ may be filed after pleas to the merits and at any time before the case has been disposed of. *Wheeler v. Wheeler*, 65 T. 573.

A motion to quash sequestration proceedings may be made at any time before the case is disposed of. *Gravity Canal Co. v. Sisk*, 43 C. A. 194, 95 S. W. 724.

The court on motion to quash a writ of sequestration for not sufficiently describing the property sought to be taken must judge the writ by its own recitals, and not by any evidence that the writ was not in fact levied on property attempted to be described. *Orange County Irr. Co. v. Orange Nat. Bank* (Civ. App.) 130 S. W. 869.

Objection to the invalidity of a writ of sequestration first raised by assignment of error on appeal cannot be reviewed. *Hearn v. Harless* (Civ. App.) 154 S. W. 613.



**Variance.**—A variance in the description of the property as contained in the writ and petition is fatal. *Woessner v. Fly*, 63 T. 198. But where such a variance exists the writ may be amended by the petition. Query, if the bond had followed the mistake in the writ. *Porter v. Miller*, 7 T. 468. And see *Whittenberg v. Lloyd*, 49 T. 633; *Brack v. McMahan*, 61 T. 1.

**Void writ.**—Moving a house and contents, under a void writ of sequestration, held to be conversion. *Crawford v. Thomason* (Tex. Civ. App.) 117 S. W. 181.

Where persons having no rights in land gained possession by wrongfully obtaining a writ of sequestration and having it executed, they acquired no rights by the possession so gained. *Knox v. McElroy* (Tex. Civ. App.) 118 S. W. 1142.

**Art. 7100. [4870] Duty of officer while he retains custody of property.**—The officer executing a writ of sequestration, while he retains custody of the property sequestered, shall take care of and manage the same in a prudent manner, and if he confides the same to the custody of other persons he shall be responsible for their acts in regard thereto, and shall be responsible to the party injured for any neglect or mismanagement by himself, or by those to whom he has confided the custody or management of the property. [Act Nov. 9, 1866, p. 121, sec. 3.]

**Officer's custody of property.**—An officer has the right to hold property seized under a writ until ordered by the court to dispose of it, or until a final disposition of the cause. *Thompson v. Graves*, 4 App. C. C. § 7, 15 S. W. 33.

**Art. 7101. [4871] Compensation of officer.**—The officer retaining custody of property by virtue of a writ of sequestration shall be entitled to receive a just compensation and all reasonable charges therefor, to be determined by the judge or justice from whose court the writ issued, to be taxed in the bill of costs against the party cast in the suit, and collected in the same manner as the other costs in the case. [Id.]

**Right of officer.**—Under Arts. 2000, 3747, and this article, a court might properly allow a sheriff compensation in a proceeding against him to recover money collected by him under an order of sale, in which the sheriff filed an answer, claiming compensation for taking care of live stock levied on, which was equivalent to a motion to retax costs. *Coleman Nat. Bank v. Futch* (Civ. App.) 146 S. W. 957.

**Taxation as costs.**—See Title 37, Chapter 18.

**Art. 7102. [4872] Officer expending money may retain property until, etc.**—If the officer be compelled to expend any sum of money in the security, management or care of the property, he may retain possession of said property until said money be refunded by the party offering to replevy said property, his agent or attorney. [Id.]

**Art. 7103. [4873] Defendant may replevy by giving bond.**—When property has been sequestered, the defendant shall have the right to retain possession of the same by delivering to the officer executing the writ his bond, payable to the plaintiff, with two or more good and sufficient sureties, to be approved by such officer, for an amount of money not less than double the value of the property to be replevied. [Act Feb. 8, 1860. P. D. 5100.]

See *Halbert v. San Saba Springs Land & Live Stock Co.* (Civ. App.) 34 S. W. 636.

**Persons entitled to replevy.**—The defendant alone has the right to replevy. *Harris v. Shackelford*, 6 T. 133; *Haile v. Oliver*, 52 T. 443.

The right to give a replevy bond is limited to the parties to the suit. *Haile v. Oliver*, 52 T. 443.

A writ of sequestration was levied upon property in possession of one not the defendant in the writ, who gave a bond that the defendant would return the property. It was not a claim or replevy bond, and no judgment could be rendered against the sureties thereon. *Lang v. Dougherty*, 74 T. 226, 12 S. W. 29.

**Validity of bond.**—In a suit against B. the property in controversy was found in the possession of C. The sequestration bond recited on its face that it was given by C. as principal, and B. and another as sureties, conditioned that C. should have the property forthcoming, etc. C. was not a party to the suit, but the bond was signed first by B., the defendant. Held, that the bond must be treated as properly executed by the defendant. *Pait v. McCutchen*, 43 T. 291.

When a writ of sequestration is improvidently issued, there can be no liability on a replevin bond given to secure the property. *McSweeney v. Ellerman* (Civ. App.) 155 S. W. 270.

**Adequacy of remedy.**—Under this article defendant can retain possession of the sequestered property by giving bond, in which case he is not required under Art. 7112 to account for the rents or revenue thereof, and it is not an adequate legal remedy to save and collect for a mortgage creditor the rents thereof, and apply them to the discharge of his debts, and to keep the property in such repair as to be rented annually, and hence it is a proper case for the appointment of a receiver. *De Barrera v. Frost*, 33 C. A. 530, 77 S. W. 639.

**Reversal of judgment.**—When a judgment in favor of the plaintiff is reversed on appeal from the justice's court, and rendered in favor of the defendant in the suit, it inures to the benefit of the sureties on the replevy bond, who are thereby discharged from all liability on the bond. *McKay v. Irion*, 4 App. C. C. § 184, 15 S. W. 123.

**Necessity against principals.**—Two principals in a replevin bond in a sequestration proceeding being jointly and severally bound thereby, the sureties are bound if judgment goes against either principal. *Wandelohr v. Grayson County Nat. Bank* (Civ. App.) 106 S. W. 413.

**Art. 7104. [4874] Bond in case of personal property.**—If the property to be replevied, as provided in the preceding article, be personal property, the condition of the bond shall be that the defendant will not remove the same out of the county, or that he will not waste, ill-treat, injure, destroy or sell or dispose of the same, according to the plaintiff's affidavit, and that he will have such property, with the value of the fruits, hire or revenue thereof, forthcoming to abide the decision of the court, or that he will pay the value thereof and of the fruits, hire or revenue of the same in case he shall be condemned so to do. [Id.]

**Form of bond.**—The negative condition of the bond is limited to the particular act stated in the affidavit. *Krall v. Printing Press Co.*, 79 T. 556, 15 S. W. 565.

**Sufficiency of bond.**—The fact that the bond recites three persons as principals, and is executed by one only, does not invalidate it, if the person who executed it was the plaintiff in replevin. *McLeod Artesian Well Co. v. Craig* (Civ. App.) 43 S. W. 934.

Where property seized under writs of sequestration is replevied, a quashal of the sequestration discharges the replevy bond. *Avery v. Popper* (Sup.) 48 S. W. 572.

Where replevin bond, though not in full compliance with the statute, is less onerous than statute prescribes, and is in substantial compliance with it, it is valid. *Whitaker v. Sanders* (Civ. App.) 52 S. W. 638.

**Rights to property replevied.**—Property replevied by the defendant is subject to seizure under any other valid writ. *Krall v. Printing Press Co.*, 79 T. 556, 15 S. W. 565.

By giving a replevy bond the defendant is not authorized to sell the property so as to give a good title to the purchaser. He must satisfy the judgment or return the property in satisfaction of the judgment. *Crawford v. Southern Rock Island Plow Co.* (Civ. App.) 77 S. W. 281.

**Rights of sureties.**—The sureties on the replevy bond have no right to return the property to the officer who levied the writ. *Krall v. Printing Press Co.*, 79 T. 556, 15 S. W. 565.

Sureties on a replevin bond given in proceedings to foreclose a chattel mortgage could not complain that the judgment for plaintiff did not in terms foreclose the mortgage. *McLeod Artesian Well Co. v. Craig* (Civ. App.) 43 S. W. 934.

Where property has been sequestered, rights of sureties on a replevy bond stated. *Wandelohr v. Grayson County Nat. Bank* (Civ. App.) 106 S. W. 413.

Sureties upon bonds given to replevy property in sequestration proceedings held concluded by judgment rendered against principal, except as to certain matters in the absence of collusion between principal and adverse party or other like circumstances. *Wandelohr v. Grayson County Nat. Bank*, 102 T. 20, 108 S. W. 1154.

**Liability on bond.**—Final judgment for slave property was given against the defendant and his sureties on a replevy bond. The property in slaves having ceased to be such, it was held that the party in whose hands the property was left by the replevy bond was relieved from liability thereon. *Pait v. McCutchen*, 43 T. 291.

The sureties in a replevy bond are not liable for the value of the use of property prior to the time of the execution of the bond. *Gunn v. Pickering*, 4 App. C. C. § 276, 17 S. W. 1115.

The liability of the obligors is not conditioned upon the regularity of the sequestration proceedings, and the sureties are liable when judgment is for the plaintiff, notwithstanding the writ of sequestration is quashed. *Bemis v. Wells*, 10 C. A. 626, 31 S. W. 827, citing *Sexton v. Hindman*, 2 App. C. C. § 462; *Jacobs v. Daugherty*, 78 T. 682, 15 S. W. 160.

The defendant who has replevied the property is not released from his liability on his bond by the fact that the property was taken from his possession by process in another suit, nor is the plaintiff required to follow the property. *Cohen v. Adams*, 13 C. A. 118, 35 S. W. 303.

Measure of liability on replevin bond held the value of the property at the date of the approval of the bond, with interest. *McLeod Artesian Well Co. v. Craig* (Civ. App.) 43 S. W. 934.

The rights of plaintiff in foreclosure proceedings, on a bond given by defendant, who replevied the mortgaged property, does not depend on pleadings. Id.

Plaintiff, having alleged the value of the property, is not entitled to judgment on defendant's replevin bond exceeding the sum alleged. *Monday v. Vance* (Civ. App.) 51 S. W. 346.

In an action on a replevin bond, the measure of damages is the value of the property replevied at the time of the trial and special damages. *Talcott v. Rose* (Civ. App.) 64 S. W. 1009.

The value of the property sequestered and retained by a defendant under replevy bond is determined by its market value at time of trial when the question arises in the original suit and under the statutes. *Luedde v. Hooper*, 95 T. 172, 66 S. W. 56.

The measure of damages is the market value of the property at the time of the trial and not at time and place defendant took possession of it. *Wood v. Fuller*, 34 C. A. 178, 78 S. W. 236.

Sureties on a replevin bond held not liable for costs. *Pipkin v. Tinch* (Civ. App.) 97 S. W. 1077.

The sureties on a defendant's replevy bond are not liable for the value of the use or hire of the property which accrued prior to the time the property was replevied. *Bateman v. Hipp*, 51 C. A. 405, 111 S. W. 971.

The sureties on a replevin bond are not liable for the costs in the suit. *McIntyre v. Emerson* (Civ. App.) 132 S. W. 947.

Under the provisions of this article and Arts. 7106, 7107, 7108, 7129 and 7149, the delivery or tender of the property must be made to the sheriff of the county or constable of the precinct in which the judgment is rendered and not to the one from whom it was replevied, in order to avoid liability upon a replevy bond. *Texas Fidelity & Bonding Co. v. Cagle* (Civ. App.) 135 S. W. 689.

— **Effect of quashing of writ.**—Where sequestration was levied and goods replevied, and writ of sequestration quashed, sureties on the replevy bond were released. *Mitchell v. Bloom*, 91 T. 634, 45 S. W. 558.

Where sequestered property is replevied by defendant, the quashing of the sequestration does not discharge the replevin bond. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

A replevin bond in distress proceedings is not binding when the warrant is quashed. *Mitchell v. Bloom* (Civ. App.) 46 S. W. 406; *Lincoln v. Hollenbach*, 49 S. W. 686; *Hail v. Tunstall*, 21 C. A. 593, 54 S. W. 323; *Love v. Hudson*, 24 C. A. 377, 59 S. W. 1127; *Jackson v. Corley*, 30 C. A. 417, 70 S. W. 570.

— **Dismissal of suit.**—No right of recovery on defendant's replevin bond where plaintiff voluntarily dismisses his suit without establishing any right against defendant. *Bullock v. Traweek* (Civ. App.) 20 S. W. 724.

— **Judgment.**—See notes under Art. 7106.

**Liability of purchaser pending suit.**—Plaintiff, in sequestration held not to have elected to pursue the defendant, who had given a replevin bond pending suit, so as to estop him from proceeding against the purchaser of the property. *Crawford v. Southern Rock Island Plow Co.*, 33 C. A. 510, 77 S. W. 280.

In sequestration, where defendant replevies the goods and sells them pending suit, motion for execution against the purchaser, after judgment for plaintiff, held not prejudicial to the purchaser. *Id.*

**Art. 7105. [4875] In case of real estate.**—If the property be real estate, the condition of such bond shall be that the defendant will not injure the property, and that he will pay the value of the rents of the same in case he shall be condemned so to do. [*Id.*]

**Form of bond.**—When the levy is upon both personal and real property, a replevy bond conditioned as required by the statute in cases of levy of personal property alone is invalid. *Haile v. Oliver*, 52 T. 443.

A bond drawn in accordance with Art. 7104 is invalid as replevy bond for real estate. A bond to replevy real estate should be drawn under this article and a replevin bond for real estate insufficient under the statute is not enforceable as a common-law bond. *Broussard v. Hinds* (Civ. App.) 101 S. W. 855.

**Liability of sureties.**—Sureties on a replevin bond given by occupants of land sequestered are not liable for costs of suit. *Henderson v. Brown*, 16 C. A. 464, 41 S. W. 406; *Zimmerman v. Pearson* (Civ. App.) 51 S. W. 523.

A vendor's claim for rents in possession of an administratrix of the deceased purchaser under her replevy bond held the rental value of the land. *Fidelity & Deposit Co. of Maryland v. Texas Land & Mortgage Co.*, 40 C. A. 489, 90 S. W. 197.

For the purpose of recovery on a replevin bond in a sequestration proceeding the amount of rents collected by the principal may be shown, but not what he did with it. *Wandelohr v. Grayson County Nat. Bank* (Civ. App.) 106 S. W. 413.

Recovery may not be had against the sureties on a replevin bond given in a sequestration proceeding for rents accruing prior to the execution of the bond. *Id.*

Sureties on a replevin bond, given by defendant to retain possession of certain land pending an action to determine the right to its possession, held liable for removal of crops by defendant after judgment for plaintiff and pending steps to perfect an appeal, which was not completed. *Love v. Perry* (Civ. App.) 111 S. W. 203.

**Termination of liability.**—The replevy bond stands security for the rents pending the litigation which does not necessarily stop with the judgment in the trial court, but may be continued at the option of the defendant party until action is secured by the courts of last resort on appeal or writ of error. *Fidelity & Deposit Co. v. Texas Land & Mortgage Co.*, 40 C. A. 489, 90 S. W. 199, 200.

**Art. 7106. [4876] Return of bond and judgment thereon.**—The bond provided for in the three preceding articles shall be returned with the writ to the court from whence the writ issued, and in case the suit is decided against the defendant final judgment shall be entered against all the obligors in such bond, jointly and severally, for the value of the property replevied, and the value of the fruits, hire, revenue or rent thereof, as the case may be. [*Id.*]

See *Owens v. Vander Stucken* (Civ. App.) 133 S. W. 491.

**In general.**—To authorize a summary judgment against the sureties, the bond must, in essential requisites, conform to the statute. If, however, the departure from the conditions prescribed by statute makes the bond less onerous, summary judgment may be rendered thereon against the sureties. *Janes v. Reynolds' Adm'rs*, 2 T. 250; *Hanks v. Horton*, 5 T. 103; *Harris v. Shackelford*, 6 T. 133.

Replevin bond held not a statutory bond, so that it was error to render summary judgment against the sureties thereon. *Mariany v. Lemaire* (Civ. App.) 83 S. W. 215.

Where property has been replevied in a sequestration suit and judgment is rendered for plaintiff, and the property is not returned to the sheriff within ten days after the

judgment, it is proper to render judgment against the obligors in the replevy bond. *Pipkin v. Tinch* (Civ. App.) 97 S. W. 1077.

Evidence held to show that judgment against sureties on a replevin bond given in a sequestration proceeding represented no rents accruing before the bond was executed. *Wandelohr v. Grayson County Nat. Bank* (Civ. App.) 106 S. W. 413.

**Citation or notice.**—Where a judgment has been rendered in replevin, and the case has been affirmed on appeal, and the mandate has been returned, and an order of sale has been issued in the lower court and returned stating that no property can be found, it is proper for the lower court to enter judgment on the bond without notice to the sureties. *Cabell v. Floyd*, 21 C. A. 135, 50 S. W. 478.

Judgment against a person not a party to the suit, not cited, and who neither appeared nor answered, but who gave a bond to retain possession of property levied on under a writ of sequestration, could not be sustained. *Vickrey v. Griffin* (Civ. App.) 154 S. W. 1057.

**Pleadings, findings and evidence to support judgment.**—Where, in an action on a replevin bond, the verdict does not find the value of the property, no judgment against the bondsmen can be entered. *Talcott v. Rose* (Civ. App.) 64 S. W. 1009.

In an action to recover certain articles of personalty, or their value, in which there was no evidence of their value, and the jury did not find it, it was error to state the value of each of the articles in the judgment. *Lewter v. Lindley* (Civ. App.) 81 S. W. 776.

There is no need to plead on the replevy bond or to allege the value of rents in order for the court to render judgment thereon. The court is authorized to render judgment on the bond without further pleading as to liability. *Wandelohr v. Grayson Co. Nat. Bank* (Civ. App.) 106 S. W. 415.

Where a sequestration writ issues, and defendant replevins the property, and judgment goes against him, it is the duty of the court to render judgment on the replevin bond; and this though there is no reference in the pleadings to the issuance of such proceedings. *Tyson v. First State Bank & Trust Co. of Santa Anna* (Civ. App.) 154 S. W. 1055.

**Consent judgment.**—Sureties are bound by a judgment entered by agreement of the parties. *Siddall v. Goggan*, 68 T. 708, 5 S. W. 663.

**Judgment on appeal.**—This statute is mandatory and a failure to enter judgment as therein provided, when shown on appeal, will require a reversal of the case. The jury in a verdict for the plaintiff in a sequestration suit must find the value of each article (or animal) replevied as the defendant is entitled to return the same and have its value credited pro tanto on the judgment. *Martin v. Berry Bros.* (Civ. App.) 87 S. W. 712.

Where a replevy bond is given in an attachment case conditioned as required by this article, the appellate court, in reversing the judgment of the lower court quashing the attachment and vacating the lien, cannot render judgment on the bond, but can only foreclose the attachment lien, and leave the plaintiff to pursue his remedy against the sheriff if the property is not on hand, or against the principal and sureties on the bond. *Norvell-Shapleigh Hardware Co. v. Hall N. & M. Works* (Civ. App.) 91 S. W. 1094.

**Requisites of judgment.**—The verdict and judgment against persons who have replevied property should find the value of the several items of property replevied, as the obligors have the right under Art. 7107 to return the entire property or any portion thereof in satisfaction of the judgment in whole or in part. *Cook v. Halsell*, 65 T. 1; *B. F. Avery & Sons v. Dickson* (Civ. App.) 49 S. W. 662; *Lewter v. Lindley*, 81 S. W. 777; *Bateman v. Hipp*, 111 S. W. 973; *Owens v. Vander Stucken*, 133 S. W. 491.

A party who replevied sequestered property, and disposed of it all, is not prejudiced by failure of the judgment to fix the value of each article replevied. *Avery v. Popper* (Civ. App.) 45 S. W. 951.

A verdict and judgment against the principal and sureties on a replevin bond should find the value of the several items of property replevied at the date of the trial. *Meyers v. Bloon*, 20 C. A. 554, 50 S. W. 217.

Where a judgment in replevin declared that the property had been disposed of and could not be returned, it was not necessary to find the value of each separate article. *Pipkin v. Tinch* (Civ. App.) 97 S. W. 1077.

Sureties on replevy bond in sequestration proceeding held liable on judgment being rendered against one of the principals and themselves, though such judgment was not rendered against the other principal. *Wandelohr v. Grayson County Nat. Bank*, 102 T. 20, 108 S. W. 1154.

The failure to render judgment against a wife, who with her husband were principals on a replevy bond, held error as to the sureties on the bond. *Wandelohr v. Grayson County Nat. Bank*, 102 T. 20, 112 S. W. 1046.

The right of a party against whom judgment has been rendered on a replevin bond to have the judgment fix the value of the different items of property separately is waived, where such party does not assign the omission of the judgment to fix the values separately as error. *Owens v. Vander Stucken* (Civ. App.) 133 S. W. 491.

**Remedies aside from statute.**—Failure to enter judgment for defendant on replevin bond in action decided adversely to plaintiff held not to estop defendant from recovering value of property replevied. *Norwood v. Interstate Nat. Bank* (Civ. App.) 45 S. W. 927.

The liability of sureties on replevy bond, in an action of trespass to try title, not having been enforced in the original suit, an independent suit may be maintained on the bond. *Wilson v. Dickey* (Civ. App.) 133 S. W. 437.

**Art. 7107. [4877] Defendant may discharge judgment by return of property, etc.**—The defendant shall have the right, at any time within ten days after the rendition of the judgment provided for in the preceding article, to deliver to the sheriff or constable of the court in which such judgment is rendered, the property, or any portion thereof, which he has bound himself to have forthcoming to abide the decision of the court, and the sheriff or constable to whom such possession is tendered

shall receive such property, if the same has not been injured or damaged since the replevy, and receipt to the defendant therefor, and shall immediately deliver such property to the plaintiff; and the defendant in such judgment shall, upon filing with the papers in the cause the receipt of the sheriff or constable, be credited by the clerk or justice of the peace upon such judgment with the value of the property so returned.

See *Cook v. Halsell*, 65 T. 1; *Hoeser v. Kraeka*, 29 T. 450; *Blakely's Adm'r v. Duncan*, 4 T. 184; *Watts v. Overstreet*, 78 T. 571, 14 S. W. 704; *Herder v. Schwab Clothing Co.* (Civ. App.) 37 S. W. 784; *Ratliff v. Gordon*, 149 S. W. 196.

**In general.**—In an action on a replevin bond, it was erroneous to render judgment in default of a restoration of the property prior to the date of judgment, and also improper not to find the value of each article replevied, and to fail to give defendants an opportunity to return all or a part of the property within 10 days after judgment and receive credit therefor. *C. R. Cummings & Co. v. Masterson*, 42 C. A. 549, 93 S. W. 500.

If defendant whose cattle had been sequestered did not desire to pay therefor upon an adverse judgment, he may discharge the obligations of his replevin bond by returning the cattle, under this article. *Reasonover v. Riley Bros.* (Civ. App.) 150 S. W. 220.

**Order for return.**—An order is not necessary to enable the defendant to return the property to the officer. *Mills v. Hackett*, 65 T. 580.

**To whom delivered.**—Where judgment is against the defendant, a tender of the property must be made to the officer and not to the plaintiff. *Childs v. Wilkinson*, 15 C. A. 687, 40 S. W. 749.

If a tender were made to the plaintiff, and accepted, he would be estopped. *Id.*

Delivery or tender of the property must be made to the sheriff of the county or constable of the precinct in which the judgment is rendered and not to the one from whom it was replevied, in order to avoid liability upon a replevy bond. *Texas Fidelity & Bonding Co. v. Cagle* (Civ. App.) 135 S. W. 689.

**Art. 7108. [4878] When the property has been injured, etc.**—If the property tendered back by the defendant has been injured or damaged while in his possession under such bond, the sheriff or constable to whom the same is tendered shall not receive the same, unless the defendant at the same time tenders the reasonable amount of such injury or damage, to be judged of by such sheriff or constable.

See *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**To whom tender shall be made.**—Under this article and Arts. 7103, 7106, 7107, 7129 and 7149, the delivery or tender of the property must be made to the sheriff of the county or constable of the precinct in which the judgment is rendered and not to the one from whom it was replevied, in order to avoid liability upon a replevy bond. *Texas Fidelity & Bonding Co. v. Cagle* (Civ. App.) 135 S. W. 689.

**Art. 7109. [4879] Execution shall issue, when.**—If the property be not returned and received, as provided in the two preceding articles, execution shall issue upon said judgment for the amount due thereon, as in other cases.

See *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**Art. 7110. [4880] Plaintiff may replevy, when, and his bond.**—When the defendant fails to replevy the property within ten days after the levy of the writ, if such defendant, his agent or attorney, is present in the county, or within twenty days if absent from the county at the time of such levy, the officer having the property in possession shall deliver the same to the plaintiff upon his giving bond payable to the defendant in a sum of money not less than double the value of such property, with two or more good and sufficient sureties to be approved by such officer, conditioned for the forthcoming of such property, together with the fruits, hire, revenue and rent of the same, to abide the decision of the court. [Act Nov. 9, 1866, p. 122, sec. 3. P. D. 5101a.]

See *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**In general.**—In an action on replevy bonds given by plaintiff in a foreclosure suit, held, that defendant was estopped by an agreement with plaintiff before the foreclosure suit, in which defendant consented to a private sale of the property afterwards replevied. *Cameron v. Hinton* (Civ. App.) 48 S. W. 24.

Where the officer in replevin has accepted plaintiff's bond, and delivered the property to him, the court on petition of defendant may not require the officer to accept defendant's bond and deliver to him the property. *Keasler Lumber Co. v. Clark*, 151 S. W. 345.

**Liability of plaintiff.**—Plaintiff in replevin and his sureties held liable, though the property belonged to a third person. *Staples v. Word* (Civ. App.) 48 S. W. 751.

A plaintiff who replevies the property of the defendant is required to account for "the fruits, hire, revenue and rent" of the property and is liable to a judgment for "the value" thereof. *Taylor v. Flynt*, 28 C. A. 219, 67 S. W. 348.

**Right to possession.**—The plaintiff to whom property has been delivered by virtue of a replevy bond has a possessory right thereto, and may recover the property or its value if wrongfully taken from him, pending the suit, by the defendant therein. But the defendant, for the purpose of estimating the damages recoverable in the action, may prove the ownership of the property to be in himself. *Fowler v. Stonum*, 6 T. 60; *Wilkins v. Weller*, 1 App. C. C. § 876.

**Art. 7111. [4881] Bond shall be returned, and the proceedings thereon if forfeited.**—The bond provided for in the preceding article shall be returned with the writ, and, in case the suit is decided against the plaintiff, final judgment shall be entered against all the obligors in such bond jointly and severally, for the value of the property replevied, and for the value of the fruits, hire, revenue or rent thereof, as the case may be, and the same rules which govern the discharge or enforcement of a judgment against the obligors in the defendant's replevy bond, as hereinbefore provided, shall be applicable to and govern in case of a judgment against the obligors in the plaintiff's replevy bond.

**In general.**—When personal property is seized under a writ of sequestration, the defendant, if successful, is entitled to judgment for its value at the time of trial, in the absence of allegation and proof of special damage accruing by plaintiff's acts. *Watts v. Overstreet*, 78 T. 571, 14 S. W. 704; *Mortgage Co. v. Shelton*, 8 C. A. 550, 29 S. W. 494; *Halbert v. San Saba Springs Land & Live-Stock Ass'n* (Civ. App.) 34 S. W. 636.

When plaintiff in sequestration fails to establish his cause, defendant, without any plea on plaintiff's replevin bond, is given affirmative relief under this article. *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**Dismissal by plaintiff.**—Refusal of motion of plaintiff in sequestration to dismiss the cause, unless he returns the piano for which he had given replevin bond, is harmless; the court having power under the statute to render judgment on the replevin bond, though plaintiff be permitted to dismiss the case. *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**Art. 7112. [4882] Defendant not required to account for hire, etc., when.**—In suits for the enforcement of a mortgage or lien upon property, the defendant, should he replevy the property, shall not be required to account for the fruits, hire, revenue or rent of the same, but this exemption shall not apply to the plaintiff in case he shall replevy the property. [P. D. 5100.]

**Owner's right to rents.**—If the owner of property incumbered by a lien so acts as to compel the lienholder, in his own protection, to sequester it, such owner is not entitled to a credit for the value of the rents of the property during the time it is held by the officer in obedience to the writ. *Bumpass v. Morrison*, 70 T. 756, 8 S. W. 596.

**Receiver.**—A receiver should not be appointed on the ex parte application of a mortgagor in a case where the pleadings disclose that the mortgage on the premises is invalid. *Rogers v. Southern Pine & Lumber Co.*, 21 C. A. 48, 51 S. W. 26.

**Art. 7113. [4883] Property likely to waste, etc., may be sold, when.**—If after the expiration of ten days from the levy of a writ of sequestration the defendant has failed to replevy the same, if the plaintiff or defendant shall make affidavit in writing that the property levied upon, or any portion thereof, is likely to be wasted or destroyed, or greatly depreciated in value, by keeping, and if the officer having possession of such property shall certify to the truth of such affidavit, it shall be the duty of the judge or justice of the peace to whose court the writ is returnable, upon the presentation of such affidavit and certificate, either in term time or in vacation, to order the sale of said property, or so much thereof as is likely to be so wasted, destroyed or depreciated in value by keeping, but either party may replevy the property at any time before such sale. [Id. P. D. 5099a.]

**Art. 7114. [4884] Order of sale in such case.**—The judge or justice granting the order provided for in the preceding article shall issue an order directed to the officer having such property in possession, commanding such officer to sell such property in the same manner as under execution. [Id.]

**Art. 7115. [4885] Return of order of sale.**—The officer making such sale shall, within five days thereafter, return the order of sale to the court from whence the same issued with his proceedings thereon, and shall, at the time of making such return, pay over to the clerk or justice of the peace the proceeds of such sale. [Id.]

**Art. 7116. [4886] Where debt is not due, property may be sold, when, etc.**—If the suit in which the sequestration issued be for a debt or demand not yet due, and the property sequestered be likely to be wasted, destroyed or greatly depreciated in value by keeping, the judge or justice of the peace shall, under the regulations hereinbefore provided, order the same to be sold, giving credit on such sale until such debt or demand shall become due. [Act March 15, 1884. P. D. 5098.]

**Art. 7117. [4887] Purchaser shall give bond, etc.**—In the case of a sale, as provided for in the preceding article, the purchaser of the property shall execute his bond, with two or more good and sufficient sureties, to be approved by the officer making the sale, and payable to such officer, in a sum not less than double the amount of the purchase money, conditioned that such purchaser shall pay such purchase money at the expiration of the time given. [Id.]

See *Morris v. Anderson* (Civ. App.) 152 S. W. 677.

**Art. 7118. [4888] Bond shall be returned and judgment, etc., thereon, when.**—The bond provided for in the preceding article shall be returned by the officer taking the same to the clerk or justice of the peace from whose court the order of sale issued, with such order, and shall be filed among the papers in the cause; and, in case the purchaser does not pay the purchase money at the expiration of the time given, judgment shall be rendered against all the obligors in such bond for the amount of such purchase money, interest thereon and all costs incurred in the enforcement and collection of the same; and execution shall issue thereon in the name of the plaintiff in the suit, as in other cases, and the money when collected shall be paid to the clerk or justice of the peace to abide the final decision of the cause. [Id.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Right of action in replevin.**—One cannot recover in replevin on mere proof of prior possession unless defendant was a mere trespasser. *Murray v. Lyons* (Civ. App.) 95 S. W. 621.

**Recovery of exempt property.**—In an action to recover certain personal property, or its value, the statute of exemptions held immaterial. *Ricketson v. Best* (Civ. App.) 134 S. W. 353.

**Evidence.**—In sequestration, evidence tending to show that defendant did not own the property involved held immaterial. *Rea v. Schow & Bros.*, 42 C. A. 600, 93 S. W. 706.

In an action wherein a seller of furniture on the installment plan sequestered it, evidence held to sustain a finding that the furniture had been paid for. *Daniel v. De Ortiz* (Civ. App.) 140 S. W. 486.

## TITLE 123

## SHERIFFS AND CONSTABLES

[See Code of Criminal Procedure.]

Chap.  
1. Of Sheriffs.Chap.  
2. Of Constables.

## CHAPTER ONE

## OF SHERIFFS

Art.	ELECTION AND QUALIFICATION	Art.	
7119.	Election and term of office.	7127.	May employ guards.
7120.	Vacancies, how filled.	7128.	Shall receive prisoners from, etc.
7121.	Oath and bond.	7129.	To attend upon open courts.
7122.	May act without commission.	7130.	Shall execute all legal process.
7123.	Neglect to qualify in twenty days.	7131.	And all legislative process.
7124.	Failure to give new bond when required.	7132.	To discharge all duties imposed by law.
	POWERS, DUTIES AND LIABILITIES	7133.	List of fugitives to be sent to adjutant general.
7125.	May appoint deputies, etc.	7134.	Shall indorse all process.
7126.	Responsible for their acts.	7135.	May summon posse comitatus.
		7136.	Unfinished business.

## ELECTION AND QUALIFICATION

**Article 7119. [4890] Election and term of office.**—There shall be elected by the qualified voters of each county one sheriff, who shall hold his office for two years, and until his successor shall be elected and qualified. [Const., art. 5, sec. 23. Act May 12, 1846, p. 265, sec. 1. P. D. 5108.]

**Art. 7120. [4891] Vacancies, how filled.**—Should a vacancy occur in the office of sheriff, the commissioners' court of the county shall fill such vacancy by appointment; and the person appointed, after qualifying in the manner prescribed by law for persons elected to said office, shall discharge the duties of sheriff for the unexpired term and until the election and qualification of his successor. [Id.]

**Art. 7121. [4892] Oath and bond.**—Every person elected to the office of sheriff shall, before entering upon the duties of his office, give a bond with two or more good and sufficient sureties, to be approved by the commissioners' court of his county, for such sum as may be directed by such court, not less than five nor more than thirty thousand dollars, payable to the governor and his successors in office, conditioned that he will account for and pay over to the persons authorized by law to receive the same all fines, forfeitures and penalties that he may collect for the use of the state or any county, and that he will well and truly execute and due return make of all process and precepts to him lawfully directed, and pay over all sums of money collected by him by virtue of any such process or precept to the persons to whom the same are due, or their lawful attorney, and that he will faithfully perform all such duties as may be required of him by law, and shall also take and subscribe the oath of office prescribed by the constitution, which shall be indorsed on said bond, together with the certificate of the officer administering the same, which bond and oath shall be recorded in the office of the clerk of the county court and deposited in said office. Said bond shall not be void on the first recovery, but may be sued on from time to time



in the name of any person injured until the whole amount thereof is recovered. [Act May 12, 1846, p. 265, sec. 2. P. D. 5109.]

See *United States Fidelity & Guaranty Co. v. Crittenden* (Civ. App.) 131 S. W. 232.

**Liability on bond—In general.**—Liability in general, see Art. 7130.

To charge the sureties on a sheriff's bond, the act complained of must not only be such as might be rightfully done by the sheriff as such, but which was actually done by him as sheriff under a claim of right by him to do it in his official capacity. *Heidenheimer v. Brent*, 59 T. 533.

An officer in whose hands a writ of attachment is placed must execute it, although he may have knowledge of the insufficiency of the cause of the action and that it was sued out maliciously; and he is not liable on his official bond. *Rice v. Miller*, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630; *Blum v. Strong*, 71 T. 321, 6 S. W. 167.

Where an execution is void, recovery for seizure thereunder cannot be had against sureties of the officer executing the writ. *Jones v. Hess* (Civ. App.) 48 S. W. 46.

It matters not that the (sheriff's) bond declared on did not name all the specific conditions prescribed in this article if the condition inserted in the bond and to which the breach was assigned, was broad enough to cover them all, or at least the act of malfeasance complained of. *Lasater v. Waites* (Civ. App.) 67 S. W. 519.

Where sheriff, in opening county road, cut fences not in line of road, he and his bondsmen held liable. *Morgan v. Oliver* (Civ. App.) 80 S. W. 111.

Where a sheriff wrongfully arrested and imprisoned a person under a void warrant, the sureties on the sheriff's official bond were liable. *Roberts v. Brown*, 43 C. A. 206, 94 S. W. 388.

A sheriff taking without authority of law the property of another held not entitled to defeat the claim of the owner by showing that the property was sold and the proceeds applied to the satisfaction of a debt due from the owner. *Nash v. Noble*, 46 C. A. 369, 102 S. W. 736.

— **Money received.**—To render the sureties of a sheriff responsible for money received, it must be shown that it came into his hands as sheriff by virtue of some process or lawful authority, and that he then failed to pay it over. *Heidenheimer v. Brent*, 59 T. 533.

When the parties to a suit authorize the sheriff to sell attached property without reference to the legal proceedings pending, the sureties on such bond are not liable for the funds arising from such sale and appropriated by the sheriff. *Brent v. Hohorst*, 1 App. C. C. § 343.

The question of a sheriff's right to costs for the sale of land for delinquent taxes held properly determined in an action against the sheriff for failure to pay over the amount received. *City of San Antonio v. Campbell* (Civ. App.) 56 S. W. 130.

One claiming title to property attached as the property of a debtor and obtaining on appeal a judgment directing the clerk of the trial court to turn over to him the proceeds of a sale of the property may recover from the sheriff and the sureties on his indemnity bond the full value of the property, where the clerk did not turn over any of the proceeds because they had been paid out on the judgment in the attachment case before the return to the trial court of the mandate. *Griffin v. Terry* (Civ. App.) 124 S. W. 115.

— **Fines and costs.**—A county judge has no authority to remit the fine of a prisoner and order the sheriff to discharge him from custody so as to relieve the sheriff from liability on his bond for the fine and costs. *Spradley v. State*, 23 C. A. 20, 56 S. W. 114, 442.

— **Release of attached property.**—A sheriff is responsible in damages where he has released, on an insufficient replevy bond, property seized under an attachment. *Barclay v. Scott*, 1 App. C. C. §§ 110, 111.

— **Levy and failure to levy.**—The existence of prior liens does not justify the failure of the officer to make a levy. *Smothers v. Field*, 65 T. 435.

A sheriff must execute a writ of attachment in his hands, although he knows that the writ was wrongfully and maliciously sued out, and he is not liable on his bond therefor. *Rice v. Miller*, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

**Art. 7122. [4893] May act without a commission.**—When any person elected or appointed sheriff, in accordance with the preceding article, shall have given bond and taken the oath of office he may enter at once upon the discharge of his duties, and his acts shall be as valid in law before receiving his commission from the governor as afterward. [Act Dec. 20, 1836, p. 179, sec. 2. P. D. 5102.]

**Art. 7123. [4894] Neglect to qualify.**—When any person elected sheriff shall neglect, refuse or fail from any cause whatever to give bond and take the oath of office within twenty days after notice of his election, the office shall be deemed vacant; and the county commissioners' court shall proceed to appoint a sheriff to fill the vacancy, who shall hold his office for the unexpired term. [Acts 1885, p. 89.]

**Application.**—This article does not undertake to provide for all cases of vacancy and does not apply to a case where a man has been duly elected to the office, but has died without receiving a certificate of his election and without qualifying. And when such an event happens the incumbent does not hold over, but the commissioners' court can declare a vacancy and elect some one to the office. *Maddox v. York*, 21 C. A. 622, 54 S. W. 24.

**Provision mandatory.**—This article is mandatory; and therefore if a sheriff fails or refuses to qualify within 20 days after he has been notified of his election the office thereby becomes vacant. *State v. Box*, 34 C. A. 435, 78 S. W. 955.

**Art. 7124. [4895] Failure to give new bond when required.**—Whenever any of the sureties of a sheriff shall die, remove permanently from the state, become insolvent, or be released from liability in accordance with law, or whenever the commissioners' court shall deem the sheriff's bond insufficient, said court shall cite said sheriff to appear at a time to be named in such citation, not less than ten nor more than thirty days after issuing such citation, and give a new bond with good and sufficient security; and, if such sheriff shall neglect or refuse to appear and give such bond on or before the designated time, he shall cease to exercise the functions of his office, and shall be removed from office by the judge of the district court in the mode prescribed by law for the removal of county officers. [Acts 1836, p. 178. P. D. 5110.]

### POWERS, DUTIES AND LIABILITIES

**Art. 7125. [4896] May appoint deputies, etc.**—Sheriffs shall have the power, by writing, to appoint one or more deputies for their respective counties, to continue in office during the pleasure of the sheriff, who shall have power and authority to perform all the acts and duties of their principals; and every person so appointed shall, before he enters upon the duties of his office, take and subscribe to the oath of office prescribed by the constitution, which shall be indorsed on his appointment, together with the certificate of the officer administering the same; and such appointment and oath shall be recorded in the office of the county clerk and deposited in said office; provided, that the number of deputies appointed by the sheriff of any one county shall be limited to not exceeding three in the justice precinct in which is located the county site of such county; and a list of these appointments shall be posted up in a conspicuous place in the clerk's office so that all can see them; provided, further, that no person shall be appointed a deputy sheriff who stands convicted for a felony; and an indictment for a felony of any deputy sheriff appointed shall operate a revocation of his appointment as such deputy sheriff; provided, that any sheriff may appoint one deputy in addition to the above enumerated for each justice precinct in addition to the precinct where the county site is situated; and all sheriffs having more deputies than are provided for in this law shall make the number of his deputies conform to the provisions of the same. [Acts 1889, p. 23.]

**In general.**—A sheriff cannot appoint or detail deputies to act as guards or watchmen over railroad property, except to prevent threatened injury thereto. *Texas & N. O. R. Co. v. Parsons*, 102 T. 157, 113 S. W. 914, 132 Am. St. Rep. 857.

**Powers of deputy.**—Where the evidence shows that the alleged appointment of a deputy sheriff was only verbal and that he had qualified, and there is no evidence that he believed that he was a duly appointed officer, he cannot claim immunity when charged with unlawfully carrying a pistol. *Baker v. State*, 53 Cr. R. 27, 108 S. W. 684.

**Service and return of writs.**—All writs, including attachments, are directed to the sheriff or any constable, but may be executed by a deputy sheriff, who makes his return in the name of the principal. So far as the public is concerned, there is no difference between the power and duties of the sheriff and his deputy; either can perform and can be compelled to perform the same acts that are required of the other. *Heye v. Moody*, 67 T. 615, 4 S. W. 242.

**Service of subpoena.**—A deputy sheriff may serve a subpoena in a cause in which the sheriff is a party. *Blum v. Bassett*, 67 T. 194, 3 S. W. 33.

**Levy.**—The act of a deputy in making the levy of an attachment upon a stock of goods was the act of the sheriff, and amounted to the same thing as if he had made the levy himself. As the goods were in the possession of the sheriff under a former attachment, it was, of course, proper for him to levy a subsequent writ upon them, subject to the previous levy made by his deputy. *Heye v. Moody*, 67 T. 615, 4 S. W. 242.

**Duration of office.**—A deputy sheriff, who was appointed by the sheriff in November, 1906, but was not reappointed upon the re-election of the sheriff in November, 1908, could not lawfully act as deputy sheriff after the expiration of the earlier term of the sheriff. *Trinkle v. State*, 59 Cr. R. 257, 127 S. W. 1060.

**De facto deputies.**—One to whom constable, having no right to appoint deputy, delivers prisoner is not a de facto deputy. *Messer v. State*, 37 Cr. R. 635, 40 S. W. 488.

**Service made of a writ of garnishment by a de facto officer acting under color of authority is valid.** *Trammell v. Shelton*, 18 C. A. 366, 45 S. W. 319.

The appointment of a person as deputy sheriff constitutes him a de facto officer, though not made in writing as the statute provides, and though he does not give bond or take oath. *Broach v. Garth (Civ. App.)* 50 S. W. 594.

Where there was no showing that a deputy sheriff, who refused to take the oath of office, exercised the duties thereof or was reputed in the community to be a deputy sheriff, he was not an officer de facto. *Brown v. State*, 43 Cr. R. 411, 66 S. W. 547.

See, also, notes under Art. 3687, Rule 13.

**Art. 7126. [4897] Responsible for their acts.**—Sheriffs shall be responsible for the official acts of their deputies, and they shall have power to require from their deputies bond and security; and they shall have the same remedies against their deputies and sureties as any person can have against a sheriff and his sureties. [Acts 1846, p. 265. P. D. 5113.]

See *Giraud v. Ellis* (Civ. App.) 24 S. W. 967.

**Responsibility for official acts.**—In seeking to fix upon the sheriff liability for acts of his deputy, it is only required to show that the wrongful act complained of was one which the deputy might, under proper circumstances, do as an officer, and that in fact it was done under color of or by virtue of his official station. *Luck v. Zapp*, 1 C. A. 528, 21 S. W. 418.

The deputy sheriff, acting in his official capacity, and by virtue of an execution from a justice's court, ejected plaintiff from her house, removed her goods therefrom and nailed it up. The sheriff was told that it was her homestead, and appealed to to release the levy, and refused. The act done by the deputy was wrongful, and the sheriff and his sureties are liable therefor. *Id.*

A charge in the allegations that a levy was made by the deputy sheriff instead of by the sheriff as alleged in the original petition does not state a new cause of action. *Herring v. Patten*, 18 C. A. 147, 44 S. W. 50.

A sheriff arresting by deputy, under a warrant, the wrong person by mistake held liable on his official bond for damages. *Clark v. Winn*, 19 C. A. 223, 46 S. W. 915.

In legal contemplation as between the sheriff and the aggrieved party, the acts of his deputy are the acts of the sheriff, and if the original petition was defective in charging that the acts were done by the sheriff when in fact they were performed by his deputy yet the petition was sufficient to stop the running of the statute of limitation. *Cox v. Patten* (Civ. App.) 66 S. W. 65, 66.

When a deputy sheriff summons assistance in making an arrest when there is no resistance nor ground to expect it, he is not acting in the performance of an official act or duty and the sheriff is not responsible for his act. *Maddox v. Hudgeons*, 31 C. A. 291, 72 S. W. 415.

A statement made by a sheriff on hearing of certain acts of his deputies held not to amount to a ratification of their acts. *Brown v. King*, 41 C. A. 588, 93 S. W. 1017.

Where certain deputy sheriffs sought to effect the arrest of certain parties for shooting a pistol in a public place and within the view of such officers, their acts were none the less done in their official capacity because one of the persons injured in effecting his arrest was not guilty of such offense. *King v. Brown*, 100 T. 109, 94 S. W. 328.

When parties fire off pistols on a public road at night within 250 yards of deputy sheriffs who see the flashes and hear the reports, this violation of law occurs "within their presence," and they are authorized to arrest the parties without warrants, and if in attempting to arrest, they shoot an innocent man, they are acting officially and the sheriff will be liable for damages. *Id.*

An act of a deputy sheriff, proceeding without a warrant or without an offense being committed in his presence, is not the act of the sheriff. *Brown v. Wallis* (Civ. App.) 101 S. W. 1068.

In an action against a sheriff for injuries inflicted by his deputies, proof of the existence of facts warranting the exercise of authority by them is essential to recover. *Id.*

In an action against a sheriff for personal injuries inflicted by his deputies, evidence held not to show that any offense was committed in the presence of his deputies. *Id.*

In an action against a sheriff for personal injuries inflicted by his deputies, evidence held to show that the deputies were not acting in an official capacity. *Brown v. Wallis*, 100 T. 546, 101 S. W. 1070, 12 L. R. A. (N. S.) 1019.

Notice to a deputy sheriff of the post office address of a judgment debtor against whom the sheriff has an execution is notice to the sheriff. *Snouffer v. Heisig* (Civ. App.) 130 S. W. 912.

**Art. 7127. [4898] May employ guards.**—Whenever in any county it may become necessary to employ guards for the safe keeping of prisoners and the security of jails, the sheriff may, with the approval of the commissioners' court, or in case of emergency, with the approval of the county judge, employ such number of guards as may be necessary; and his account therefor, duly itemized and sworn to, shall be allowed by said commissioners' court and paid out of the county treasury. [*Id.*]

"Guard."—A private citizen to whom a constable delivers a prisoner to assist him in procuring bail is not a guard under this article, and the prisoner is not guilty of an offense for trying to bribe him. *Messer v. State*, 37 Cr. R. 635, 40 S. W. 488.

**Approval of commissioners' court.**—Where a sheriff went into the room in the court house occupied by the commissioners' court and three commissioners were in there at the time, and he asked what he should do about the two guards at the jail and one of the commissioners said for him to go ahead and pay them and make out his account and the commissioners' court would allow it, this was an approval by the commissioners' court (the court being in session at the time), of the employment of the guards, though no order was entered upon the minutes, nor was any motion made or vote by the commissioners present. And even were this not true the action of the court in afterwards ratifying the action of the sheriff employing the guards had the effect of binding the county for the payment of the guards. *Ledbetter v. Dallas County*, 51 C. A. 140, 111 S. W. 195. See *McDade v. Waller County*, 3 App. C. C. §§ 110, 111.

**Art. 7128. [4899] Shall receive prisoners from constables, etc.**—It shall be the duty of sheriffs to receive from constables and other officers all persons who shall be apprehended by such constables or other officers for offenses against the state, and them safely keep, subject to the order of the proper court. [Act Dec. 20, 1836, p. 179, sec. 14. P. D. 5104.]

**Art. 7129. [4900] To attend upon courts.**—Each sheriff shall attend upon all district, county and commissioners' courts for his county; and, in counties where the supreme court and court of appeals shall hold their sessions, the sheriffs of such counties shall attend upon such court. [Act May 12, 1846, p. 265, sec. 13. P. D. 51.]

Fee for attendance.—See Art. 3864.

**Art. 7130. [4901] Shall execute all legal process.**—Each sheriff shall execute all process and precepts directed to him by legal authority, and make return thereof to the proper court, on or before the day to which the same is returnable; and any sheriff who shall fail so to do, or who shall make a false return on any process or precept shall, for every such offense, be liable to be fined by the court to which such process is returnable, as for a contempt, not exceeding one hundred dollars, at the discretion of the court; which fine shall go to the county treasury; and such sheriff shall also be liable to the party injured for all damages he may sustain. [Id. sec. 8. P. D. 5115.]

**Historical.**—The act of March 31, June 30, 1885 (19th Leg., p. 90), contains the following provision: Whenever the sheriff, constable, or a deputy of either, has been sued for damages for any act done in their official character, and they have taken indemnifying bonds for such acts so done by them, upon which said acts suits for damages are based, the said sheriffs, constables or their deputies shall have the right to make the parties, principal and surety on such bond of indemnity, parties defendant in suit for damages, and the cause may be continued for the purpose of obtaining service on such parties so made in said cause. This provision is now incorporated in Art. 1844, ante.

**Custody of property.**—Sheriff held entitled to retain money claimed by different parties, and have question of title thereto determined by the court, and could not be subjected to statutory penalty for failing to pay over the same. *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Civ. App.) 78 S. W. 239.

A sheriff held liable for rent of a building used by him until he disposed of certain goods levied on, without regard to the validity of the sale of the goods by the attachment defendant to plaintiff. *Hooks & Hines v. Pafford*, 34 C. A. 516, 73 S. W. 991.

The failure of an officer levying execution to make an inventory of the property levied upon makes him liable for resulting damages. *Mara v. Branch* (Civ. App.) 135 S. W. 661.

**Wrongful levy or other taking of property.**—See, also, Art. 3769.

When the plaintiff in execution or his attorney withholds from the officer knowledge in his possession which would enable him to make a levy, that fact would exonerate him from liability. *Batte v. Chandler*, 53 T. 613.

If property seized by a sheriff under a writ of sequestration belongs to a stranger to the suit, but in possession of the property, the officer cannot justify by a plea that he did not know that such person was the owner. *Campbell v. Ulch*, 24 C. A. 618, 60 S. W. 272.

An officer who, in executing civil process, has effected a lawful entry into a dwelling house and acquired a right to use force in making a levy but who voluntarily leaves, is not entitled to re-enter by force. *Hillman v. Edwards*, 28 C. A. 308, 66 S. W. 788.

An officer, having in his hands an order for the sale of specific property, held not entitled to effect a forcible entry into the dwelling of the defendant for the purpose of seizing it. *Id.*

An officer, in order to execute civil process, cannot climb through an open window of the defendant's dwelling, if that is an unusual place of entry. *Id.*

Plaintiff in execution and the officer levying on property held guilty of a tort in levying on exempt property, and the officer was liable for the consequences resulting from his levy and sale of exempt property. *Railey v. Hopkins* (Civ. App.) 131 S. W. 624.

**Process or order of court as protection from liability.**—A sheriff knowing the insufficiency of the cause of action must execute a writ of attachment, and for so doing he is not liable on his bond. *Rice v. Miller*, 70 T. 613, 8 S. W. 317, 8 Am. St. Rep. 630.

A writ of attachment, regular and valid on its face, will protect the officer who executes it. *Randall v. Rosenthal* (Civ. App.) 31 S. W. 822; *Tierney v. Frazier*, 57 T. 437.

A writ of sequestration under which a wrongful seizure was made will not relieve the officer from liability for actual damages. *Land v. Klein*, 21 C. A. 3, 50 S. W. 638.

A writ of sequestration, under which a sheriff seized property of a stranger to the suit, held no protection in a suit against the officer by the owner to recover damages for the seizure. *Vickery v. Crawford*, 93 T. 373, 55 S. W. 560, 49 L. R. A. 773, 77 Am. St. Rep. 891.

A sheriff held not liable in damages for the levy of an execution fraudulently issued out of the district court of another county, where the execution is fair and regular on its face. *Wettermark v. Campbell* (Civ. App.) 57 S. W. 904.

Where a sheriff levied an attachment after the return day, he was a mere trespasser, and the process afforded no justification. *Jordan v. Henderson*, 39 C. A. 89, 86 S. W. 961.

A writ of restitution being fair and regular on its face, and issuing out of a court of competent jurisdiction, is valid, and, though issued on an irregular and void judgment, it will protect a constable in ousting the tenant. *Wilson v. Moore*, 57 C. A. 418, 122 S. W. 577.

An order of the county commissioners' court requiring a sheriff to open a road protects him and his bondsmen from liability for acts within the order. *Morgan v. Oliver* (Civ. App.) 129 S. W. 156.

A ministerial officer in possession of property lawfully received must exercise reasonable diligence to preserve it for restoration to the person entitled or for disposition as directed by law. *Worsham v. Votgsberger* (Civ. App.) 129 S. W. 157.

Actions for penalty.—Makers of sheriff's indemnity bond held entitled to contest right of plaintiffs to recover statutory penalty from sheriff for failure to pay over proceeds of execution sale. *W. T. Rickards & Co. v. J. H. Bemis & Co.* (Civ. App.) 78 S. W. 239.

Actions against officers.—Even if the acts of a sheriff in levying upon property constituted a conversion thereof, the owner by voluntarily reclaiming the property waived his right of action against the sheriff for the conversion. *First State Bank of Hamlin v. Jones & Nixon* (Civ. App.) 129 S. W. 145; *Id.* (Civ. App.) 139 S. W. 671.

A sheriff, against whom a petition had been filed by a judgment creditor, for the sheriff's failure to make return on an execution upon the judgment, held not entitled to object that the petition did not show the status of the plaintiff. *Waxahachie Nursery Co. v. Sansom* (Civ. App.) 138 S. W. 422.

Filing of a general denial held to be a waiver of defendant's right to object that the petition did not show the status of the plaintiff. *Id.*

— Evidence.—Evidence, in an action against a sheriff for oppressive and excessive levy of execution, held not to sustain a finding that certain articles claimed to have been levied upon merchandise. *Mara v. Branch* (Civ. App.) 135 S. W. 661.

— Damages.—Measure of damage for illegal levy of execution by sheriff determined. *Jones v. Hess* (Civ. App.) 48 S. W. 46.

In a suit against an officer for levying an attachment of goods in his possession under a distress warrant, the amount for which the distress warrant was levied should be deducted from the amount of damages recovered. *Block v. Sweeney*, 63 T. 419.

Writ commanding sheriff to seize certain property, and deliver to third person, does not relieve him from actual damages; the property being owned by plaintiff, and he not being a party to the judgment. *Lackey v. Campbell* (Civ. App.) 54 S. W. 46.

Measure of damages for illegal seizure of a cow by sheriff held to be the value of the cow at the time of seizure; the milk of which plaintiff was deprived not being an item of damage. *Id.*

The owner of exempt property seized by an officer under an execution held entitled to recover, in addition to the property or its value, interest from the time of the wrongful taking to the trial or the value of the use of the property for such period. *Ralley v. Hopkins* (Civ. App.) 131 S. W. 624.

An officer who knowingly levies on exempt property and who sells the same held gully of a malicious tort authorizing punitive damages. *Id.*

An officer levying on exempt property held liable for the use of the property from the time of the levy to the trial. *Id.*

Suit by deputy.—A deputy sheriff may sue in his own name on a promise to indemnify. *Heidenheimer v. Johnston*, 1 App. C. C. § 645.

Mandamus.—Under this article, held, that for want of statutory authority a sheriff could not demand an indemnity bond as a condition to executing a regular writ of restitution issued on a valid judgment in forcible detainer proceedings, so that, on his refusal to execute the writ without a bond, he could be compelled to do so by mandamus. *Duncan v. Johnson* (Civ. App.) 146 S. W. 686.

**Art. 7131. [4902] And all legislative process.**—Sheriffs are required also to execute all subpoenas and other process issued by the speaker of the house of representatives, or the president of the senate, or chairman of a committee of either house of the legislature, to them directed, under like pains and penalties as are incurred by failure to execute process issued by a court; and for such services they shall receive the fees prescribed by law for similar services in the courts, to be paid on the certificate of the authority issuing such process. [Act March 28, 1873, p. 19. P. D. 7102a et seq.]

**Art. 7132. [4903] To discharge all duties imposed by law.**—Sheriffs shall also do and perform all such duties as may be imposed upon them by the Penal Code and Code of Criminal Procedure, or other laws.

**Art. 7133. [4904] List of fugitives to be sent to adjutant general.**—It shall be the duty of each sheriff in this state, upon the close of any regular term of the district court in his county, or within thirty days thereafter, to make out and forward by mail to the adjutant general of this state a certified list of all persons who, after indictment for a felony, have fled from said county. Such lists shall contain the full name of each of such fugitives, with a description giving his age, height, weight, color and occupation, the complexion of skin and the color of eyes and hair, and any peculiarities in person, speech, manner or

gait that may serve to identify such fugitive, so far as the sheriff may be able to give them, and shall state the offense with which such person is charged. The adjutant general shall prescribe, have printed and forward to the sheriffs of the several counties the necessary blanks upon which are to be made the lists herein required. [Acts 1887, p. 44, sec. 1. Amend. 1895, Sen. Jour. No. 97, p. 484.]

**Art. 7134. [4905] Shall indorse all process.**—Every sheriff and deputy sheriff or constable shall indorse on all process and precepts coming to their hands the day and hour on which they received them, the manner in which they executed them, and state at what time and place the process was served, as well as the distance actually traveled in serving such process, and shall sign their returns officially. [Act May 12, 1846, p. 265, sec. 14. P. D. 5121. Amend. Acts 1903, p. 81.]

**Art. 7135. [4906] May summon posse comitatus.**—Whenever a sheriff or any of his deputies shall meet with resistance in the execution of any legal process, they shall call to their aid the power of the county; and any person who shall neglect or refuse to aid and assist any sheriff or deputy in the execution of any legal process when summoned so to do shall be deemed guilty of a contempt of court, and shall be fined in a sum not exceeding ten dollars, to be recovered on motion of such sheriff or his deputy, and proof of such neglect or refusal before the court from which such process issued, three days' notice of such motion being given to the party accused, and in addition thereto may be punished criminally as prescribed in the Penal Code. [Id. sec. 10. P. D. 5117.]

**Resistance a prerequisite.**—It is in case of resistance alone that authority is given to summon assistance and where there is no resistance nor ground to expect it an officer is not acting in performance of an official act when he summons assistance and when a deputy sheriff so summons assistance the sheriff is not responsible. *Maddox v. Hudgeons*, 31 C. A. 291, 72 S. W. 415.

**Art. 7136. [4907] Unfinished business.**—When any sheriff shall from any cause vacate his office, all unfinished business whatsoever in his hands shall be transferred to his successor, and be completed by him in the same manner as if commenced by himself. [Act May 12, 1846, p. 265, sec. 15. P. D. 5122.]

## CHAPTER TWO OF CONSTABLES

<p><b>Art.</b> 1. ELECTION, QUALIFICATION, ETC. 7137. Election and term of office. 7138. Only one deputy. 7139. Appointed, how, in unorganized counties. 7140. Vacancies, how filled. 7141. Bond and oath. 7142. May act without commission. 7143. Neglect to qualify.</p>	<p><b>Art.</b> 7144. Failure to give new bond. 2. POWERS, DUTIES AND LIABILITIES 7145. Duties in general. 7146. May summon posse comitatus. 7147. Failure to execute or return process. 7148. Failure to pay over collections. 7149. May execute process, where. 7150. Unfinished business.</p>
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[In addition to the notes under the particular articles, see also notes of decisions relating to subject in general, at end of chapter.]

### 1. ELECTION, QUALIFICATION, ETC.

**Article 7137. [4908] Term of office.**—There shall be elected at each general election by the qualified voters of each justice's precinct a constable for such precinct, who shall hold his office for the term of two years, and until his successor is elected and qualified; provided, that, when in any such justice's precinct there may be a city of eight thousand or more inhabitants, such constable may appoint no more than

two deputies, who shall qualify as required of deputy sheriffs. [Acts 1885, p. 17. Amend. Acts 1897, p. 194.]

**Who is deputy.**—A private citizen appointed by a constable to take charge of a prisoner, in a city in which a constable has no power to appoint a deputy, is not a deputy constable. *Messer v. State*, 37 Cr. R. 635, 40 S. W. 488.

**Art. 7138. Only one deputy.**—Be it further provided, that, in cities and towns of twenty-five hundred or more inhabitants, said constable may appoint no more than one deputy, who shall qualify in such manner as is required by law. [Id.]

**Art. 7139. [4909] Appointed, how, in unorganized counties.**—The commissioners' courts of the several counties to which unorganized counties are attached for judicial purposes shall have power to appoint a constable for each of the unorganized counties attached to said counties for judicial purposes, in accordance with the provisions of the law now in force authorizing such appointment in organized counties. [Acts 1879, p. 89.]

**Art. 7140. [4910] Vacancies, how filled.**—Vacancies in the office of constable shall be filled by the commissioners' court until the next succeeding general election.

**Art. 7141. [4911] Bond and oath.**—Every person who may be elected to the office of constable shall, before entering upon the duties of the office, give a bond with two or more good and sufficient sureties, to be approved by the commissioners' court of his county, for such sum as may be directed by said court, not less than five nor more than fifteen hundred dollars, payable to the governor and his successors in office, conditioned for the faithful performance of all the duties required of him by law; and shall also take and subscribe the oath of office prescribed by the constitution, which shall be indorsed on said bond, together with the certificate of the officer administering the same; which bond and oath shall be recorded in the office of the clerk of the county court, and deposited in said office; said bond shall not be void on the first recovery, but may be sued on from time to time in the name of the party injured until the whole amount thereof is recovered. [Act May 12, 1874, p. 251, sec. 2. P. D. 981.]

See *United States Fidelity & Guaranty Co. v. Crittenden* (Civ. App.) 131 S. W. 232.

**Bond.**—A constable's bond, running to the county judge, instead of to the governor, as required by statute, is enforceable as a common-law obligation, despite the defect. *Hines v. Norris* (Civ. App.) 81 S. W. 791.

— **Liability on.**—Where a constable, while arresting a person charged with a misdemeanor, wrongfully kills such person, the sureties on his official bond are liable for the damages recovered for such act. *Moore v. Lindsay*, 31 C. A. 13, 71 S. W. 298.

A constable's sureties held not liable for his sale of exempt property, where he acted under a chattel mortgage and not in his official capacity. *Baughn v. Allen* (Civ. App.) 73 S. W. 1063.

Sureties on the official bond of a constable held liable for damages recovered against him for wrongfully killing a person accused of a misdemeanor while attempting to arrest him. *Black v. Moore*, 35 C. A. 613, 80 S. W. 867.

**Art. 7142. [4912] May act without commission.**—Whenever any person is elected or appointed to the office of constable and has given bond and taken the oath prescribed in the preceding article, he may enter at once upon the duties of the office, and his acts shall be as valid in law as if he had been duly commissioned.

**Art. 7143. [4913] Neglect to qualify.**—Whenever any person elected constable shall neglect or refuse to give bond and take the oath of office as required in the preceding articles within twenty days after notice of his election, the office shall be deemed vacant; and the commissioners' court of the county shall fill the same as in other cases of vacancy. [Act May 12, 1846, p. 251, sec. 4. P. D. 983.]

**Statute directory.**—Time within which an officer must qualify is directory only. *Platan v. State*, 56 T. 93.

**Art. 7144. [4914] Failure to give new bond.**—Whenever any of the sureties of a constable shall die, remove permanently from the state,

or become insolvent, or are released from liability in accordance with law, or whenever the commissioners' court shall deem the bond of any constable to be insufficient, said court shall cite said constable to appear at a time to be named in such citation, not less than ten nor more than thirty days after issuing such citation, and give a new bond, with good and sufficient security; and, if such constable shall neglect or refuse to appear and give such bond at the designated time, he shall cease to exercise the functions of his office, and shall be removed from office by the judge of the district court in the mode prescribed by law for the removal of county officers. [Id. sec. 3. P. D. 982.]

## 2. POWERS, DUTIES AND LIABILITIES

**Art. 7145. [4915] Duties in general.**—Each constable shall execute and return according to law all process, warrants and precepts to him directed and delivered by any lawful officer, and shall attend upon all justices' courts held in his precinct, and shall perform all such other duties as may be required of him by law. [Id. sec. 8. P. D. 987.]

**Summoning talesmen.**—Where a sheriff was plaintiff in a suit it was not error to appoint a constable to execute the precept for summoning talesmen. *Houston Printing Co. v. Moulden*, 15 C. A. 574, 41 S. W. 381.

**Civil process.**—A constable held personally liable for the value of an exempt mule sold under a chattel mortgage, where the proceeds of the sale of two nonexempt mules were sufficient to satisfy the debt. *Baughn v. Allen* (Civ. App.) 73 S. W. 1063.

Process can be delivered by an attorney to a constable as well as by a lawful officer, and a constable has the same right to execute civil process issued out of the county and district courts as the sheriff has within the limits of the county in which the precinct of the justice of the peace of which he is constable is embraced. *Medlin v. Seideman*, 39 C. A. 553, 88 S. W. 251.

**Art. 7146. [4916] May summon posse comitatus.**—When any constable shall meet with resistance in the execution of any lawful process, or in the arrest of offenders, he may call to his aid any citizen of the county who may be convenient; and any person who shall fail or refuse to obey such call may be fined as for a contempt by any justice of the peace, in a sum not exceeding ten dollars, on motion of such constable, three days' notice thereof having been given to the party accused, and may also be punished criminally as prescribed in the Penal Code. [Id. sec. 7. P. D. 986.]

**Art. 7147. [4917] Failure to execute or return process.**—If any constable shall fail or refuse to execute and return, according to law, any process, warrant, or precept to him lawfully directed and delivered, he shall be fined for a contempt, on motion of the party injured, before the court from which such process, warrant or precept issued, in any sum not less than ten dollars nor more than one hundred, with costs; which fine shall be for the benefit of the party injured; and said constable shall have ten days' notice of such motion. [Id. sec. 11. P. D. 990.]

**In general.**—A constable held to have the same duties and powers in connection with the execution and return of civil process within the county to which his precinct belongs as the sheriff. *Medlin v. Seideman*, 39 C. A. 553, 88 S. W. 250.

A constable levying a writ of attachment is not liable with the attachment plaintiff for the wrongful suing out of the writ in the absence of any evidence to show that the officer participated in the procurement of the writ. *Faroux v. Cornwell*, 40 C. A. 529, 90 S. W. 537.

**Art. 7148. [4918] Failure to pay over collections.**—If any constable shall receive from any person any bonds, bills, notes or accounts for collection, and shall give his receipt therefor, in his official capacity, and shall fail to pay to such person, on demand, any amount he may have collected on the same, such constable and his sureties shall be responsible on his official bond for all such amounts as he may have collected on such bonds, bills, notes or accounts not paid over. [Id. sec. 12. P. D. 991.]

**Art. 7149. [4919] May execute process, where.**—Every constable may execute any process, civil or criminal, throughout his county and



elsewhere, as may be provided for in the Code of Criminal Procedure, or other law. [Id. sec. 14. P. D. 993.]

**District court process.**—A constable can execute all process issued from the district court. *Texas Land & Immigration Co. v. Masterson*, 11 C. A. 483, 33 S. W. 376.

**Art. 7150. [4920] Unfinished business.**—Whenever any constable shall vacate his office, all unfinished business remaining in his hands shall be transferred to his successor, and be completed by him in the same manner as if commenced by himself. [Id. sec. 13. P. D. 992.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Rewards for fugitives.**—A constable who arrests a person for misdemeanor held not entitled to recover a reward for the conviction of any one committing such misdemeanor. *Southwestern Telegraph and Telephone Co. v. Priest*, 31 C. A. 345, 72 S. W. 241.

Prior knowledge of a reward offered by a sheriff for the arrest and return of an escaped prisoner and performance in accordance therewith are essential to a right to recover. *Broadnax v. Ledbetter*, 100 T. 375, 99 S. W. 1111, 9 L. R. A. (N. S.) 1057.

**Liability of railroad for hired deputy.**—The liability of a railroad company for the act of one appointed a deputy sheriff and stationed at its railroad yards held for the jury. *Texas & N. O. R. Co. v. Parsons* (Civ. App.) 109 S. W. 240.

The fact that one is a deputy sheriff does not entitle him to any more rights or privileges in the yards of a railroad company than any other person except while in the performance of official duty. *Id.*

A finding that a railroad company had the right to control the conduct of one appointed a deputy sheriff and to discharge him from the service held warranted under the evidence. *Id.*

The right to eject trespassers from private property held not to belong to an officer as such. *Id.*

The fact that one is a deputy sheriff does not relieve his employer from liability for his conduct while acting as employé in the performance of a service personal to the employer. *Id.*

That one was a deputy sheriff does not show that his act in injuring a trespasser was official. *Texas & N. O. R. Co. v. Parsons*, 102 T. 157, 113 S. W. 914, 132 Am. St. Rep. 857.

In an action against a railway company for injury to a trespasser inflicted by a deputy sheriff and watchman, whether the latter's acts were official or those of a servant must be determined by all the circumstances and evidence. *Id.*

## TITLE 123 A

## STEVEDORES

<p><b>Art.</b> 7150a. Contracting stevedore and stevedore defined.</p> <p>7150b. License and bond; penalty.</p> <p>7150c. Bond.</p>	<p><b>Art.</b> 7150d. Bond and license in each county, etc.; suits on bond.</p> <p>7150e. License, how granted.</p> <p>7150f. New bonds and licenses; time within which to qualify.</p>
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**Article 7150a. Contracting stevedore and stevedore defined.**—A contracting stevedore, within the meaning of this Act, is any person, firm, association of persons, or corporation that contracts with any ship, agent, owners, masters, managers or captains of vessels, or with any other person or corporation, for the purpose of loading or unloading, or of having loaded or unloaded any vessel, ship or water craft; a stevedore within the meaning of this Act is any laborer who performs any of the actual labor in loading and unloading any ship, vessel or water craft whatsoever while in the service or employ of a contracting stevedore as above mentioned. [Acts 1913, p. 153, sec. 1.]

**Art. 7150b. License and bond; penalty.**—It shall hereafter be unlawful for any contracting stevedore to engage in the business or pursue the occupation of loading and unloading or having loaded or unloaded by the employment of labor therefor any ship, vessel or water craft in this state without first obtaining the license and executing the bond as hereinafter provided, and any such person who pursues said occupation without first qualifying as provided by this Act shall be guilty of a misdemeanor, and on conviction shall be fined in any sum not less than one hundred nor more than five hundred dollars for each day he shall pursue such occupation or business without thus qualifying and any member of a firm or association or any manager of a corporation who come within the meaning of a contracting stevedore who shall thus offend shall be amendable [amenable] to prosecution hereunder. [Id. sec. 2.]

**Art. 7150c. Bond.**—Each contracting stevedore as contemplated by this Act is hereby required to make bond in the sum of five thousand dollars, entered into with two or more good and sufficient sureties, who are residents of this state, or with any good and sufficient surety bonding Co. authorized to transact business in this state, payable to the county judge of the county in which such stevedore pursues his occupation and to his successor in office, as trustee for all persons who may become entitled to the benefits of this Act, said bond to be conditioned that said contracting stevedore will promptly on Saturday of each week pay each laborer his wages for labor performed in loading and unloading any such ship, vessel or water craft according to the scale of wages agreed upon, and that all agreements entered into with said laborers and each of them in respect to the loading and unloading of said water craft, as above mentioned, will be faithfully and truly performed, which bond shall be approved by the county clerk of the county in which said contracting stevedore is pursuing said business or occupation and by him shall be filed and recorded. [Id. sec. 3.]

**Art. 7150d. Bond and license in each county, etc.; suits on bond.**—The bond and license hereinafter provided for shall be made in each county in which said contracting stevedore pursues said occupation, in which county suits may be maintained upon such bond by any person to whom wages are due and unpaid for such labor as is hereinbefore mentioned; provided, that the same shall not become free upon the first recovery, but may be sued upon until the full amount thereof is exhaust-

ed, or suits sufficient to exhaust the bond or [are] pending, and when so exhausted said contracting stevedore shall make and file a new bond in amount and conditioned as provided for the first, and his failure so to do shall render him amendable [amenable] to prosecution as if no bond had ever been given in the first instance. [Id. sec. 4.]

**Art. 7150e. License, how granted.**—Said contracting stevedore shall, before beginning business as before stated, file his application in writing for a license to pursue the occupation of a contracting stevedore for the county mentioned, and on approval of the bond hereinbefore provided for by the county clerk and payment of a license fee of five dollars the clerk shall grant to him a license to pursue said occupation upon such form as the county commissioners court may designate, the said license fee to be paid into the general fund of the county. [Id. sec. 5.]

**Art. 7150f. New bonds and licenses; time within which to qualify.**—Said contracting stevedore shall be and he is hereby required to execute a new bond and to obtain the issuance of a new license at the expiration of each year from the former, every two years from the issuance of the former license, and all contracting stevedores who may be engaged in the occupation herein defined at any port, sub-port or other place where ships, vessels or water crafts are loaded or unloaded, at the time this law becomes effective, shall have thirty days from and after the going into effect of this law to qualify thereunder by executing the bond and obtaining the license as required herein. [Id. sec. 6.]

TITLE 124

STOCK LAWS

- Chap.  
 1. Of Marks and Brands.  
 2. Protection of Live Stock.  
 3. Of the Sale, Slaughter and Shipment of Animals.  
 4. Of Estrays.  
 5. Of the Mode of Preventing Hogs and Certain Other Animals from Running at Large in Counties and Subdivisions.

- Chap.  
 6. Of the Mode of Preventing Horses and Certain Other Animals Running at Large in Particular Counties Named.  
 7. Regulations for the Protection of Stock Raisers in Certain Localities.  
 8. Live Stock Sanitary Commission.  
 9. Veterinary Medicine and Surgery.

CHAPTER ONE

OF MARKS AND BRANDS

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| Art.<br>7151. Owners of stock to have mark and brand. | Art.<br>7156. Brands of minors.        |
| 7152. Each county to have brand.                      | 7157. When stock to be branded.        |
| 7153. Owner may place brand on his stock.             | 7158. Disputes, how settled.           |
| 7154. May counterbrand, when.                         | 7159. Marks and brands to be recorded. |
| 7155. Duty of secretary of state.                     | 7160. Unrecorded brands no evidence.   |

**Article 7151. [4921] Owners of stock to have mark and brand.—**Every person who has cattle, hogs, sheep or goats shall have an ear mark and brand differing from the ear mark and brand of his neighbors, which ear mark and brand shall be recorded by the clerk of the county court where such cattle, hogs, sheep or goats shall be; and no person shall use more than one brand, but may record his brand in as many counties as he may think necessary. [Act March 20, 1848, p. 156, sec. 1. P. D. 4655.]

**Constitutional and statutory provisions.—**Acts 1874, c. 37 (House Bill No. 16), provides by section 20 that the place on the animal on which the brand should be burned should be designated, but section 44 exempted certain counties. Held that, under Const. 1869, art. 12, § 18, providing that no law shall be revised or amended by reference to its title, but in such cases the act revised or section amended shall be re-enacted and published at length, chapter 108 of the acts of the same session, which provided that House Bill No. 16 should apply to the exempted counties, is invalid and these articles remain in force in the excepted counties. Dugat v. State (Cr. App.) 148 S. W. 789.

**Change of brand.—**While the statute prohibits a party from having but one brand for cattle, it does not prevent a stockman from changing it, and the mere fact that he changes his brand does not invalidate his former brand. Dugat v. State (Cr. App.) 148 S. W. 789.

**Art. 7152. [4922] County brands.—**The several counties in this state shall have a brand for horses and cattle, said brand to be known and designated as the "county brand." The county brand of each county in the state shall be as follows:

Anderson .....	A. A.	Blanco .....	B. N.
Andrews .....	A. N.	Borden .....	B. D.
Angelina .....	A. L.	Bosque .....	B.
Aransas .....	A. R.	Bowie .....	B. O.
Archer .....	A. H.	Brazoria .....	B. D.
Armstrong .....	A. M.	Brazos .....	B. Z.
Atascosa .....	A. T.	Briscoe .....	B. H.
Austin .....	A. U.	Brown .....	B. W.
Bandera .....	B. A.	Burleson .....	B. U.
Bastrop .....	B. S.	Burnet .....	B. T.
Bailey .....	B. I.	Caldwell .....	C. A.
Baylor .....	B. R.	Calhoun .....	C. H.
Bee .....	B. E.	Callahan .....	C. L.
Bell .....	B. L.	Cameron .....	C. M.
Bexar .....	B. X.	Camp .....	C. P.

Carson	C. R.	Hamilton	H. I.
Cass	C. S.	Hansford	H. F.
Castro	C. T.	Hardeman	H. N.
Chambers	C. B.	Hardin	H. D.
Cherokee	C. K.	Harris	H. S.
Childress	C. D.	Harrison	H. X.
Clay	C. Y.	Hartley	H. T.
Cochran	C. C.	Haskell	H. 6.
Coleman	C. E.	Hays	H. Y.
Collin	C. I.	Hemphill	H. M.
Collingsworth	C. W.	Henderson	H. E.
Colorado	C. N.	Hidalgo	H. G.
Comal	C. O.	Hill	H. L.
Comanche	C. J.	Hockley	H. K.
Concho	C. V.	Hood	H. O.
Cooke	C. U.	Hopkins	H. P.
Coryell	C. X.	Howard	H. R.
Cottle	C. 2.	Houston	H. 4.
Crockett	C. 3.	Hunt	H. U.
Crosby	C. 4.	Hutchinson	H. H.
Dallas	D. A.	Jack	J.
Dallam	D. L.	Jackson	J. A.
Dawson	D. N.	Jasper	J. P.
Deaf Smith	D. S.	Jefferson	J. E.
Delta	D. T.	Johnson	J. H.
Denton	D. O.	Jones	J. O.
De Witt	D. E.	Karnes	K.
Dickens	D. I.	Kaufman	K. A.
Dimmit	D. M.	Kendall	K. E.
Donley	D. N.	Kent	K. T.
Duval	D. D.	Kerr	K. R.
Eastland	E. A.	Kimble	K. I.
Edwards	E. D.	King	K. N.
Ellis	E. L.	Kinney	K. O.
El Paso	E. P.	Knox	K. X.
Encinal	E. N.	Lamar	L. A.
Erath	E. R.	Lamb	L. M.
Falls	F. A.	Lampasas	L. P.
Fannin	F. N.	La Salle	L. S.
Fayette	F. E.	Lavaca	L. C.
Fisher	F. I.	Lee	L. E.
Floyd	F. L.	Leon	L. 4.
Fort Bend	F. B.	Liberty	L. I.
Franklin	F. K.	Limestone	L. T.
Freestone	F. R.	Lipscomb	L. B.
Frio	F. O.	Live Oak	L. O.
Galveston	G. A.	Llano	L.
Gaines	G. I.	Lubbock	L. K.
Garza	G. R.	Lynn	L. N.
Gillespie	G. L.	Madison	M. 1.
Goliad	G. D.	Marion	M. 2.
Gonzales	G. O.	Martin	M. 4.
Gray	G. Y.	Mason	M. N.
Grayson	G. N.	Matagorda	M. R.
Greer	G.	Maverick	M. K.
Gregg	G. G.	McCulloch	M. C.
Grimes	G. M.	McLennan	M. L.
Guadalupe	G. E.	McMullen	M.
Hale	H.	Medina	M. A.
Hall	H. A.	Menard	M. D.

Milam .....	M. I.	Shelby .....	S. H.
Mitchell .....	M. H.	Sherman .....	S. N.
Montague .....	M. E.	Smith .....	S. T.
Montgomery .....	M. M.	Somervell .....	S. O.
Moore .....	M. O.	Starr .....	S. R.
Morris .....	M. S.	Stephens .....	S. E.
Motley .....	M. T.	Stonewall .....	S. L.
Nacogdoches .....	N. S.	Swisher .....	S. I.
Navarro .....	N. A.	Tarrant .....	T. A.
Newton .....	N.	Taylor .....	T.
Nolan .....	N. O.	Terry .....	T. E.
Nueces .....	N. E.	Throckmorton.....	T. H.
Ochiltree .....	O. H.	Titus .....	T. I.
Oldham .....	O. O.	Tom Green.....	T. G.
Orange .....	O.	Travis .....	T. S.
Palo Pinto .....	P. P.	Trinity .....	T. R.
Panola .....	P. A.	Tyler .....	T. L.
Parmer .....	P. R.	Upshur .....	U. P.
Parker .....	P. K.	Uvalde .....	U.
Pecos .....	P.	Van Zandt.....	V.
Polk .....	P. K.	Victoria .....	V. I.
Potter .....	P. O.	Walker .....	W. K.
Presidio .....	P. R.	Waller .....	W.
Rains .....	R.	Washington .....	W. N.
Randall .....	R. A.	Webb .....	W. E.
Red River .....	R. R.	Wharton .....	W. T.
Refugio .....	R. E.	Wheeler .....	W. H.
Roberts .....	R. S.	Wichita .....	W. A.
Robertson .....	R. O.	Wilbarger .....	W. R.
Rockwall .....	R. L.	Williamson .....	W. I.
Runnels .....	R. N.	Wilson .....	W. L.
Rusk .....	R. K.	Wise .....	W. S.
Sabine .....	S. B.	Wood .....	W. O.
San Augustine.....	S. A.	Yoakum .....	Y.
San Jacinto.....	S. J.	Young .....	Y. O.
San Patricio.....	S. P.	Zapata .....	X.
San Saba.....	S. S.	Zavala .....	X. X.
Scurry .....	S.		
Shackelford .....	S. D.		

[Acts 1883, p. 76.]

**Art. 7153. [4923] Owner may put county brand on his stock.—**The owners of all horses and cattle, in addition to their private brand, may place said county brand on all horses and cattle owned by them, and shall be placed upon the neck of all animals so branded. [Id. sec. 3.]

**Art. 7154. [4924] When stock removed from county may be counterbranded.—**Whenever any horses or cattle branded with the county brand are removed to another county, the owners of such stock may counterbrand with said county brand, and a bar under said county brand shall be used and known as the "county brand," and when so counterbranded the brand of the county in which said stock may be newly located may be placed on said stock. [Id. sec. 4.]

*Effect of new brand.—*Though the statute provides that an individual shall have but one mark and brand for his cattle, yet, if cattle be removed by the owner from a county in which his brand is recorded, and for any reason he causes to be recorded a different brand in the county to which the cattle are removed, the new brand does not invalidate the old one, nor deprive the owner of any benefit accruing from its registration. *McClure v. Sheek's Heirs*, 68 T. 426, 4 S. W. 552.

**Art. 7155. [4925] Secretary of state to furnish lists of brands.—**It shall be the duty of the secretary of state to furnish a printed list of the county brands to the county clerks of this state, who shall securely post the same in their office. [Id. sec. 7.]

**Art. 7156. [4926] Brands of minors.—**Minors owning cattle or hogs, separate from that of the father or guardian, may have a brand

and mark, which shall be recorded; the father or guardian shall be responsible for the proper use of such mark and brand of any such minor. [Acts 1848, p. 156. P. D. 4660.]

**Minors.**—Ever since 1848 we have had a statute in Texas providing that minors owning cattle separate from that of the father or guardian may have a recorded mark and brand. *Coke & Reardon v. Ikard*, 39 C. A. 409, 87 S. W. 869.

**Art. 7157. [4927] When stock to be branded.**—Cattle shall be marked with the ear mark or branded with the brand of the owner on or before they are twelve months old; hogs, sheep and goats shall be marked with the ear mark of the owner on or before they are six months old. [Id. sec. 2. P. D. 4656.]

**Art. 7158. [4928] Disputes, how settled.**—If any dispute shall arise about any ear mark or brand, it shall be decided by reference to the book of marks and brands kept by the clerk of the county court, and the ear mark and brand of the oldest date shall have the preference. [Id. sec. 3. P. D. 4657.]

**Art. 7159. [4929] Marks and brands to be recorded.**—It shall be the duty of the clerks of the county courts in their respective counties to keep a well-bound book, in which they shall record the marks or brands of each individual who may apply to them for that purpose, noting in every instance the date on which the brand or mark is recorded; which record shall be subject to the examination of every citizen of the county at all reasonable office hours, free of charge for such examination. [Id. sec. 4. P. D. 4658.]

**Certificate of record.**—A certificate of the county clerk of Y. county to a copy taken from the record of marks and brands was as follows: "The State of Texas, County of Young. I, Chas. O. Jolim, clerk of the county court in and for said county, do hereby certify that the foregoing is a true copy of the record and brand of Wilkins Bros." Held, in a criminal case, sufficient to show that the mark and brand was recorded in Young county. *Byrd v. State*, 26 T. 374, 9 S. W. 759; *Thompson v. State*, 26 T. 466, 9 S. W. 760. **Evidence of ownership.**—See Art. 7160.

**Art. 7160. [4930] Unrecorded brands no evidence; proviso.**—No brands, except such as are recorded by the officers named in this chapter, shall be recognized in law as any evidence of the ownership of the cattle, horses or mules, upon which the same may be used; provided, that this shall not apply in criminal cases. [Acts 1848, p. 156, sec. 5. P. D. 4659. Acts 1913, p. 129, sec. 1, amending Art. 7160, Rev. St. 1911.]

**Recorded brands as evidence.**—The record of marks and brands is evidence and notice of title. *Poag v. State*, 40 T. 151; *Allen v. State*, 42 T. 517; *Schneider v. Fowler*, 1 App. C. C. § 856. See Art. 7160.

The record of a mark and brand, in the county where the stock is found to be, is constructive notice of title to the stock in the person in whose name the mark and brand is recorded. *Schneider v. Fowler*, 1 App. C. C. § 856.

The owner of stock had his brand recorded in T. county, where he then lived. Afterwards he moved to C. county, and his stock ran in T. and C. counties and in an adjoining county. It was held that the record of the brand in T. county was evidence of ownership of stock stolen in C. county. *Thompson v. State*, 26 T. 466, 9 S. W. 760.

A parol sale of a recorded mark and brand is as effectual to pass the title as would a verbal transfer of real estate, which is likewise governed exclusively by statutory provisions. *Rankin v. Bell*, 85 T. 28, 19 S. W. 874.

The record of a second brand while the first remains unabandoned is not admissible to prove ownership of the cattle branded. *Unsell v. State*, 39 Cr. R. 330, 45 S. W. 1022.

Where a brand is recorded in one county it can be used as evidence in any other county. *Walton v. State*, 41 Cr. R. 454, 55 S. W. 568.

Under this article a brand properly recorded is, in a prosecution for theft of cattle, evidence of ownership. *Dugat v. State* (Cr. App.) 148 S. W. 789.

**Unrecorded brands as evidence.**—Under Art. 3968, providing that no gift of chattels shall be valid unless by deed or will, duly acknowledged and recorded, unless actual possession be taken and retained by the donee, and this article, no title passed to cattle which were branded with a peculiar brand by the owner, pursuant to his express intention that they and their issue should belong to his niece where the latter never had actual possession of the cattle which continued to run on the donor's range and to be looked after by him, and the brand was not recorded. *Eldridge v. McDow* (Civ. App.) 132 S. W. 516.

In a prosecution for the theft of a cow, an unrecorded brand cannot be introduced to establish ownership. *Powers v. State* (Cr. App.) 152 S. W. 909.

**Identification.**—Cattle can be identified by unrecorded marks. *Gregory v. Nunn* (Civ. App.) 25 S. W. 1083.

A brand not recorded in accordance with the requirements of the statute is not admissible in evidence to identify an animal in a prosecution for theft. *Steed v. State*, 43 Cr. R. 567, 67 S. W. 330.

**Mistake in registration.**—The fact that a registered stallion sold as such was by mistake described in the registration book as having a star, when he had none, would not damage the purchaser beyond the cost of correcting the mistake in registration, in absence of special damage. *National State Bank of Mt. Pleasant, Iowa, v. Ricketts* (Civ. App.) 152 S. W. 646.

## CHAPTER TWO

### PROTECTION OF LIVE STOCK

<p>Art. 7161. Inspection for glanders, etc. 7162. Report to county judge, duty of inspector. 7163. Condemned animals to be killed. 7164. Payment for animals killed, fee, etc. 7165. Law cumulative. 7166. Bounties for killing certain animals. 7167. Scalps and affidavits, etc., to be presented to commissioners' court.</p>	<p>Art. 7168. Scalp defined; powers and duties of court, etc. 7168a. Court to make statement; duties of comptroller and county treasurer. 7168b. Laws repealed; trespass not permitted. 7168c. Appropriation. 7169. [Superseded].</p>
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**Article 7161. [4931] County judge to order inspection when glanders, etc., exist.**—If at any time it shall come to the knowledge of any county judge of any county in this state, by affidavit of any credible citizen of his county, stating that affiant has reason to believe and does believe that glanders or farcy exists among any horses, mules, jacks or jennets in said county, naming owner or owners of such animal or animals so infected, if known, if unknown, so stating, it shall be the duty of such county judge, upon the filing of said affidavit, to immediately appoint three disinterested and intelligent citizens of said county, whose duty it shall be to carefully and minutely examine said animal or animals so reported to be diseased with glanders or farcy; said three citizens, before entering upon the duties required of them by this chapter, shall take an oath before some officer legally qualified to administer oaths that they will discharge their duties as prescribed by this chapter in a fair and impartial manner. [Acts 1892, S. S., p. 11, sec. 1.]

**Fees of Inspectors.**—See Title 58, Chapter 3.  
**Constitutionality.**—Title 124, c. 2, providing for appraisal and destruction of diseased horses, held constitutional. *Chambers v. Gilbert*, 17 C. A. 106, 42 S. W. 630.  
This article and Arts. 7162, 7163 and 7164 are not in conflict with art. 1, sec. 17 of the constitution, because they do not amount to the taking of property for public use. *Livingston v. Ellis County*, 30 C. A. 19, 68 S. W. 724.

**Art. 7162. [4932] Report of county judge; duty of inspector.**—If, after carefully and minutely examining the animal or animals so reported to be affected with glanders or farcy, said three citizens shall be of the opinion that the animal or animals so examined by them are diseased with glanders or farcy, they shall condemn the same; and it shall be their duty to appraise such animal or animals at their just and full value at the time of such examination and condemnation, and shall forthwith report their action in writing to the county judge, giving in said report the number of animals condemned, if any, the owner or owners of same if known, and if unknown so stating it, with the appraised value of same. But if the said citizens have any reasonable doubt as to the diseased animals being affected with glanders or farcy, before condemning as above provided for, they shall require the owner or owners to have said diseased animals separated from contact with all other animals subject to contagion, for a reasonable time; and, when they are fully satisfied that the disease is glanders or farcy, then they shall proceed to condemn and destroy said animals as provided for in this article. [Id. sec. 2.]

**Report of commissioners.**—The report of commissioners appointed by the county judge to appraise horses afflicted with glanders held not objectionable, as not returning the value of the animals as diseased. *Maynard v. Freeman* (Civ. App.) 60 S. W. 334.

**Art. 7163. [4933] Condemned animals killed.**—The county judge, upon the receipt of the report named in the preceding article, shall issue his order to the sheriff or any constable of his county, commanding him to seize said diseased animal or animals and take same to some secluded place and kill them and bury or burn the carcass. [Id. sec. 3.]

**Constitutionality.**—See notes under Art. 7161.

**Art. 7164. [4934] Payment for animals killed; fee, etc.**—After said animal or animals are killed, as provided in the preceding article, the party owning such animal or animals so killed may present his claim to the commissioners' court of the county where said animal or animals



were killed, for the value of such animal or animals at the time the same were killed (if such animal or animals had any value); and the amount of such claim, or so much thereof as may be allowed by said court, shall be paid out of the general revenue of the county, as other claims against such county. The sheriff or constable killing, burying or burning said animal or animals shall be paid by the county such sum as the commissioners' court thereof may determine the service worth. [Id. sec. 4, Amended Acts 1899, p. 303.]

**Determination of value.**—See *City of Dallas v. Allen* (Civ. App.) 40 S. W. 324; *Livingston v. Ellis County*, 30 C. A. 19, 68 S. W. 724.

**Art. 7165. [4935] Law cumulative.**—This law is cumulative of all other laws now in force for the prevention of glanders and farcy. [Acts 1892, S. S., p. 11, sec. 6.]

**Art. 7166. [4936] Bounties for killing certain animals.**—That hereafter when any person shall kill in this state any coyote, lobo or other wolf, panther, Mexican lion, tiger, leopard or wild cat, he shall be paid the sum of five (\$5.00) dollars for each lobo wolf, or grey or timber wolf, panther, Mexican lion, tiger or leopard, and the sum of one (\$1.00) dollar for each coyote wolf, and one (\$1.00) dollar for each wild cat so killed. [Acts 1903, p. 113, sec. 1. Acts 1911, p. 44, sec. 1.]

**Constitutionality.**—The provision for the payment of bounties for the destruction of animals is constitutional. *Weaver v. Scurry County* (Civ. App.) 28 S. W. 836.

This chapter does not conflict with the constitution that forbids the legislature, cities or counties from granting public moneys to individuals. *Chambers v. Gilbert*, 17 C. A. 106, 42 S. W. 630.

**Art. 7167. [4937] Scalps and affidavit, etc., to be presented to commissioners' court.**—The scalps of said animals killed shall be presented by the person or persons having killed said animals in person to the commissioners court of the county in which said animal or animals were killed, accompanied by a written affidavit before the county judge of said county, or any other officer authorized to administer oaths, stating when and where he killed said animal, and the kind of each, that affiant in person and no other killed said animal or animals. [Acts 1903, p. 113, sec. 2. Acts 1911, p. 44, sec. 2.]

**Art. 7168. [4938] Scalp defined; powers and duties of court, etc.**—Such scalp shall consist of the entire hide of said animal, including the scalp and both ears, so that the court may sufficiently identify the class of animals so killed; the court may in all cases when it is not satisfied as to the sufficiency of the evidence before it under this Act reject any and all claims. The commissioners court shall immediately take and pass upon said hide, slit both ears of said hide, and may return same to the owner; but in no case shall any commissioners court in this state be authorized under this Act to issue warrant for bounty on any hide when presented with either ear of same disfigured in the least, cut, slit or any defect whatsoever. Both ears must be absolutely whole, and such commissioners court shall issue certificate signed by at least three members of said court, and attested by the signature of the clerk of said court, and under the seal of said court, showing the kind of animals killed and the number of each, and the name of the party who killed same, and the amount due such party. The clerk of the court shall issue a warrant on the county treasury for the amount specified, and payable to the order of the party named in such certificate. [Acts 1903, p. 113, sec. 3. Acts 1911, p. 44, sec. 3.]

**Art. 7168a. Court to make statement; duties of comptroller and county treasurer.**—It shall be the duty of the commissioners court of the several counties of this state, at each regular session of each year, to make an itemized statement, showing the several amounts paid, to whom and when paid, by order of said court under this provision of this Act; said statement shall be entered upon the minutes of said court, and a certified copy of each statement shall be entered upon the minutes of said court, and a certified copy of such statement shall be transmit-

ted by the clerk of said court to the comptroller of the state. Upon receipt of said certified copy by the comptroller, it shall be his duty to draw his warrant upon the state treasurer for three-fourths of the aggregate amount paid out by such county, under the provisions of this Act, as shown by said certified copy of statement, payable to the treasurer of said county, which said amount when received by said county treasurer, shall be by him credited to the fund of the third class of said county. [Acts 1911, p. 44, sec. 4.]

**Art. 7168b. Laws repealed; trespass not permitted.**—All laws or parts of laws in conflict herewith are hereby repealed; provided, that nothing herein contained shall permit any person to enter on the enclosed or posted premises of another for the purpose of hunting or trapping or otherwise catching or trapping wild animals for their scalp without having first obtained the consent of the owner. [Id. sec. 5.]

**Art. 7168c. Appropriation.**—And the sum of one hundred thousand (\$100,000.00) dollars is hereby appropriated out of any money in the state treasury, not otherwise appropriated, for the payment of above named bounties. [Id. sec. 6.]

**Note.**—Section 7 provides that the act shall not become effective, and that the appropriation shall not become available, until September 1, 1912.

**Art. 7169.** [Superseded.] See Arts. 7166–7168c.

## CHAPTER THREE

### OF THE SALE, SLAUGHTER AND SHIPMENT OF ANIMALS

Art.		Art.	
7170.	Bill of sale to be taken.	7177.	Register of cattle.
7171.	Possession, prima facie illegal, without.	7178.	County clerk to make a copy.
7172.	Stock animals sold by marks, etc.	7179.	Butchers' bond, etc.
7173.	Butchers to report, etc.	7180.	To keep a record, etc.
7174.	Butchers to register with county clerk.	7181.	Shall be open for inspection.
7175.	Bill of sale, etc., to be recorded, etc.	7182.	May be sued upon bond, when.
7176.	Owners to file sworn lists.	7183.	Inspector to keep a record, etc.
		7184.	Exempted counties.

**Article 7170. [4940] Bill of sale to be always taken.**—Upon the sale, alienation or transfer of any horse, mare, mule, gelding, colt, jack, jennet, cow, calf, ox, or beef steer by any person in this state, the actual delivery of such animals shall be accompanied by a written transfer from the vendor, or party selling, to the purchaser, giving the number, marks and brands of each animal sold and delivered. [Act Nov. 13, 1866, p. 223, sec. 1. P. D. 7445.]

See *Hughes v. State* (Cr. App.) 149 S. W. 173.

**Application.**—For a sale of live stock running at large in the range, a bill of sale is required by the statutes as evidence of title, and in default of it the prima facie presumption obtains that the possession by one claiming to be a purchaser is illegal. If the live stock consists of cattle running at large, a bill of sale and record thereof are absolutely prerequisite to the acquisition of title; and if the instrument be not recorded it does not take effect in favor of any one for any purpose. *Black v. Vaughan*, 70 T. 47, 7 S. W. 604. It follows that a parol transfer of cattle in the range is a nullity; but it does not follow that a parol agreement to transfer in the manner prescribed by the statute is void, if founded upon a valid consideration and unmixed with fraud. An agreement in parol to transfer stock cattle on the range, if founded upon valuable consideration, may be enforced. *Prude v. Campbell*, 85 T. 4, 19 S. W. 890.

These provisions do not apply to a sale without the limits of this state where actual possession passed and the cattle were brought into this state. *Ft. W. Nat. Bank v. Daugherty*, 81 T. 301, 16 S. W. 1028.

**Removal after bill of sale.**—Where a bill of sale is properly made and registered in the county of the residence of the parties, the removal of the stock to another county does not defeat the sale. *Blum v. Light*, 81 T. 414, 16 S. W. 1090.

**Transfer by parol.**—A parol agreement to transfer stock cattle on the range, founded upon a sufficient consideration, may be enforced. *Prude v. Campbell*, 85 T. 4, 19 S. W. 890.

**Actual delivery.**—The title to property passes on purchase and delivery without a bill of sale, when the purchase is bona fide, upon sufficient consideration, and no evasion of the law is intended. *Wells v. Littlefield*, 59 T. 556.

Sale of stock running loose on the range, not in writing and not accompanied by actual delivery, is void. *Black v. Vaughan*, 70 T. 50, 7 S. W. 604; *Bank v. Emery*, 78 T. 498, 15

S. W. 23; Prude v. Campbell, 85 T. 4, 19 S. W. 890; Rankin v. Bell, 85 T. 36, 19 S. W. 874; Bank v. Brown, 85 T. 85, 23 S. W. 862; Hickman v. Hickman, 5 C. A. 99, 27 S. W. 31.

**Diligence.**—On the sale of cattle by marks and brands in number "more or less," the vendor must use that skill, energy and diligence in delivering that a good business man would use. Day v. Cross, 59 T. 595.

**Damages for nondelivery.**—In a contract for the delivery of cattle, the purchase money not being paid, the measure of damages for failure to deliver is the difference between the contract and market price at the time and place of delivery with interest to the time of trial. Day v. Cross, 59 T. 595.

**Sale of stock.**—Facts held to show no title in defendant to cattle taken possession of in satisfaction of previous advances to buyer. Wilson v. Carroll (Civ. App.) 50 S. W. 222.

Evidence held to show that title to cattle passed to plaintiff on his passing on them as merchantable and defendant's tender of delivery. Maud v. Coppinger, 23 C. A. 128, 56 S. W. 127.

Where the bill of sale of cattle clearly passed the title, if the seller owned them at the time of sale the intent of the parties was immaterial. Eldridge v. McDow, 46 C. A. 270, 102 S. W. 435.

A buyer of an animal having no market value held entitled to relief without returning or tendering a return thereof. Partridge v. Wooton (Civ. App.) 137 S. W. 412.

Where one purchased, paid for, and secured possession of a horse, he acquired title, though a bill of sale of the horse was issued to another as security for money borrowed to pay the seller. Barnett v. Ward (Civ. App.) 144 S. W. 697.

Where title and possession of a horse passed as consideration for contract which was breached, held, that subsequent purchasers could not be held as for conversion, though the horse was fraudulently sold to them. Ross v. Head (Civ. App.) 145 S. W. 1077.

**Rights and liabilities on sale of diseased stock.**—Where plaintiff bought diseased hogs from defendant, who represented them as sound, plaintiff held entitled to rescind though there was no fraud. Carter v. Cole (Civ. App.) 42 S. W. 369.

Plaintiff was not entitled to recover the consideration paid for hogs, where the hogs were not diseased at time of sale, but began to die soon after. Cole v. Carter, 22 C. A. 457, 54 S. W. 914.

Plaintiff was not entitled to recover consideration paid for diseased hogs, if he bought them on his own judgment after a personal inspection. Id.

Evidence held to justify a finding that a horse was diseased at the time he was sold with warranty of health. Robinson v. Snow (Civ. App.) 74 S. W. 328.

In an action for breach of warranty of soundness of a horse, a charge that if, though warranted sound and proven unsound, the vendee could have discovered the defect on examination, the vendor was not liable, held error. McAfee v. Meadows, 32 C. A. 105, 75 S. W. 813.

Where plaintiff charged defendant with knowingly selling him a glandered horse, defendant's liability depended on his knowledge that the horse was diseased. Griffin v. Allison (Civ. App.) 138 S. W. 1068.

Where defendant sold hogs infected with cholera, represented that they were sound, and the buyer relied on the representation and gave a note for the price, which the seller transferred to a bona fide purchaser, the seller was liable to the buyer on the death of the hogs soon after the purchase. Terrell v. Landrum (Civ. App.) 153 S. W. 647.

**Seller's failure to furnish registration papers.**—Where the seller of cattle agreed to furnish registration papers, and failed to do so within a reasonable time, there was a breach of the contract entitling the seller to damages. Miller v. Mosely (Civ. App.) 91 S. W. 648.

Where the seller of cattle failed to deliver registration papers as agreed, the purchaser was entitled to nominal damages. Id.

Where the seller of cattle failed to furnish registration papers as agreed, he could not justify his breach on the ground that the purchaser should have procured the papers from other sources. Id.

In action for breach of contract whereby the seller of cattle agreed to deliver registration papers, the measure of damages determined. Id.

**Conversion.**—Facts held to constitute a conversion of plaintiff's cattle by defendant. Uvalde Nat. Bank v. Dockery (Civ. App.) 83 S. W. 29.

Evidence held insufficient to sustain a finding as to the number of plaintiff's cattle converted by defendant. Id.

**Art. 7171. [4941] Possession prima facie illegal, without.**—Upon the trial of the right of property of any animal, such as is mentioned in the preceding article, in any court of this state, the possession of such animal without the written transfer therein specified shall be deemed prima facie illegal. [Id.]

See Art. 7785; Traders' Nat. Bank v. Day, 7 C. A. 569, 27 S. W. 264.

**Rebuttal of presumption.**—The presumption of the illegality of such sale may be rebutted. Swan v. Larkin, 8 C. A. 421, 28 S. W. 217.

**Art. 7172. [4942] Stock animals sold by mark and brand, etc.**—Persons may dispose of stock animals of the kind mentioned in article 7170, as they run in the range, by the sale and delivery of the brands and marks; but in every such sale the purchaser, in order to acquire title thereto, shall have his conveyance or bill of sale of such stock recorded in the county clerk's office, in a book to be kept by him for

that purpose; and such sale or transfer shall be noted on the record of original marks and brands in the name of the vendee or purchaser. [Id.]

**Application of law.**—This article does not apply where the vendee named in the bill of sale not recorded has received and actually taken possession of the cattle, since a court of equity under such circumstances will require the purchaser to do equity without regard to defects attending the attempted transmission of title. *Panhandle Nat. Bank v. Emery*, 78 T. 498, 15 S. W. 23.

This provision does not apply to a judicial sale of cattle on the range, and the title of a purchaser is not defeated by the fact that the bill of sale is not so executed as to entitle it to record stock. *Holloway v. Cabell*, 3 C. A. 320, 22 S. W. 531.

This article does not apply to a sale of cattle which the vendor has placed in a pasture and designates in the sale by number and brand. *Nance v. Barber*, 7 C. A. 111, 26 S. W. 151.

As to sale of stock by brand, see *Scofield v. Douglass* (Civ. App.) 30 S. W. 817; *Swan v. Larkin*, 23 S. W. 217, 8 C. A. 421.

By statute title to cattle running on the range passes by sale of the mark and brand. *Coke & Reardon v. Ikard*, 39 C. A. 409, 87 S. W. 869.

**Record.**—A written transfer of cattle, accompanied by an actual delivery, is not required to be recorded under this article. *Boutwell v. Hiltbold*, 4 App. C. C. § 65, 15 S. W. 501.

**Horses on range.**—Horses on the range rounded up and under control of a herder are not within the purview of this article. *Scofield v. Douglass* (Civ. App.) 30 S. W. 817.

**Sale and actual delivery.**—Without selling the mark and brand it is competent to prove a sale and actual delivery of branded cattle, not including the whole of the stock so branded; but such sale passes no title to the brand as evidence of title. *Rankin v. Bell*, 85 T. 28, 19 S. W. 874.

A verbal sale of cattle running at large, followed by reduction to possession, is valid against a subsequent attachment against the vendor. *Davis v. National Bank*, 7 C. A. 41, 26 S. W. 222.

A sale by brands and marks by an unrecorded bill of sale, where there is a delivery of possession with intent to convey the stock only, without any right to the brand, is valid. *Rainwater-Boogher Hat Co. v. O'Neal*, 7 C. A. 242, 26 S. W. 462.

**Art. 7173. [4943] Butchers to report to commissioners' court.**—Every person in this state engaged in the slaughter and sale of animals for market shall make a regular report, under oath, to the county commissioners' court of the county, giving the number, color, age, marks and brands of every animal slaughtered, which report shall be made to each regular meeting of the court, and be filed with and kept on file by the county clerk for the inspection of any one interested. Each report shall be accompanied by the bill of sale or written conveyance to the butcher for every animal that he has purchased for slaughter, and, if any of the animals slaughtered have been raised by himself, it shall be so stated in the report. Said butcher's report so made to the commissioners' court may be destroyed within the discretion of the county clerk after a period of five years. [Id. p. 224, sec. 3. P. D. 6557. Amended Acts 1907, p. 239.]

**Power of cities to regulate butchers.**—See Title 22, Chapter 4.

**Art. 7174. Butchers to register with county clerk.**—Before engaging in the business of slaughter and sale of animals for market, every person, firm, or corporation desiring to so engage, must first register his name, or their names, with the county clerk, indicating their purpose to engage in such business; and upon failure to so first register their names they may be punished as provided for in the Penal Code for this offense; provided, nothing in this law shall be construed to apply to slaughter houses in this state slaughtering as many as three hundred cattle per day. [Acts 1907, p. 239.]

**Art. 7175. [4944] Bill of sale and description to be recorded before driving.**—Any person who shall purchase animals of any class named in article 7170, for the purpose of driving to market out of the county where purchased, or out of the state, shall, before moving the animals out of the county where purchased, deposit with the clerk of the county court, for record, a bill of sale and correct list of the number, marks, brands and kind of animals, signed and acknowledged by the vendor or vendors, which, together with the postoffice or place of abode of the vendee, shall be recorded in the book kept by the clerk

for that purpose, and with his certificate of record, under seal attached, shall be returned to the purchaser upon payment of the recording fees. [Id. pp. 223, 224, sec. 2. P. D. 6556.]

**Art. 7176. [4945] Owners to file sworn descriptive lists.**—Persons intending to drive stock raised by themselves to market out of the county where raised, or out of the state, shall, before driving, deposit with the clerk of the county court for record a correct list of such animals, with a particular description of their marks and brands, verified by their own affidavit; which list the county clerk shall record and certify, as in other cases of registration, and return to the owner. [Id. p. 224, sec. 2.]

**Art. 7177. [4946] Register of cattle shipped or slaughtered to be kept.**—The commanders or agents of all vessels, and the agents of all railroads on which cattle are exported from the state, and the proprietors or agents of all establishments for the slaughter of cattle within the state, shall keep a register of all cattle shipped or slaughtered, with the marks, brands and general description of such animals, and the names of the persons shipping or selling the same, the dates of their shipments or purchase, and the county from which they were driven. [Act Sept. 5, 1850, p. 27, sec. 1. P. D. 460.]

**Art. 7178. [4947] County clerk to make a copy.**—Such register shall be deposited with the clerk of the county court of the county where the cattle were shipped or slaughtered on the first day of each month; and such clerk shall at once copy the same in a well-bound book to be kept for that purpose, and return the original to the party depositing it. The record kept by the county clerk shall be open at all times to public inspection without charge. [Id. sec. 2. P. D. 461.]

**Art. 7179. [4948] Butchers' bond, etc.**—Every person, before he shall set up and carry on the trade of a butcher or slaughterer of cattle in the state of Texas, shall file a bond, to be approved by the county judge of the county in which he desires to carry on the business, in a sum of not less than five hundred dollars nor more than five thousand dollars, payable to the state of Texas, conditioned that he shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, with a description of the animal, including marks, brands, age, weight, and from whom purchased, and the date thereof; that he will have the hide and ears of such animal inspected by the inspector or some magistrate of the county within five days after it is slaughtered; and that he will not purchase any cattle that has been slaughtered by another, unless the hide and ears of such slaughtered animal accompanies said animal offered for sale; and that he will not purchase any animal that has been slaughtered by another when the ear marks or brands on the hide accompanying such animal when offered for sale have been changed, mutilated or destroyed. [Acts 1889, p. 84.]

**Change in law.**—Art. 7305, exempting Mitchell county from the operation of Arts. 7256 et seq., relating to the inspection of hides and animals, did not repeal as to such county Penal Code, art. 1364 et seq., originally taken from this article, relating to the sale, slaughter, and shipment of animals, which article of the Penal Code requires the filing of a bond with the county clerk by one carrying on the business of a butcher and slaughterer of animals for market. *Grable v. State*, 62 Cr. R. 108, 136 S. W. 775.

**Art. 7180. [4949] Shall keep a record, etc.**—Every person who shall carry on the business of butcher or slaughterer of cattle shall keep a true and faithful record, in a book kept for that purpose, of all cattle purchased or slaughtered by him, together with a description of each animal, including mark, brand, age, weight and from whom purchased and the date thereof, and shall have the hide and ears of such animal or animals inspected by the inspector or some magistrate of the county within five days after such animal is slaughtered. [Id. sec. 3.]

**Art. 7181. [4950] Shall be open to inspection.**—The record provided for in the preceding article shall be open to inspection of all persons. [Id. sec. 5.]

**Art. 7182. [4951] May be sued upon bond.**—Any butcher or slaughterer of cattle who shall violate any of the conditions of the bond referred to in article 7179 may be sued upon his bond at the instance of the county or district attorney of the county where such bond is given, and all sums recovered by suits upon said bonds shall be paid into the county treasury and become a part of the available school fund of such county. [Id. sec. 7.]

**Art. 7183. [4952] Inspector to keep a record, etc.**—It shall be the duty of the inspector or magistrate who inspects such hides as are mentioned in this chapter to keep a record of the marks, brands, color and a general description of such hide, and for whom inspected, with the date of such inspection, and return the same to the clerk of the county court within ten days after such inspection, and shall be entitled to receive the sum of twenty-five cents for each hide so inspected, to be paid by the party having the hide inspected. [Id. sec. 8.]

**Art. 7184. [4953] Exempted counties.**—The provisions of the five preceding articles shall in no wise apply to the following counties: Anderson, Bell, Clay, Gonzales, Coryell, Hamilton, Mills, Brown, Comanche, Lavaca, Llano, San Saba, Concho, Runnels, Coleman, Travis, Grayson, Cooke, Montague, Colorado, Bexar, Jasper, Newton, Orange, Jefferson, Polk, San Jacinto, Tyler, Chambers, Hardin, Liberty, Harrison, Smith, Upshur, Gregg, Wood, Rains, Bowie, Cass, Morris, Titus, Lee, Bastrop, Fayette, Hill, Johnson, Ellis, McLennan, Falls, Robertson, Milam, Brazos, Galveston, Brazoria, Matagorda, San Patricio, Guadalupe, Caldwell, Hays, Blanco, Comal, Tarrant, Wise, Parker, Jack, Dallas, Nacogdoches, San Augustine, Sabine, Shelby, Panola, Rusk, Hunt, Hopkins, Delta, Franklin, Camp, Angelina, Houston, Leon, Grimes, Madison, Kaufman, Rockwall, Fannin, Lamar, Red River, Van Zandt, Henderson, Cherokee, Bosque, Hood, Erath, Somervell, Collin, Denton, Trinity, Walker, Montgomery, Harris, Austin, Washington, Wharton, Fort Bend, Waller, Burleson, Limestone, Freestone, Navarro, Young, Karnes, Mason, Medina, Kimble, Kerr, Kendall, Bandera, Sutton, Gillespie, Williamson, Lampasas, Burnet, El Paso, Presidio, Brewster, Midland, Reeves and Marion. [Amend. Acts 1909, p. 74.]

## CHAPTER FOUR

### OF ESTRAYS

<b>Art.</b>	<b>Art.</b>
7185. Who may take up stray animals.	7197. Sale, when to be made.
7186. Oath, appraisalment and bond.	7198. Hogs, sheep, etc., how estrayed.
7187. Ownership, how proved.	7199. Not to be estrayed until.
7188. Proof of respectability, when.	7200. Names of bidders to be given.
7189. When taker up not entitled to compensation.	7201. Taker-up liable for damage.
7190. Estrays not to be used until.	7202. Taker-up may use, when.
7191. When county commissioners to return.	7203. Death, etc., of estrays to be reported.
7192. County clerk to record papers, etc.	7204. Proceeds of sale, how disposed of.
7193. Two or more animals to be in one entry.	7205. If taker up refuses to deliver, liable for damages.
7194. Clerk to advertise.	7206. When owner may reclaim money.
7195. Property in estrays, etc.	7207. Notice to be sent by county clerk, when.
7196. Return of sale.	7208. Penalty for failure to send such notices.

**Article 7185. [4954] Who may take up stray animal, etc.**—Hereafter when any stray horse, mare, gelding, filly, colt, mule, jack, jennet or work ox shall be found on the plantation or land of any citizen or

his lessee for one year or more, such citizen or lessee may forthwith advertise the same (describing the animal's color and specifying the marks and brands, if any, also, giving the age and flesh marks of every kind) at three public places in the county in which such citizen resides, one of which notices shall be at the court house door, for at least twenty days, and shall also deliver to the clerk of the county court a copy of said notice which shall be by him securely posted up in his office; after the expiration of which time, if no owner apply, it shall be the duty of the taker-up of said animal or animals to appear before some justice of the peace in said county and estray the same. [Act Oct. 26, 1866, p. 54. P. D. 6810.]

**Art. 7186. [4955] Oath, appraisement and bond.**—Any citizen, entitled to estray any animal, as provided in the preceding article, shall make oath that the animal which he proposes to estray was taken upon his plantation, or on his lands adjoining the same; that the marks and brands thereof have not been altered or disfigured since the same was taken up; that notice has been given as the law requires, and that no owner has been found; which affidavit shall be sworn to and subscribed by the person estraying, and attested by the justice and filed; whereupon the said justice shall cause to appear before him, by summons or otherwise, two disinterested householders of his county, who are in no way related to the person estraying, commanding them, after being sworn, to value and appraise the same and certify the valuation, together with a particular description of the animal, including stature, marks, brands, color and age, under oath, which shall be attested by said justice, who shall thereupon require of the taker-up a bond, with two or more good and sufficient sureties, in double the value of such animal or animals, payable to the county judge of the county and his successors in office, conditioned that the taker-up shall comply with the provisions of this chapter, which bond, affidavit and appraisement shall be transmitted by such justice to the clerk of the county court within twenty days thereafter, for which said justice shall receive the same fees that are allowed for similar services by law. [Act Oct. 26, 1866. P. D. 6811.]

**Art. 7187. [4956] Ownership, how proven, etc.**—At any time within twelve months, and before the sale of any estrays, it shall be lawful for the owner of any estray animal enumerated in the first article of this chapter to prove his property by the affidavit of any respectable witness, which shall specify a particular description of the animal claimed, including the kind, marks, brands, stature, color and age of the same, which certificate may be sworn to and subscribed before any officer authorized by law to administer oaths in the county where such animal may have been estrayed, which certificate shall be delivered to the taker-up and by him filed in the office of the county clerk of such county, and on the delivery of such certificate and the payment of all costs incurred in posting such estray or estrays, to the taker-up, such owner shall be entitled to demand and receive the animal. [Id. P. D. 6812.]

**Art. 7188. [4957] Proof of respectability, when required.**—When the respectability of the witness named in the preceding article is not known to the officer administering the oath, the party claiming the estray shall produce satisfactory evidence of the respectability of such witness, certified to by a notary public, county clerk or county judge of the county in which such witness resides. [Id.]

**Art. 7189. [4958] When taker-up not entitled to compensation.**—If the owner of any animal which has been estrayed in accordance with the provisions of this chapter be a resident citizen of the county in which such animal has been estrayed, and shall have had his mark and brand recorded in said county, and the animal so estrayed shall be in

the mark and brand of the owner at the time it was taken up, then and in that case the taker-up shall not be entitled to receive any compensation for expense incurred in estraying said animal. [Id.]

**Art. 7190. [4959] Estray not to be used until, etc.**—Any animal taken up as an estray according to the provisions of the preceding articles shall not be used for any purpose whatsoever until the party taking up such animal shall have given bond as required by article 7186. [Id. P. D. 6810.]

**Art. 7191. [4960] When county commissioner to return estrays.**—If any estray of any kind shall be found running at large and not estrayed, and the owner of the same be unknown, it shall be the duty of the county commissioners, or any of them, to return the same, with a full description thereof, to the county clerk of their respective counties, who shall advertise the same in the manner specified in this chapter, and if such animal shall not be proven away by the owner within the time allowed by law the commissioner returning the same, or his successor in office, shall proceed to sell such animal and report the sale thereof to the clerk of the county court, and after paying the clerk's fee and retaining twenty per cent of the proceeds of such sale, he shall pay the remaining sum into the county treasury. [Id. P. D. 6813.]

**Art. 7192. [4961] County clerk to record papers.**—It shall be the duty of the clerk of the county court to record the papers transmitted to him, as provided in article 4571 [7186] in a separate book, to be kept by him for that purpose, for which he shall be entitled to demand and receive the same fees that are allowed by law for similar services, to be paid in all cases by the taker-up. [Id. P. D. 6814.]

**Art. 7193. [4962] Two or more animals to be in one entry.**—When two or more animals are taken up at the same time by the same person, they shall be included in the same entry, and no more fees (including fees for posting and advertising hereinafter mentioned) shall be charged than is allowed by law for one such animal. [Id.]

**Claim satisfied by proceeds of one.**—Allegations of a petition in an action for the wrongful sale of mares by a city poundkeeper, showing that two mares belonging to plaintiff were advertised together and one expense account made out against both, and that the first one sold for enough to pay off the city's entire claim, sufficiently showed an illegal sale of the second mare as against a general demurrer. *Bell v. City of San Angelo* (Civ. App.) 146 S. W. 1195.

**Art. 7194. [4963] Clerk to advertise, etc.**—The clerk of the county court shall cause a statement of the appraisement and a description of the animals so estrayed to be advertised at least three times in some newspaper published in the county where such animal was estrayed, if there be one; and if there be no newspaper published in the county, then the clerk shall cause the same to be advertised in the newspaper nearest to the county, and also by posting up notices at three public places in the county, one of which shall be at the court house door thereof; and the printer of such notice shall furnish the said clerk with a copy of the paper containing said notice, and it shall be the duty of the said clerk to file and preserve the same in his office for the inspection of all persons who may be interested; and for such publication the printer shall be entitled to receive from the party estraying the same the sum of two dollars, to be collected by the county clerk and paid to the order of the printer. [Id.]

**Art. 7195. [4964] Property in estrays, etc., sales, etc.**—The property of every stray horse, mare, gelding, filly, colt, mule, jack, jennet or work ox taken up as aforesaid and not proven away within twelve months after such appraisement shall be deemed vested in the county wherein such estray or estrays may have been posted, and the taker-up shall immediately thereafter proceed to sell the same for cash to the highest bidder at the court house door of the county, after giving notice



of the same as required in the case of sheriffs' sales; and within ten days after such sale, he shall, after deducting the expenses incurred in estraying said animals, pay into the county treasury seventy-five per cent of the proceeds of the same, and retain the other twenty-five per cent for his own use and benefit. [Id. P. D. 6815.]

**Art. 7196. [4965] Return of sale.**—Whenever a sale of an estray shall be made according to the provisions of the preceding article, the taker-up shall make a return of such sale, duly sworn to by him, to the clerk of the county court of the county in which the sale was made, who shall file the same in his office. [Id.]

**Art. 7197. [4966] Sales made on first Monday.**—All sales of estrays, horses, mares, fillies, geldings, colts, mules, jacks, jennets or work oxen shall be made on the first Monday in the month, and between the hours of one and three o'clock p. m. of said day. [Id.]

**Art. 7198. [4967] Hogs, sheep, etc., how estrayed, etc.**—Any citizen taking up any stray hogs, sheep, goats or cattle, other than work oxen, shall proceed in the same manner as is required in the case of horses, etc., except advertising in a newspaper; and any person estraying the same, at the expiration of six months from the day of appraisal, shall proceed to give notice as in the case of sheriffs' or constables' sales, and sell such estrays where they were taken up; provided, there be not less than three adult bidders in attendance at said sale, beside the family of the taker-up. [Id. P. D. 6816.]

**Art. 7199. [4968] Not to be estrayed until after four months.**—No animal enumerated in article 7198, except work oxen, shall be subject to be estrayed, unless the same shall have been known to the taker-up as being an estray for at least four months previous to the time of estraying the same. [Id. Amended Acts 1899, p. 234.]

**Art. 7200. [4969] Names of bidders to be given.**—In making the returns of sales under this title, when the sale has been made at the residence of the taker-up or other place than at the court house door of the county, the taker-up shall, in all cases, give the names of at least three of the bidders who were present at said sale, who were not members of his family. [Acts 1866, p. 54. P. D. 6817.]

**Number of persons present.**—The sale of an estray is illegal when there are less than three persons present bidding besides the family of the person estraying the animal. *Floyd v. State* (Civ. App.) 68 S. W. 691.

**Art. 7201. [4970] Taker-up liable for damages, when.**—If any person estraying an animal enumerated in this chapter shall send or take away the same out of the county in which the same was taken up and estrayed, or sell or otherwise dispose of the same, he and his sureties shall be liable upon their bond in an action for damages in favor of the party injured. [Id. P. D. 6818.]

**Art. 7202. [4971] Taker-up may use, when.**—The taker-up of an estray may use the same in moderation, after having executed bond as provided in article 7186, but should he abuse or injure the same he and his sureties shall be liable upon his bond in damages for such abuse or injury, and may be sued therefor by the owner for his own use, or by the county judge for the use of the county.

**Art. 7203. [4972] Death, etc., of estray to be reported.**—Whenever an estray animal shall be found dead, or shall escape, the taker-up shall, without delay, make report thereof, in writing, to the clerk of the county court, under oath; which report shall be recorded by said clerk in a book to be kept by him for that purpose; and any person who shall make a false report shall be liable on his bond, together with his sureties, for the value of the animal or animals estrayed; and shall also be liable to be indicted and punished as for perjury. [Id. P. D. 6819. P. C. 188.]

**Art. 7204. [4973] Proceeds of sale, how disposed of.**—All moneys arising from the sales of estrays, under the provisions of this chapter, shall be paid to the county treasurer, and shall be by him applied exclusively to the jury fund of the county. [Id. P. D. 6820.]

Stray accounts.—See Title 29, Chapter 1.

**Art. 7205. [4974] If taker-up refuse to deliver, liable for damages.**—If any person having in charge an estray shall refuse to deliver the same to the owner thereof, on his complying with the requisitions of this chapter, such owner shall be entitled to his action therefor with damages. [Id. P. D. 6821.]

**Art. 7206. [4975] Owner may reclaim money in twelve months.**—At any time within twelve months after the sale of any estray made under the provisions of this chapter, the owner of such estray may apply to the county treasurer of the county in which such estray has been sold, and upon proof of such ownership shall be entitled to receive from said treasurer the amount deposited on account of such sale, after paying such costs as may be necessary to establish his right thereto. [Id. P. D. 6822.]

**Art. 7207. [4976] County clerk to send notice of estray, etc.**—Whenever any person shall stray any animal on which any county brand may be found, it shall be the duty of the county clerk of the county in which said estray may be to immediately send a notice containing a full description of said animal, together with the marks and brands, to the county clerk of the county to which the county brand may belong; and it shall be the duty of the county clerk of said county brand to record said notice in a book kept for that purpose, and post the same on the court house door; and it shall further be his duty to ascertain from his record of brands to whom said animal may belong, and to notify said owner by letter or otherwise; and for such services he shall be entitled to a fee of one dollar from said owner; and the county clerk furnishing the notice shall be entitled to a fee of one dollar from said owner. [Acts 1883, p. 76, sec. 5.]

**Art. 7208. [4977] Liability for failure.**—Any county clerk who shall fail to send a notice as required in article 7207 of this chapter, the county clerk so failing shall become liable to the original owner of said estray in an amount equal to the value of said estray. [Id. sec. 6.]

## CHAPTER FIVE

### OF THE MODE OF PREVENTING HOGS AND CERTAIN OTHER ANIMALS FROM RUNNING AT LARGE IN COUNTIES AND SUBDIVISIONS

<p>Art. 7209. Commissioners' court to order election. 7210. May be ordered in subdivisions, when. 7211. Requisites of petition. 7212. Election, how ordered, etc. 7213. Notice, how given, etc. 7214. Requisites of order, etc. 7215. Voting places. 7216. Managers to be appointed, when. 7217. Freeholders only to vote, etc. 7218. Manner of voting, etc. 7219. Returns of election. 7220. Returns, how opened. 7221. Proclamation of result, etc. 7222. Stock may be impounded, when.</p>	<p>Art. 7223. Not to be impounded, when. 7224. Fees and damages. 7225. Stock may be sold, when. 7226. Again may be sold, how. 7227. Lawful fence. 7228. Subsequent election, when. 7229. May be impounded when fence law in force, when. 7230. Stock not to be injured, etc. 7231. Lawful fence may be determined by election, etc. 7232. No election until lapse of two years. 7233. Proclamations to be issued. 7234. In cases where there are less than fifty freeholders.</p>
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**Article 7209. [4978] Commissioners' court to order election.**—Upon the written petition of fifty freeholders of any county, or upon the

petition of twenty freeholders of any subdivision of a county, the commissioners' court of such county shall order an election to be held in said county or subdivision, on some day named in the order, for the purpose of enabling the freeholders of such county or subdivision to determine whether hogs, sheep or goats shall be permitted to run at large in such county or subdivision. [Const., art. 16, sec. 22. Act Aug. 15, 1876, p. 150, sec. 1. Amended Acts 1909, p. 164.]

See *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

**Filing petition.**—The petition can properly be filed with the clerk and during vacation and the order issued at the ensuing term. *Kirkland v. Guinn*, 26 C. A. 39, 62 S. W. 1101.

Where a law pertaining to local option elections provided that petitions therefor should be filed with the county clerk, an omission of a like requirement in an act in relation to stock law elections passed at the same session of the legislature held not to show that petition was not to be filed with clerk. *Id.*

Where statute provides that a term of court shall begin on a certain day, it begins with such day, and not at the particular hour at which the court is accustomed to meet, in determining the time at which application for election under stock law must be filed. *Barlow v. State*, 47 Cr. R. 114, 80 S. W. 375.

**Subdivisions.**—When an election has been held in a subdivision of a county, no other subdivision can be carved out of said county so as to include the first subdivision and make it a part of the second subdivision for the purpose of holding an election therein, nor for any other purpose except in cases of elections for the whole county. *Gilley v. Haddox*, 4 App. C. C. § 213, 15 S. W. 714.

**Art. 7210. [4979] Election may be ordered in subdivisions, when.**—Whenever there is territory between two subdivisions of a county which have adopted the stock law, and in such intervening territory there is less than fifty freeholders, an election shall be ordered on the petition of a majority of the freeholders residing in such intervening territory, and the election shall be held as provided by law in other cases relating to the adoption of the stock law. [Acts 1881, p. 110.]

**Art. 7211. [4980] Requisites of petition.**—Such petition shall set forth clearly the class or classes of animals enumerated in the preceding articles which the petitioners desire shall not run at large in such county or subdivision, as the case may be; and, if the petition be from the freeholders of a subdivision of any county, such subdivision shall be particularly described and the boundaries thereof designated. [Acts 1876, p. 150.]

**Description.**—A description of an election district to determine whether stock may be allowed to run at large held not defective. *Jones v. Carver*, 29 C. A. 268, 67 S. W. 780.

A stock law election under the acts of the 26th legislature held void where the petition for election fails to describe the limits of the justice precinct for which it is to be held by metes and bounds. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert*, 100 T. 483, 101 S. W. 206.

A petition for election in a subdivision of a county, e. g., a justice precinct, must particularly describe the subdivision and designate the boundaries thereof, and an election without such a petition is a nullity. *Missouri, K. & T. Ry. Co. v. Tolbert*, 44 C. A. 8, 101 S. W. 1015.

Under this article a stock-law election is invalid where the petition, the order of commissioners' court, the notices of election, and the proclamation of the county judge ordering an election contained no particular description by metes and bounds of the subdivision in which the election was to be held. *Ex parte Gulledege*, 57 Cr. R. 156, 122 S. W. 21.

**Validity of election.**—An election is void where the petition was to determine whether "hogs, sheep, and goats," should be restrained, and the order of court read "hogs, sheep, or goats." *McElroy v. State*, 39 Cr. R. 529, 47 S. W. 359.

The validity of a stock law election may be inquired into in an action against a railroad for injuries to stock. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert*, 44 C. A. 8, 101 S. W. 1014.

Where a petition and order for a local option election to put the stock law in force in the justice precinct excepted a portion thereof, the fact that one of the polling places selected was within the excepted territory did not invalidate the election. *Ex parte Stein*, 61 Cr. R. 320, 135 S. W. 136.

**Art. 7212. [4981] Election, how ordered and conducted.**—Upon the filing of such petition, the commissioners' court, at its next regular term thereafter, shall pass an order directing an election to be held throughout the county, or the particular subdivision thereof, as the case may be, on a day to be designated in the order, not less than thirty days from the date of such order; which election shall be held and conducted

and the returns thereof made in accordance with the laws regulating general elections, in so far as the same are applicable. [Id.]

**Application to city.**—Under a city charter, held, that an election ordered by the commissioners' court to determine whether hogs, sheep, and goats should run at large within the county would be void as to the city, and could not prevent a saloon from being open on the day it was held. *Reuter v. State*, 43 Cr. R. 572, 67 S. W. 505.

**Term of court.**—Such order must be made at the term held under Art. 2274. *McHan v. Connell*, 4 App. C. C. § 202, 15 S. W. 284.

This article only authorizes making the order for the election at the next regular term of the commissioners' court after the filing of the petition for the election. *Robertson v. State*, 44 Cr. R. 270, 70 S. W. 542.

If the petition was left with the clerk before the term, but not marked filed until during the term at which the order was made, the order will not be invalid for said reason. *Gulf, C. & S. F. Ry. Co. v. Campbell* (Civ. App.) 105 S. W. 539.

**Irregularities.**—An election is not void for mere irregularities. *Hannah v. Shepherd* (Civ. App.) 25 S. W. 137.

**Art. 7213. [4982] Notice, how given.**—Immediately after the passage of an order for an election by the commissioners' court, the county judge shall issue an order for such election and cause public notice thereof to be given for at least thirty days before the day of election, by publication of the order therefor in some newspaper published in the county, if there be one; if no newspaper be published in the county, then by posting copies of such order at the court house door, and at some public place in each justice's precinct, if the election be ordered for the whole county, or at three public places in the subdivision, if the election be ordered for a subdivision. [Id.]

**Art. 7214. [4983] Requisites of the order.**—The order of the county judge shall specify:

1. The petition and the action of the commissioners' court.
2. The class of animals it is proposed shall not run at large.
3. The territorial limits to be affected.
4. The day of election.
5. The places at which polls are to be opened. [Id.]

**Sufficiency of order.**—A variance in the description of territory contained in the published notice of election and the description in the order for election held a mere irregularity, and insufficient to invalidate the election held thereunder. *Kirkland v. Guinn*, 26 C. A. 39, 62 S. W. 1101.

An order for an election, made by the county judge in obedience to a prior order of the commissioners' court, to determine whether hogs, sheep, "or" goats should be permitted to run at large, is void, because in the alternative. *Reuter v. State*, 43 Cr. R. 572, 67 S. W. 505.

An order on a petition for an election as to whether animals shall be permitted to run at large in a given territory held not void. *Houston & T. C. R. Co. v. Thompson* (Civ. App.) 97 S. W. 106.

**Art. 7215. [4984] Voting places.**—If the election is ordered for the whole county, the same shall be held at the usual voting places in the several election precincts; but, if the election is ordered for any particular subdivision, the county judge shall designate the particular places in such subdivision at which the polls shall be opened. [Id. sec. 3.]

**Validity of election.**—Where a petition and order for election to adopt the stock law within a justice precinct excepted that portion of the precinct within an incorporated town, and electors living within that portion were not permitted to vote at the election, the fact that one of the polling places selected was the courthouse located within the excepted portion, was not such an irregularity as would invalidate the election. *Ex parte Stein*, 61 Cr. R. 320, 135 S. W. 136.

**Art. 7216. [4985] Managers to be appointed, when.**—If the election be for a division of the county, the county judge shall, at the time he issues the order for such election, appoint proper persons as managers of said election, all of whom shall be freeholders of the county and qualified voters; and such managers may appoint their own clerks. [Id. pp. 150, 151, sec. 4.]

**Art. 7217. [4986] Freeholders only to vote.**—No person shall vote at any election under the provisions of this chapter, unless he be a freeholder and is also a qualified voter under the constitution and laws. [Const., art. 16, sec. 23. Id. p. 150, sec. 2.]

**Freeholders.**—Purchasers of land in possession or with right of possession are voters although the land is not paid for. *Hannah v. Shepherd* (Civ. App.) 25 S. W. 137.

Where a law authorizing a county election to adopt a local live-stock law does not forbid freeholder citizens of incorporated cities from voting, they are not disqualified. *Roberson v. State*, 42 Cr. R. 595, 63 S. W. 884.

An order of the commissioners' court, authorizing a county election to adopt a local live-stock law, held not invalid for failure to limit the right of freeholders alone to vote in the county. *Id.*

Persons to whom land has been conveyed to enable them to vote at an election held not freeholders and qualified voters. *Jones v. Carver*, 29 C. A. 268, 67 S. W. 780.

**Art. 7218. [4987] Manner of voting.**—All votes at any election in pursuance of this chapter shall be by ballot; and voters desiring to prevent the animal designated in the order from running at large shall place upon their ballots the words, "For the stock law," and those in favor of allowing such animals to run at large shall place upon their ballots the words, "Against the stock law." [*Id.* sec. 3.]

**Art. 7219. [4988] Returns of election.**—On or before the tenth day after any election under the provisions of this chapter, the persons holding such election shall make due return of all the votes cast at their respective voting places for and against said proposition to the county judge of the county, who shall tabulate and count said returns and ascertain the result of said election. [*Id.* p. 151, sec. 4.]

**Declaration of result.**—The commissioners' court has no statutory authority to declare the result of the election; but this is the duty of the county judge, in the presence of the parties named in the statutes. Unless the provisions of the statutes are complied with the election is invalid. *King v. State* (Cr. App.) 74 S. W. 773.

**Art. 7220. [4989] Returns, how opened.**—The returns shall be opened, tabulated and counted by the county judge in the presence of the county clerk and at least one justice of the peace of the county, or two respectable freeholders of the county. [*Id.* sec. 4.]

**Count.**—The county judge must open, tabulate, and count the vote in the mode prescribed in this article, else the law will not be valid. *Gulf, C. & S. F. Ry. Co. v. Campbell* (Civ. App.) 105 S. W. 539.

**Art. 7221. [4990] Proclamation of the result, and its effect.**—If a majority of the votes cast at such election shall be, "For the stock law," the county judge shall immediately issue his proclamation declaring the result; which proclamation shall be posted at the court house door, and after the expiration of thirty days from its issuance it shall be unlawful to permit to run at large within the limits designated any animal of the class mentioned in said proclamation. [*Id.*]

**Validity.**—Where a petition and order for an election to determine whether the stock law should be put in force within a justice precinct excepted that portion included within an incorporated town, and the majority of the voters outside the town voted in the affirmative, the fact that an order subsequently entered putting the law in force declared that it was in force in the entire precinct did not render it invalid, in so far as it applied to the precinct outside the town. *Ex parte Stein*, 61 Cr. R. 320, 135 S. W. 136.

**Proclamation.**—The county judge must publish the result of an election held to determine whether stock should be permitted to run at large. *King v. State* (Cr. App.) 74 S. W. 773.

**Art. 7222. [4991] Stock may be impounded, when.**—If any stock forbidden to run at large shall enter the inclosed lands, or shall, without being herded, roam about the residence, lots or cultivated land of any person other than the owner of such stock, without his consent, in any county or subdivision in which the provisions of this chapter have become operative in the manner provided in the preceding articles, the owner, lessee or person in lawful possession of such lands may impound said stock and detain the same until his fees and all damages occasioned by said stock are paid to him. [Acts 1887, p. 56.]

**In general.**—Under Stock Law (Acts 1899, p. 221, c. 128) § 13, the bare presence of stock at large on a railroad track held to be negligence on the part of the owner. *Red River, T. & S. Ry. Co. v. Dooley*, 35 C. A. 364, 80 S. W. 566.

**Animals held not running at large within the law prohibiting animals from running at large.** *International & G. N. R. Co. v. Seiders*, 50 C. A. 568, 110 S. W. 997.

**A complaint for violating the stock law alleging the same to have been in force in the justice precinct, when, in fact, it was not in force, except in the territory outside an incorporated town in such precinct, held fatally defective.** *Ex parte Stein*, 61 Cr. R. 320, 135 S. W. 136.

**Action for illegal sale.**—In an action to recover hogs taken up and impounded by defendant for trespass, plaintiff held entitled to judgment, subject to defendant's lien for the damages found by the court. *Whitaker v. Miller* (Civ. App.) 117 S. W. 882.

In an action for the possession or for the value of mares taken up and sold by a city poundkeeper, or for the net proceeds of the sale, a demurrer to the petition was improperly sustained, since, even if the sale was legal in every respect, plaintiff was entitled to recover the proceeds in excess of the expenses chargeable. *Bell v. City of San Angelo* (Civ. App.) 146 S. W. 1195.

The owner of animals illegally sold by a city poundkeeper may recover them, or their value from the person holding under the illegal sale. *Id.*

**Action for damages.**—Action for damages from animals running at large is maintainable; the remedy by impounding being cumulative. *Frazer v. Bedford* (Civ. App.) 66 S. W. 573.

Under the stock law, the owner of animals prohibited from running at large is conclusively negligent, if they so run, and liable for their trespass on premises sufficiently fenced to turn animals authorized to so run. *Id.*

**Criminal prosecution.**—The fact that a local law prohibiting the running at large of live stock contains a civil remedy does not preclude a criminal prosecution for a violation. *Roberson v. State*, 42 Cr. R. 595, 63 S. W. 884.

**Art. 7223. [4992] Not to be impounded, when.**—No animals shall be impounded, unless they have entered upon the inclosed lands or be found roaming about the residence, lots or cultivated land of another; and whenever any stock is impounded notice thereof shall at once be given to the owner, if known, and such owner shall be entitled to their possession upon payment of fees and damages. [*Id.*]

**Historical.**—Old articles 4605–4607 (Arts. 7223–7225 herein) were held unconstitutional in *Armstrong v. Traylor*, 87 T. 598, 30 S. W. 440, and the law was amended by the act of 1895. See *Nass v. Maxwell* (Civ. App.) 32 S. W. 561.

**Art. 7224. [4993] Fees and damages.**—Any owner, lessee, or person in lawful possession of enclosed lands shall be entitled to the following fees for impounding stock, to-wit: Ten cents per day per head for hogs, ten cents per day per head for goats, and five cents per head per day for sheep. The damages done by such stock, if any, and the fees due to the taker-up of stock, if any, may be assessed by any three disinterested freeholders of the subdivision in which said stock is taken up, who shall upon the application of the taker-up of the stock be appointed by the justice of the peace of the precinct in which such subdivision is situated. Where said justice shall fail or refuse to make appointment, or where the stock law has been adopted by an entire county, said freeholders shall be appointed by the county judge of the county. Said freeholders, after being duly sworn to discharge with impartiality the duties devolving upon them by said appointment, shall proceed after hearing the evidence to determine whether or not any trespass prohibited by the provisions of this chapter has been committed, and to ascertain the damages, if any, occasioned thereby, and the fees due to the taker-up of the stock by reason of said trespass, and shall make an assessment of damages and fees, in writing, and signed by said freeholders, or two of them, and verified by the affidavit of said freeholders, to the effect that said assessment is just and that they have no bias in favor of or prejudice against any party interested therein, and shall file said assessment with the justice of the peace, which shall be final; provided, that the owner of the stock, if known, shall have five days' notice of the time and place of the meeting of said freeholders, and if the owner is unknown then a written notice thereof shall be posted in two public places in said subdivision, and one at the door of the court house of the county; and provided, further, that nothing in this chapter shall be construed to deprive the taker-up of the stock to enforce by suit in a court of competent jurisdiction any claim he may have for such fees and damages, and to subject the stock so taken for the payment of the same under the provisions of this chapter. [*Amend.* 1895, p. 84.]

**Art. 7225. [4994] Stock may be sold, when.**—After the filing of the assessment, as provided for in the preceding article, the constable of the precinct shall sell such stock at public auction for cash, after having given notice of such sale as in constables' sales of personal property, and apply the proceeds of such sale, after deducting the expenses

thereof, to the satisfaction of said fees and damages, and shall pay the balance, if any remains, to the owner of such stock. The justices and constables shall receive for their services the same compensation as is allowed for like services in civil cases. [Id.]

**Art. 7226. [4995] May be sold, when and how.**—If no owner can be found of stock so impounded, the taker-up may make affidavit before a justice of the peace of the county, describing the stock impounded by him, and that the owner is unknown to affiant, which affidavit shall be forthwith delivered to the county clerk by such justice, to be kept in his office for inspection. After the filing of such assessment, the constable of the precinct shall sell such stock as in case where the owner is known; and, if anything remains after satisfying the expenses of said sale and the fees and damages due to the taker-up, he shall report the same under oath to the clerk of the county court, and pay the same over to the county treasurer, to be received and disbursed by him as in case of sales of estrays; or the taker-up may at his option, after the expiration of five days, stray such stock, according to the laws regulating estrays in this state. [Id.]

**Art. 7227. [4996] Lawful fence.**—After the adoption of the stock law in any county or subdivision, any fence within such county or subdivision shall be deemed a lawful fence if it be sufficient to keep out the classes of stock not affected by the provisions of this chapter; and no person within such county or subdivision shall be required to fence against stock not permitted to run at large. [Acts 1876, p. 150, sec. 5.]

See Fences.

**Applies to railroads.**—The statute relating to fencing after the stock law has been adopted held to apply to railroad companies. *Missouri, K. & T. Ry. Co. of Texas v. Tolbert* (Civ. App.) 90 S. W. 508.

**Art. 7228. [4997] Subsequent elections in case of defeat.**—Whenever an election is held under the provisions of this chapter for any county or subdivision, and the proposition for a stock and fence law, as herein provided, is defeated, no other election for such purpose shall be held within that locality for the space of twelve months thereafter. But the defeat of the proposition for a county shall not prevent another election from being held immediately thereafter for any subdivision of such county; nor shall a defeat of the proposition for any subdivision prevent an election from being held immediately thereafter for the entire county. [Id. sec. 5.]

**Art. 7229. [4998] May be impounded when fence law in force; lawful fence.**—Should any stock not permitted to run at large enter any enclosure of any owner or lessee of land, entitled to the benefit of this chapter, without his or their consent, it shall be lawful for the owner or lessee of said enclosure to impound said stock; and it shall be the duty of the owner or lessee of said land to give notice immediately to the owner of said stock of their impounding and detention; and the owner of said stock shall be entitled to the possession of his or her stock on payment of expenses incurred in impounding and keeping said stock; provided, that in such county or subdivision said owners or lessees shall not be required to fence against the stock not permitted to run at large; and any fence in said county or subdivision which is sufficient to keep out ordinary stock permitted to run at large under this chapter shall be deemed a lawful fence. Three barbed wires with posts not more than thirty feet apart, and one or more stays between them, or pickets four feet high and not more than six inches apart, shall constitute a lawful fence. If boards or rails are used, then three boards to be not less than five inches wide and one inch thick, or four rails shall constitute a lawful fence; provided, that all fencing built under

the provisions of this chapter shall be four feet high. [Acts 1879, p. 66, sec. 6. Amended Acts 1901, p. 290.]

**Intent of law.**—The fencing law, Art. 3927 et seq., and this article, were enacted to give landowners complying with their requirements as to fences a special remedy for damages by trespassing stock, irrespective of negligence. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

**Art. 7230. [4999] Stock not to be injured, etc.**—If any person whose fence is insufficient under this law shall, with guns, dogs or otherwise, maim, wound or kill any cattle or any horse, mule, jack, or jennet, or procure the same to be done, such person or persons so offending shall give full satisfaction to the party injured for all damages by such person or persons sustained, to be recovered as in other suits for damages; provided, that this article shall not be so construed as to authorize any person in any event to maim, kill or wound any horse, mule, jack, jennet or cattle belonging to another. When a trespass has been committed by any cattle or horses on the cleared or cultivated land of any person who has complied with the provisions of this chapter, in the erection of a lawful fence, it shall be lawful for such person to complain thereof to the justice of the peace of the precinct in which such trespass shall have been committed; and such justice is hereby authorized and required to cause two disinterested and impartial freeholders to be summoned, who shall on oath view and examine whether such complaint be sufficient or not, and what damages he has sustained by said trespass, and certify the same in writing; and, if it shall so appear that said fence be sufficient, then the owner of such cattle or horses shall make just satisfaction for the trespass to the party injured, to be recovered before any tribunal having proper jurisdiction. In case of a second trespass by the same cattle or horses, the owner or lessee of the premises upon which the trespass is committed may, if he deem it necessary for the protection and preservation of his premises or growing crops thereon, cause said stock to be penned and turned over to the sheriff or constable, and held responsible to the person damaged for all damages caused by said stock and all costs thereof. It shall be lawful for the owner or lessee of such inclosures as are contemplated in this chapter to charge the following rates for impounding such stock as referred to in this chapter, to-wit, twenty-five cents per day per head. [Id. sec. 9.]

**Power of city to punish for abuse of animals.**—See Title 22, Chapter 4.

**Action to recover stock.**—In a suit before a justice of the peace to recover seven head of hogs, or the value thereof, an answer stating that the hogs were taken up while running loose in territory where the hog law had been adopted, and claiming damages to crops by the hogs and pound fees, sufficiently set up that the hog law was in operation in the territory, without alleging the several acts required to be done in order to put the hog law in operation. *Lee v. McInnis* (Civ. App.) 128 S. W. 160.

**Prosecution.**—Prosecution for killing hogs on cultivated land cannot be maintained in county which has adopted the stock law. *McC Campbell v. State* (Cr. App.) 45 S. W. 711.

**Art. 7231. [5000] Lawful fence may be determined by election.**—Nothing in this chapter shall prevent the freeholders of any county, or subdivision of a county, where the stock law prevails from deciding by a majority vote whether or not three barbed wires without a board or plank shall constitute a lawful fence in such county or subdivision of same; the election for such purpose to be conducted in the same manner and under the same rules and regulations as elections provided for in the act authorizing the passage of stock and fence laws, approved August 15, 1876.

**Art. 7232. [5001a] No election until lapse of two years.**—After the adoption of the stock law in any county or subdivision, no election under the preceding articles shall be held within the same prescribed limits in less than two years after an election under this title has been held therein; but at the expiration of that time the commissioners' court of each county in the state, whenever petitioned to do so by a majority of the freeholders, who are qualified voters under the constitution and



laws of a county which has formerly adopted the stock law, or by a majority of the freeholders, who are qualified voters under the constitution and laws of the subdivision of a county which has formerly adopted the stock law, shall order another election to be held by the freeholders, who are qualified voters under the constitution and laws of such county, or subdivision, to determine whether hogs, sheep and goats shall be permitted to run at large in such county, or subdivision, which election shall be ordered, held, notice thereof given, the votes returned and counted in all respects as provided by this title for a first election. [Acts 1899, p. 80.]

**Art. 7233. [5001b] Proclamation to be issued.**—If, in a county or subdivision which has formerly adopted the stock law, a majority of the legal votes cast at such election shall be “Against the stock law,” the county judge shall immediately issue his proclamation declaring the result; which proclamation shall be posted at the court house door, and after the expiration of one hundred and eighty days from its issuance it shall be lawful to permit to run at large, within the limits designated, any animal of the class mentioned in said proclamation; if a majority of the legal votes cast at such election shall be “For the stock law,” he shall so state in his proclamation, and the operation of the law shall be in no way affected by such election. [Id.]

**Art. 7234. [5001c] In cases where there are less than fifty freeholders.**—Whenever there is territory between two subdivisions of a county which have adopted a stock law, or when there is territory adjoining a subdivision which has adopted a stock law, and in such territory there are less than fifty freeholders, an election shall be ordered on a petition of a majority of the freeholders residing in such territory; and the election shall be held as provided by law in other cases relating to the adoption of the stock law. And in cases where there are no freeholders on such intervening or adjoining territory, then, on the petition of the owner or owners of the land to the commissioners’ court, the said commissioners’ court shall issue an order extending the stock law to said territory, and the same shall be included in the territory of such adjoining subdivision; and any person or persons who own enclosed lands adjoining any other lands which have been added to territory in which a stock law prevails, shall have the same right; and on petition of the owner or owners of such land to the commissioners’ court, the said commissioners’ court shall issue an order extending the stock law to said territory, and the same shall be included in the territory of such adjoining subdivisions. [Id. Amended Acts 1907, p. 150.]

**Extension to adjoining territory.**—The stock law can be extended to territory adjoining a subdivision of a county which has adopted the stock law, where it is part of another subdivision of the county in which election has been held within a year and the stock law defeated. Where conditions exist which entitle owner of land to have same placed under stock law, the commissioners’ court has no discretion and can be compelled by mandamus to grant the application and enter an order extending the stock law to the adjoining territory. *Stokes v. Winfree*, 23 C. A. 690, 57 S. W. 918.

The fact that land to which the stock law was sought to be extended constituted a part of a subdivision which had within 12 months rejected the stock law does not prevent the annexation of the land to an adjoining subdivision, which had adopted the law, and authorize an extension thereof, as provided by article 7234. *Id.*

## CHAPTER SIX

### OF THE MODE OF PREVENTING HORSES AND CERTAIN OTHER ANIMALS RUNNING AT LARGE IN PAR- TICULAR COUNTIES NAMED

**Art.**  
7235. Election to put law into operation.  
7235a. Election in Harris county.  
7235b. Provisions applicable.  
7236. Election to repeal law.

**Art.**  
7237. Intervening territory, election in.  
7238. Petition shall state what.  
7239. Order for election by commissioners’ court.

Art.		Art.	
7240.	County judge to issue order and notice.	7248.	Proclamation and time law goes into effect.
7241.	Recitals in order.	7249.	Impounding stock.
7242.	Election places.	7250.	Same.
7243.	Officers of election.	7251.	Fees for impounding.
7244.	Qualifications of electors.	7252.	Sale of impounded stock, fees.
7245.	Election by ballot, form of.	7253.	Unknown owner.
7246.	Election returns.	7254.	Lawful fence, what constitutes.
7247.	Same, effect of.	7255.	Second election when proposition is defeated.

[In addition to the notes under the particular articles, see also notes on the subject of Trespassing Animals, at end of chapter.]

**Article 7235. Election to put law in operation.**—Upon the written petition of one hundred freeholders of any of the following counties: Anderson, Atascosa, Austin, Bastrop, Baylor, Bee, Bell, Bexar, Blanco, Borden, Bosque, Brazos, Brewster, Brown, Burnet, Caldwell, Calhoun, Callahan, Cameron, Camp, Cass, Castro, Cherokee, Childress, Coleman, Collin, Colorado, Cooke, Comanche, Concho, Coryell, Cottle, Crosby, Cochran, Crane, Dallas, Dallam, Dawson, Deaf Smith, Delta, Denton, DeWitt, Donley, Eastland, Ector, Ellis, Erath, Falls, Fannin, Fayette, Floyd, Foard, Franklin, Fisher, Freestone, Gaines, Guadalupe, Garza, Glasscock, Gillespie, Gonzales, Grayson, Hale, Hamilton, Hansford, Harrison, Hays, Haskell, Hall, Hardeman, Hartley, Henderson, Hidalgo, Hill, Hood, Hopkins, Howard, Hockley, Hunt, Jack, Jackson, Jones, Johnson, Kaufman, Knox, Kerr, Kendall, Lamar, Lavaca, Lee, Limestone, Lynn, Llano Lubbock, Mason, McLennan, McCulloch, Moore, Lampasas, Martin, Medina, Midland, Milam, Mitchell, Montague, Morris, Navarro, Ochiltree, Palo Pinto, Nolan, Nueces, Parker, Pecos, Rains, Randall, Red River, Reeves, Mills, Robertson, Rockwall, Rusk, Runnels, San Patricio, San Saba, Scurry, Sherman, Smith, Somervell, Starr, Swisher, Tarrant, Taylor, Titus, Travis, Upshur, Victoria, Val Verde, Van Zandt, Waller, Washington, Williamson, Wilson, Wise, Ward, Wharton, Sterling, Wood, Wheeler, Winkler, Wichita, Wilbarger, and Young, or upon the petition of fifty freeholders of any such subdivision of a county as may be described in the petition, and defined by the commissioners court of any of the above named counties, the commissioners court of said county shall order an election to be held in such county or such subdivision of a county as may be described in the petition and defined by the commissioners court on the day named in the order, for the purpose of enabling the freeholders of such county or such subdivision of a county as may be described in the petition and defined by the commissioners court to determine whether horses, mules, jacks, jennets and cattle shall be permitted to run at large in such county or such subdivision of a county as may be described in the petition and defined by the commissioners court; provided that where there is an application for an election to include an entire county there shall not be less than twelve freeholders from each justice precinct of said county as signers to the petition for such election.

And provided further that the provisions of this section shall not apply to Wharton county as a whole, but shall apply only to such subdivision thereof as may be designated in the manner herein provided. [Acts 1909, p. 121, sec. 1. Acts 1911, p. 172, sec. 1. Acts 1913, p. 131, sec. 1, amending Art. 7235, Rev. St. 1911.]

**Note.**—Acts 1911, p. 172, amends section 1 of chapter 57, Acts 30th Leg. The act amended was incorporated in Rev. St. 1911 as article 7235. Acts 1913, p. 131, does not refer to the amendatory act of 1911, but purports in its title to amend article 7235, Rev. St. 1911.

**Defect in petition.**—The fact that the petition for an election contains the word "Jennies" instead of "Jennets" will not invalidate the election. *Graves v. Rudd*, 26 C. A. 554, 65 S. W. 63.

A petition for an election in a justice's precinct which merely gives the number of the precinct is insufficient. It must give the boundaries. *Cox v. State* (Cr. App.) 83 S. W. 812.

**Several petitions constituting one.**—A number of petitions signed by the requisite number of freeholders in compliance with the law constitutes one petition and upon it the court can make the necessary orders. *Graves v. Rudd*, 26 C. A. 554, 65 S. W. 63.

**Filing.**—The petition for the election must be filed prior to the regular term at which it is acted upon and not during that term. *Cox v. State* (Cr. App.) 88 S. W. 812.

**Art. 7235a. Election in Harris county.**—Upon the written petition of twenty (20) freeholders of any such subdivision of Harris county as may be described in the petition and defined by the commissioners' court of Harris county, the commissioners' court of said county shall order an election to be held in such subdivision of said county as may be described in the petition and defined by the commissioners' court on the day named in the order, for the purpose of enabling the freeholders of such subdivision of Harris county as may be described in the petition and defined by the commissioners' court, to determine whether horses, mules, jacks, jennets and cattle shall be permitted to run at large in such subdivision of Harris county, as may be described in the petition and defined by the commissioners' court. Provided no subdivision of the county described in any such petition shall extend further than three miles from the boundaries of any incorporated city or town. [Acts 1913, p. 157, sec. 1.]

**Art. 7235b. Provisions applicable.**—Upon the filing of such petition, the order of the commissioners' court thereon, the holding of such election, the return thereof, and all other action in respect thereto shall be as prescribed in the general law, title 124, chapter 5, of the Revised Statutes of Texas of 1911. [Id. sec. 2.]

**Art. 7236. Election to repeal law.**—Upon the written petition of two hundred freeholders of any of the above named counties, or upon the written petition of fifty freeholders of any subdivision of the above named counties, if the law be in force in that subdivision only, the commissioners' court shall be authorized and required to order an election on the date therein named to determine whether or not said law be repealed; provided, that such petition be not filed within less than two years from the date this law goes into effect; and provided, further, that such petition be signed by at least twenty-four freeholders from each justice precinct in such county. But if this law becomes operative over any of the above named counties, as prescribed, it can in no case be repealed by any subdivision, except by a two-thirds majority of the votes cast by the freeholders of such counties, at an election held in accordance with the provisions of this chapter. [Acts 1909, p. 121, sec. 2.]

**Art. 7237. Intervening territory; election in.**—Whenever there is territory between two subdivisions of a county which have adopted the stock law, and in such intervening territory there are less than fifty freeholders, an election shall be ordered on the petition of a majority of the freeholders residing in such intervening territory; and the election shall be held as provided by law in other cases relating to the adoption of the stock law. [Acts 1899, p. 220, sec. 2.]

**Art. 7238. Petition shall state what.**—Such petition shall set forth clearly the class or classes of animals enumerated in the first article of this chapter, which the petitioners desire shall not run at large in such county, or subdivision, as the case may be; and, if the petition be from the freeholders of a subdivision of any county, such subdivision shall be particularly described and the boundaries thereof designated. [Id. sec. 3.]

**Requisites.**—The petition must set forth clearly the "class or classes" of stock which are to be prohibited from running at large, and no legal election can be held until this section has been complied with. The commissioners' court cannot order an election under this law of its own motion. It must be ordered upon petition. *Ex parte Kimbrell*, 47 Cr. R. 333, 83 S. W. 383.

**Art. 7239. Order for election by commissioners' court.**—Upon the filing of such petition, the commissioners' court at the next regular term thereafter shall pass an order directing an election to be held through-

out the county, or the particular subdivision thereof, as the case may be, on a day to be designated in the order, not less than thirty days from the date of such order; which election shall be held and conducted and the returns thereof made in accordance with the laws regulating general elections, in so far as the same are applicable. [Id. sec. 4.]

**In general.**—In a prosecution for violating the local stock law, information held defective for not alleging that the commissioners' court made an order directing an election to be held to determine whether horses, cattle, etc., should be permitted to run at large. *Hill v. State*, 58 Cr. R. 79, 124 S. W. 940.

In a prosecution for violating the local stock law, it was essential to allege and prove the precedent steps, required by law, by which the stock law was adopted. *Id.*

That an order declaring the stock law in force in a justice precinct erroneously included an incorporated town not within the petition and order for election would not render it invalid as to the balance of the territory. *Ex parte Stein*, 61 Cr. R. 320, 135 S. W. 136.

**Art. 7240. County judge to issue order and notice.**—Immediately after the passage of an order for an election by the commissioners' court, the county judge shall issue an order for such election and cause public notices thereof to be given for at least thirty days before the day of election, by publication of the order therefor in some newspaper published in the county, if there be one, if no newspaper be published in the county, then by posting copies of such order at the court house door and at some public place in each justice's precinct, if the election be ordered for the whole county, or at three public places in the subdivision, if the election be ordered for a subdivision. [Id. sec. 5.]

**Form and publication of notice.**—The notices of election provided for in this section need not run in the name of the state. The proceeding is special and Art. 2280 does not apply. *Graves v. Rudd*, 26 C. A. 564, 65 S. W. 63.

Notice in this case was given by publishing three weeks, as required by section 42 of the Terrell election law (1903). This was not legal. Notice must be given as required in this section (6) of the law itself, that is, by publication for 30 days. *Ex parte Kimbrell*, 47 Cr. R. 333, 83 S. W. 333.

**Art. 7241. Recitals in order.**—The order of the county judge shall specify:

1. The petition and the action of the commissioners' court.
2. The class of animals it is proposed shall not run at large.
3. The territorial limits to be affected.
4. The day of election.
5. The places at which polls are to be opened. [Id. sec. 6.]

**Art. 7242. Election places.**—If the election is ordered for the whole county, the same shall be held at the usual voting places in the several election precincts; but, if the election is ordered for any particular subdivision, the county judge shall designate the particular places in such subdivision at which the polls shall be opened. [Id. sec. 7.]

**Art. 7243. Officers of election.**—If the election be for a subdivision of the county, the county judge shall, at the time he issues the order for such election, appoint proper persons as managers of said election, all of whom shall be freeholders of the county and qualified voters; and such managers may appoint their own clerks. [Id. sec. 8.]

**Art. 7244. Qualifications of electors.**—No person shall vote at any election under the provisions of this chapter, unless he be a freeholder and is a qualified voter under the constitution and laws. [Id. sec. 9.]

**Art. 7245. Election by ballot, form of.**—All votes at any election, in pursuance of this chapter, shall be by ballot, and voters desiring to prevent the animals designated in the order from running at large shall place upon their ballots the words, "For the Stock Law," and those in favor of allowing such animals to run at large shall place upon their ballots the words, "Against the Stock Law." [Id. sec. 10.]

**Art. 7246. Election returns.**—On or before the tenth day after any election under the provisions of this chapter, the persons holding such election shall make due return on all votes cast at their respective voting places for and against said proposition to the county judge of the county,

who shall tabulate and count said returns and ascertain the results of said election. [Id. sec. 11.]

**Art. 7247. Same, effect of.**—The returns shall be opened, tabulated and counted by the county judge in the presence of the county clerk and at least one justice of the peace of the county, or by [of] two respectable freeholders of the county, and an order showing the result shall be duly recorded in the minutes of the commissioners' court in the said county. And the order showing the result of said election thus determined, certified and recorded, shall be held to be prima facie evidence that all the provisions of law have been complied with in presenting the petition, the action of the court thereon ordering the election, the giving of notice and holding said election, and in counting and returning the votes and declaring the result thereof, and, if said election be then declared to be in favor of the stock law, then after thirty days from said date, it shall be prima facie evidence that the proclamation required by law has been made and published as required by law. [Acts 1907, p. 123, sec. 12.]

**Art. 7248. Proclamation and time law goes into effect.**—If a majority of the votes cast at such election shall be "For the Stock Law," the county judge shall immediately issue his proclamation declaring the result, which proclamation shall be posted at the court house door, and, after the expiration of thirty days from its issuance, it shall be unlawful to permit to run at large, within the limits designated, any animal of the class mentioned in said proclamation. [Acts 1899, p. 220, sec. 13.]

**Form of proclamation.**—The fact that the order declaring the result used the words "or cattle" instead of "and cattle" is of no consequence. *Graves v. Rudd*, 26 C. A. 554, 65 S. W. 63.

**Art. 7249. Impounding stock.**—If any stock forbidden to run at large shall enter the enclosed lands, or shall, without being herded, roam about the residence, lots or cultivated lands of any person other than the owner of such stock without his consent, in any county or subdivision in which the provisions of this chapter have become operative in the manner provided in the preceding article, the owner, lessee or person in lawful possession of such lands may impound such stock and detain the same until his fees and all damages occasioned by said stock are paid to him. [Id. sec. 14.]

**Trespassing stock.**—One is authorized to impound stock that have escaped from their owner's inclosure and are found trespassing upon land and hold the same until the fees and damages are paid as provided by the terms of the law. *Graves v. Rudd*, 26 C. A. 554, 65 S. W. 64, 65.

The owners of stock must keep them confined at their peril, else they will be held liable to account for the damages which their stock may inflict. *Frazer v. Bedford* (Civ. App.) 66 S. W. 573, 574.

Where the owner of the stock turns it into a field surrounded by a fence which is insufficient to hold it to his knowledge, and because of the condition of the fence the stock stray from the owner's field onto the cultivated land of another in the possession of a tenant they are trespassing thereon and can be impounded. *Houston & T. C. Ry. Co. v. Hollingsworth*, 29 C. A. 306, 68 S. W. 726, 727.

**Remedy.**—The owner of trespassing cattle is unconditionally liable to the owner of the land injured and the latter can sue therefor in the court having jurisdiction. The remedy provided in this law is not exclusive but cumulative. *Frazer v. Bedford* (Civ. App.) 66 S. W. 573.

**Lessees of school lands.**—Lessees of inclosed school land cannot prevent parties from driving stock through their inclosed lands, this being a condition allowed by law when they leased the land. *Bugby-Coleman L. & C. Co. v. Matador L. & C. Co.*, 26 C. A. 260, 63 S. W. 914.

**Art. 7250. Same.**—No animals shall be impounded, unless they have entered upon the enclosed lands or be found roaming about the residence, lots or cultivated land of another, and, whenever any stock is impounded, notice thereof shall be given to the owner, if known, and such owner shall be entitled to their possession upon payment of fees and damages. [Id. sec. 15.]

**Art. 7251. Fees for impounding.**—Any owner, lessee or person in lawful possession of enclosed lands shall be entitled to the following fees for impounding stock, to-wit: Twenty-five cents per day per head

for horses and mules, fifteen cents per day per head for cattle, and ten cents per day per head for jacks and jennets. The damages done by such stock, if any, and the fees due to the taker-up of stock, if any, may be assessed by any three disinterested freeholders of the subdivision in which said stock is taken up, who shall, upon the application of the taker-up of the stock, be appointed by the justice of the peace of the precinct in which such subdivision is situated. When such justice shall fail or refuse to make appointments, or when the stock law has been adopted by an entire county, said freeholders shall be appointed by the county judge of the county. Said freeholders, after being duly sworn to discharge with impartiality the duties devolving upon them by said appointment, shall proceed after hearing the evidence to determine whether or not any trespass prohibited by the provisions of this chapter has been committed, and to ascertain the damages, if any, occasioned thereby, and the fees due the taker-up of the stock by reason of said trespass, and shall make an assessment of damages and fees in writing and signed by said freeholders, or two of them, and verified by the affidavit of said freeholders to the effect that said assessment is just, and that they have no bias in favor of or prejudice against any party interested therein, and shall file said assessment with the justice of the peace, which shall be final; provided, that the owner of the stock, if known, shall have five days notice of the time and place of the meeting of said freeholders, and if the owner is unknown, then a written notice thereof shall be posted in two public places in said subdivision, and one at the door of the court house of the county; and provided, further, that nothing in this chapter shall be construed to deprive the taker-up of the stock to enforce, by suit in a court of competent jurisdiction, any claim he may have for such fees and damages, and to subject the stock so taken up for the payment of the same under the provisions of this chapter. [Id. sec. 16.]

**Art. 7252. Sale of impounded stock; fees.**—After the filing of the assessment, as provided for in the preceding article, the constable of the precinct shall sell such stock at public auction for cash, after having given notice of such sale, as in constables' sales of personal property, and apply the proceeds of such sale, after deducting the expenses thereof, to the satisfaction of said fees and damages, and shall pay the balance, if any remains, to the owner of such stock. The justices and constables shall receive for their services the same compensation as is allowed for like service in civil cases. [Id. sec. 17.]

**Recovery of proceeds.**—Demurrer to a petition to recover proceeds of sale of mares taken up and sold by a poundkeeper held improperly sustained, where, if the sale was legal, plaintiff was entitled to the proceeds. *Bell v. City of San Angelo* (Civ. App.) 146 S. W. 1195.

**Art. 7253. Unknown owner.**—If no owner can be found of stock so impounded, the taker-up may make affidavit before a justice of the peace of the county, describing the stock impounded by him, and that the owner is unknown to affiant; which affidavit shall be forthwith delivered to the county clerk by such justice to be kept in his office for inspection. After the filing of such assessment, the constable of the precinct shall sell such stock as in case when the owner is known; and, if anything remains after satisfying the expenses of said sale and the fees and damages due to the taker-up, he shall report the same under oath to the clerk of the county court, and pay the same over to the county treasurer, to be received and disbursed by him as in case of sales of estrays; or the taker-up may, at his option, after the expiration of five days, stray such stock according to the laws regulating estrays in this state. [Id. sec. 18.]

**Art. 7254. Lawful fence, what constitutes.**—After the adoption of the stock law in any county, or subdivision, any fence within such county or subdivision shall be deemed a lawful fence if it be sufficient to

keep out the classes of stock not affected by the provisions of this chapter. [Id. sec. 19.]

**Art. 7255. Second election when proposition is defeated.**—Whenever an election is held under the provisions of this chapter for any county or subdivision, and the proposition of a stock law as herein provided is defeated, no other election for such purpose shall be held within that locality for the space of twelve months thereafter; but the defeat of the proposition for a county shall not prevent another election from being held immediately thereafter for any subdivision of such county, nor shall a defeat of the proposition for any subdivision prevent an election from being held immediately thereafter for the entire county. [Id. sec. 20.]

#### TRESPASSING ANIMALS

**Trespass by animals.**—The defendant, in an action for wrongfully pasturing cattle on plaintiff's lands, held under the evidence to be a mere trespasser, and liable for damages. *Forst v. Rothe* (Civ. App.) 66 S. W. 575.

Where plaintiff's crops were destroyed by defendant's cattle breaking through plaintiff's fence, plaintiff was not restricted to the remedy specially provided in case of a breach of a statutory fence. *Burch v. Samples* (Civ. App.) 74 S. W. 81.

Petition in an action for damages from trespasses by stock held to allege a common-law liability by the stock owner, grounded upon his negligence in knowingly permitting breachy animals to run at large, as well as a liability under the statute. *Posey v. Coleman* (Civ. App.) 133 S. W. 937.

**Injury to animals.**—Where plaintiff's horse trespassed on defendant's land, and fell into an open well, defendant was not liable therefor, in the absence of gross negligence. *McCutchen v. Gorsline*, 39 C. A. 146, 86 S. W. 1044.

**Fences.**—See notes under Title 59.

## CHAPTER SEVEN

### REGULATIONS FOR THE PROTECTION OF STOCK RAISERS IN CERTAIN LOCALITIES

Art.	Art.
7256. Inspector may be elected, etc.	7288. Fees of inspector in such cases.
7257. Governor to appoint, when.	7289. Hides to be delivered to.
7258. Term of office, etc.	7290. Revised list of marks and brands.
7259. Vacancies, how filled.	7291. Same brands not to be recorded twice, where.
7260. Bond and oath.	7292. In the county where cattle range.
7261. Appointees to give bond.	7293. Only one mark, etc., to be used.
7262. Seal of office.	7294. Counterbranding, etc.
7263. Deputies may be appointed, when.	7295. Authority to gather, etc.
7264. Appointment to be recorded.	7296. Inspections to be personal.
7265. Meaning of terms.	7297. Certificates of inspection.
7266. May authenticate instruments.	7298. Inspection before exporting.
7267. Inspections and records thereof.	7299. Certificate where filed.
7268. Monthly returns to county clerk.	7300. Seizure of cattle not inspected originally.
7269. Exemptions from inspection.	7301. Sequestration if necessary.
7270. Unbranded animals not to be certified.	7302. Proceeds paid, where, and subject to claims.
7271. May seize certain animals.	7303. Description of cattle filed.
7272. Also unbranded hides, etc.	7304. Change of destination.
7273. Procedure in case of seizure.	7305. Exempted counties.
7274. Bill of sale to be taken.	7305a. Other counties exempted.
7275. Also in sale of hides.	LOCAL OPTION AS TO HIDE AND ANIMAL INSPECTION
7276. Certificate of inspection to be given.	7306. Commissioners' court to order election, when.
7277. Same.	7307. Result to be declared, etc.
7278. Road brand.	7308. Ballots.
7279. Exportation of cattle to Mexico.	7309. In case election is carried.
7280. Herds in transit may be inspected.	7310. Fees of inspector.
7281. Fees, how paid.	7311. Elections not to be held oftener than.
7282. Hides imported from Mexico.	
7283. Horses and mules.	
7284. Suspicious hides to be seized.	
7285. Procedure upon seizure.	
7286. Inspector to recover on proof.	
7287. Hides to be sold if not proven away.	

**Article 7256. [5002] Inspector to be elected.**—Each organized county, not expressly excepted herein, shall constitute an inspection district for the inspection of hides and animals; and at each general election an officer to be styled, "Inspector of hides and animals," shall be

elected by the qualified voters of such county in the same manner as other county officers are elected. [Const., art. 16, sec. 23. Act Aug. 23, 1876, p. 265, sec. 1.]

**Art. 7257. [5003] Governor may appoint in unorganized county.**—The governor is authorized to appoint a hide inspector for each unorganized county in this state. [Acts 1879, p. 89.]

**Art. 7258. [5004] Term of office.**—Inspectors of hides and animals shall hold their offices for the term of two years and until the election and qualification of their successors in office. [Act Aug. 23, 1876, p. 295, sec. 2.]

**Art. 7259. [5005] Vacancies, how filled.**—In case of a vacancy in such office, the commissioners' court shall fill the same by appointment for the unexpired term; and until such vacancy is filled by such appointment the sheriff of the county shall discharge the duties of the office. [Act Aug. 19, 1876, p. 217, sec. 1.]

**Art. 7260. [5006] Bond and oath.**—Every person elected to the office of inspector of hides and animals, before entering on the duties of his office, shall enter into a bond, with two or more good and sufficient sureties, to be approved by the county commissioners' court of the county constituting his district, which bond shall be in a sum to be fixed by said court, not less than one thousand dollars, nor more than ten thousand dollars, payable to the county judge, conditioned that he shall well and truly perform the duties of his office, in accordance with the provisions of this chapter; and he shall also take and subscribe the oath of office prescribed by the constitution, which shall be indorsed on or attached to said bond, together with the certificate of the officer administering the same, which bond and oath shall be deposited and recorded in the office of the clerk of the county court of the county. The bond herein provided for shall not be void for want of form or on the first recovery, but may be sued on from time to time, in the name of any person injured by a breach thereof, until the whole penalty shall have been recovered. [Id. sec. 3.]

**Art. 7261. [5007] Appointees also to give bond.**—Persons appointed to fill vacancies in the office of inspector shall give bond and take the oath in like manner as prescribed in the preceding article, and shall not enter upon the duties of the office until such bond is given and approved and such oath is taken; but a sheriff acting temporarily as inspector, pending a vacancy in such office, shall not be required to give additional bond, but his official bond as sheriff shall extend to and include the faithful and proper performance of his duties as inspector ad interim. [Act Aug. 19, 1876, p. 217, sec. 1.]

**Art. 7262. [5008] Seal of office.**—The county commissioners' court of each county shall furnish to the inspector for such county a seal of office, having upon it the words, "Inspector of Hides and Animals, \_\_\_\_\_ county, Texas" [the blank to be filled with the name of the county], and each inspector and his deputy shall certify their official acts with the impress of such seal. Upon his retirement from office, the inspector shall deliver such seal, together with the books, papers and records of his office, to his successor. [Act Aug. 23, 1876, p. 296, sec. 6.]

**Art. 7263. [5009] Deputies may be appointed.**—Every inspector shall have power to appoint as many deputies as shall be necessary to perform the duties imposed on them by this chapter; and such deputies shall have the same power and authority to perform the duties of their office as their principal; and the inspectors shall require bond and security of their deputies for the faithful performance of their duties; and the said deputies shall, before entering upon their duties, take and



subscribe the oath prescribed by the constitution, which, together with the certificate of the officer administering the same, shall be indorsed upon the bonds. [Id. p. 295, sec. 4.]

**Art. 7264. [5010] Appointment to be recorded.**—The appointment of each deputy shall be in writing, with the seal of the inspector thereon, and shall, with their bonds and oath of office, be recorded by the clerk of the county court of the county constituting their district; and the inspectors shall be responsible to any persons injured thereby for the official acts of each of their deputies, and they shall have the same remedies against their deputies and their sureties as any person can have against the inspectors and their sureties. [Id. pp. 295, 296, sec. 5.]

**Art. 7265. [5011] Meaning of terms.**—Whenever in this chapter the word “inspector” is used, it shall be taken and deemed to be “the inspector of hides and animals,” the words “deputy inspector” shall be taken to mean the “deputy inspector of hides and animals,” and the words “county,” “district” or “inspection district” shall be held to include each organized county in this state not herein excepted, together with any unorganized county that may be attached for judicial purposes to any such county. [Id. p. 301, sec. 27.]

**Art. 7266. [5012] May authenticate instruments.**—Every inspector shall have authority to authenticate bills of sale of animals, and give certificates of acknowledgment of the same under his hand and seal. [Id. p. 302, sec. 30.]

**Art. 7267. [5013] Inspections and record thereof.**—It shall be the duty of the inspector, in person or by deputy, to faithfully examine and inspect all hides or animals known or reported to him as sold, or as leaving or going out of the county for sale or shipment, and all animals driven or sold in his district for slaughter, packeries or butcheries; and the inspector shall keep a record, in a well-bound book, in which he shall record a correct statement of the number, ages, marks and brands of all animals inspected by him, and the number, mark and brand of all hides inspected by him, and whether the same are dry or green, and the name or names of the vendor or vendors, and of the purchaser or purchasers thereof. [Id. p. 296, sec. 7.]

**Constitutionality.**—The cattle and hide inspection acts are constitutional. *Limburger v. Barker*, 17 C. A. 602, 43 S. W. 616.

**Inspection where sold.**—Although cattle are inspected in the counties from which they were brought, nevertheless the law requires them to be inspected again when sold for slaughter in a different county. *Limburger v. Barker*, 17 C. A. 602, 43 S. W. 616.

**Art. 7268. [5014] Monthly returns to county clerk.**—He shall return a certified copy of all entries made in such record during each month to the clerk of the county court of the county on the last day of each month, which report shall be filed among the records of the county court. The book of records herein provided for shall at all times be open for the inspection of any person interested therein. [Id.]

**Art. 7269. [5015] Exemptions from inspection.**—The provisions of this chapter shall not be so construed as to include sheep, goats, swine, or hides of either, nor to involve the re-inspection of salted hides in packeries or other slaughter houses taken from animals previously inspected and returned, as provided in the preceding articles. [Id.]

**Art. 7270. [5016] Shall not certify unbranded animals, etc.**—No inspector shall grant any certificate of inspection of any unbranded hides or animals, or of hides or animals upon which the marks and brands can not be ascertained, and he shall prevent the same from being taken or shipped out of the county, unless they are identified by proof or by a bill of sale signed by the owner of such hides or animal, and acknowledged before some officer authorized to authenticate instruments for record in this state. [Id. sec. 8.]

**Art. 7271. [5017] May seize certain animals, etc.**—Every inspector shall have power to and may seize and sequester all unbranded or unbranded calves or yearlings, and all calves or yearlings freshly marked or branded, and on which the fresh marks or brands are unhealed, which are about to be slaughtered, or driven or shipped out of the county, unless such animals are accompanied by the mothers thereof, or are identified by the presentation of a bill of sale from the person proved to be the owner thereof, signed by him or his legally authorized agent, and acknowledged before some officer authorized to authenticate instruments for record in this state. [Id. sec. 9.]

**Art. 7272. [5018] Also unbranded hides and animals.**—Every inspector shall have power to and may seize and sequester all unbranded animals or hides, and animals and hides upon which the mark or brand can not be ascertained, which are about to be taken or shipped out of the county, or which animals are to be slaughtered, unless such animals or hides are identified as provided in the preceding article. [Id. sec. 10.]

**Art. 7273. [5019] Procedure in cases of seizure.**—When the inspector has seized any hides or animals, as provided for in the two preceding articles, he shall report the fact to some judge of the district or county court, or justice of the peace, according as the value of the property seized may come within the jurisdiction of either of said courts; and it shall be the duty of said judge or justice to issue or cause to be issued a citation addressed, "To all whom it may concern," setting forth a seizure of said property, with a description of the same, commanding them to appear at a day named in said citation to show cause why the said property should not be forfeited to the county wherein the same was seized and sold for the benefit of said county; said citation shall be directed to the sheriff or any constable of said county, who shall cause certified copies of the same to be posted in three public places in said county for a period of ten days before the day mentioned in said citation. Upon the proof of the posting of said citation, as herein required, it shall be the duty of the judge or justice of the peace issuing said citation to proceed to condemn the property mentioned in said citation, unless satisfactory proof should be made of the ownership of said property, or other sufficient cause be shown why the same should not be condemned; and in case of condemnation he shall order the same to be sold by the inspector at public auction to the highest bidder. The inspector shall be entitled to retain one-fourth of the net proceeds of such sale, after deducting therefrom all expenses connected therewith, and he shall immediately pay the remaining three-fourths thereof into the county treasury; and all sums so paid in shall be placed to the credit of the general fund of such county. [Id. p. 304, sec. 44.]

**Art. 7274. [5020] Bill of sale to be taken.**—Every person who shall buy or drive any animal or animals for sale or shipment out of any county, or who shall buy or drive any animal or animals for slaughter, shall, at the time of purchasing and before driving the same, procure a bill of sale from the owner or owners thereof, or from his or their legally authorized agent; which bill of sale shall be in writing, properly signed and acknowledged before some officer authorized to authenticate instruments for record in this state. Such bill of sale shall distinctly enumerate the number, kind and age of animals sold, together with all the marks and brands discernable on said animals; and said animals shall, before leaving the county in which they have been gathered, be inspected by the inspector of such county or his deputy. [Id. p. 297, sec. 11.]

See *Wells v. Littlefield*, 59 T. 556; *Black v. Vaughan*, 70 T. 47, 7 S. W. 604; *Ft. Worth National Bank v. Daugherty*, 81 T. 301, 16 S. W. 1028.

**Validity of sale.**—A verbal sale of cattle running in the range will pass title against a subsequent attachment if reduced to possession prior to the levy. *Davis v. Dallas National Bank*, 7 C. A. 41, 26 S. W. 222.

A sale of horses running on the range, without actual delivery or a bill of sale, is a nullity and passes no title. *Hickman v. Hickman*, 5 C. A. 99, 27 S. W. 31.

**Art. 7275. [5021] Also in sale of hides.**—Every person who shall purchase any hides of cattle shall, at the time of purchasing the same, obtain from the owner thereof, or from his legally authorized agent, a bill of sale in writing, certified to by the inspector, or by any officer authorized to take acknowledgments, which bill of sale shall recite in full the marks and brands of each hide, the weight thereof, and whether the same is dry or green. [Id. sec. 12.]

**Art. 7276. [5022] Certificate of inspection to be given.**—Whenever an inspector shall have inspected any animal or animals, as herein provided, he shall, on the presentation of a bill of sale or power of attorney from the owner or owners of such animal or animals, or his or their agent, duly authorized in writing, which bill of sale, power of attorney or authority shall be in writing, duly signed and acknowledged by the person executing the same before some officer authorized to authenticate instruments for record in this state, and on payment to said inspector of his legal fees, deliver to the purchaser of the animals mentioned in such bill of sale or power of attorney, or his agent, a certificate setting forth that he has carefully examined and inspected such animal or animals, and that said purchaser has in all respects complied with the provisions of this chapter, which certificate shall not be complete until the same and bill of sale herein provided for shall be recorded in the office of the clerk of the county court of the county, and be certified to by said clerk under his hand and seal. Such certificate shall be then delivered to the purchaser or purchasers, and shall protect him or them from the payment of inspection fees in any other district for the animals therein described, except from the county from which the same may be exported. [Id. sec. 13.]

**Art. 7277. [5023] Same subject.**—Any person or persons driving cattle in his or their own mark and brand shall be entitled to the certificate of inspection provided for in the preceding article, on payment of fees to the inspector, and on presentation to the inspector of the certificate of the clerk of the county court of the county where such mark and brand is recorded, to the effect that the mark and brand named therein is duly recorded in his office as the mark and brand of the person so driving such cattle. [Id. sec. 14. Amend. 1895, Sen. Jour., No. 101a, p. 484.]

**Art. 7278. [5023a] Road brand.**—Any person or persons who shall drive any cattle to market beyond the limits of this state shall, before removing such cattle from the county where the same are gathered, place upon each and every animal so to be driven a large and plain road brand, composed of any device he may choose, which brand shall be branded on the left side of the back behind the shoulder; and every person or persons using or causing to be used any road brand shall place the same on record as in the case of other brands, in the county from which the animals are to be driven, and before their removal from such county. [Acts 1876, p. 295. Sen. Jour. 1895, p. 484.]

**Art. 7279. [5023b] Exportation of cattle to Mexico.**—Any person intending to drive or ship any animals to the Republic of Mexico may ship the same from any point on the coast of Texas, or may drive or ship them across the Rio Grande river at any point where a custom house of the United States is located, and shall not drive or ship such animals across the Rio Grande at any other point or points; and he shall cause all such animals to be inspected by the inspector of the district in which the point of shipment or place at which they are to be driven across

said river is situated; such inspection shall be made before shipment from the state or passage across said river of said animals. [Id.]

**Art. 7280. [5023c] Herds in transit may be inspected.**—Whenever a drove of cattle may be passing through any county, it shall be the duty of the inspector, if called upon to do so by any person, to stop and inspect said drove without any unnecessary detention of the same; and he shall exercise the same powers and perform the same duties in the inspection of such cattle as are prescribed in articles 7267, 7271 and 7272. [Id.]

**Art. 7281. [5023d] Fees, how paid.**—If any cattle be found in said drove not included in the certificate of the inspector of the county in which the drove may have been gathered, the fees of the inspector shall be paid out of the proceeds of the sale of said cattle, but if no cattle shall be found in said drove except those covered by the inspector's certificate, then the inspector's fee shall be paid by the person at whose instance and request said drove was inspected. [Id. Sen. Jour., 1895, p. 485.]

**Art. 7282. [5023e] Hides imported from Mexico.**—The hides of all cattle imported into this state from Mexico shall be inspected by the inspector of hides and animals of any county or district into which the same may be introduced or imported; and, should the importer of said hides fail or refuse to pay the inspection fees as required by law, the inspector is hereby authorized to retain possession of said hides and sell a sufficient number thereof, after public notice of three days, to the highest and best bidder, to pay said inspection fees and all necessary expenses in connection therewith. [Id.]

**Art. 7283. [5023f] Horses and mules.**—Horses and mules imported from Mexico into this state shall be inspected in accordance with the provisions of the preceding article, and with like authority to retain and sell as therein provided for a failure to pay the inspection fees. [Id.]

**Art. 7284. [5023g] Suspicious hides to be seized.**—Should an inspector of hides and animals find among hides imported from Mexico any hides which, from the brand or from other evidence, he has reason to believe have been stolen from the lawful owner, it shall be his duty to separate said hides from the others undergoing inspection, and to notify any person he believes to be interested therein to come forward and institute suit for the recovery of the same. [Id.]

**Art. 7285. [5023h] Procedure upon seizure.**—Should no person appear to claim said hides, the inspector shall, within twenty-four hours, make oath before the county judge of the county, or before a justice of the peace of the county, that he has reason to believe that said hides have been stolen; whereupon said county judge or justice of the peace shall issue a citation, directing the importer or party claiming the same to appear before him at his office within a time specified, not to exceed twenty-four hours, to show cause why said hides should not be condemned.

**Art. 7286. [5024] Importer to recover on proof.**—Should said importer or claimant make proof that he is the lawful owner of said hides by showing a bill of sale from the owner of the same, or his legally authorized agent, and by showing a complete chain or transfer of title from the original owner of the brand to himself, or his firm, as the case may be, the county judge or justice of the peace shall direct that the same be delivered to said importer or claimant upon his paying the inspection fees. [Id.]

**Art. 7287. [5025] Hides to be sold, if not proven away.**—Should the importer or claimant of said hides fail to establish his claim as the lawful owner of the same, or to any number of said hides so seized, it shall be the duty of the county judge or the justice of the peace to di-

rect that said hides be sold at public auction by the inspector of hides and animals, or his deputy, after a notice of ten days, published in a newspaper, should there be one published in said county, or if no newspaper be published in the county, then by notice in writing, posted at the court house and two or more other places in said county, and the said hides shall be sold to the highest and best bidder. [Id.]

**Art. 7288. [5026] Fees of inspector in such cases.**—The inspector of hides and animals shall retain twenty-five per cent of the purchase money, after having deducted and paid all necessary expenses incurred by reason of said sale, and he shall deposit the remainder of said purchase money with the county treasurer, and take his receipt therefor; and said county treasurer shall place one-half of said sum of money to the credit of the school fund and the other half to the credit of the jury fund of said county. [Id.]

**Art. 7289. [5027] Hides to be delivered to true owner, etc.**—Should any person appear either by himself, his agent or attorney, and claim any hides imported from Mexico at any time before said hides shall have been sold as above directed, and should said claim be established before the county judge or a justice of the peace of said county, such hides shall be delivered to the claimant, and all costs accruing therein shall be paid by the importer; provided, that at any time before proceedings shall have been commenced as above directed, the importer may be permitted to pay the lawful owner, his agent or attorney, for any hides imported by him from Mexico and presented in any county of this state for inspection, and upon such payment, and the fees for inspection, such hides shall be released. [Id.]

**Art. 7290. [5028] Revised list of marks and brands.**—The clerk of the county court in each county shall transcribe the list of all recorded marks and brands in his county and revise the same. Such revised list shall be written in a well-bound book, kept for that purpose only, and shall be arranged as follows, viz.: All brands of the letter class shall be placed in alphabetical order, following which shall be the numeral, character and device brands in the order of the date of their registration. Opposite each brand shall be stated the marks corresponding to said brand, the name of the owner of the brand, his place of residence; if the same be sold, the name of the person to whom sold, and his residence; the date of registration of brands and marks, particulars relating thereto. Before each brand shall be placed its number, commencing at one for the first brand on the revised list; and the name of the owner of each brand shall be indexed, reference being had in such index to the list number of the brand or brands of such owner; and all new brands and marks placed on record shall be immediately recorded and indexed in said book, which shall at all times be open to the inspection of all persons; provided, that the provisions of this article shall apply only to counties in which the work of transcribing the records has not already been done in accordance with law. [Id. p. 300, sec. 23.]

**Art. 7291. [5029] Same brand, etc., not to be recorded twice, etc.**—In all cases where application for registration of any mark or brand shall be made, the clerk of the county court shall receive and record the same, unless an examination of the recorded list of marks and brands shows that a similar mark and brand is already upon record in such county, in which event he shall refuse to register or give any certificate for the same; provided, that if such applicant shall have previously had such mark and brand recorded in some other county, and shall have a certificate from the clerk of the county in which said brand had been recorded, stating that said brand and mark had been recorded in said county at some time anterior to the time of the registration of the similar mark and brand in the county in which the applicant may desire to

have his brand recorded, then said brand and mark shall be recorded; and the clerk shall, on the record, make a minute setting forth said facts. [Id. sec. 24.]

**Art. 7292. [5030] In the county where cattle range.**—All marks and brands of cattle shall be recorded in the county or counties in which they usually range; provided, that when cattle are gathered near the county line the bills of sale of the same shall be recorded in both counties; and, when any stock of cattle is sold, the fact shall be noted on the record opposite or near the record of its mark and brand, giving the name of the vendor and vendee and date of sale, and this shall be done as often as there is a sale. It is made the duty of the inspector to procure certified copies of the marks and brands of this county for himself and his deputies, and, monthly, to have added thereto the marks and brands that may be recorded. [Id. p. 301, sec. 28.]

**Art. 7293. [5031] Only one mark and brand to be used.**—No person owning and claiming stock shall, in originally marking and branding animals, make use of more than one mark and brand; provided, that any person may own and possess animals in many marks and brands, the same having been by him acquired by purchase; and bills of sale in writing, properly acknowledged, from the previous owner or owners of his or their legally constituted agent, shall be sufficient evidence of such purchase, but the increase of such animals, or of any animal counterbranded by such person from other stocks of cattle owned by him, shall be branded or counterbranded by one and the same brand; and when marked by such person shall be marked in one and the same mark. [Id. p. 300, sec. 22.]

**Art. 7294. [5032] Counterbranding.**—In all cases where the counterbranding of any cattle shall be deemed necessary or expedient, the person so counterbranding shall counterbrand the existing brand of the animal by which the owner thereof is then known, or by which it is then claimed and owned, by branding below the said brand its facsimile, that is, similar letters, characters or numbers, as the case may be; and he shall also place on said animals the brand of the then owner thereof; but no person shall change or alter the ear marks of any animal, but in counterbranding shall leave the ears bearing the same mark or marks as before counterbranding. [Id. sec. 21.]

**Art. 7295. [5033] Authority to gather, etc.**—Any person having marks and brands recorded in the office of the clerk of the county court may file with the inspector a list of his recorded marks and brands, certified by the clerk under his seal, to which certified list shall be attached the names of any person or persons whom the owner of said stock may wish to authorize to gather, drive or otherwise handle his stock; and the filing of said list with the inspector shall be deemed sufficient authority to the person or persons named in such list to gather, drive or otherwise handle any animals of the marks and brands therein described. [Id. p. 209, sec. 20.]

**Art. 7296. [5034] Inspections to be personal.**—In making inspections, the inspector shall not trust to the statement or representations of any persons, but he shall in person carefully inspect and examine each animal or hide separately so as to identify the marks and brands, and in case of animals, the ages and sexes. [Id. p. 301, sec. 29.]

**Art. 7297. [5035] Certificate of inspection.**—He shall also carefully examine the bills of sale and lists of brands and marks for the cattle inspected by him; and, if satisfied that the person claiming the cattle inspected has correct bills of sale or chain of transfer in writing from the recorded owner, or is the owner himself in whole or part of the mark and brand of each animal in his drove or herd which should be inspected, and that he has none other in said herd or under his control to be car-

ried with it, he will then, and not until then, make out a certificate, which he shall first enter in his record, under his hand and seal, containing the number of cattle in each mark and brand, with their respective ages and sexes, thus inspected, and that they appear to be the property of the person for whom they were inspected, naming him or her, as appears by bills of sale from the recorded owner of the marks and brands on the cattle inspected by him, or the owner of the brand and mark himself or herself, and that he has none other in his herd or under his control that should be inspected; and that he intends to drive or ship them, naming the place in the state, for sale or slaughter; or, if out of the state, he shall then name the place on the border of the state through which it is proposed to drive or ship such stock. [Id.]

**Art. 7298. [5036] Inspection before exportation.**—Whenever any person shall be about to drive or ship any stock out of the state, if the inspector shall believe, or is informed by any credible person, that said person has other stock in his herd than those covered by his original certificate of inspection, or by subsequent purchase duly attested by proper bill of sale, the inspector at said point of shipment, or border county where said person leaves the state, shall be authorized to inspect said stock in the same manner as in the original inspection; and, if any stock is found in said herd other than those covered by his original certificate of inspection, or by subsequent purchase duly and properly authenticated by bill of sale, the fees of said inspection shall be paid as provided in article 7281 of this chapter, provided, that the said inspector shall in no case be authorized to receive or demand more than three cents per head for each head of cattle inspected; but if not, then said fees shall be paid by the person at whose instance said inspection was made; and, if said inspection is made by the inspector, at his own instance, and no stock is found in said herd, except those properly accounted for under the provisions of this article, then said inspector shall receive no fees for said inspection. [Acts 1879, S. S., ch. 22.]

**Art. 7299. [5037] Certificate, where filed.**—One of these certificates the inspector shall immediately remit by mail, postage paid, to the first inspector, and the party owning the cattle shall deposit the other with him in two months from the date of the original inspection, both to be kept by him in his office. [Id.]

**Art. 7300. [5038] Seizure of cattle not inspected originally.**—But if the inspector at the point of destination shall find, upon inspection, that the owner of the herd or person in charge has in his herd other cattle besides those inspected originally in the county from which said herd was driven, he shall seize said cattle and take them into possession, and thereupon the same proceedings shall be had as are prescribed in article 7271. [Id.]

**Art. 7301. [5039] Writ of sequestration if necessary.**—If the person in charge of any such cattle shall refuse to deliver the same into the possession of the inspector, such inspector may apply for and obtain a writ of sequestration from any justice of the peace, county judge or district judge, according as the value of such cattle may come within the jurisdiction of either. Such writ may be obtained upon the affidavit of the inspector, stating that he believes such cattle have been unlawfully acquired, and shall issue without bond, and be forthwith executed by the sheriff or any constable of the county; and thereupon the proceedings referred to in the preceding article shall be had before the officer issuing the writ, either in term time or in vacation. [Id.]

**Art. 7302. [5040] Proceeds paid into county treasury subject to claims.**—The net proceeds of the sale of cattle condemned under the two preceding articles, save one-fourth of such proceeds retained by the inspector for his compensation, shall be paid into the county treasury, sub-

ject to the claim of the true owner of such cattle; and if no claim be set up and established thereto within one year from the date of its deposit, such proceeds shall pass into the general fund of the county, and all claims thereto shall thereafter be barred. [Id.]

**Art. 7303. [5041] Description, etc., of cattle also filed.**—At the time such proceeds are originally deposited in the county treasury the inspector shall accompany such deposit with a certified statement, under his hand and seal, of the number of cattle sold, the mark and brand of each animal, the amount for which each sold. [Id.]

**Art. 7304. [5042] Change of destination.**—If the owner of the inspected herd should desire to sell, slaughter or ship the cattle, or any of them, at any other place than the destination named in the original certificate of inspection, he may do so by first having his herd inspected at the point of destination therein named and a new certificate of inspection issued to him at that point, naming the new point of destination or shipment; and upon his arrival at such new point of destination like proceedings shall be had in the way of inspection, comparison and return of the certificates of inspection as are prescribed for the original point of destination. [Id.]

**Art. 7305. [5043] Counties exempted.**—The counties of Anderson, Angelina, Aransas, Archer, Armstrong, Atascosa, Austin, Bailey, Bandera, Bastrop, Baylor, Bee, Bell, Bexar, Bowie, Bosque, Brazoria, Brazos, Brewster, Briscoe, Brown, Burlson, Burnet, Caldwell, Callahan, Calhoun, Cameron, Camp, Carson, Cass, Chambers, Cherokee, Childress, Clay, Cochran, Collin, Collingsworth, Colorado, Comal, Comanche, Cooke, Coryell, Cottle, Crockett, Crosby, Dallam, Delta, Denton, De Witt, Dickens, Donley, Duval, Eastland, Ellis, El Paso, Erath, Falls, Fannin, Fayette, Floyd, Foard, Fort Bend, Franklin, Freestone, Frio, Galveston, Gillespie, Goliad, Gonzales, Gray, Grayson, Gregg, Grimes, Guadalupe, Hall, Hamilton, Hardeman, Hardin, Harris, Harrison, Hartley, Hays, Hemphill, Henderson, Hidalgo, Hill, Hockley, Hood, Hopkins, Houston, Hunt, Irion, Jackson, Jack, Jasper, Jeff Davis, Jefferson, Johnson, Karnes, Kaufman, Kendall, Knox, Kinney, Lamar, Lamb, Lampasas, Lavaca, Leon, Liberty, Limestone, Lipscomb, Live Oak, Llano, Loving, Madison, Marion, Mason, Medina, Maverick, McLennan, Milam, Mills, Mitchell, Montague, Montgomery, Morris, Motley, Nacogdoches, Navarro, Newton, Orange, Palo Pinto, Panola, Parker, Pecos, Polk, Presidio, Rains, Red River, Refugio, Robertson, Rockwall, Rusk, Reeves, Sabine, San Augustine, San Jacinto, San Patricio, Schleicher, Shelby, Smith, Shackelford, Somervell, Starr, Stephens, Tarrant, Terrell, Throckmorton, Titus, Trinity, Tyler, Upshur, Val Verde, Van Zandt, Victoria, Walker, Ward, Washington, Webb, Wharton, Wheeler, Williamson, Wilson, Wise, Winkler and Young are hereby exempted from the provisions of this chapter, and from all laws regulating the inspection of hides and animals. [Acts 1893, ch. 107. Acts 1895, ch. 43. Acts 1909, pp. 30, 113. Acts 1913, p. 85, sec. 1, amending Art. 7305, Rev. St. 1911.]

*Note.*—Acts 1911, p. 13, excepting Starr and Atascosa counties, is omitted as those counties are included in Acts 1913, p. 85.

**Art. 7305a. Other counties exempted.**—That the counties of Stonewall, Kent, Scurry and Fisher be, and the same are hereby exempt from the provisions and operations of articles 7256 to 7305 inclusive of chapter 7, title 124, of the Revised Civil Statutes of 1911 relative to the inspection of hides and animals. [Acts 1913, p. 87, sec. 1.]

*Note.*—Section 2 repeals all laws in conflict, etc.

## LOCAL OPTION AS TO HIDE AND ANIMAL INSPECTION

**Art. 7306. Commissioners' court to order election, when.**—Whenever twenty-five of the qualified voters of each justice precinct in any county, or a majority thereof, shall petition the commissioners' court



for an election to determine whether such county shall have a hide and animal inspector, said court shall, either at general or special term, order such election to be held after thirty days notice having been given by posting such notice in each of such justice precincts and by publishing same in some newspaper published in said county, if there be one so published. It shall be the duty of the clerk of said court to prepare said notices and the sheriff to put up same and make return of such posting and file with said clerk, showing time and place of such posting. [Acts 1909, p. 127, sec. 1.]

**Art. 7307. Result to be declared, etc.**—The commissioners' court at the time of ordering said election shall appoint two persons to act as judges, designating one of such as presiding judge, and two persons to act as clerks, who shall hold said election, count the votes and foot up same, showing the number of votes for and against the issue; the result shall be prepared in duplicate and sealed up, one copy for the commissioners' court and the other to be retained by the presiding judge; and the presiding judge shall deliver or cause to be delivered one copy of the result of said election to the clerk of the county court for said commissioners' court within five days after said election. Within five days after such delivery of such returns to said clerk, the commissioners' court shall count the votes and declare the results and enter the same on the election record. The county shall pay the expenses of holding such election. [Id. sec. 2.]

**Art. 7308. Ballots.**—The election shall be held under the law as now provided for holding local and general elections, and all qualified voters shall be entitled to vote, and each ballot shall have written or printed on same, "For Inspector," or, "Against Inspector." [Id. sec. 3.]

**Art. 7309. In case election is carried.**—If at such election a majority of the votes cast be "For Inspector," then the persons holding such offices shall retain same to the next general election until his successor is elected and inducted into office as now provided by law; but, in counties having no inspector, the commissioners' court shall appoint one to serve until the next general election, who shall give bond and take the oath of office as now provided by law. [Id. sec. 4.]

**Art. 7310. Fees of inspector.**—Such inspector as herein provided for shall be entitled to such fees for his services as are now provided by law; provided, that no inspector herein provided for shall be entitled to any fee, unless he shall make a personal inspection of each animal or hide to be inspected as provided by law. [Id. sec. 5.]

**Art. 7311. Election not to be held oftener than two years.**—No election shall be held oftener than every two years under this law. [Id. sec. 6.]

## CHAPTER EIGHT

### LIVE STOCK SANITARY COMMISSION

<b>Art.</b>	<b>Art.</b>
7312. Commission created; oath, bond, term.	7315. When governor shall proclaim quarantine.
7313. Qualifications of commissioners.	7316. Commission to purchase supplies.
7314. Duties and powers of commission.	7317. Railways to keep clean stock cars.
7314a. Moving live stock from quarantined district, etc.	7318. Infection to be reported.
7314b. Further duties and powers of commission, etc.	7319. Compensation of commissioners.
7314c. Owners and caretakers to treat live stock, etc.	7320. Sheriffs and constables subject to commission.
7314d. Duties of commissioners' court and county judge.	7321. Appropriation for purposes of this chapter.
7314e. Tick eradication in certain counties; election to determine, etc.	7322. [Repealed.]
	7323. Concurrence of two commissioners necessary.
	7324. Law cumulative.

**Article 7312. [5043a] Commission created; oath, bond and term of office.**—There shall be appointed by the governor, and with the consent of the senate, a live stock sanitary commission of the state of Texas, composed of three members. Before entering upon the duties of their office, said commissioners shall take and subscribe to the usual oath of office and file the same with the secretary of state; and they shall also, before entering upon the performance of their duties, execute a bond, to be approved by the state comptroller, in the sum of ten thousand dollars each, conditioned that they will faithfully perform the duties of their office, which said bond they shall file with the secretary of state. The term of office of said commissioners shall be for a period of two years next from the day of their qualification, and until their successors shall have been appointed and qualified. [Acts 1893, p. 70.]

**Art. 7313. [5043b] Qualifications of commissioners.**—The commissioners, whose appointment is provided for in the preceding article, shall each be practical live stock raisers in the state of Texas, and shall have been actively engaged in said business for at least five years next preceding the date of their appointment, and shall be bona fide residents of and stock raisers in the particular section of the state from which they may be appointed. One of said commissioners shall be appointed from the west, one from the south, and one from the eastern portion of said state. [Id.]

**Art. 7314. [5043c] Duties and powers of the commission; transporting live stock in certain cases, etc., prohibited; state veterinarian, etc.**—It shall be the duty of the commission provided for in article 7312 to protect the domestic animals of the state from all contagious, infectious diseases of a communicable character, whether said diseases exist in Texas or elsewhere; and for this purpose it is hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as it may deem necessary. It shall also be the duty of said commission to co-operate with the live stock sanitary commission and officers of other states and with the United States secretary of agriculture in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this state against Texas splenic fever and other contagious, infectious and communicable diseases of live stock. It shall also be the duty of said live stock sanitary commission to quarantine any district, county or part of county within this state when it shall determine the fact that cattle or other live stock in such district, county or part of county, are affected with any contagious, infectious or communicable disease, or with the agency of transmission of such diseases, and to give written or printed notice of the establishment of such quarantines to the proper officers of railroads and express companies doing business in or through such quarantine district, county or part of county within this state, and to publish notice of the establishment of such quarantine in such newspapers in the quarantine district, county or part of county as the live stock sanitary commission may select, or give notice in such other ways as it deems necessary. And no railroad or express company shall receive for transportation or transport from any quarantine district, county or part of county in this state into any other district, county or part of county within this state, any cattle or live stock except as hereinafter provided. Nor shall any person, company, or corporation deliver for transportation to any railroad or express company, any cattle or other live stock of or from a quarantined area except as hereinafter provided. Nor shall any person, company or corporation drive on foot or cause to be driven on foot or transport in private conveyance or cause to be transported in private conveyance, from a quarantined district, county or part of county into any other district, county or part of county of this state any cattle or other live stock, except as hereinafter provided. It

shall be the duty of the live stock sanitary commission of Texas, and it is hereby authorized and directed, to make and promulgate rules and regulations which shall permit and govern the inspection, disinfection, certification, treatment, handling and method and manner of delivery and shipment of cattle and other live stock from a quarantined district, county or part of county into any other district, county or part of county in this state, and the live stock sanitary commission of Texas shall give notice of such rules and regulation by proclamation issued by the governor, and the said live stock sanitary commission of Texas is hereby especially empowered with the authority to employ a state veterinarian, and assistant state veterinarians in time of emergency, and inspectors or other persons as it may deem necessary to the performance of the duties imposed upon said commission. The live stock sanitary commission, the state veterinarian, assistant state veterinarians, and inspectors acting under authority or direction of the commission, are hereby empowered and it is made their duty to enter upon premises of any person, or persons, company or corporation, within the state, for the purpose of inspecting, quarantining or disinfecting premises or live stock thereon. Whenever any person shall move any animal which is quarantined or which is by law or by the rules and regulations of the live stock sanitary commission prohibited from being so moved, across any quarantine line, out of any quarantined district, or of quarantined premises in violation of the law or of the rules and regulations of the live stock sanitary commission or without its consent, the said commission, the chairman thereof, or any inspector acting under his direction, shall be authorized [authorized] and empowered to seize such animal or animals and call to their aid the sheriff of the county in which they may be found or through which they may have moved, in violation of law or the rules and regulations of the live stock sanitary commission, and it will be the duty of said sheriff to return such animal or animals to the place, county or quarantined area from which so moved. [Acts 1893, p. 70. Acts 1913, p. 353, sec. 1.]

**Note.**—While Acts 1913, p. 353, in section 9 expressly repeals Art. 7322, and the act contains no other repealing clause, its subject-matter covers the subject-matter of Art. 7314, as it appears in Rev. St. 1911, and hence supersedes such article.

**Historical.**—The law of this article is changed by Art. 7322 so that the authority of the commission is limited to the adoption of the quarantine line established by the United States department of agriculture. *Ft. Worth & D. C. Ry. Co. v. Masterson*, 95 T. 262, 66 S. W. 835.

**Constitutionality.**—This law is in no sense a regulation of commerce. It originated in a desire to protect the stock interests of Texas. It but provides for the suspension of introduction of cattle, etc., for a very limited time, and is not unconstitutional as an interference with interstate commerce. *Railroad Co. v. Smith*, 20 C. A. 451, 49 S. W. 627.

**Art. 7314a. Moving live stock from quarantined district, etc.**—That cattle or other live stock may be moved from a quarantined district, county or part of county, or from quarantined premises into any other district, county, part of county, or premises, under and in compliance with the rules and regulations of the live stock sanitary commission, as proclaimed by the governor, but it shall be unlawful to move or allow to move any cattle or other live stock from any quarantined district, county, part of county or premises, to any other district, county, part of county or premises, in manner, method or conditions other than those prescribed by the live stock sanitary commission and proclaimed by the governor. [Acts 1913, p. 353, sec. 2.]

**Art. 7314b. Further duties and powers of commission, etc.**—It is furth [further] provided that the live stock sanitary commission shall have the power, and it is hereby made its duty to as far as possible eradicate Texas or splenic fever, the scabies, anthrax, tuberculosis, hog cholera, glanders and other infectious, contagious or communicable diseases of live stock, and for this purpose it is empowered to establish special quarantined districts, where such diseases or the infection of such diseases are known to exist, and notice of the establishment of such

special quarantined districts shall be given as provided for in article 7314. The live stock sanitary commission shall have power to quarantine premises or pastures located in such special quarantined districts, and the domestic live stock thereon situated in such quarantined districts, or elsewhere when, to their knowledge, such pastures or premises or the live stock located thereon are infected with or have been exposed to a contagious, infectious or communicable disease or the infection thereof, and no live stock shall be moved to or from such special quarantined district, pastures or premises, in a manner, method or other condition other than those prescribed by the live stock sanitary commission. It will be the duty of the live stock sanitary commission to prescribe methods for dipping or otherwise treating or disinfecting such premises and the live stock thereon, as in their opinion are necessary for the eradication of the disease or the infection of the disease for which they are quarantined and when any person, company or corporation, owning, controlling or caring for such live stock, shall fail or refuse to dip or otherwise treat such live stock or disinfect premises at such time and in such manner as directed by the live stock sanitary commission, then the live stock sanitary commission shall have power to call upon the sheriff of the county in which such live stock are found, and it will be the duty of said sheriff, together with the inspector, to dip or otherwise treat such live stock in a manner and at such time as the live stock sanitary commission shall direct; and the said sheriff shall keep said cattle in his custody subject to such quarantine instruction as he shall receive from such officers. No officer who shall seize such live stock for dipping or treatment shall be liable to the owner thereof for damages for such taking, or by reason of such dipping or treatment; provided, the dipping or treatment has been done in accordance with the methods approved by the said live stock sanitary commission. [Id. sec. 3.]

**Art. 7314c. Owners and caretakers to treat live stock, etc.**—It shall be the duty of any person in any county who is the owner or caretaker of any live stock located in a special quarantined area established under the authority of section 3 [Art. 7314b] of this Act, known by the live stock inspector to be infected with ticks (*margaropus analatus*) or scabies infection are exposed to infection or agent of transmission of any other infectious, contagious or communicable disease to treat such live stock and at such times and in such manner as shall be directed by the live stock sanitary commission. [Id. sec. 4.]

**Art. 7314d. Duties of commissioners' court and county judge.**—It shall be the duty of the commissioners court to co-operate with and assist the live stock sanitary commission in protecting the live stock of their respective counties from all contagious, infectious or communicable diseases, whether such exists within or outside of the county, and in other ways protecting the live stock interest of their counties. It shall be the duty of said commissioners' court to co-operate with the live stock sanitary commissioner [commission] and the officers working under the authority or direction of said commission in the suppression and eradication of contagious, infectious or communicable diseases. Provided, when it becomes necessary to disinfect any premises under order of the live stock sanitary commission, the county judge shall have such disinfecting done at the expense of the county, and in no case shall the owner, or lessee or tenant of the premises be held answerable to any of the provisions of this Act by reason of the fact that the county fails to disinfect the premises, as herein provided. [Id. sec. 5.]

**Note.**—Sections 6 and 7 are purely criminal and are omitted.

**Art. 7314e. Tick eradication in certain counties; election to determine, etc.**—It shall be the duty of the commissioners court of any county lying and being situated south or east of the federal quarantine line to

order an election in said county when petitioned to do so by seventy-five resident land owners of the county for the purpose of determining whether the county shall take up the work of tick eradication in said county. Said election to be ordered not less than thirty days nor more than sixty days after the filing of said petition. At said election the ballots shall have printed upon them, "For Tick Eradication in \_\_\_\_\_ County," and "Against Tick Eradication in \_\_\_\_\_ County." The officers of said election shall hold said election and make returns thereof as provided by law, in case of other elections as nearly as may be. Said returns shall be made returnable to the county judge of the county. The commissioner's court shall meet and canvass said returns as soon as practicable after such election and if they shall find that a majority of all the votes were in favor of tick eradication under the direction of the live stock sanitary commission, they shall so certify and cause publication of same to be made in a newspaper published in said county. The county judge shall so notify the live stock sanitary commission and upon receipt of such notice from the county judge of the county so holding such election, the live stock sanitary commission shall cause to be issued a supplement proclamation signed by the governor proclaiming a quarantine around said county, and the citizens of said county, in co-operation with, and under the direction of, the live stock sanitary commission, shall begin the work of tick eradication within thirty days of the issuance of the said supplemental proclamation. Should the commissioner's court find that a majority of the votes cast were against tick eradication, then the county judge shall so notify the live stock sanitary commission and on and after such notice by the county judge of the county holding such election the live stock sanitary commission shall be denied the right to take up the work of tick eradication in said county, and the provisions of this Act with reference to tick eradication and the establishment of special quarantines in reference thereto shall not be in effect in said county. [Id. sec. 8.]

**Art. 7315. [5043d] When the governor shall proclaim quarantine.**—When the commission shall have determined the quarantine lines and other regulations necessary to prevent the spread among domestic animals of Texas of any malignant, contagious, or infectious disease found to exist among the live stock of this state, or elsewhere, and given their orders as hereinbefore provided, prescribing quarantine and other regulations, they shall notify the governor of the state of Texas, who shall issue his proclamation, proclaiming the boundary of such quarantine around such diseased stock, and the orders, rules, and regulations prescribed by the commission; and such commission shall give such notice as may to them seem best to make the quarantine established by them effective. [Acts 1893, p. 70.]

**Art. 7316. [5043e] Commission to purchase supplies, etc.**—The commission provided for in this chapter shall have power to purchase such supplies and material as may be necessary to carry into full effect all orders by them given, as hereinbefore provided; which said supplies and material and wages, and expenses of the veterinarian hereinafter provided for, shall be paid out of the moneys hereinafter appropriated, on the warrant of the comptroller, issued to said commissioners, upon their filing with the comptroller an itemized account thereof, properly verified by affidavit; provided, that no material or supplies may be purchased by the commissioners, except such as may be necessary to carry into effect the quarantine and other regulations prescribed by them. And such commissioners shall have the power to employ a competent veterinarian to assist them in the investigation of the diseases amongst the live stock of this state, whenever they may deem the services of one necessary; provided, that the compensation of such

veterinarian shall not exceed the sum of ten dollars per day and actual expenses while so employed; and provided, further, that the expenditures for the compensation of veterinarians shall not exceed nine hundred dollars in any one year. [Id.]

**Art. 7317. [5043f] Railways to keep clean transporting cars.**—It shall be the duty of the railway corporations doing business in the state to cleanse and disinfect the cars used by them in transporting live stock in or through this state, at such times and places as the commissioners may designate, whenever, in the opinion of the commissioners, any such order may be necessary to prevent the spread of infectious or contagious disease; and such corporations violating the provisions of this article shall be liable to a penalty of five hundred dollars for each offense, to be recovered in a civil action, to be prosecuted under the direction of the attorney general in the name of the state of Texas. [Id.]

**Art. 7318. [5043g] Knowledge or suspicion of infection to be reported.**—It shall be the duty of any owner or person in charge of any domestic animal or animals, who discovers, suspects or has reason to believe that any of his domestic animals, or domestic animals in his charge, are affected with any contagious or infectious disease, to immediately report such fact, belief or suspicion to the commission and to the sheriff and county clerk of the county in which said domestic animals are found.

**Art. 7319. [5043h] Compensation of commissioners.**—The commissioners appointed by the governor, as hereinbefore provided, shall receive five dollars per day for the time by them necessarily employed in the discharge of the duties required by this chapter; and said commissioners, hereinbefore provided for, shall receive in addition thereto the actual and necessary traveling expenses incurred by them and paid in the discharge of the duties required of them by the provisions of this chapter; which said per diem and expenses shall be drawn from the treasury on the warrant of the comptroller, to be issued to said commissioners on their filing with the comptroller an itemized account thereof, properly verified by affidavit.

**Art. 7320. [5043i] Sheriffs and constables subject to orders of commissioners.**—The live stock sanitary commission shall have power to call upon any sheriff, deputy sheriff, or constable to execute their orders, and such officers shall obey the orders of said commissioners; and the officer or officers performing these duties shall each be entitled to two dollars and fifty cents per day for himself and horse, which payment shall be made upon a sworn account, approved by said commissioners; provided, said expenses under this article shall not exceed in any event five hundred dollars per annum. [Id.]

**Art. 7321. [5043j] Appropriation for purposes of this chapter.**—The sum of twenty thousand dollars, or so much thereof as may be necessary, is hereby appropriated, out of the general revenue fund not otherwise appropriated, for the purpose of carrying into effect the provisions of this chapter; provided, that the exhaustion of the appropriation herein made shall terminate the liability of the state for the two years next following, and absolve it from any future claims of any and all persons who may have claims, real or pretended, under the provisions of this chapter. [Id.]

**Art. 7322.**—Repealed. Acts 1913, p. 353, sec. 9. See note under Art. 7314.

**In general.**—The power of the sanitary commission in regard to prescribing quarantine lines is limited by the provisions of this article. Beyond this they have no power to prescribe quarantine lines, and any attempt on their part to do so is ineffective. Trent v. State (Cr. App.) 75 S. W. 857.

The action of the live stock sanitary commission in establishing a quarantine line, independent of the federal quarantine line, was ultra vires and void, under Art. 7322. Id.

**Effect as to railroad commission.**—This article takes away the discretion of the railway commission to establish a quarantine line against Texas or splenic fever, as given in Art. 7314, and compels it to adopt the line established by the United States department of agriculture. *Ft. Worth & D. C. Ry. Co. v. Masterson*, 95 T. 262, 66 S. W. 835.

**Art. 7323. [5043/] Concurrence of two commissioners, etc.**—No quarantine line shall be established at any time, nor regulations made in relation thereto, unless two of the live stock sanitary commissioners agree thereto.

**Art. 7324. [5043m] Cumulative law.**—This chapter does not repeal any law in force for the protection of domestic animals, but is cumulative thereto.

## CHAPTER NINE

### VETERINARY MEDICINE AND SURGERY

Art.	Art.
7324a. Practitioners must comply, etc.	7324g. Fees.
7324b. State board of veterinary medical examiners.	7324h. License to be recorded, etc.
7324c. Officers; rules and regulations; quorum.	7324i. Duties of district clerk, etc.
7324d. Meetings, examinations; certificates of license and temporary license.	7324j. Compensation of members of board.
7324e. Application for license; preliminary requirements; subjects of examination; practice without license, when.	7324k. Revocation of license.
7324f. Records.	7324l. Practicing defined; not applicable to whom.
	7324m. Reciprocal arrangements with other states.
	7324n. Power of grand jury, etc.
	7324o. Penalty for issue of license in certain cases.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 7324a. Practitioners must comply, etc.**—That no person shall practice veterinary medicine or veterinary surgery in any of their departments, including veterinary dentistry, within this state, unless and until such persons shall have complied in all respects with the provisions of this Act. [Acts 1911, p. 132, sec. 1.]

**Constitutionality of act.**—The regulation of the practice of veterinary medicine, surgery, and dentistry is within the police powers of the state. *Pistole v. State* (Cr. App.) 150 S. W. 618.

This act, being a police regulation and not a tax measure, is not violative of Const. art. 8, §§ 1, 2, requiring taxation to be equal and uniform. *Id.*

This act is not violative of Const. U. S. art. 4, § 2, providing that the citizens of each state shall be entitled to the privileges and immunities of citizens of the several states, nor of the due process and equal protection provisions of the fourteenth amendment, despite the provisions of Arts. 7324g, 7324h, 7324i, and 7324m. *Id.*

Arts. 7324a–7324e are not violative of Const. art. 1, §§ 3, 17, 19, providing that all men shall have equal rights, that private property shall not be taken for public use without adequate compensation, and that no citizen of the state shall be deprived of property, privileges, or immunities, except by due process of law. *Id.*

The title of this act: "An act to regulate the practice of veterinary medicine, surgery and dentistry; creating a board for the examination of applicants for the practice of veterinary medicine, surgery and dentistry; prescribing their powers, duties and qualifications; said board to be known as the 'State Board of Veterinary Examiners;' prescribing penalties for a violation of the provisions of this act, and declaring an emergency"—is not open to the objection that it is too general, and does not embrace the provisions of the act. *Id.*

**Art. 7324b. State board of veterinary medical examiners.**—That there shall be a board to be known as the "State Board of Veterinary Medical Examiners," said board to consist of seven qualified veterinaries, who shall be graduates of legally organized and recognized veterinary colleges, of good standing in their profession, and who have had not less than two years' actual practice of veterinary medicine or veterinary surgery in the state of Texas. It shall be the duty of this board to examine into the qualifications of all applicants for certificates of license to practice veterinary medicine or veterinary surgery in this state. The members of said board shall be appointed by the governor within sixty days after the passage of this Act, from a list of eligible practitioners furnished by the state veterinary medical association, no two members of

which shall be graduates of the same college, and shall hold office for a term of two years; but all vacancies by death, resignation or removal shall be filled by the governor for the unexpired term. [Id. sec. 2.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Number and qualifications of members of board.**—In the trial of one for violating this act by practicing without a license, it was no defense that the board of examiners consisted of only five members, and that three of the five were graduates of the same school; the presumption being, that the governor has not violated his sworn duty, such board being at least a de facto board and the section of the statute requiring that no two members of the board shall be graduates of the same college would not disqualify the board, though more than two of them were graduates of a particular college, where the members so graduating were also graduates of other and diverse colleges. *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324c. Officers; rules and regulations; quorum.**—The members of said board shall meet in Austin, Texas, and organize within thirty days after date of appointment by electing from their own number a president and secretary-treasurer. Said board is authorized to adopt such rules and regulations as may be necessary and proper for the efficient operation of the board, to have a seal and power to administer oaths and to take testimony. Four members shall constitute a quorum for the transaction of business or examination of applicants, and a majority of those present shall be necessary to reject an application. [Id. sec. 3.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324d. Meetings; examinations; certificates of license and temporary license.**—That the regular meetings of the board shall be held during the third week in June of each year for the transaction of business, and the examination of applicants at such places as may be determined by the board, but other meetings may be held as necessary upon the call of the president and secretary. Due notice of all examinations shall be made public a sufficient time before they are held. All examinations shall be held under uniform rules and regulations to be adopted by the board. All examination papers shall be examined, graded and passed upon as soon as practicable, and if the applicant is thereupon found worthy and competent by the board, it shall issue to him a certificate of license to practice veterinary medicine, surgery and dentistry in this state. Provided, however, that in order to prevent any inconvenience, the secretary of the board may grant a certificate of temporary license to any applicant whose application is accompanied by the application fee hereinafter prescribed. Said applicant shall be permanently located at some designated place in this state, and must present satisfactory evidence that he possesses the necessary qualifications. Said temporary license shall entitle the holder thereof to practice until the next examination following the issue. [Id. sec. 4.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324e. Application for license; preliminary requirements; subjects of examination; practice without license, when.**—That any person desiring to practice veterinary surgery in this state shall make application for license to said state board of veterinary medical examiners upon blanks furnished by said board for such purpose. Said application shall be accompanied by the fee hereinafter prescribed and by satisfactory proof that the applicant is of good standing and character. His diploma shall be submitted for inspection by the board. When these preliminary requirements are satisfied, the applicant shall present himself before the board for examination upon the following subjects: Veterinary anatomy, veterinary pathology, chemistry, veterinary surgery, veterinary obstetrics, veterinary materia medica, veterinary sanitary science and police and veterinary practice. Provided, that until January first, 1912, persons who have been engaged in the practice of veterinary surgery or any of the branches thereof, including veterinary dentistry, in the state of Texas, as their principal occupation for at least one year immediately



prior to the passage and approval of this Act, and are of good moral character, shall be entitled to a certificate of license on application to the board, presentation of satisfactory evidence and payment of the regular application fee hereinafter prescribed. Such license to expire at the end of one year from date of issuing. Provided that nothing in this Act shall prohibit any person who has practiced veterinary surgery for five years prior to the enactment of this law from practicing in their county or residence only, without license by making affidavit before the district clerk of his county that he has practiced veterinary surgery for five years, but if such person shall move from such county of residence he shall comply with all the requirements of this Act before he shall be allowed to practice. [Id. sec. 5.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324f. Records.**—That the board of veterinary medical examiners shall keep a record of their proceedings in a book provided for that purpose, which book shall be kept open for inspection, and shall record the name of each applicant, his age, the school from which he graduated, with the date and the degree conferred, the time granting a certificate of license, the names of the members of the board present; and where a certificate of license is refused to any applicant under authority of this Act, the fact and ground of such refusal shall be entered upon the minutes of the board, and shall be communicated in writing to such applicant. [Id. sec. 6.]

**Art. 7324g. Fees.**—That every person applying to said board for a license to practice shall accompany such application with a fee of five dollars, which fee shall in no case be refunded; provided, the payment of a license fee of five dollars shall not be required of those who have practiced veterinary surgery in Texas for as much as one year before this Act shall become operative. All fees shall be held in the custody of the secretary-treasurer who shall give bond in the sum of two thousand dollars for their safe keeping. [Id. sec. 7.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324h. License to be recorded, etc.**—That any person receiving a certificate of license from the board of veterinary medical examiners shall forthwith have it recorded in the office of the district clerk of the county in which he makes his residence, and shall display it in his regular place of business. The date of recording shall be recorded thereon, and said license, when so recorded, shall not be collaterally questioned, except as hereinafter provided. Until the license is recorded the holder shall not exercise any of the rights or privileges therein conferred; and in case said license is not recorded within three months from its date of issue it shall become invalid. The district clerk shall be paid his fee for recording such certificate by holder thereof. Any registered veterinarian removing his residence from one county in this state into another county in order to practice shall in like manner record his certificate of license in the county to which he removes. Practitioners who have registered in the county in which they reside may go from one county to another on professional business without being required to register. [Id. sec. 8.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324i. Duties of district clerk, etc.**—That the district clerk of each county shall keep a complete list of the certificates of licenses recorded by him, together with the date of each and the date of recording. He shall further record the name of the veterinary college which conferred the diploma on which the certificate is based, and the date when conferred; and the district clerk shall hereafter, beginning on the first Monday in June, 1911, and annually thereafter, report to the secretary of the board a list of such registers, for which service the

district clerk shall be paid out of the funds of the board twenty-five cents for each name so reported. The register of the district clerk of each county shall be open to inspection during business hours. [Id. sec. 9.]

**Art. 7324j. Compensation of members of board.**—That the members of said board shall receive as compensation for their service ten dollars per day while in the actual service of the board; and also their actual hotel and traveling expenses of each meeting of the board shall be paid out of any moneys in the treasury of the board upon the certificate of the president and secretary-treasurer. It shall not be lawful for the board, or any member thereof, in any manner whatever or for any purpose to charge or obligate the state for the payment of any money, and said board shall look alone to the revenue derived from the operation of this Act for the compensation prescribed. If said revenue is not sufficient to pay each member in full, together with the necessary expenses of the board, then the amount available shall be prorated among the members. [Id. sec. 10.]

**Art. 7324k. Revocation of license.**—That the board shall have the right and power to revoke any license upon evidence that it was secured by fraud or that the holder of the license has been guilty of unprofessional or dishonorable conduct. [Id. sec. 11.]

**Note.**—Section 12 makes it a misdemeanor to practice without a license, and is omitted.

**Constitutionality.**—See notes under Art. 7324a.

**Art. 7324l. Practicing defined; not applicable to whom.**—That any person shall be regarded as practicing veterinary medicine, surgery or dentistry within the meaning of this Act who professes publicly to be a veterinary surgeon or dentist, or who appends to his name any initials or title implying qualifications to practice or who shall treat, operate on or prescribe for any physical ailment in or any physical injury to or deformity of any domestic animal for which he shall receive compensation, either directly or indirectly. Nothing in this Act shall be construed to interfere with or punish veterinarians in the United States army or in the United States bureau of animal industry, while so commissioned, or any lawfully qualified veterinarians residing in other states or countries meeting registered veterinaries of this state on consultation, or any veterinarian residing on the border of a neighboring state and duly authorized under the laws thereof to practice extends [extending] into the limits of this state; provided, that such practitioner shall not open any office or appoint a place to meet patients within the limits of Texas. Nothing in this Act shall apply to persons gratuitously treating animals. It is further provided that the operations known as “dehorning,” “castrating,” and “spaying” shall not be regarded as the practice of veterinary surgery, nor the vaccination of cattle for blackleg as the practice of veterinary medicine, and nothing in this Act shall be construed to prohibit any one whomsoever from performing any of these operations on any wild or domestic animal. [Id. sec. 13.]

See *Pistole v. State* (Cr. App.) 150 S. W. 618.

**Art. 7324m. Reciprocal arrangements with other states.**—That the board of veterinary medical examiners shall be empowered to make reciprocal arrangements with similar boards of other states whereby due credit for state and territorial license will be allowed in the state of Texas, and vice versa. But no such arrangements shall be made with any state where a satisfactory standard of requirements is maintained. [Id. sec. 14.]

**Art. 7324n. Power of grand jury, etc.**—That the grand jury of each county in this State is hereby given inquisitorial power over all offenses against or violations of this Act, and the judges of the state district courts shall give the same in their charges to the grand juries, and it

shall be the duty of the board of veterinary medical examiners or any member thereof, to report any violation of this Act to the proper authority. [Id. sec. 15.]

**Art. 7324o. Penalty for issue of license in certain cases.**—That it shall be a misdemeanor and shall disqualify from office for the board of medical examiners to issue a certificate of license to any person, only as set forth and prescribed from office; the governor shall appoint a new board in full, as provided in this Act. [Id. sec. 16.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Liability of carrier.**—Where cattle were shipped from a point quarantined against, held the duty of the carrier to use ordinary care to prevent the cattle from escaping from its pens. *Reynolds v. Galveston, H. & S. A. Ry. Co.* (Civ. App.) 99 S. W. 569.

In an action against a carrier for alleged negligence in allowing diseased cattle to escape from its pens into plaintiff's pasture, evidence held insufficient to warrant a finding of negligence. *Id.*

**Sale of impure animal food.**—The measure of damages for selling unsound feed for cattle, whereby they were made sick, held to be their diminished market value at the time and place they were injured. *Houston Cotton Oil Co. v. Trammell* (Civ. App.) 72 S. W. 244.

In an action for the death of stock caused by unwholesome bran sold plaintiff by defendant, proof respecting an implied warranty held to make out a case for plaintiff. *Houk v. Berg* (Civ. App.) 105 S. W. 1176.

**Covenant in lease.**—The clause not to overstock the pasture, made in an agreement by the landlord in taking cattle to pasture, is a continuing covenant. That the owner of the stock inspected the pasture before the contract does not relieve the owner from his covenant, and the consequent damages for so doing. *McAuley v. Harris*, 71 T. 632, 9 S. W. 679.

## TITLE 125

## SUPPLIES FOR PUBLIC INSTITUTIONS

[See Acts 1909, p. 275, providing for supplying electric lights, etc., to public institutions at the capital.]

Chap.

1. State Purchasing Agent for Eleemosynary Institutions.

Chap.

2. Of the Mode of Supplying Fuel to the Executive and Other Departments.

## CHAPTER ONE

## STATE PURCHASING AGENT FOR ELEEMOSYNARY INSTITUTIONS

Art.		Art.	
7325.	State purchasing agent; appointment; forbidden to receive rebates, etc.	7331.	Invoices, payment of.
7326.	Oath; bond; forbidden to be concerned in sale of merchandise, etc., to state.	7332.	Successful bidder must give bond.
7327.	Storekeepers; appointment; bond; duties.	7333.	Emergency purchases.
7328.	Manner of contracting for supplies.	7334.	Purchases must be according to appropriations.
7329.	Bids, submission of.	7335.	Purchase of perishables.
7330.	Bids, opening and acceptance of.	7336.	Purchasing agent's clerk.
		7337.	Institutions contemplated by this chapter.
		7338.	Payment only on affidavit.

**Article 7325. State purchasing agent; appointment; forbidden to receive rebates, etc.**—The state purchasing agent shall be appointed by the governor, by and with the advice and consent of the senate, every two years, and shall hold his office for the term of two years from the date of his qualification, and until his successor is appointed and qualified. Said purchasing agent shall receive an annual salary of two thousand dollars, which shall not be increased or diminished during his term of office, and he shall not receive, directly or indirectly, any extra compensation in the way of commissions or otherwise. Said agent shall not be interested in or in any manner connected with, any contract or bid for furnishing supplies or articles of any kind to any of said institutions, or to any other department or institution of the state, or with any person, firm or corporation who is interested in, or in any manner connected with, any kind of contract with the state or any of its institutions and departments, nor shall he collect or be paid his salary, or any part thereof, while he is in any manner or degree indebted to the state, or in arrears in his accounts and reports as such agent. Neither shall said agent accept or receive from any person, firm or corporation to whom any contract may be awarded, directly or indirectly, by rebate, gift or otherwise, any money or other thing of value whatever, nor shall he receive any promise, obligation or contract for future reward or compensation from any such party. [Acts 1899, p. 138, sec. 1.]

**Art. 7326. Oath; bond; forbidden to be concerned in sale of merchandise, etc., to state.**—Upon being appointed and confirmed as aforesaid, said agent shall take the constitutional oath of office, and enter into a bond, with two or more good and sufficient sureties, payable to the state of Texas, in the sum of fifty thousand dollars, to be approved by the governor of the state, and conditioned for the faithful performance of his duties, and that he will correctly and honestly pass upon and award all bids and contracts for supplies, and will fully and accurately account to and pay over to the state, or to the persons authorized to receive the same, all moneys, merchandise and articles of value that shall come into and pass through his hands as such agent, or for which he may be responsible; and also conditioned that he will

honestly, faithfully and accurately disburse and account for all moneys controlled or handled by him in the performance of his duties. It is unlawful and within the conditions of said bond for said agent to sell or be in any manner concerned in the sale of any merchandise, supplies or other articles to any of the institutions herein named, or to any other department or institution of the state. It shall also be within the conditions of said bond and the same shall provide that said purchasing agent shall not accept or receive, directly or indirectly, by rebate, commissions or in any other manner whatever any money or other thing of value from any person, firm or corporation to whom said agent may award any contract, directly or indirectly. The said bond shall be filed in the office of the comptroller, and recoveries may be had on the same until exhausted. [Id. sec. 2.]

**Art. 7327. Storekeepers; appointment; bond; duty.**—There shall be appointed by the superintendents, with the advice and consent of the boards of managers, of said institutions, storekeepers and accountants, one for each of said institutions, who shall hold their offices for two years from date of qualification, or until their successors shall have qualified, unless sooner removed by the boards of managers at the suggestion of the superintendent, or upon the complaint of the purchasing agent, for inefficiency, incompetency, neglect of duty or other adequate cause affecting their faithful and satisfactory performance of duty. Said storekeepers or accountants shall receive a compensation not to exceed the sum of nine hundred dollars per annum, to be charged and paid as part of the current expenses of said institutions; and they shall not be entitled to charge, collect or receive any other compensation or commutation or commission, unless their own individual board and lodging, if they shall be required to reside within the institutions to which they are attached. Each of said storekeepers or accountants shall, before entering upon the performance of his duties, make and file with the comptroller of public accounts a bond in the sum of ten thousand dollars, payable to the state of Texas, to be approved by the governor and filed with the comptroller, which bond shall be conditioned for the full, faithful, accurate and honest performance of his duties; and it shall not be lawful for said storekeepers or accountants to sell or be in any way concerned in the sale of any merchandise, supplies or other articles to any of the institutions herein named, or to have any interest in any bid or contract therewith, or with any other institution or department of the state government. The offices or positions of steward, quartermaster or other similar position heretofore existing in any and all of said named institutions are abolished, and said storekeepers or accountants shall hereafter perform all the duties, except such as may be inconsistent with the provisions of this chapter heretofore imposed upon such abolished officers or employes, as well as such other duties as may be required of them by the management of said institutions. They shall also keep the purchasing agent constantly advised as to the amount and character of supplies on hand, and the amount and character required in order to keep the institutions constantly provided for. They shall also furnish any other information respecting such matters as may be desired by the said purchasing agent. [Id. sec. 3.]

**Art. 7328. Manner of contracting for supplies.**—It shall be the duty of the purchasing agent aforesaid to contract for all supplies, merchandise and articles of every description needed for the maintenance and operation of said institutions, except those supplies that are of a strictly perishable character, basing his contract or contracts upon estimates to be furnished him by the superintendents and approved by the boards of said institutions respectively, by the first day of May of each year, for an entire year; and all such contracts shall be made after full notice by advertisement of not less than four weeks in at

least four of the leading papers of the state, to be selected by said agent and within the limit of appropriations made by the legislature for such purposes, regard being had to the appropriation for each institution. Such advertisement shall call for sealed bids or proposals to furnish the aggregate of the desired articles and supplies as estimated for by such institutions, naming the articles and supplies and the quantities and character required; and all such bids or proposals shall be for the entire period of one year; such supplies, articles and merchandise to be delivered at such times, in such quantities, and to such institutions as said agent may from time to time designate; and, should the supplies, or any portion thereof, as contracted for, be not sufficient for the year for which the contract or contracts shall be made, then the contractor or contractors shall be required to furnish such additional supplies at the prices named for similar articles under the contract or contracts; provided, that should said purchasing agent at any time discover that he could purchase the same supplies for less money for any one year by buying the same for a less length of time than one year, he shall have the authority to make such purchases for a shorter length of time, but not less than three months. It being the purpose of this chapter to authorize and require said purchasing agent to make such contracts upon such terms as will secure the best and cheapest rates for the state in the purchase of supplies and articles of necessity for said institutions, and to that end he shall reserve the right to reject any and all bids, or to accept any bid in part or reject it in part; and if none of the bids and proposals are deemed advantageous and satisfactory, he may buy in the open market until a proper and satisfactory bid is offered. The period for which such bids or proposals are invited shall be clearly stated in said advertisements, as well as the terms and conditions contemplated by the provisions of this chapter. When the same article is estimated for by two or more institutions, but of different brands or grades, the purchasing agent may determine which of the brands or grades shall be purchased, so as to produce uniformity in use by all the institutions; provided, that other things being equal, supplies offered by bidders who have an established local business in this state shall have preference. [Id. sec. 4.]

**Art. 7329. Bids, submission of.**—Any and all bids or proposals under this chapter shall be accompanied by a good and sufficient bond or a certified check, in such sum as the said purchasing agent may require, the same to be stated in the advertisements aforesaid; and the said agent may, if he deems it advisable, advertise for the various articles and supplies needed separately or together, and may accept the bid or bids for the same to be furnished separately or all by one bidder, as may be most advantageous to the state, and when purchases are made by the state purchasing agent, preference shall be given to state or home products, all things being equal. [Id. sec. 5.]

**Art. 7330. Bids, opening and acceptance of.**—All bids shall be opened on the date and at the place specified in the advertisement for the same, and such opening and inspection of the bids shall be made by the purchasing agent in the presence of the governor and comptroller of public accounts and of the superintendent and board of managers, if they desire to be present. The supplies and articles furnished under all bids and contracts shall be such as are called for by requisitions of the superintendents of the several institutions named, and equal to and of the same quality as the sample furnished purchasing agent; and all supplies furnished by contract as provided herein shall be equal to the sample which is required by article 7328 to accompany the bid. And when the supplies delivered under contract do not come up to the sample, the superintendent shall refuse to accept the same. The estimates furnished said purchasing agent as aforesaid, upon which he

makes his advertisements and contracts, shall, as near as practicable, state the quantity and quality of the articles and supplies needed, and when possible, the brand of the same, and copies of such estimates shall be filed with the comptroller and be open to public inspection. [Id. sec. 6.]

**Art. 7331. Invoices, payment of.**—Invoices of all supplies of whatever kind shall be furnished in triplicate by the contractor or seller at the time of each delivery of said supplies, two of which shall be transmitted to the storekeeper of the institution to which supplies are sent, and one by the same mail to the purchasing agent. As soon as the supplies shall have been received and examined by the storekeeper of the institution to which the same shall have been shipped, and if he shall find them to correspond in every particular with the invoices transmitted him and the samples by which the supplies were sold, he shall transmit to the purchasing agent one of said invoices with a certificate thereon that the supplies received correspond in every particular with the invoice and the sample by which the supplies were sold; and if the purchasing agent shall, upon further examination, find such invoice to be correct, he shall transmit it with his approval to the comptroller; and when such invoice so approved by the storekeeper of the institution to which the supplies named therein have been furnished, and by the purchasing agent, shall have been further approved by the comptroller, he shall draw his warrant for the amount due on the invoice, or upon so much thereof as has been allowed, upon the state treasury, and it shall be charged against the institution so furnished. And the contractor or seller, to the invoice to be transmitted by him to the storekeeper, thence to the purchasing agent, and thence to the comptroller, shall append an affidavit made and subscribed to by him before any officer having a seal and authorized to administer oaths, that the invoice is correct, and that it corresponds in every particular to the supplies furnished and shipped. [Id. sec. 7.]

**Art. 7332. Successful bidder must give bond.**—When any bid shall have been accepted, the purchasing agent shall require of the successful bidder a bond payable unto the state, with good and sufficient sureties, in the sum not less than one-third of the amount of the bid, to be approved by the comptroller, conditioned that he will fully, faithfully and accurately execute the terms of the contract into which he has entered, said bond to be filed in the office of the comptroller, and recoveries may be had on such bond until exhausted. [Id. sec. 8.]

**Art. 7333. Emergency purchases.**—In case any temporary and unforeseen exigency should arise in any of the institutions named, and it shall be made to appear upon the written statement of the superintendent to the board of managers of such institution that a serious detriment will be caused to the service if the method of purchase, as hereinbefore defined, shall be pursued, then such board, if upon examination it shall deem an immediate purchase necessary, may by appropriate order, to be approved by the governor and duly entered upon its minutes, authorize the purchase of such supplies as may be needed to meet such temporary and unforeseen exigency, and which are not embraced in any existing contract; and the superintendent may thereupon direct the storekeeper to purchase the same in open market. A report of such purchase, together with a copy of the application of the superintendent, and the order of the board, shall be transmitted to the purchasing agent, and he shall transmit the same, with his endorsement thereon, to the comptroller, and upon it the comptroller shall issue his warrant upon the treasury of the state for the amount so expended. The provisions of this article shall only apply to articles and supplies that are not of a strictly perishable character. [Id. sec. 9.]

**Art. 7334. Purchases must accord with appropriations.**—All purchases by contract or otherwise, as herein authorized, shall be in accordance with such appropriations as have been made by the legislature for the support of the several institutions respectively. [Id. sec. 10.]

**Art. 7335. Purchase of perishables.**—The governor, comptroller, and purchasing agent shall frame and transmit to each institution a system of rules and regulations for the purchase of such supplies as are strictly perishable in their character, and to which conformity by all the institutions is hereby required. [Id. sec. 11.]

**Art. 7336. Purchasing agent's clerk.**—The purchasing agent shall have authority to appoint one clerk to assist him in his duties, with a salary not to exceed one thousand dollars per annum, and shall make an annual report to the governor at the end of each fiscal year covering all his acts and doings; and such report shall be laid before the legislature at its next session thereafter. [Id. sec. 12.]

**Art. 7337. Institutions contemplated by this chapter.**—The institutions herein contemplated are those for the care of the insane, the deaf and dumb, the blind, the orphans, the Confederate home, and all others of a charitable and eleemosynary character, to be hereafter established under state patronage and control. [Id. sec. 13.]

**Art. 7338. Payment only on affidavit.**—No account for goods, wares or merchandise purchased by any officers to whom this chapter refers shall be paid, unless sworn to as required by article 3712, which affidavit shall further state that no commission or other compensation has been or will be paid as a consideration for such purchase, and that affiant knows such facts. [Id. sec. 15.]

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## CHAPTER TWO

### OF THE MODE OF SUPPLYING FUEL TO THE EXECUTIVE AND OTHER DEPARTMENTS

Art.  
7339. Board of contractors.  
7340. Advertisement for proposals.  
7341. Proposals, how made.  
7342. Contract awarded to lowest bidder.  
7343. Bids to be guaranteed.

Art.  
7344. Contractor's bond.  
7345. Rescission of contract.  
7346. No officer to be interested in contract.  
7347. Rate for fuel.  
7348. Record of proceedings.

**Article 7339. [2929] Board of contractors; duration of contract.**—The attorney general, treasurer, and secretary of state are constituted a board of contractors, and required to contract with any suitable person or persons, firm or firms, who are residents of and doing business in this state, to furnish such fuel as may be required by law or needed by any department of the state government, except the judicial department; and said contracts shall be for the term of one year, and until a new contract shall be made and approved. [Act Aug. 21, 1876, p. 273, sec. 1. Const., art. 16, sec. 21.]

**Art. 7340. [2930] Advertisement for proposals.**—The secretary of state shall every year, and at such other times as are necessary, advertise for thirty days in one or more newspapers published in the city of Austin, and having the largest circulation, for sealed proposals for furnishing such fuel, and shall in said advertisement state a time and place when and where said proposals shall be received and opened and contract awarded, not exceeding forty days from the date of the first publication of said advertisement; and he shall in said advertisement give such specifications and estimates of the probable amount and quality of fuel that will be required as may be practicable. [Id. sec. 2.]



**Art. 7341. [2931] Proposals, how made.**—All proposals shall be sealed and addressed to the secretary of state, and shall be indorsed with the statement that they are proposals for fuel, and when received shall be filed carefully away by the secretary of state in his office, and the seals thereof shall not be broken until the day named in the advertisement for awarding the contract, and shall be opened in the presence of the contracting board and such bidders as may desire to be present. [Id. sec. 2.]

**Art. 7342. [2932] Contract awarded to lowest bidder.**—The bids shall be examined by the contracting board, a careful comparison made, and the contract awarded to the lowest and most responsible bidder, whose bid shall be below such maximum rates as are hereinafter prescribed. [Id.]

**Art. 7343. [2933] Bids to be guaranteed.**—Each bid shall be accompanied by a guarantee, signed by at least two responsible citizens, guaranteeing that if the contract be awarded to said bidder that he or they will enter into contract, and give a good and sufficient bond to carry out the same. [Id.]

**Art. 7344. [2934] Contractor's bond.**—The party to whom any contract is awarded shall immediately after such award enter into bond in such sum as may be prescribed by the board of contractors, payable to the state, and with good and sufficient sureties to be approved by the board, conditioned for the faithful performance of such contract; which bond shall be deposited in the office of the secretary of state.

**Art. 7345. [2935] Rescission of contract.**—At any time after a contract has been made and entered into with any person or firm, as herein provided, the legislature may annul said contract if not executed, and may alter or amend by enactment the maximum rates for such fuel. The board of contractors shall have power and is hereby required when the legislature is not in session to cancel the contract whenever the party or parties fail to comply with the contract as promptly as the exigencies of the public service demand; and it shall be their duty to let out a new contract in the manner herein provided. [Id. sec. 3.]

**Art. 7346. [2936] No officer to be interested in contracts.**—No member or officer of any department of the government shall be in any way interested in said contracts; and all such contracts shall be in writing and signed by the board of contractors, and approved in writing by the governor, secretary of state, and comptroller. [Id. p. 274, sec. 5.]

**Art. 7347. [2937] Rate for fuel.**—The rate paid for fuel in said contracts shall not exceed six dollars and ten cents per cord for dry cedar, and five dollars and ten cents per cord for dry oak and other kinds of wood, except cedar. [Id. sec. 6.]

**Art. 7348. [2938] Record of proceedings.**—The secretary of state shall keep a record of his proceedings and the proceedings of the board of contractors; and a majority of said board shall be competent to do business. [Id. sec. 4.]

## TITLE 126

## TAXATION

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| <p>Chap.<br/>1. Of the Levy of Taxes and Payment of Occupation Taxes.<br/>2. Taxes Based Upon Gross Receipts.<br/>3. Franchise Tax.<br/>4. State Intangible Tax Board.<br/>5. Tax on Liquor Dealers.<br/>6. Tax on Sale of Intoxicating Liquors in Local Option Territory.<br/>7. Tax on Dealers in Non-Intoxicating Malt Liquors.<br/>8. Tax on Persons Soliciting Orders or Operating Cold Storage for Intoxicating or Non-Intoxicating Beverages in Local Option Districts.<br/>9. Occupation Tax on Handling Liquors C. O. D.<br/>10. Inheritance Tax.</p> | <p>Chap.<br/>11. Of the Property Subject to Taxation, and the Mode of Rendering Same.<br/>12. Of the Assessment of Taxes; Election and Qualification of Assessor.<br/>13. Of the Collection of Taxes; Election and Qualification of Collector.<br/>14. Of the Assessment and Collection of Back Taxes on Unrendered Lands.<br/>15. Delinquent Taxes.<br/>16. Evidence of Title to Redeem Land.<br/>17. Assessment and Collection of Taxes in Certain Cases.<br/>18. Of Municipal Taxes to Pay Subsidies in Aid of Railroads and Other Internal Improvements.<br/>19. New Counties.</p> |
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## CHAPTER ONE

## OF THE LEVY OF TAXES AND PAYMENT OF OCCUPATION TAXES

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| <p>Art.<br/>7349. Board to calculate ad valorem tax.<br/>7350. Tax assessor to make certificate to comptroller.<br/>7351. Method of ascertaining tax rate.<br/>7352. Comptroller to certify rate to tax assessor.<br/>7353. Commissioners' court to calculate county rate, when.<br/>7354. Poll tax.<br/>7355. Occupation taxes.<br/>    Sec. 1. Itinerant merchants.<br/>    2. Traveling vendors of patent medicines.<br/>    3. Auctioneers.<br/>    4. Ship brokers and agents.<br/>    5. Persons selling on commission.<br/>    6. Itinerant physicians, etc.<br/>    7. Shooting gallery.<br/>    8. Billiard and pool tables.<br/>    9. Nine and ten pin alleys.<br/>    10. Hobby horses, etc.<br/>    11. Foot peddlers.<br/>    12. Clock peddlers.<br/>    13. Theaters.<br/>    14. Circus.<br/>    15. Menagerie, etc.<br/>    16. Acrobatic performances.<br/>    17. Sleight of hand performances.<br/>    18. Waxworks, etc.; benevolent associations exempt.<br/>    19. Concerts, etc., exemptions.<br/>    20. Insurance adjusters and general agents.<br/>    21. Lightning rod agents.<br/>    22. Cotton brokers and commission merchants.</p> | <p>Art.<br/>    Sec. 23. Pawnbrokers.<br/>    24. Sewing machine dealers.<br/>    25. Gas companies.<br/>    26. Electric light companies.<br/>    27. Waterworks companies.<br/>    28. Money lenders.<br/>    29. Credit associations.<br/>    30. Skating rinks.<br/>    31. Ball parks.<br/>    32. Ice dealers.<br/>    33. Race tracks.<br/>    34. Street car companies.<br/>    35. Phonographs, etc.<br/>    36. Moving picture shows.<br/>    37. Panorama or view shows.<br/>    38. Medicine shows, etc.<br/>    39. Brokers.<br/>    40. Cigarette dealers.<br/>7356. Tax on dealers in cannon crackers.<br/>7357. County ad valorem.<br/>7358. Taxes payable in money.<br/>7359. Collector to keep books.<br/>7360. Tax collector to be furnished books.<br/>7361. Tax to be paid before occupation begins.<br/>7362. Occupation tax receipts to be furnished collector.<br/>7363. Account of occupation tax receipts by collector.<br/>7364. License.<br/>7365. Purchaser of unexpired license may pursue occupation, when.<br/><br/>    REVENUE AGENT<br/>7366. Powers and duties of state revenue agent.<br/>7367. State revenue agent to have access to books, etc.<br/>7368. Compensation.</p> |
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**Article 7349. Board constituted.**—The governor, comptroller of public accounts, and treasurer of this state, are constituted a board to calculate the ad valorem tax to be levied and collected each year for state and public free school purposes. [Acts 1907, p. 464, sec. 1.]

**Taxes constituting school fund.**—See Title 48, Chapter 9.

**Art. 7350. Tax assessor to make certificate to comptroller.**—It shall be the duty of the tax assessor of each county in this state to make to the comptroller of public accounts, on or before the fifteenth day of July of each year a statement, showing as nearly as can be ascertained from his inventories or assessments, the total amount of property in each county subject to taxation; provided, that the tax for state and public free school purposes shall not be calculated and carried out upon said rolls. [Id. Amended Acts 1909, p. 371, sec. 2.]

**Art. 7351. Method of ascertaining tax rate.**—Within five days after the comptroller of public accounts has received such certified statements from every assessor within this state, said board shall meet for the purpose of calculating the ad valorem rate for taxes to be collected for the state and public free school purposes. In calculating said rates, the board shall calculate the same by the following rules and upon the following basis: They shall find, by adding together all the property subject to taxation in all the counties as shown by the certified statements returned by the assessors, the total valuation of all property within this state subject to ad valorem taxes. They shall find, by adding together the sums appropriated by the legislature, which will or which may become due by the state during the following fiscal year, the total sum which will or which may become due by the state, during the following fiscal year. They shall find, by adding all sums paid into the state treasury as taxes for state purposes from all sources other than as ad valorem taxes during the first half of the current calendar year and the latter half of the last preceding calendar year, the total sum paid into the state treasury from said sources during said time. They shall find, by subtracting from the total sum which will or which may become due by the state during the next succeeding fiscal year the total sum which was paid into the state treasury as taxes for state purposes during the first half of the current calendar year and the latter half of the last preceding calendar year, the total sum for state purposes which must be collected by ad valorem taxes. They shall add to such remainder twenty per cent of said remainder. They shall divide the total sum for state purposes which must be collected by ad valorem taxes added to twenty per cent of such total sum by the quotient of the total valuation of all property within this state divided by one hundred. The quotient shall be the number of cents on the one hundred dollars valuation to be collected for the current year for state purposes; provided, that said quotient shall not be run to more than three decimals; and provided, that the rate for state purposes shall never exceed the rate fixed by law on the one hundred dollars valuation of property. In calculating the rate to be collected for public free school purposes, the said board shall take into consideration the number of children in the state within the scholastic age to be determined from the most recent official school census; and shall fix a rate that will yield and produce for such fiscal year four dollars per capita for all the children within the scholastic age, as shown by said scholastic census; provided, the rate so fixed for any year shall never exceed the rate fixed by law. [Acts 1907, p. 464, sec. 3.]

**Duties of comptroller of public accounts.**—See Title 65, Chapter 2.

**Art. 7352. Comptroller to certify rate to tax assessor.**—It shall be the duty of the comptroller of public accounts to certify to the assessor of taxes of each county in this state, through registered letter, the rate of taxes for state purposes and for public free school purposes for the current year, and shall also publish immediately such rate for thirty days in some newspaper published in the state and having a general circulation therein; and as soon as such tax assessor has received notice of such rate he shall calculate the taxes due the state for state purposes, and also the taxes due for public free school purposes, on all taxable property within his county, as set out in article 7351, and shall carry the

same out upon the copies of the tax rolls of the county to be delivered to the tax collector and to the clerk of the county court and to be returned to the comptroller of public accounts, as provided by law. After he has so completed the said copies of the tax rolls, he shall return to the comptroller of public accounts a copy of same. [Id. sec. 4.]

**Art. 7353. Commissioners' court to calculate the county rate, when.**—The commissioners' courts of the several counties of this state, all the members thereof being present, at either a regular or special session, may at any time after the tax assessors of their respective counties have forwarded to the comptroller of public accounts the certificate required in article 7350 and prior to the time when the tax collector of such county shall have begun to make out his receipts, calculate the rate and adjust the taxes levied in their respective counties for general purposes to the taxable values shown by the assessment rolls. [Id. sec. 5.]

**Art. 7354. [5048] Poll tax.**—There shall be levied and collected from every male person between the ages of twenty-one and sixty years, resident within this state, on the first day of January of each year (Indians not taxed, and persons insane, blind, deaf and dumb or those who have lost one hand or foot, excepted) an annual poll tax of one dollar and fifty cents, one dollar for the benefit of free schools, and fifty cents for general revenue purposes; provided, that no county shall levy more than twenty-five cents poll tax for county purposes. [Acts 1882, p. 18.]

**Constitutionality.**—Under section 3, article 7, of the constitution a poll tax is levied on every male inhabitant between the ages of 21 and 60 years, and the exceptions of the persons and the classes of persons named in this article could be held to be invalid and unavailing, so that the law and tax could stand and the attempted exceptions fail. *Solon v. State*, 54 Cr. R. 261, 114 S. W. 359.

This article, not being violative of Const. art. 8, § 1, requiring taxation to be equal and uniform, the classification being uniform and resting on a substantial basis and reason, *Sp. Laws 1897*, p. 155, c. 110, § 15, amended by *Sp. Laws 1905*, p. 263, c. 30, § 15, providing that any person in the county subject to payment of a poll tax who shall fail to pay it before a certain time shall be subject to road duty for a period of three days during the year, etc., is not violative of the section of the constitution. *Bluitt v. State*, 56 Cr. R. 525, 121 S. W. 168.

**Construction of statute.**—The law exempting those from payment of a poll tax who have lost a hand or foot does not exempt one who has lost part of his fingers or whose foot is useless. *Bigham v. Clubb*, 42 C. A. 312, 95 S. W. 675.

**Place of payment of tax.**—See notes under Art. 7616.

**Property liable for delinquent tax.**—As to the liability of exempt property to seizure and sale for delinquent poll tax, see *Ring v. Williams*, 13 C. A. 609, 35 S. W. 733.

**Poll tax in cities.**—See Art. 928.

**Art. 7355. [5049] Occupation taxes.**—There shall be levied on and collected from every person, firm, company or association of persons pursuing any of the occupations named in the following numbered subdivisions of this article, an annual occupation tax, which shall be paid annually in advance, except where herein otherwise provided, on every such occupation or separate establishment, as follows:

**Section 1. Itinerant merchants.**—From every merchant who may remove from place to place and offer for sale "bankrupt stocks" of goods, or advertising "fire sales," or "water and fire damaged stocks for sale," for a limited period of time, there shall be collected one hundred dollars per month for the first month, or less than a month, for each and every place where such business is located; and for each additional month that such sales are continued, at any given place, said merchant shall pay an additional sum of twenty dollars; provided, that where they remain for six months in one place, in addition to the one hundred dollars charged for the first month, they shall pay an additional sum of ten dollars per month; and provided, further, that, if they remain in one place for the period of twelve months, they shall be required to pay, in addition to the one hundred dollars for the first month, the sum fixed in the preceding paragraph, according to class and amount of goods sold in one year.

**Sec. 2. Traveling vendors of patent medicines.**—From every traveling person selling patent or other medicines, one hundred dollars; and

no traveling person shall so sell until said tax is paid; provided, that this tax shall not apply to commercial travelers, drummers or salesmen making sales, or soliciting trade for merchants engaged in the sale of drugs or medicines by wholesale.

**Sec. 3. Auctioneers.**—From every auctioneer, an annual tax of ten dollars.

**Sec. 4. Ship brokers and agents.**—From every person, firm or association of persons following the occupation of ship brokers or ship agents, an annual tax of ten dollars.

**Sec. 5. Persons selling on commission.**—From every person, firm or association of persons selling on commission, ten dollars.

**Sec. 6. Itinerant physicians, etc.**—From every itinerant physician, surgeon, oculist or medical or other specialist of any kind, traveling from place to place in the practice of his profession, except dentists practicing from place to place in the county of their residence, an annual tax of fifty dollars.

**Sec. 7. Shooting gallery.**—From every person or firm keeping a shooting gallery at which a fee is paid or demanded, an annual tax of thirty dollars in each county.

**Sec. 8. Billiard and pool tables.**—From every billiard or pool table, or any thing of the kind used for profit, twenty dollars; and any such table used in connection with any drinking saloon or other place of business where intoxicating liquors, cigars or other things of value are sold or given away, or upon which any money or other thing of value is paid, shall be regarded as used for profit.

**Sec. 9. Nine and ten pin alleys.**—From every nine or ten pin alley, or any other alley used for profit, by whatever name called, constructed or operated upon the principle of a bowling alley, and upon which balls, rings or other devices are used as [or] substitutes thereof are rolled, without regard to the number of pins used, or whether pins are used or not, or whether the balls, rings or other device are rolled by hand or with a cue or any other device, one hundred dollars. Any such alley used in connection with any drinking saloon, or any drug store, or with any drug store where intoxicating liquors are sold or given away, or upon which money or anything of value is paid, shall be regarded as used for profit.

**Sec. 10. Hobby horses, etc.**—From all persons keeping or using for profit any hobby horse, flying-jenny, or device of that character, with or without name, fifteen dollars for each county wherein the same are kept or used.

**Sec. 11. Foot peddlers.**—From every foot peddler, five dollars in each county in which he peddles; from every peddler with one horse or one pair of oxen, the sum of seven dollars and fifty cents in the county in which he peddles; from every peddler with two horses or two pair oxen, ten dollars in each county in which said occupation is pursued; from every peddler with sail or other boat in streams along coasts or bays of this state, ten dollars in each county in which said occupation is pursued; provided, that nothing herein contained shall be so construed as to include traveling vendors of literature or traveling vendors of poultry, vegetables, fruits or other country produce exclusively, and fruit trees exclusively.

**Sec. 12. Clock peddlers.**—From every person or firm who peddles out clocks, agricultural implements, cooking stoves or ranges, wagons, buggies, carriages, surreys and other similar vehicles, washing machines and churns, an annual tax of two hundred and fifty dollars, to be paid in each county in which said occupation is pursued; provided, that a

merchant shall not be required to pay this special tax for selling the articles named in this chapter when sold in his place of business.

**Sec. 13. Theaters.**—From every theater or dramatic representation for which pay for admission is demanded or received in towns or cities of fifteen hundred inhabitants or less, one dollar; in towns and cities of fifteen hundred and not over three thousand, two dollars; in towns and cities of over three thousand and not less than five thousand, three dollars; in towns and cities over five thousand and not over ten thousand, four dollars, and in towns and cities of over ten thousand inhabitants, five dollars per day for every day they may perform; provided, that theatrical or dramatic representations given by performers for instruction only, or entirely for charitable purposes, shall not be herein included; provided, however, that this tax shall not be collected where the performances are exhibited in regularly recognized opera houses or theaters; but in lieu of said tax the managers of said opera houses or theaters shall pay an annual occupation tax of twenty-five dollars.

**Sec. 14. Circus.**—From every circus or wild west show wherein, among other acts, broncho-busting, rough-riding, equestrian or acrobatic feats are performed or exhibited for which pay for admission is demanded or received, for each day or part thereof on which performances or exhibitions are given, where an admission fee of 75 cents or over is charged, \$225; for each day or part thereof on which performances or exhibitions are given where an admission fee of any sum from 50 cents to 75 cents is charged, \$200; for each day or part thereof on which performances or exhibitions are given where an admission fee of 50 cents or less is charged, \$150; provided, that the amount of fee charged for reserved seats shall be considered as a part of such admission fee; provided that where there is a combination of circus and menageries, wild west and menagerie or circus or wild west and other exhibitions, the highest tax fixed by this act for any division or department of the combination shall be collected; provided, further, that every show or exhibition which advertises itself as a circus, wild west show or menagerie or a combination of any of them, shall be held and construed to be such for the purposes of the levy and collection of occupation taxes provided for herein. [Acts 1911, p. 142, sec. 1.]

Note.—Acts 1911, p. 142, amends subdivision 23, art. 5049, Rev. St. 1895, as amended by Acts 25th Legislature, Called Session, ch. 18, p. 49. The provision amended was incorporated in Rev. St. 1911 as subdivision 14, Art. 7355.

**Sec. 15. Menagerie, etc.**—From every menagerie, wax-works, side show or exhibition, whether connected with a circus or not, where a separate fee for admission is demanded or received, ten dollars for every performance or exhibition in which fees for admission are received.

**Sec. 16. Acrobatic performances.**—From every exhibition where acrobatic feats are performed and an admission fee charged for profit, not connected with the circus or theater, ten dollars for each performance.

**Sec. 17. Sleight of hand performances.**—From every sleight of hand performance or exhibition of legerdemain, not connected with a theater or circus, twenty-five dollars.

**Sec. 18. Wax-works, etc.; benevolent associations exempt.**—From every menagerie, wax-works or exhibition of any kind where a separate fee for admission is demanded or received, ten dollars for every day on which fees for such admission are received; provided, that exhibitions by associations organized for promotion of art, science, charity or benevolence, shall be exempt from taxation; and provided, further, that persons who form a museum composed entirely of the products of Texas shall have the right to exhibit the same for a fee without paying any occupation tax.

**Sec. 19. Concerts, etc.; exemptions.**—From every concert where a fee for admission is demanded or received, two dollars; provided, that entertainments when given by the citizens for charitable purposes, or for the support or aid of literary or cemetery associations are exempt.

**Sec. 20. Insurance adjusters and general agents.**—From each and every person acting as general adjuster of losses, or agents of fire and marine insurance companies, who may transact any business as such in this state, an annual occupation tax of fifty dollars. By “general agent,” as used in this law, is meant any person or firm, representative of any insurance company in this state, or who may exercise a general supervision over the business of such insurance company in this state, or over the local agency thereof in this state, or any subdivision thereof.

**Sec. 21. Lightning rod agents.**—From every person, firm or association of persons, dealing in lightning rods, an annual tax of thirty-six dollars to the state and eighteen dollars as county tax to the county in which such business is carried on; and upon every person canvassing for the sale of lightning rods, an annual tax of one hundred dollars to the state and fifty dollars as county tax, in each county in which such canvassing is done.

**Sec. 22. Cotton brokers and commission merchants.**—From every person, firm or association of persons following the occupation of cotton broker, cotton factor, or commission merchant, in a city of ten thousand inhabitants or over, thirty-five dollars; and in all cities and towns of less than ten thousand inhabitants, an annual tax of eighteen dollars; provided, that a merchant who pays an occupation tax under this law shall not be considered as a cotton broker. A “commission merchant,” in the meaning of this article, is every person, firm or association of persons, receiving country produce, horses, cattle, sheep, hogs, grain, corn, hay, lumber, shingles, wood, coal, goods, wares and merchandise, or anything else for sale, to be accounted for to the owner when sold, and charging a commission therefor.

**Sec. 23. Pawnbrokers.**—From every pawnbroker, an annual tax of one hundred and fifty dollars.

**Sec. 24. Sewing machine dealers.**—From every person, firm, agency, or association of persons dealing in sewing machines, an annual tax of fifteen dollars to the state and seven dollars as a county tax in every county where such business may be carried on; provided, that a merchant who pays an occupation tax, as required by this article, shall not be required to pay this special tax to sell sewing machines when sold in his place of business.

**Sec. 25. Gas companies.**—From each gas company, manufacturing gas in towns and cities of ten thousand or more inhabitants, thirty-five dollars; in a city or town of less than ten thousand inhabitants, twenty dollars.

**Sec. 26. Electric light companies.**—From each electric light company operating an electric light plant in a town or city of ten thousand inhabitants or more, thirty-five dollars; in a city or town of less than ten thousand inhabitants, twenty dollars.

**Sec. 27. Waterworks companies.**—From each waterworks company operating a waterworks plant in a town or city of ten thousand inhabitants or more, thirty-five dollars; in a city or town of less than ten thousand inhabitants, twenty dollars.

**Sec. 28. Money lenders.**—From every person, firm, or association of persons loaning money as agent or agents for any corporation, firm or association, either in this state or out of it, an annual occupation tax of one hundred and fifty dollars for the state, for the principal office, and a county tax of fifteen dollars from each agent for each county in which

he may do business, and no additional occupation tax shall be levied by any county, city or town in this state.

**Sec. 29. Credit associations.**—From each person, party, partnership or corporation engaged in the business of inquiring into and reporting upon the credit or standing of persons engaged in business in this state, or acting as agent or business manager in this state for any such person, party, partnership, joint stock association, or corporation, three hundred dollars; and provided, further, that no county, city or town shall levy or collect any occupation tax upon or from any such person, party, partnership, joint stock association, or corporation. The payment of this tax, evidenced by the receipt of the comptroller of public accounts, shall exempt the company or party paying the same from the payment of this tax in any other county; and payment of such tax shall not be required of any sub-agent or correspondent of the party or company carrying on such business in this state.

**Sec. 30. Skating rinks.**—From each and every owner or keeper of any skating rink used for profit, twenty-five dollars.

**Sec. 31. Ball parks.**—From every manager of a base ball park in a city or town containing five thousand or more inhabitants, where an admission fee is charged, twenty-five dollars.

**Sec. 32. Ice dealers.**—From each person or corporation, who are wholesale dealers, selling imported or home-made ice to the trade to be sold again, in cities and towns of twenty thousand inhabitants, or more, fifty dollars; in cities and towns of less than twenty thousand inhabitants, or more than ten thousand inhabitants, thirty dollars; in cities and towns of less than ten thousand inhabitants, and more than five thousand inhabitants, twenty dollars; in cities and towns of less than five thousand inhabitants, ten dollars.

**Sec. 33. Race tracks.**—From every owner or manager of every race track, one mile or more in length, used for profit, one hundred dollars; from each owner or manager of every race track, one-half mile or less in length, fifty dollars per annum; provided, this shall not apply to race tracks owned by private individuals and used only for training purposes, or in connection with agricultural fairs and expositions.

**Sec. 34. Street car companies.**—From every street car company in this state, two dollars per mile on each mile of track owned by said company or corporation.

**Sec. 35. Phonographs, etc.**—From each owner or manager of every phonographic, electric battery, graphophone or other like machines or instruments, where a fee is charged, an annual tax of twenty-five dollars; provided, that when an electric battery is used by a regularly authorized physician on a patient no tax shall be charged.

**Sec. 36. Moving picture shows.**—From each owner or keeper of every kinetoscope, cinetograph or similar machine or instrument used for profit, which shows the life-like motions of persons or animals, an annual occupation tax of twenty-five dollars.

**Sec. 37. Panorama or view shows.**—From each owner, manager or keeper of every panorama or view show, used for profit, exhibiting in a wagon, room, tent or elsewhere, an annual occupation tax of ten dollars and a county occupation tax of two dollars per annum. A panorama or view show, in the meaning of this act, is a show exhibiting pictures, statuary or other works of art which are to be viewed through stereoscopic or magnifying lenses.

**Sec. 38. Medicine shows, etc.**—From each owner, manager or keeper of every show or company of persons giving exhibitions of music, songs, recitations, sleight of hand, gymnastic, dancing or other kinds of performances in a tent, house or elsewhere, which said exhibitions are



used for profit by sale of medicines, electric belts or other articles of value, whether charge is made only for seats or not, an annual occupation tax of fifty dollars and a county occupation tax of two dollars and fifty cents for every such performance or exhibition; provided, this tax shall not be assessed when these performances are given inside the grounds of any state or county fair during the time that said state or county fair is giving its annual exhibition.

**Sec. 39. Brokers.**—From every person, firm or association of persons selling on commission, if in a city of more than ten thousand inhabitants, fifty dollars; if in a city or town of less than ten thousand inhabitants, twenty-five dollars. This article is intended to cover every person, firm or association of persons selling on samples only, and who do not carry any stock of merchandise or anything else on hand; provided, that this tax shall not apply to commercial travelers or salesmen making sales or soliciting trade from merchants.

**Sec. 40. Cigarette dealers.**—From all dealers in cigarettes in this state, the sum of ten dollars per annum, a cigarette being within the meaning of this act the same as defined by the laws of the United States government; provided, that this tax shall be in addition to the occupation tax levied on merchants, and any other tax levied under the law; and provided, further, that each dealer shall be required to procure an annual license from the county clerk of the county where he proposes to sell cigarettes, which shall be granted for no shorter or longer period than one year; and provided, further, that the license shall describe the house and locality where the dealer proposes to sell cigarettes. [Acts 1897, 1 S. S., p. 49.]

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|--------------------------------------------------------|------------------------------------------------------------------------|
| 1. Section 2.                                          | 19. — Licenses to physicians and surgeons.                             |
| 2. Section 8.                                          | 20. — License fee for embalmers.                                       |
| 3. Section 12.                                         | 21. — Hunting licenses.                                                |
| 4. Section 13.                                         | 22. — Licenses for plumbers.                                           |
| 5. Section 14.                                         | 23. — Licenses to make and sell scales and measures.                   |
| 6. Section 15.                                         | 24. — License for ferries.                                             |
| 7. Section 16.                                         | 25. Decisions under former acts—Attorneys.                             |
| 8. Section 21.                                         | 26. — Brokers and bankers.                                             |
| 9. Section 24.                                         | 27. — Insurance agents.                                                |
| 10. Section 32.                                        | 28. — Land agents—Nonpayment of tax as affecting right to commissions. |
| 11. Section 34.                                        | 29. — Merchants.                                                       |
| 12. Definitions—"Occupation."                          | 30. — Photograph gallery.                                              |
| 13. Occupation taxes, what are.                        | 31. — Recovery of tax on gross earnings.                               |
| 14. — Liability for other taxes.                       |                                                                        |
| 15. Validity of statute in general.                    |                                                                        |
| 16. Powers of cities.                                  |                                                                        |
| 17. Other taxes and licenses—Taxes on law proceedings. |                                                                        |
| 18. — Inspection tax on mill products.                 |                                                                        |

1. Section 2.—See, also, Art. 871.

A salesman making sales for a wholesale drug house is exempt from paying the tax required by this subdivision. *Needham v. State*, 51 Cr. R. 248, 103 S. W. 357.

Where the affidavit and information fail to negative one of the exceptions they are fatally defective. In this case they omit the words "or salesman making sales." *Huffman v. State*, 55 Cr. R. 144, 115 S. W. 578.

One who, after the expiration of his license as a traveling vendor of medicine, continued to sell medicine from his home, his store, and one other place, and advertised his medicine while traveling in a wagon to sell other articles, but sold no medicine from the wagon, is not required to take a new license. *Peoples v. State* (Cr. App.) 152 S. W. 168.

2. Section 8.—See, also, Art. 872.

State has power to levy occupation tax on pool table run in connection with a saloon, regardless of any profit to owner thereof. *Wright v. State*, 41 Cr. R. 200, 53 S. W. 640.

3. Section 12.—Imposition of a peddler's license by Acts Sp. Sess. 25th Leg. p. 54, amending Rev. St. 1895, art. 5049, subd. 40, superseded by this subdivision, held unconstitutional, under Const. art. 8, §§ 1, 2. *Ex parte Overstreet*, 39 Cr. R. 474, 46 S. W. 825.

A person acting as manufacturer's agent, taking orders for stoves to be shipped from factory from another state in three separate parcels, and to be delivered and set up by an employé of the manufacturer, is not engaged in peddling stoves within the statute. *Harkins v. State* (Cr. App.) 75 S. W. 27.

An information which fails to allege that the stoves were cooking stoves or ranges is defective. *Id.*

4. Section 13.—See *Ex parte Lingenfelter*, 142 S. W. 555.

5. Section 14.—The word "circus" is to be understood in its common and ordinary acceptation and embraces the character of exhibition commonly known as a circus and

does not mean such an exhibition as the Wild West Show, the main features of which were intended to portray scenes, incidents and characters peculiar to the west in the not very distant past. Therefore the defendant Cody was not required to pay a license tax under this subdivision, but was only required to pay the tax required by subdivisions 15, 16, of this article. *State v. Cody* (Civ. App.) 120 S. W. 267.

6. **Section 15.**—See *Ex parte Lingenfelter*, 64 Cr. R. 30, 142 S. W. 555.

Buffalo Bill's Wild West Show is not a "circus" within the meaning of Art. 7355, subd. 14, but subdivisions 15, 16, fix the license tax for exhibitions given by above-named show. *State v. Cody* (Civ. App.) 120 S. W. 267.

7. **Section 16.**—See *Ex parte Lingenfelter*, 64 Cr. R. 30, 142 S. W. 555.

8. **Section 21.**—In this subdivision the word "dealer" is used in the sense of one who buys and sells at his place of business, and one who pays the dealer's tax is not authorized to make sales by canvassing, so that the act is not in violation of Const. art. 8, § 1, 2, providing that taxation shall be equal and uniform upon the same class of subjects. *Camp v. State*, 61 Cr. R. 229, 135 S. W. 146.

9. **Section 24.**—Acts 25th Leg. 1st Called Sess. c. 18, amending article 5049, subd. 39, Rev. St. 1895, and providing that from every person, firm, agency, or association of persons dealing in sewing machines an annual tax of \$15 to the state and \$7 to the county in every county where such business is carried on shall be paid, provided that a merchant who pays an occupation tax as required by the act shall not be required to pay the special tax to sell sewing machines when sold in his place of business, and also levying a tax of \$3 upon merchants for the state, with a tax of \$1.50 for the county was in violation of Const. art. 8, § 1, 2, for inequality and nonuniformity. *Ex parte Bockhorn*, 62 Cr. R. 651, 138 S. W. 706.

Since an unconstitutional act is void from its inception, neither conferring rights, imposing duties, nor affording protection, Acts 25th Leg. 1st Called Sess. c. 18, art. 5049, subd. 39, imposing a license tax on sellers of sewing machines, unconstitutional in its inception as discriminating and nonuniform was not rendered valid by the subsequent repeal of the part of the act rendering it unconstitutional by Acts 30th Leg. c. 35. *Id.*

10. **Section 32.**—One who manufactures and sells his product is not a dealer within the meaning of this law and is not taxable as such a dealer. *Egan v. State* (Cr. App.) 68 S. W. 273.

11. **Section 34.**—This subdivision is not repealed by Art. 7378, levying a tax on gross earnings. *Dallas Consol. Electric St. Ry. Co. v. State*, 102 T. 570, 120 S. W. 997, affirming *Dallas Consol. Electric St. Ry. Co. v. State* (Civ. App.) 118 S. W. 880.

12. **Definitions**—"Occupation,"—"Occupation," as used in a statute imposing a license, held to mean a calling, trade, or vocation engaged in for profit. *Shed v. State* (Cr. App.) 155 S. W. 524.

13. **Occupation taxes, what are.**—A tax levied on a corporation for the exercise of the privilege of carrying on its business is an occupation tax under Const. art. 8, § 1. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 71.

Unless mainly imposed for revenue, a license fee is not a tax, but the price paid for the privilege of exercising a franchise. *Ex parte Denny*, 59 Cr. R. 579, 129 S. W. 1115.

Sums imposed in the regulation of the business of running vehicles for hire are license fees and not occupation taxes. *Id.*

14. — **Liability for other taxes.**—Where a statute imposes an occupation tax, it will generally be assumed that the tax is to be the only one on that occupation. *Dallas Consol. Electric St. Ry. Co. v. State*, 102 T. 570, 120 S. W. 997.

15. **Validity of statutes in general.**—The legislature in the exercise of its police power held entitled to impose special burdens on occupations and individuals, provided the classification is reasonable and all within the class are treated alike, notwithstanding Const. Amend. U. S. 14. *State v. Texas & P. Ry. Co.* (Civ. App.) 143 S. W. 223.

A statute imposing an unreasonable tax on a legitimate business under the guise of an occupation tax is unconstitutional; but this rule does not apply to occupations which are detrimental to the health, morals, or good order of society. *Caswell & Smith v. State* (Civ. App.) 148 S. W. 1159.

16. **Powers of cities.**—See Title 22, Chapters 4, 6.

17. **Other taxes and licenses.**—Taxes on law proceedings.—See Title 37, Chapter 18.

18. — **Inspection tax on mill products.**—See Title 92.

19. — **Licenses to physicians and surgeons.**—See Title 90, Chapter 1.

20. — **License fee for embalmers.**—See Title 66, Chapter 4.

21. — **Hunting licenses.**—See Title 63, Chapter 3.

22. — **Licenses for plumbers.**—See Title 22, Chapter 9.

23. — **Licenses to make and sell scales and measures.**—See Title 133.

24. — **License for ferries.**—See Title 119, Chapter 10.

25. **Decisions under former acts—Attorneys.**—The payment of license tax by lawyer imposed by subdivision 12, art. 5049, Rev. St. 1895, is not a condition precedent to his right to practice law. *Ft. W. & D. C. Ry. Co. v. Carlock & Gillespie*, 33 C. A. 202, 75 S. W. 932.

26. — **Brokers and bankers.**—The fact that the state has no authority to enforce the law against national banks does not make subdivision 5, art. 5049, Rev. St. 1895, void for the want of uniformity. It is equal and uniform on the same class of subjects within the limits of the authority of the state to tax. *Brooks v. State* (Civ. App.) 58 S. W. 1033, 1034.

27. — **Insurance agents.**—Repeal of law requiring insurance agent to procure a license in each county in which he does business held to exempt from punishment a person who had offended against the provisions of such repealed law. *Eichlitz v. State*, 39 Cr. R. 486, 46 S. W. 643.

28. — **Land agents—Nonpayment of tax as affecting right to commissions.**—One who has not paid his occupation tax imposed by subdivision 11, art. 5049, Rev. St. 1895, is not thereby prevented from recovering his commissions. *Amato v. Dreyfus* (Civ. App.) 34 S. W. 450; *J. B. Watkins Land Mortgage Co. v. Thetford*, 43 C. A. 536, 96 S. W. 72.

29. — **Merchants.**—That an eleventh-class merchant runs a dray line in connection with his business as merchant does not relieve him from paying a tax as such merchant. *Edwards v. State* (Cr. App.) 69 S. W. 144.

30. — **Photograph gallery.**—Subdivision 6, art. 5049, Rev. St. 1895 is constitutional. Photography is not a mechanical pursuit. The tax is not levied on the vocation of a photographer but on the owner of a photographic gallery. *Mullinnix v. State*, 42 Cr. R. 526, 60 S. W. 768.

31. — **Recovery of tax on gross earnings.**—Subdivision 42, art. 5049, Rev. St. 1895, makes it the duty of the comptroller to collect the tax upon the gross earnings of railroad companies, but it does not make it his duty to bring suit therefor. Suits must be brought in the name of the state and by its principal law officer the attorney general or some other law officer whose duty it is to represent the state in legal proceedings. *Lewright v. Love*, 95 T. 157, 65 S. W. 1089.

**Art. 7356. Tax on dealers in cannon crackers, etc.**—There shall be levied upon every person, firm or corporation engaged in the occupation of selling cannon crackers, or toy pistols used for shooting or exploding cartridges, within this state, an annual tax of five hundred dollars, and counties and incorporated cities or towns in which such business shall be located shall have the power to levy a tax of one-half the above amount as now provided by law in addition to the above tax, and such person, firm or corporation so selling such cannon crackers shall be required to pay an additional tax in the above amount and take out an additional license for each separate establishment or place in which such cannon crackers shall be sold. By the term, "cannon cracker," is meant any fire cracker or other combustible package more than two inches in length, and more than one inch in circumference commonly sold and exploded for purposes of amusement. Nothing in this article shall be so construed as to prohibit the sale of or to place a tax on the sale of cartridges, combustible packages or explosives commonly used for fire arms or artillery, mining, excavating earth or stone, scientific purposes or for any public or private work. [Acts 1909, p. 174.]

**Art. 7357. [5050] County ad valorem, etc.**—The commissioners' courts of the several counties of this state shall have the power to levy, for county revenue purposes, a tax of one-fourth of one per cent, and, for roads and bridges, fifteen cents on the one hundred dollars valuation of all property subject to a state tax by the provisions of this title; and, for the payment of debts incurred prior to September, 1883, and for the erection of public buildings and other permanent improvements, they shall have power to levy a tax not to exceed twenty-five cents on the one hundred dollars valuation in any one year; and, for the improvement of public roads, a tax not to exceed fifteen cents on the one hundred dollars valuation under the restrictions provided in chapter seven of title ninety-seven, and shall have power to levy a special tax for the further maintenance of public free schools, and the erection within each school district of school buildings therein in counties not exempt from the district school system; provided, that two-thirds of the qualified property taxpaying voters of the district, voting at an election to be held for that purpose, shall vote such tax not to exceed in any one year twenty cents on the one hundred dollars valuation of the property subject to taxation in such district, and shall have the right to levy one-half of the occupation tax levied by the state upon all occupations not herein otherwise specially exempted; provided, any one wishing to pursue any of the vocations named in this chapter, upon which a county occupation tax may be levied, may do so by paying the same quarterly; and provided, further, the receipt of the proper officer under seal shall be prima facie evidence of the payment of such taxes as are herein named; and provided, further, the provisions of this law shall not be deemed to affect the provisions of any law specially authorizing any commissioners' court to levy a different rate of tax; and provided, further, no person shall be allowed license for selling intoxicating or spirituous liquors, or for keeping any nine or ten pin alley, or billiard, bagatelle, pigeon-hole, jenny-lind, devil-among-the-tailors table, or anything of the kind used for profit, for a period of less than

twelve months; and provided, further, the mayor and board of aldermen of any incorporated town or city shall in no case levy a greater tax on any occupation than that authorized by this chapter to be levied by the county commissioners' court; and be it further provided, that in all cases where any dealer in merchandise, wares or goods of any kind, subject to ad valorem or occupation taxes, or both, under the provisions of this law, who shall after the rendition of said merchandise, wares or goods for taxation, or after becoming liable for any occupation tax, become bankrupt or make assignment of said merchandise, wares or goods, then the collector of taxes shall at once present to the receiver or assignee of said dealer for payment of the amount due for said taxes by said dealer; and in case of failure of said receiver or assignee to at once pay the amount of said taxes, the said collector shall levy upon, seize and sell from the said merchandise, wares or goods, enough to satisfy the amount of said taxes; and said taxes until paid shall constitute a prior lien on said merchandise, goods and wares in default of said taxes. [Acts 1885, p. 105. Acts 1891, p. 51.]

County finances.—See notes under Title 29.

Levy of taxes.—For an order to levy a tax held insufficient, see *Dawson v. Ward*, 71 T. 72, 9 S. W. 106.

An order to levy a specified tax "for courthouse and jail" sufficiently indicates its purpose. *Cresswell Ranch & Cattle Co. v. Roberts County* (Civ. App.) 27 S. W. 737.

An order levying an occupation tax held sufficient, without specifying the different occupations taxed. *Witherspoon v. State*, 39 Cr. R. 65, 44 S. W. 164, 1096.

Levy of taxes to pay road and bridge bonds.—See notes under Title 18, Chapter 2.

Levy of taxes in cities, towns and villages.—See notes under Title 22, Chapters 6, 14.

Levy of drainage taxes.—See notes under Title 47, Chapter 4.

Levy of taxes for schools.—See notes under Title 48.

Levy of taxes in irrigation districts.—See notes under Title 73, Chapter 3.

Levy of taxes in improvement districts.—See notes under Title 83, Chapter 2.

Levy of taxes for seawalls.—See notes under Title 83, Chapter 3.

Levy of taxes in navigation district.—See notes under Title 96.

Levy of taxes for roads and bridges.—See notes under Title 119.

Authority of court—in general.—See, also, Title 40, Chapter 2.

This article confers authority upon the commissioners' courts of counties to levy taxes and the language, "And shall have the right to levy one-half of the occupation tax levied by the state upon all occupations not herein otherwise specially exempted," applies only to the subjects mentioned in that article which specified a number of occupations that were subject to taxation. It was not intended to confer upon the court the power to levy tax upon all occupations which might thereafter be made the subject of taxation by the statute. The authority to tax was limited to those named, but not exempted. There is no law authorizing the levy upon a railroad of any occupation tax for the exercise of its franchise to operate and carry on its business as a carrier. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 78.

— Time to exercise.—See notes under Art. 2244.

Injunction against levy of taxes.—See notes under Art. 4643.

**Art. 7358. [5051] Taxes payable in what.**—The taxes herein levied by this chapter are hereby made payable in the currency or coin of the United States; provided, that persons holding scrip issued to themselves for services rendered the county may pay their county ad valorem taxes in such scrip. [Acts 1897, 1 S. S., p. 38.]

Payment of taxes.—County scrip received for taxes is no longer evidence of a debt. *Wharton County v. Ahldag*, 84 T. 12, 19 S. W. 291.

**Art. 7359. [5052] Collector to keep books, etc.**—The collector of taxes shall keep a book of such size and character as may be necessary, in which shall be entered quarterly, at the following dates, to-wit, January 1, April 1, July 1 and October 1, or within ten days thereafter, in which to require the returns to be made under the provisions of this chapter, the several amounts as shown by such returns for which and upon which any person, firm or association of persons is or may be liable to a tax upon occupations under article 7355; and within fifteen days from the time of receiving and making up the several amounts and the sums due upon such amounts as occupation tax, the collector shall forward to the comptroller of public accounts a transcript or duplicate of the return and the amount as shown by his record, this transcript and record from which it is taken to show the amount of such quarterly returns and the tax due thereon from every person, firm or

association of persons liable to such tax; provided, that nothing contained in this article is intended to affect the liability, which, in the absence of this statute, would be incurred under any special enactment of this state. [Acts 1879, p. 143.]

**Art. 7360. [5053] Tax collector to be furnished books, etc.**—The comptroller of public accounts shall be authorized and required to furnish tax collectors the necessary books and blanks required to be used by such collectors under the provisions of this chapter. [Id. sec. 7.]

**Art. 7361. [5054] Tax to be paid before occupation begins.**—The payment of the specific tax herein provided for shall be required by the collector of taxes to be made before any person, firm or association of persons shall be allowed to engage in any occupation requiring a license under the provisions of this law, this payment to be made for a period not less than three months. All arrearages of taxes that may be due by reason of any such business having been carried on shall be a lien upon all the stock and fixtures owned or used in or making a part of any business or vocation liable to such tax under the provisions of this chapter, and which lien shall authorize the collector to sell, after due notice, so much stock or other personal property of any person, firm or association of persons owing taxes under the provisions of this chapter, as will satisfy such claim, together with the cost of such proceeding. [Id. sec. 9.]

**Interest on delinquent taxes.**—Interest is not allowable on taxes from the respective dates when they become due, but from the date of the judgment holding parties liable for taxes. *Brooks v. State* (Civ. App.) 58 S. W. 1035.

**Art. 7362. [5055] Occupation tax receipts furnished collectors.**—The comptroller shall cause occupation tax receipts for each occupation to be printed, with his signature, for all occupations payable to the collectors, annual receipts for those that are paid annually, and quarterly receipts for all that can be paid quarterly; such receipts shall state the name of the occupation and the amount of the tax, and have blanks for the year, month and name of licensee, and also have a blank space for signature of the collector; these receipts shall each have a stub attached, stating briefly the substance of the attached receipt, and shall be bound in books; and he shall forward to each collector a proper number of said receipts, and charge him with the amount represented therein, and cause him to account therefor. The collector, whenever collecting any occupation tax, shall fill the blanks in the receipt and stub by writing thereon the time for which he collects and the name of the licensee, and shall sign the receipt and stub officially; and no person shall pursue any occupation, unless he has a receipt, signed as herein provided, by the comptroller and collector; and every person, firm or corporation keeping an office or having a local place of business shall keep posted up in a conspicuous place his or their said licenses. [Id. sec. 9.]

**Art. 7363. Account of occupation tax receipts by collectors.**—When the comptroller furnishes collectors with blank occupation tax receipts, he shall furnish the commissioners' courts with the numbers and value of the receipts furnished to their respective collectors; and such courts shall charge their respective collectors with the number and such proportion of the value of the receipts so furnished as shall apply to the county tax, when such collectors shall make their settlements with the comptroller. The comptroller shall furnish the commissioners' court with the numbers and value of the receipts returned, and with the amount of the occupation taxes collected by their respective collectors. [Acts 1897, 1 S. S., p. 49, sec. 2.]

**Art. 7364. [5056] License, transfer of.**—Any person, firm, corporation or association of persons, who shall be the legal owners or holders of any unexpired occupation license issued in accordance with the

laws of this state, shall be and are hereby authorized to transfer the same on the books of the officer by whom the same was issued. [Acts 1885, p. 27, sec. 1.]

**Validity of transfer of license.**—It would seem that where an occupation-tax license has been sold by the party to whom it was issued, a right therein may pass to the vendee, although the transfer may not have been entered as provided by statute on the books of the officer who issued it. *Cox v. Trent*, 1 C. A. 639, 20 S. W. 1118.

A transfer by deed without entry on the books of the officer is valid as between the parties. *Michelson v. White* (Civ. App.) 25 S. W. 801.

The failure of the purchaser of an unexpired license to have the transfer thereof made upon the books of the officer by whom it was issued, and his failure to file with the county clerk an application designating therein the particular house in which he proposed to conduct his business under the unexpired license, and his failure to have such designation made in the license, does not render void his "liquor dealer's" bond. *Faulker v. Cassidy*, 39 C. A. 415, 87 S. W. 906.

**Art. 7365. [5057] Purchaser of unexpired license may pursue occupation, when, etc.**—The assignee or purchaser of such unexpired occupation license shall be authorized to pursue such occupation under such unexpired license for and during the unexpired term thereof; provided, that such assignee or purchaser shall, before following such occupation, comply in all other respects with all the requirements of the law provided for in original applications for such licenses; and provided, further, that nothing in this law shall be so construed as to authorize two or more persons, firms, corporations or associations of persons to follow the same occupation under one license at the same time; and provided, further, that whenever any person, firm, corporation or association of persons following an occupation shall be closed out by legal process, the occupation license shall be deemed an asset of said person, firm, corporation or association of persons, and sold as other property belonging to said person, firm, corporation or association; and the purchaser thereof shall have the right to pursue the occupation named in said license, or transfer it to any other person; provided, such occupation license shall under no circumstances be transferred more than one time. [Id. sec. 2.]

**Transfer by legal process.**—The statute treats a liquor license as assignable property, and subject to be disposed of by legal process. *Nicolini v. Langermann* (Civ. App.) 104 S. W. 501.

**Mortgaged liquor license and rights of parties.**—A liquor license may be mortgaged. *Nicolini v. Langermann* (Civ. App.) 104 S. W. 501.

And the fact that the purchaser of a mortgaged liquor license had it transferred to his firm, instead of to himself, did not affect the mortgagee's right to sue him alone. *Id.*

Where the debt secured by a mortgage on a liquor license was less than the market value of the license, it was error to allow a recovery of its market value. *Id.*

## REVENUE AGENT

**Art. 7366. [5058] Powers and duties of state revenue agent.**—The governor is authorized to appoint a suitable person as revenue agent for the state, for the purpose of securing a better enforcement of the revenue laws of the state. The agent provided for herein shall be known as the state revenue agent. Said revenue agent shall be subject to the directions of the governor, who may, whenever in his judgment the public service demands it, direct the said revenue agent to investigate books and accounts of the assessing and collecting officers of this state, and all officers and persons disbursing, receiving or having in their possession public funds, and to make such other investigations and perform such other duties in the interest of the public revenues as the governor may direct. Whenever any such investigation is ordered by the governor, the revenue agent shall report to him in writing the results of such investigation, and point out the particulars, if any, wherein the revenue laws have been violated, their enforcement neglected, together with the names of the parties delinquent therein. Whereupon the governor shall institute civil and criminal proceedings through the attorney general in the name of the state against such delinquent parties who are reported by such agent to be delinquent. Said revenue agent shall have

power at any time to examine and check up all and any disbursements or expenditures of money appropriated for any of the state institutions or for any other purpose or for improvements made by the state on state property or money received and disbursed by any board authorized by law to receive and disburse any state money. Said revenue agent shall also have power and authority, and it is hereby made his duty, to fully investigate any and all state institutions when so directed by the governor or required by information coming to the knowledge of said agent. He shall investigate the manner of conducting the same and the policy pursued by those in charge thereof, and the conduct or efficiency of any person employed therein by the state. He shall examine into and report upon the character and manner as well as the amount of expenditures thereof. He shall also investigate and ascertain all sums of money due the state from any source whatever, the ascertainment and collection of which does not devolve upon other officers of this state under existing law; and he shall report all such facts to the governor, who shall proceed therein as provided by this or any other law of this state. [Acts 1891, p. 87. Amended Acts 1899, p. 26.]

**Art. 7367. [5059] Shall have access to books, etc.**—When said revenue agent, acting under the direction of the governor, calls on any person connected with the public service to inspect his accounts, records or books, said officers or official so called upon shall submit to said agent all books, records and accounts so called for without delay. [Id.]

**Art. 7368. [5060] Compensation, etc.**—Said revenue agent shall receive as compensation for his services not exceeding two thousand dollars per annum, together with his actual traveling expenses, which shall be paid on the approval of the same by the governor; provided, said revenue agent shall not be allowed traveling expenses for any service connected with the examination and investigation of the accounts of any institution in Travis county. [Id.]

Salary of state revenue agent.—See Title 120.

## CHAPTER TWO

### TAXES BASED UPON GROSS RECEIPTS

[For taxes on life insurance companies, see "Insurance."]

<b>Art.</b>	<b>Art.</b>
7369. Express companies.	7380. Dealers in pistols.
7370. Telegraph companies.	7381. Text or law book publishers.
7371. Gas, electric light, electric power or waterworks plants.	7382. Telephone companies.
7372. Collecting or commercial agency.	7383. Oil well companies.
7373. Car companies.	7384. Terminal companies.
7374. Pipe line companies.	7385. Tax to be paid when business is begun after beginning of quarter.
7375. Sleeping car, palace car or dining car companies.	7386. Penalty for failure to report.
7376. Insurance companies.	7387. Penalty for failure to pay tax.
7377. Wholesale dealers in oils; "wholesale dealer" defined.	7388. Penalties to be recovered by attorney general.
7378. Interurban and electric railway companies.	7389. Permit not granted until tax is paid.
7379. Wholesale dealer in or distributors of liquors; "wholesale dealer" defined.	7390. Tax in addition to all other taxes.
	7391. Comptroller may require additional reports.
	7392. Revenue agent to examine books, etc., when.

[In addition to the notes under the particular articles, see also notes of decisions under superseded acts, at end of chapter.]

**Article 7369. Express companies.**—Each and every individual, company, corporation or association doing an express business, by railroad or water, in this state, shall, on or before the first day of March of each year, make a report to the comptroller of public accounts under oath

of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from charges and freights within this state paid to or collected by such individual, company, corporation or association on account of money, goods, merchandise or other character of freight carried within this state during the twelve months next preceding. Said individuals, companies, corporations or associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the year beginning on said date equal to two and one-half per cent of said gross receipts as shown by said report. [Acts 1907, p. 479, sec. 1.]

**Constitutionality in general.**—Acts 1905, c. 148, substantially re-enacted by Acts 1907, p. 479, embodied in this chapter, imposing an occupation tax on gross receipts of persons and corporations engaged in certain businesses fully discussed and held constitutional and therefore valid. *Texas Co. v. Stephens*, 100 T. 628, 103 S. W. 481; *Southwestern Oil Co. v. State*, 100 T. 647, 103 S. W. 489.

**Amount of tax.**—Where an occupation tax imposed by Acts 29th Leg. c. 148, was levied against a business in the state, it was proper that sales and deliveries outside the state should be included in fixing the volume of the business to fix the amount of the tax. *Texas Co. v. Stephens*, 100 T. 628, 103 S. W. 481.

Where a person or corporation carries on several different businesses on which a tax is imposed by Acts 29th Leg. p. 358, c. 148, each business is subject to tax, but operations which are a mere incident to a business are not subject to tax as a separate business. *Id.*

**Art. 7370. Telegraph companies.**—Each and every individual, company, corporation or association owning, operating, controlling or managing any telegraph lines in this state, or owning, operating, controlling or managing what is known as wireless telegraph stations, for the transmission of messages, or aerograms and charging for the transmission of such messages or aerograms, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts under oath of the individual, or of the president, treasurer or superintendent of such companies, corporation or association, showing the gross amount received from all business within this state during the preceding quarter, in the payment of telegraphic or aerograms charges, including the amount received on full rate messages and aerograms and half rate messages and aerograms, and from the lease or use of any wires or equipment within the state during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to two and three-fourths per cent of said gross receipts as shown by said report. [Id. sec. 2.]

**Constitutionality.**—An occupation tax imposed on a telegraph company, which graduates the tax according to the business done, regardless of a distinction between business done wholly within the state and business done in part without the state, is free from the objection that it regulates or obstructs interstate commerce. *W. U. T. Co. v. State*, 55 T. 314.

**Art. 7371. Gas, electric lights, power or waterworks.**—Each and every individual, company, corporation or association, owning, operating or managing or controlling any gas, electric light, electric power or waterworks or water and light plant, within this state and charging for gas, electric lights, electric power or water, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount received from the business done within this state in the payment of charges for gas, electric lights, electric power and water for the quarter next preceding. Said individual, company, corporation or association, at the time of making said report for any town or city of ten thousand inhabitants and less than twenty-five thousand inhabitants, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one-fourth of one per cent of said gross receipts, as shown by said report; and, for any town or city of twenty-five thousand inhabitants or more,



the said individual, company, corporation or association, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date an amount equal to one-half of one per cent of said gross receipts as shown by said report; provided, that nothing herein shall apply to any gas, electric light, electric power or waterworks or water and light plant within this state owned by any city or town. [Id. sec. 3.]

**Art. 7372. Collecting or commercial agency.**—Each and every individual, company, corporation or association, owning, operating, managing or controlling any collecting agency, commercial agency, or commercial reporting credit agency within this state, and charging for collections made, or business done, or reports made, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts under oath of the individual or of the president, treasurer, or superintendent of such company, corporation or association, showing from business done within this state the gross amount received in the payment of charges for collections made and business done and reports made during the quarter next preceding. Such individuals, companies, corporations or associations at the time of making said report shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one-half of one per cent of said gross receipts as shown by said report. [Id. sec. 4.]

**Art. 7373. Car companies.**—Each and every individual, company, corporation or association, residing without the state of Texas, or incorporated under the laws of any other state or territory, or nation, and owning stock cars, refrigerator and fruit cars of any kind, tank cars of any kind, coal cars of any kind, furniture cars or common box cars and flat cars, and leasing, renting or charging mileage for the use of such cars within the state of Texas, shall make quarterly, on the first days of January, April, July and October of each year, and report to the comptroller of public accounts under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from such rentals, or mileage, or from other sources of revenue received from business done within this state, during the quarter next preceding. Said individuals, companies and corporations, and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to three per cent of said gross receipts as shown by said report. [Id. sec. 5.]

**Art. 7374. Pipe line companies.**—Each and every individual, company, corporation or association whether incorporated under the laws of this state, or of any other state or territory, or of the United States, or of any foreign nation, which owns, manages, operates, leases or rents any pipe line or pipe lines within this state, whether such pipe line or pipe lines be used for transmission of oil, natural or artificial gas, whether such oil or gas be for illuminating or fuel purposes, or for steam, for heat or power, or for any other purpose, and whether such pipe line or pipe lines be used for the transmission of articles by pneumatic or other power, shall, on or before the first days of January, April, July and October of each year, pay to the state of Texas an occupation tax equal to two per cent of its gross receipts, if such pipe line or pipe lines lie wholly within this state; and, if such pipe line or pipe lines lie partly within and partly without the state, such individuals, companies, corporations and associations shall pay a tax equal to two per cent of such proportion of its gross receipts, as the length of such line or lines within the state bears to the whole length of such line or lines; provided, that if satisfactory evidence is submitted to the comptroller of public accounts at any time prior to the date fixed by this article for the payment of the tax herein imposed, that any other proportion more fairly represents the proportion which the

gross receipts of any pipe line or pipe lines for any quarter within this state bears to its total gross receipts, it shall be his duty to collect for such quarter from every such pipe line or pipe lines a tax equal to such other proportion of two per cent of its total gross receipts. For the purpose of determining the amount of such tax, the individual or the president, treasurer or superintendent of such company, association or corporation, shall quarterly, on the dates aforesaid, make a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross receipts of such pipe line or pipe lines from every source whatsoever for the quarter next preceding, and shall immediately pay to the state treasurer an occupation tax for the quarter beginning on said date, calculated on the gross receipts so reported. [Id. sec. 6.]

In general.—As to taxation on pipe line companies under Acts 29th Leg. p. 358, c. 148, re-enacted with modifications in 1907 and embodied in this article. *Texas Oil Co. v. Stephens*, 100 T. 628, 103 S. W. 481.

**Art. 7375. Sleeping, palace or dining car companies.**—Every sleeping car company, palace car company, or dining car company doing business in this state, and each individual, company, corporation or association leasing or renting, owning, controlling or managing any palace cars, dining cars, or sleeping cars within this state for the use of the public, for which any fare is charged, shall, on the first days of January, April, July and October of each year, report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts earned from any and all sources whatever within this state, except from receipts derived from buffet service, during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to five per cent of said gross receipts as shown by said report. The tax herein provided for shall be in lieu of all other taxes now levied upon sleeping car, palace car or dining car companies, except the tax of twenty-five cents on the one hundred dollars of the capital stock of such car companies as provided by law. [Id. sec. 7.]

**Art. 7376. Insurance companies.**—Every insurance company transacting the business of fire, marine, marine inland, accident, credit, title, live stock, fidelity, guaranty, surety, casualty, or any other kind or character of insurance business other than the business of life insurance, within this state, and other than fraternal benefit associations, at the time of filing its annual statement, shall report to the commissioner of insurance and banking the gross amount of premiums received in the state upon property, and from persons residing in this state during the preceding year, and each of such companies shall pay an annual tax upon such gross premium receipts as follows: Shall pay a tax of two and six-tenths per cent, provided, that any company doing two or more kinds of insurance business herein referred to, shall pay the tax herein levied upon its gross premiums received from each of said kinds of business; and the gross premium receipts where referred to in this Act are understood to be the premium receipts reported to the commissioner of insurance and banking by the insurance companies upon the sworn statement of two principal officers of such companies, less return premiums paid policy holders, and the premiums paid for reinsurance in companies authorized to do business in this state. Upon receipt by him of sworn statements, showing the gross premium receipts by such companies, the commissioner shall certify to the state treasurer the amount of taxes due [by] each company, which tax shall be paid to the state treasurer for the use of the state on or before the first of March following, and the receipt of the treasurer shall be evidence of

the payment of such taxes. No such insurance company shall receive a permit to do business in this state until such taxes are paid. If any such insurance company shall have as much as one-fourth of its entire assets, as shown by said sworn statement, invested in any or all of the following securities: Real estate in the state of Texas, bonds of this state or of any county, incorporated city or town of this state, or other property in this state in which by law such companies may invest their funds, then the annual tax of any such companies shall be one per cent of its said gross premium receipts; and if any such company shall invest as aforesaid as much as one-half of its assets, then the annual tax of such company shall be one-half of one per cent of its gross premium receipts, as above defined; and provided, further, that no occupation tax shall be levied on insurance companies herein subjected to a gross premium receipt tax by any county, city or town. Provided, also, that all mutual fraternal benevolent associations, now or hereafter doing business in this state under the lodge system and on the assessment plan, whether organized under the laws of this state or a foreign state or country, are exempt from the provisions of this section.

The taxes aforesaid shall constitute all taxes and license fees collectible under the laws of this state against any such insurance companies, and no other occupation or other taxes shall be levied on or collected from any insurance company by any county, city or town, but this Act shall not be construed to prohibit the levy and collection of state, county and municipal taxes upon the real and personal property of such companies. Provided, that purely co-operative or mutual fire insurance companies carried on by the members thereof solely for the protection of their own property, and not for profit, shall be exempt from the provisions of this bill. Provided, that in addition to the tax above prescribed, each company doing the business herein referred to and affected by the provisions of the Act of the Fourth Called Session of the Thirty-first Legislature, approved September 6, 1910, and published as chapter 8, General Laws of said session, shall pay its pro rata share of the charge or cost of maintaining the state insurance board as provided by section 28 of said Act, approved September 6, 1910, and published as chapter 8 of the General Laws of the Fourth Called Session of the Thirty-first Legislature; and provided, further, that portion of section 28 of the state insurance board law which reads as follows: "Provided that the collections from insurance companies provided for in this section shall not be made for any year during which any such company shall be liable under the laws of this state to the payment of an occupation tax at a rate of two and one-half per cent or more of the gross premiums received, less deductions for reinsurance and return premiums on cancelled policies," be and the same is hereby repealed. [Acts 1911, p. 216, sec. 1.]

**Note.**—Acts 1911, p. 216, sec. 1, amends Acts 1907, ch. 18 (p. 497), sec. 8, so as to read as above. Acts 1911, p. 216, sec. 2, repeal all laws in conflict, etc. Said section 8 was contained in Rev. Civ. Stat. 1911, art. 7376, which is superseded hereby. Acts 1910, 4 S. S., ch. 8 (p. 125), was repealed by Acts 1913, p. 195. See note to Art. 4903.

**Definitions.**—"Gross amount of premiums received."—The words "gross amount of premiums received," in the statute imposing a tax on insurance companies on the premiums received, held to include the sums paid for reinsurance and the sums returned to policy holders on the cancellation of policies as therein provided. *Fire Ass'n of Philadelphia v. Love*, 101 T. 376, 108 S. W. 158, 810.

**Taxes on life insurance companies.**—See notes under Title 71, Chapter 3.

**Construction and operation of statute.**—Acts 1907, p. 482, § 8, embodied in this article, must prevail so far as there is a conflict between it and paragraph 7 of article 3084, Rev. St. 1895. The act of 1907 prescribes with certainty what the report of the fire insurance company shall be on the subject of the gross receipts and its terms are not modified by the former law. *Fire Association v. Love*, 101 T. 376, 108 S. W. 158, 810.

An insurance company organized under the laws of another state has not complied with the Acts 1907, c. 170, re-enacted with modifications in 1909, embodied in article 4775 et seq., when it shows that it is exempt from the provisions of the act, so as to entitle it to the one per cent tax rate upon its gross receipts. The fact that it is exempt for two years from complying with the act of April 24, 1907 (sections 3 and 6), is not a compliance with the act. *Kansas City Life Ins. Co. v. Love*, 101 T. 531, 109 S. W. 863.

The tax assessed for 1908 upon an insurance company, is not a tax on the gross re-

ceipts of the company for 1907 during which year up to August 14th, the rate prescribed by a previous law prevailed, but it was an occupation tax for 1908 based on the receipts of 1907, and affected in no way the tax payable in 1907. Id.

**Art. 7377. Wholesale dealer in oils; "wholesale dealer" defined.**—Each and every individual, company, corporation or association created by the laws of this state, or any other state or nation, which shall engage in his own name, or in the name of others, or in the name of its representatives, or agents in this state in the business of wholesale dealers in coal oil, naphtha, benzine or any other mineral oils refined from petroleum, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this state of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to two per cent of said gross receipts and amount uncollected from said sales as shown by said report. A wholesale dealer, within the meaning of this article, is any individual, company, firm, partnership, corporation or association who buys any of the articles hereinbefore mentioned, either in his own name or in the name of others, or in the name of their representative or agent, and sells same either in his name, or in the name of others, or in the name of their representatives or agents, to any person, firm, corporation or association to be sold again. [Acts 1907, p. 479, sec. 9.]

See *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

**Definitions**—"Wholesale dealer."—One engaged in the wholesale oil business is a wholesale dealer whether he buys the oil to sell again or buys crude oil and refines it into different petroleum products and sells them. *Texas Co. v. Stephens*, 100 T. 628, 103 S. W. 481.

**Constitutionality.**—Acts 29th Leg. p. 364, c. 148, § 9, substantially re-enacted in 1907 and embodied in this article, is not invalid. *Texas Co. v. Stephens*, 100 T. 628, 103 S. W. 481.

**Amount of tax.**—In determining the amount of a tax, wholesale sales to consumers and to retailers are properly included in fixing the volume of business. *Texas Oil Co. v. Stephens*, 100 T. 628, 103 S. W. 481.

**Art. 7378. Interurban and electric railway companies.**—Each and every individual, company, corporation or association, owning, operating or controlling any interurban, trolley, traction or electric street railway in this state and charging for transportation on said railway, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the amount of gross receipts from said charges for transportation on said railway paid to or uncollected by said individuals, company, corporation or association for the quarter next preceding. Said individual, company, corporation or association, at the time of making said report, if in or if connecting any town or city of less than twenty thousand inhabitants, shall pay to the treasurer of the state as an occupation tax for the quarter beginning on said date equal to one-half of one per cent of said gross receipts as shown by said report; if in a city of more than twenty thousand inhabitants, said individual, company or corporation or association, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to three-fourths of one per cent of said gross receipts as shown by said report; provided, that in ascertaining the population of any city or town, the same shall be ascertained by the last United States census; and provided, further, that where any interurban railroad shall connect any town having a population of more than twenty thousand with another of a less population, that it shall be liable for the taxes

measured by the population of the largest town; provided, further, that the provisions of this chapter shall not apply to any street railway or traction company wholly within any town of less than ten thousand inhabitants. [Id. sec. 10.]

See *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

**In general.**—This is but an additional tax to the one levied under Art. 7355, subd. 34, the last-named article not being repealed. *Dallas Consol. Electric St. Ry. Co. v. State*, 102 T. 570, 120 S. W. 997, affirming (Civ. App.) 118 S. W. 381.

**Art. 7379. Wholesale dealers in or distributors of liquors; "wholesale dealer" defined.**—Each and every individual, company, corporation or association created by the laws of this state or any other state, who shall engage in his own name or in the name of others, or in the name of its representatives or agents in this state, in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this state of any of said articles during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date, equal to one half of one per cent of said gross receipts from said sale as shown by said report.

A wholesale dealer or distributor, within the meaning of this section, is any individual, company, association or corporation selling any of the articles hereinbefore mentioned in any quantity, for cash or on credit, either in his own name or in the name of others, or in the name of its representatives or agents, to retail dealers or to consumers, not to be drunk on the premises, or who deliver on consignment to their agents for retail or for delivery to consumers, provided the above shall not apply to sales to consumers, where the liquor sold is delivered to the purchaser in person, at the dealers place of business and at time of sale, and where the amount sold does not exceed one gallon.

For the purpose of ascertaining the amount of gross receipt tax due each quarter by each and every individual, company, corporation, or association created by the laws of this state or in any other state, who shall engage in his own name or in the name of others, or in the name of its representatives or agents in this state in the business of a wholesale dealer or a wholesale distributor of spirituous, vinous or malt liquor or medicated bitters capable of producing intoxication, it shall be the duty of each and every individual, company, corporation or association selling any of the articles hereinbefore mentioned either in his own name or in the name of others, or in the name of its representatives or agents, to keep a plain, legible record of the date of each and every such sale or consignment, the name and address of the retail dealer or individual to whom sold or consigned, the quantity, the price, and the manner in which shipment or delivery was made; and this record shall be subject to the inspection of the comptroller of [or] the state revenue agent or their representatives at any time they see proper to investigate said records.

Any person, company, corporation or association, or any receiver or receivers failing to keep a record as provided for in this Act, shall forfeit and pay to the state of Texas a penalty not exceeding one thousand dollars. [Acts 1907, p. 479, sec. 11. Acts 1913, p. 33, sec. 1, amending Art. 7379, Rev. St. 1911.]

**Definitions—"Gross receipts."**—In this article the term "gross receipts," though ordinarily meaning the gross amount of cash received, includes the gross amount collected

and uncollected of all the sales, on which amount the percentage must be computed to determine the tax. *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

— "Receipts."—The tax imposed by this article is a tax on the gross sales whether collected or uncollected during the preceding quarter; the word "receipts," when used in a commercial sense, meaning the receiving of obligations or promises to pay, whether written or verbal, as well as cash. *Eppstein v. State*, 105 T. 35, 143 S. W. 144.

**Art. 7380. Dealers in pistols.**—Each and every individual, company, corporation or association created by the laws of this state or any other state, who shall engage in his own name or in the name of others, or in the names of its representatives or agents in this state, in the business of a wholesale or retail dealer of pistols, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of said company, corporation or association, showing the gross amount collected and uncollected from any and all sales made within this state of all such firearms during the quarter next preceding. Such individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to fifty per cent of said gross receipts from sales of all firearms as shown by said report. [Acts 1907, p. 479, sec. 12.]

See *Eppstein v. State* (Civ. App.) 138 S. W. 1124; *Caswell & Smith v. Same*, 148 S. W. 1159.

**Police power.**—This article is a valid exercise of the police power, since the immediate and direct result of the pursuit of the business of selling pistols may be regarded as harmful to the best interests of society, and, though the statute imposes a tax, it does not lose its character as a police regulation. *Caswell & Smith v. State* (Civ. App.) 148 S. W. 1159.

**Impairing the right to bear arms.**—This article is not violative of Const. Bill of Rights, § 23, guaranteeing to every citizen the right to bear arms, since the act does not infringe or attempt to infringe the right of the citizen to bear arms, nor does it prohibit a dealer in the state from selling them; and, even if it did, the statute would not be violative of the constitutional guaranty. *Caswell & Smith v. State* (Civ. App.) 148 S. W. 1159.

**Art. 7381. Text or law book publishers.**—Each and every individual, company, corporation or association, whether incorporated under the laws of this state, or of any other state or nation, engaged in publishing, printing, or selling text books used in the schools of this state, or law books of any character, or owning, controlling or managing any such business, as text books or law book purchasers, within the state or out of it, and having state agencies within this state for the purpose of selling any book or books to be used in any of the schools of this state, or any law books, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, or of the person owning, controlling or managing any such business, showing the gross amount received from such business done within this state from any and all sources during the quarter next preceding. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one per cent of said gross receipts, as shown by said report. [Id. sec. 13.]

**Art. 7382. Telephone companies.**—Each and every individual, company, corporation or association owning, operating, managing or controlling any telephone line or lines or any telephones within this state, and charging for the use of the same, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the gross amount received from all business within this state during the preceding quarter, in the payment of charges for the use of its line or lines, telephone and telephones, and from the lease or use of any wires, or equipment within this state during said quarter.

Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax, for the quarter beginning on said date, equal to one and one-half per cent of said gross receipts, as shown by said report. [Id. sec. 14.]

**Art. 7383. Oil well companies.**—Each and every individual, company, corporation or association, whether incorporated under the laws of this or any other state or territory, or of the United States, or any foreign country, which owns, controls, manages or leases any oil well within this state, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the total amount of oil produced during the quarter next preceding and the average market value thereof during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one-half of one per cent of the total amount of all oil produced, at the average market value thereof, as shown by said report. [Id. sec. 15.]

**Nature of tax imposed.**—The tax imposed on operators of oil wells by Acts 29th Leg. p. 358, ch. 148, is an occupation tax.

**Constitutionality of statute.**—The penalties provided for are disproportionate to the amount of the taxes and it was proper for the court to refuse to render judgment for the penalties. *Producers' Oil Co. v. Stephens*, 44 C. A. 327, 99 S. W. 157.

That part of Acts 29th Leg. c. 148, re-enacted with modifications in 1907 and embodied in this article, imposing one per cent. tax on the gross products of the wells, is not unconstitutional. *Producers' Oil Co. v. Stephens*, 44 C. A. 327, 99 S. W. 157; *Texas Oil Co. v. Stephens* (Civ. App.) 99 S. W. 160.

**Art. 7384. Terminal companies.**—Each and every individual, company, corporation or association, whether incorporated under the laws of this or any other state, or territory, or of the United States, or any foreign country, which owns, controls, manages or leases any terminal companies, or any railroad doing a terminal business within this state, shall make quarterly, on the first days of January, April, July and October of each year, a report to the comptroller of public accounts, under oath of the individual or of the president, treasurer or superintendent of such company, corporation or association, showing the total amount of its gross receipts from all sources whatever within this state, during the quarter next preceding, and the average market value thereof during said quarter. Said individuals, companies, corporations and associations, at the time of making said report, shall pay to the treasurer of the state of Texas an occupation tax for the quarter beginning on said date equal to one per cent of the total amount of its gross receipts from all sources whatever, as shown by said report. [Id. sec. 16.]

**Art. 7385. Tax to be paid when business is begun after beginning of quarter.**—If any individual, company, corporation, firm or association, in this chapter mentioned, shall begin and engage in any business for which there is an occupation tax herein imposed, on or after the beginning day of the quarter for which said tax is imposed, then, and in all such cases, the amount of such tax for said beginning quarter shall be and is hereby fixed at the sum of fifty dollars, payable to the treasurer of the state of Texas in advance, but for the next succeeding quarter, and all other succeeding quarters, the tax shall be determined by reports to the comptroller of public accounts of the business for the preceding quarter, or part thereof, as herein otherwise in this chapter provided; and reports and payments of such tax shall be made subject to all other provisions of this chapter. [Id. sec. 17.]

**Art. 7386. Penalty for failure to report.**—Any person, company, corporation or association, or any receiver or receivers, failing to make report for thirty days from the date when said report is required by this

chapter to be made, shall forfeit and pay to the state of Texas a penalty of not exceeding one thousand dollars. [Id. sec. 18.]

**Art. 7387. Penalty for failure to pay tax.**—Any person, company, corporation or association, or any receiver or receivers, failing to pay any tax for thirty days from the date when said tax is required by this chapter to be paid, shall forfeit and pay to the state of Texas a penalty of ten per cent upon the amount of such tax. [Id. sec. 19.]

**Art. 7388. Penalties to be recovered by attorney general.**—The penalties provided for by this chapter shall be recovered by the attorney general in a suit brought by him in the name of the state of Texas; and venue and jurisdiction of such suit is hereby conferred upon the courts of Travis county, Texas. [Id. sec. 20.]

**Legislative power.**—The legislature has the power under the constitution to create causes of action in favor of the state and to make it the exclusive duty of the attorney general to prosecute such suits. *Brady v. Brooks*, 99 T. 366, 89 S. W. 1053.

**Enjoining collection of taxes.**—A suit against state officials to restrain them from collecting a privilege tax imposed by Acts 29th Leg. p. 358, c. 148, re-enacted with modifications in 1907 and embodied in Title 126, Chapter 2, is a suit against the state and cannot be maintained without its consent. *Producers' Oil Co. v. Stephens*, 44 C. A. 327, 99 S. W. 157; *Texas Oil Co. v. Stephens* (Civ. App.) 99 S. W. 160. *Contra*, see *Galveston, H. & S. Ry. Co. v. Davidson* (Civ. App.) 93 S. W. 436.

**Art. 7389. Permit not granted until tax is paid.**—No individual, company, corporation or association, failing to pay all taxes imposed by this chapter, shall receive a permit to do business in this state, or continue to do business in the state, until the tax hereby imposed is paid. The receipt of the treasurer of the state of Texas shall be evidence of the payment of such tax. [Id. sec. 21.]

**Art. 7390. Tax in addition to all other taxes.**—Except as herein stated, all taxes levied by this chapter shall be in addition to all other taxes now levied by law; provided, that nothing herein shall be construed as authorizing any county or city to levy an occupation tax on the occupations and business taxed by this chapter. [Id. sec. 22.]

**Art. 7391. Comptroller may require additional reports.**—If for any reason the comptroller of public accounts is not satisfied with any report from any such person, company, corporation, co-partnership or association, he may require additional or supplemental reports containing information and data upon such matters as he may need or deem necessary to ascertain the true and correct amount of all taxes due by any such person, firm, or corporation. Every statement or report required by this chapter shall have affixed thereto the affidavit of the president, vice-president, secretary or treasurer of the person, corporation, co-partnership or association, or one of the persons or members of the partnership making the same, to the effect that the statement is true. The comptroller shall prepare blanks to be used in making the reports required by this chapter. [Id. sec. 23.]

**Art. 7392. Revenue agent to examine books, etc.**—If the comptroller has reason to believe, or does believe, that any individual, company, corporation, association, receiver or receivers, subject to the provisions of this chapter, has made a false return or has failed or omitted to make a full return of gross receipts, or other statement of business done, required by any of the provisions of this chapter, he shall report the same in writing to the governor; and it shall be the duty of the governor to immediately require the revenue agent of the state of Texas to examine any books, papers, documents, or other records or evidence showing or tending to show such unlawful act or omission. Said revenue agent shall check the report made with such books, papers, documents or other records or evidence, and make his report to the comptroller; and, if it appears from said report that any false or incorrect return has been made, or that any individual, or the president, treasurer or superintendent of any company, corporation or association, or any member of any



firm required by this chapter to make reports, has failed or omitted to make a full return, as required by law, then the comptroller shall notify such individual, or the president, treasurer or superintendent of any company, corporation or association, or receiver or receivers of any company, corporation or association, or any member of any firm, to make forthwith an additional or supplemental report; and, if any such individual or the president, treasurer or superintendent of any company, corporation or association, or any member of a firm, or any receiver or receivers of any company, corporation or association making said original report, shall fail or refuse to make said additional or supplemental report, he shall be guilty of a misdemeanor, and on conviction shall be punished as provided in the Penal Code; and venue of such prosecution is fixed in Travis county, Texas. If it appears from the report of the state revenue agent, or if the comptroller has reason to believe or does believe, that any individual, or any president, treasurer or superintendent of any company, corporation or association, or any receiver of any corporation or association, or any member of any firm, has wilfully and deliberately made a false report, the comptroller shall report the matter to the grand jury of Travis county, Texas, for its action; and venue of any offense arising out of such transaction is hereby fixed in Travis county, Texas. Said state revenue agent, in the performance and discharge of the duties imposed upon him by this article, shall have the right to examine, either by himself or by any person acting under his direction, any books, papers, documents, records or evidence which he may believe material and proper to examine. [Id. sec. 24.]

#### DECISIONS UNDER SUPERSEDED ACTS

**Gross earnings tax on railroads—Validity and construction of statute.**—Acts 1905, ch. 141, imposing a tax on railroads equal to one per cent. of their gross receipts, is valid except that part which imposes a penalty of two hundred dollars a day for failure to pay said tax. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 71, reversing *Galveston, H. & S. A. Ry. Co. v. State* (Civ. App.) 93 S. W. 464, and overruling *Galveston, H. & S. A. Ry. Co. v. Davidson* (Civ. App.) 93 S. W. 442. Reversed, *Galveston, H. & S. A. Ry. Co. v. Texas*, 210 U. S. 217, 28 Sup. Ct. 638, 52 L. Ed. 1031.

This law, though invalid as imposing a tax for the part of the year prior to the time it took effect is not void as to remainder of the year, but the court will give effect to it for the remainder of the year. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 78.

This law does not apply to the Texas & Pacific Railway Company, because its charter was granted by congress, and it is thus constituted an "agency" of the United States government, the operation of which cannot be hindered by taxation by the state. The tax imposed by this act is an occupation tax. An agency of the United States government for the carrying on of its business cannot be taxed by the state in which it operates. *State v. Texas & P. Ry. Co.*, 100 T. 279, 98 S. W. 834.

The statute imposing on railroads a gross earnings tax held enforceable, though it cannot apply to a railroad incorporated under an act of congress. *State v. Missouri, K. & T. Ry. Co. of Texas* (Sup.) 100 S. W. 146.

The title of the statute imposing a gross earnings tax on railroads held sufficiently broad to embrace railroads owning a line within and one without the state. *Id.*

The statute imposing on railroads a tax on their gross receipts imposes a tax on the gross receipts of railroads derived from whatever source. *Id.*

**Penalties for failure to pay taxes.**—A state, seeking to recover taxes from railroads in excess of the sum actually due, held not entitled to recover the penalties imposed on railroads failing to pay taxes. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 71.

**Right of action.**—The legislature has the power under the constitution to create causes of action in favor of the state and to make it the exclusive duty of the attorney general to prosecute such suits. *Brady v. Brooks*, 99 T. 366, 89 S. W. 1053.

## CHAPTER THREE

### FRANCHISE TAX

<b>Art.</b>	<b>Art.</b>
7393. Tax to be paid by domestic corporations.	7396. Certain affidavits may be required.
7394. Tax to be paid by foreign corporations.	7397. Reports to be filed, etc.
7395. Only part of the tax to be paid, when.	7397a. Reports to be filed; basis of tax.
	7397b. Penalty for failure to make report, etc.
	7397c. Reports privileged, etc.

<p>Art. 7397d. May be made by what officers; how executed, etc.</p> <p>7397e. Laws repealed, etc.</p> <p>7398. Supplemental tax to be paid when capital increased.</p> <p>7399. On failure to pay tax, charter forfeited, when; penalty.</p> <p>7400. Notice of forfeiture.</p> <p>7400a. Cancellation of forfeiture in certain cases; forfeiture by judgment, when, etc.</p>	<p>Art. 7401. Foreign corporations may withdraw.</p> <p>7402. No business to be done after forfeiture; penalty.</p> <p>7403. Certain corporations not required to pay tax, when.</p> <p>7404. Attorney general to bring suit, when.</p> <p>7405. Forfeiture of charter by court; duty of clerk.</p> <p>7406. Payment of franchise tax by corporations in process of liquidation.</p>
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[In addition to the notes under the particular articles, see also notes on the subject in general at end of chapter.]

**Article 7393. Tax to be paid by domestic corporations.**—Except as herein provided, each and every private domestic corporation heretofore chartered, or that may hereafter be chartered, under the laws of this state, shall on or before the first day of May of each year, pay in advance to the secretary of state a franchise tax for the year following, which shall be computed as follows, viz: Fifty cents on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, unless the total amount of capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be fifty cents on each one thousand dollars of capital stock of such corporations issued and outstanding, plus its surplus and undivided profits; provided, that such franchise tax shall not in any case be less than ten dollars; provided, that, where the authorized capital exceeds one million dollars, such franchise tax shall be fifty cents for each one thousand dollars up to and including one million dollars, and for each additional one thousand dollars, in excess of one million dollars, it shall be twenty-five cents. [Acts 1907, p. 503, sec. 1.]

**Amount of tax.**—When a corporation's authorized capital exceeds \$1,000,000, the excess of the stock over that amount, plus surplus and undivided profits, is subject to a franchise tax of 25 cents on the \$1,000; the term "excess," in the act, being intended to embrace capital, surplus, and undivided profits. *Houston & T. C. R. Co. v. McDonald* (Sup.) 148 S. W. 287.

**Corporations exempt from tax.**—See Art. 1223.

**Fees of secretary of state.**—See notes under Art. 3837.

**Art. 7394. Tax to be paid by foreign corporations.**—Except as herein provided, each and every foreign corporation, authorized, or that may hereafter be authorized to do business in this state, shall on or before the first day of May of each year, pay in advance to the secretary of state a franchise tax for the year following, which shall be computed as follows, viz: One dollar on each one thousand dollars, or fractional part thereof, of the authorized capital stock of the corporation up to and including one hundred thousand dollars, and two dollars on each five thousand dollars or fractional part thereof of such stock in excess of one hundred thousand dollars and up to and including one million dollars, and two dollars on each twenty thousand dollars, or fractional part thereof, of such stock in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock in excess of ten million dollars, unless the total amount of the capital stock of such corporation issued and outstanding, plus its surplus and undivided profits, shall exceed its authorized capital stock; and in that event the franchise tax of such corporation for the year following shall be two dollars on each one thousand dollars, or fractional part thereof, of the authorized capital stock of such corporation, issued and outstanding, plus its surplus and undivided profits, up to and including one hundred thousand dollars, and two dollars on each five thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one hundred thousand dollars, and up to and including one million dollars, and two dollars on each twenty

thousand dollars, or fractional part thereof, of such stock, surplus and undivided profits in excess of one million dollars, and up to and including ten million dollars, and two dollars on each fifty thousand dollars of such stock, surplus and undivided profits in excess of ten millions dollars; provided, that such franchise tax shall not in any case be less than twenty-five dollars. [Id. sec. 2.]

**Nature of tax imposed.**—A franchise tax, imposed by a state on a foreign corporation, held not a property tax, but a mere license or privilege to do business within the state. *Gaar, Scott & Co. v. Shannon*, 52 C. A. 634, 115 S. W. 361.

**Construction and validity of statute.**—A provision in a charter of a corporation, fixing a specified sum as taxes, held not a contract that no greater tax shall not be laid, within the constitution forbidding laws impairing the obligation of contracts. *Gaar, Scott & Co. v. Shannon*, 52 C. A. 634, 115 S. W. 361.

Acts 1905, chs. 19, 72, re-enacted with modifications in 1907 and embodied in this chapter, impose a like tax on all foreign corporations and do not discriminate in favor of domestic corporations subject to a less tax. The law is constitutional. *Id.*

**Fees for permit to do business.**—See notes under Art. 3837.

**Art. 7395. Only part of tax to be paid, when.**—Whenever a private domestic corporation is chartered in this state, and whenever a foreign corporation is authorized to do business in this state, and such corporation shall be required to pay in advance to the secretary of state, as its franchise tax from that time down to and including the thirtieth day of April next following, only such proportionate part of its annual franchise tax, as hereinabove prescribed, as the period of time between the date of filing of its articles of incorporation or the issuance of its permit to do business, as the case may be, and on the first day of May next following, bears to a calendar year. [Id. sec. 3.]

**Art. 7396. Certain affidavits may be required.**—For the purpose of determining the amount of the first franchise tax payment required by this chapter of any domestic corporation which may be hereafter chartered, or of any foreign corporation which may hereafter apply for a permit to do business within this state, and also for the purpose of determining the correctness of any report which is provided for in this chapter, the secretary of state may, whenever he may deem it necessary or proper to protect the interests of the state, require any one or more of the officers of such corporations to make and file in the office of the secretary of state an affidavit or affidavits in writing, which shall be subscribed by such officer, and by him sworn to before some officer who is by law duly authorized to administer oaths, and verified by his seal of office, setting forth fully the facts concerning the amount of the surplus and undivided profits, respectively, if any, of such domestic or foreign corporation; and until the secretary of state shall be fully satisfied as to the amount of such surplus and undivided profits, respectively, if any, he shall not file the articles of incorporation of such proposed domestic corporation, or issue such permit, or accept such franchise tax. [Id. sec. 4.]

**Art. 7397. Reports to be filed, etc.**—For the purpose of ascertaining and determining the amount of any annual franchise tax prescribed by this chapter, excepting only the first tax to be paid by any domestic corporation which may hereafter be chartered, or of any foreign corporation which may hereafter be authorized to do business in this state, the president, vice-president, general manager, secretary, treasurer and superintendent of each and every domestic or foreign corporation embraced within the provisions of this chapter, shall annually and between the first and tenth days of March, and also whenever called upon by the secretary of state to do so, report to the secretary of state, in writing, and under oath, as required by the preceding article, the total amounts of the capital stock issued and outstanding, and the surplus and undivided profits, respectively, if any, of such corporation on the first day of March next preceding; and the secretary of state may ascertain such facts from other sources: and, if the true aggregate of such

amounts shall exceed the authorized capital stock of such corporation as disclosed by its then current original or amended articles of incorporation, the amount of its annual franchise tax for the year beginning the first day of May next thereafter shall be thereon collected and paid; otherwise, its annual franchise tax shall be calculated and paid upon the amount of its authorized capital stock as shown by its aforesaid original or amended articles of incorporation. The making and filing by any one of such officers of such corporation of the record required by this article shall relieve the other officers of such corporation from the duty of making any report required by this article, except such report or reports as may be required by the secretary of state. [Id. sec. 5.]

*Note.*—This article seems to be superseded in part by Arts. 7397a-7397e.

**Art. 7397a. Reports to be filed; basis of tax.**—All corporations that are now required by law to pay an annual franchise tax, shall, between the first day of January and the first day of February of each and every year, be required to make a report to the secretary of state, on blanks furnished by him, which report shall give the authorized capital stock of the corporation, the capital stock issued and outstanding, the surplus and undivided profits of the corporation, the names and addresses of all the officers and directors of the corporation, the amount of mortgages, bonded or other indebtedness of each corporation, and the amount of the last annual, semi-annual or quarterly dividend. If the capital stock issued and outstanding plus the surplus and undivided profits shall exceed the authorized capital stock, the franchise tax shall be based on this amount instead of the authorized capital, but if it shall be less, then the franchise tax shall be based on the amount of capital stock, but no corporation shall be required to pay a greater rate of franchise tax by reason of its having a surplus than a corporation that has no surplus. [Acts 1913, p. 327, sec. 1.]

*See Art. 7397.*

**Art. 7397b. Penalty for failure to make report, etc.**—Any corporation which shall fail or refuse to make the report as provided in section one hereof [Art. 7397a], shall be subject to a fine of ten dollars for each and every day after the first day of February that they shall fail to make such report. The attorney general of this state is hereby empowered and directed to bring suit against such corporation in either of the district courts of Travis county, in the name of the state of Texas for the collection of such penalties that may be due by reason of such failure. [Id. sec. 2.]

**Art. 7397c. Reports privileged, etc.**—The reports required by this Act shall be deemed to be privileged and not for the inspection of the general public, but any party or parties who are interested in the subject matter of any report, may, upon valid request in writing made to the secretary of state, secure a copy of same. [Id. sec. 3.]

**Art. 7397d. May be made by what officers; how executed, etc.**—The following officers of each and every corporation shall be deemed competent to make the report required by this Act: The president, vice-president, secretary, treasurer or general manager, and all reports provided for in this Act shall be signed officially and sworn to before some officer authorized by law to administer oaths. [Id. sec. 4.]

**Art. 7397e. Laws repealed, etc.**—All laws and parts of laws in conflict with this Act are hereby repealed, but where this Act is not in conflict with any existing law, it shall be held to be amendatory thereof. [Id. sec. 5.]

**Art. 7398. Supplemental tax to be paid when capital increased.**—In the event of increase in the authorized capital stock of any domestic or foreign corporation, it shall also pay in advance a supplemental franchise tax thereon for the remainder of the year down to and including the

thirtieth day of April next thereafter, the amount of which shall be determined as is provided in article 7395 in case of the first franchise tax payment to be made under this chapter by a domestic corporation which may be hereafter authorized to do business within this state. [Acts 1907, p. 503, sec. 6.]

**Art. 7399. Failure to pay tax; charter forfeited, when; penalty.**—Any corporation, either domestic or foreign, which shall fail to pay any franchise tax provided for in this chapter when the same shall become due and payable under the provisions of this chapter, shall thereupon become liable to a penalty of twenty-five per cent of the amount of such franchise tax due by such corporation; and, if the amount of such tax and penalty be not paid in full on or before the first day of July thereafter, such corporation shall for such default forfeit its right to do business in this state; which forfeiture shall be consummated without judicial ascertainment by the secretary of state entering upon the margin of the record kept in his office relating to such corporation, the words, "right to do business forfeited," and the date of such forfeiture; and any corporation whose right to do business shall be thus forfeited shall be denied the right to sue or defend in any other courts of this state, except in a suit to forfeit the charter of such corporation; and, in any suit against such corporation on a cause of action arising before such forfeiture, no affirmative relief shall be granted to such corporation, unless its right to do business in this state shall be revived as provided by this chapter. And each and every director and officer of any corporation whose right to do business within this state shall be so forfeited shall, as to any and all debts of such corporation which may be created or incurred, with his knowledge, approval and consent, within this state, after such forfeiture by any such directors or officers, and before the revival of the right of such corporation to do business, be deemed and held liable thereon in the same manner and to the same extent as if such directors and officers of such corporation were partners. [Id. sec. 8.]

**Grounds for forfeiture.**—The failure of a corporation to pay the franchise tax mentioned in the article prior to its amendments embodied in this article does not authorize the secretary of state to declare forfeiture of its charter, but its dissolution can only be effected by a suit brought by the state for that purpose. *Rippstein v. Haynes Medina Valley Ry. Co.* (Civ. App.) 85 S. W. 314.

**Sufficiency of forfeiture.**—Under this article as originally enacted in 1897 an entry by the secretary in his ledger: "Penalty notice returned. Charter forfeited for 1895 tax. Charter filed March 17, 1890"—is insufficient to forfeit the corporation's right to sue. *Harvey v. Provident Inv. Co.* (Civ. App.) 156 S. W. 1127.

**Official certificate as evidence.**—See notes under Art. 3687, Introductory, § 58.

**Effect of forfeiture.**—That a corporation's right to do business had been forfeited for failure to pay franchise tax as required by this article did not destroy its corporate existence, though it assigned its assets, and ceased to do business. *Maloney Mercantile Co. v. Johnson County Savings Bank*, 56 C. A. 397, 121 S. W. 889.

As the common-law right to defend should not be denied except upon the clearest necessity, the inhibition in this article against affirmative relief would be construed as implying that defensive relief might be granted, so that, in an action upon bills of exchange against a corporation whose right to do business has been forfeited, it could be heard upon its plea of non est factum and other purely defensive relief. *Id.*

Where, at the time a corporation was sued, it had not failed to pay its franchise tax, a condition precedent to its right to do business in the state, it would not be deprived of the right to defend the action by afterwards failing to pay such tax. *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 C. A. 529, 122 S. W. 947.

**Liability of directors.**—A director of a corporation, the franchise of which had been forfeited for failure to pay the franchise tax, could not be made individually liable on an account for goods sold to the corporation, where plaintiff's petition did not specially plead the facts showing such forfeiture and personal liability under this article. *Smith v. Briggs-Weaver Machinery Co.* (Civ. App.) 132 S. W. 954.

**Art. 7400. Notice of forfeiture.**—The secretary of state shall, during the month of May of each year, notify each domestic and foreign corporation which may be or become subject to a franchise tax under any law of this state, which has failed to pay such franchise tax on or before the first day of May, that unless such overdue tax together with said penalty thereon shall be paid on or before the first day of July next following, the right of such corporation to do business in this state will be forfeited without judicial ascertainment. Such notice may be either

written or printed and shall be verified by the seal of the office of the secretary of state, and shall be addressed to such corporation and mailed to the postoffice named in its articles of incorporation as its principal place of business, or to any other known place of business of such corporation; and a record of the date of mailing such notice shall be kept by the secretary of state. Such notice and said record thereof shall constitute legal and sufficient notice thereof for all the purposes of this chapter. Any corporation whose right to do business may have been forfeited, as provided in this chapter, shall be relieved from such forfeiture by paying the secretary of state any time within six months after such forfeiture the full amount of the franchise tax and penalty due by it, together with an additional amount of five per cent of such tax for each month, or fractional part of a month, which shall elapse after such forfeiture; provided, that such amount shall in no case be less than five dollars. When such tax and all such penalties shall be fully paid to the secretary of state, he shall revive and reinstate the right of the corporation to do business within this state by cancelling the words, "right to do business forfeited," upon his record and endorsing thereon the word, "revived," and the date of such revival. If any domestic corporation whose right to do business within this state shall hereafter be forfeited under the provisions of this chapter, shall fail to pay the secretary of state, on or before the first day of January next following the revival, amounts necessary to entitle it to have its right to do business revived under the provisions of this chapter, such failure shall constitute sufficient grounds for the forfeiture, by judgment of any court of competent jurisdiction, of the charter of such domestic corporation. [Id. sec. 9.]

Parties entitled to sue for forfeiture.—See notes under Art. 7404.

**Art. 7400a. Cancellation of forfeiture in certain cases; forfeiture by judgment, when, etc.**—Every private corporation heretofore chartered under the laws of this state, whose charter or right to do business, and every foreign corporation whose right to do business within this state has heretofore been forfeited as provided by law, solely and only because of its failure to pay, within the time provided by law any franchise tax or taxes and penalty or penalties prescribed by law for failure to pay such tax or taxes when due, shall be permitted and authorized to pay to the secretary of the state on or before the first day of September, A. D., 1913, the aggregate amount of its franchise tax or taxes and the penalty or penalties thereon as provided by law, calculated for the entire period of time beginning with the day upon which the first unpaid franchise tax payment became due and ending with the day of such payment; and upon such payment being made to the secretary of state, he shall cancel such previous forfeiture of the right of such corporation to do business within this state and shall endorse upon the margin of the record kept in his office relating to such corporation the word "Revived," and the date of such revival. Failure of any such domestic corporation to pay such aggregate amount on or before the first day of September, A. D., 1913, shall constitute sufficient grounds for the forfeiture by a judgment of any court of competent jurisdiction of the charter of such domestic corporations; provided; that none of the provisions of this section shall apply to any corporation whose right to do business within this state, or whose charter may have been legally forfeited for any other reason than that of failure to pay such franchise tax or taxes and such penalty or penalties.

Provided that this Act shall not in any manner affect any litigation by or against any corporation which cause of action or defense to any cause of action originated since the forfeiture of the charter or cancellation or permit and prior to the time of taking advantage of this Act. [Acts 1907 (1st Ex. Sess.) ch. 23, sec. 10. Amended Acts 1911, p. 91, sec. 1. Acts 1913, p. 334, sec. 1.]

**Art. 7401. Foreign corporations may withdraw.**—Should any foreign corporation which may have or hereafter obtain a permit to do business within this state desire at any time to withdraw from doing business in this state, it may surrender such permit to the secretary of state, who shall thereupon mark or stamp such permit, “surrendered,” dating and signing same officially, and shall endorse upon the record of such permit in his office the word, “surrendered,” and the date thereof; and thereafter such corporation may, by complying with the provisions of this chapter, secure a new permit to do business in this state without having made any further payment of franchise tax under such old permit. [Acts 1907, p. 503, sec. 11.]

**Art. 7402. No business to be done after forfeiture; penalty.**—In any and all cases in which the charter, or right to do business, of any private domestic corporation, heretofore or hereafter chartered under the laws of this state, or the permit of any foreign corporation, or its right to do business within this state, shall have been or shall hereafter be forfeited, it shall be unlawful for any person or persons who were or shall be stockholders, or officers, of such corporation at the time of such forfeiture to do business within this state, in or under the corporate name of such corporation, or to use signs or advertisements of such corporation or similar to the signs or advertisements which were used by such corporation before such forfeiture; and each and every person who may violate any of the provisions of this article shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the Penal Code; provided, the inhibition and penalties prescribed by this article shall not apply where the right of such corporation to do business within this state has been revived in the manner provided by law and is at the time in good standing. [Id. sec. 12.]

**Art. 7403. Certain corporations not required to pay tax, when.**—The franchise tax imposed by this chapter shall not apply to any insurance company, surety, guaranty or fidelity company, or any transportation company, or any sleeping, palace car and dining car company which now is required to pay an annual tax measured by their gross receipts, or to corporations having no capital stock and organized for the exclusive purpose of promoting the public interest of any city or town, or to corporations organized for the purpose of religious worship, or for providing places of burial not for private profit, or corporations organized for the purpose of holding agricultural fairs and encouraging agricultural pursuits, or for strictly educational purposes, or for purely public charity. [Id. sec. 13.]

**Art. 7404. Attorney general to bring suit, when.**—The attorney general shall be authorized, and it shall be his duty, to bring suit therefor against any and all such corporations which may be or become subject to or liable for any and all franchise tax or taxes or penalties under this or any former law; and, in case there may now be or shall hereafter exist valid grounds for the forfeiture of the charter of any domestic private corporation, or failure to pay any franchise tax or franchise taxes or penalty or penalties to which it may have become or shall hereafter be or become subject or liable under this or former law, it shall be his duty to bring suit for a forfeiture of such charter; and, for the purpose of enforcing the provisions of this chapter by civil suits, venue is hereby conferred upon the courts of Travis county concurrently with the courts of the county in which the principal office of such corporation may be located as shown by its articles or amended articles of incorporation. Such courts shall also have authority to restrain and enjoin a violation of any and all of the provisions of this chapter. In any and all cases in which any court having jurisdiction thereof shall make and enter judgment forfeiting the charter of any

such corporation, the court may appoint a receiver thereof and may administer such receivership under the laws regulating receiverships. [Id. sec. 14.]

**Nature of procedure.**—A proceeding for judgment of ouster from corporate franchises, dissolution of a corporation, for unpaid franchise taxes and penalties, and for a receiver to wind up the corporation is not maintainable under Art. 6398, but must be had under this article. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

**Persons entitled to sue for forfeiture and for taxes.**—Under this article and Arts. 7400, 7401, the authority of the Attorney General is exclusive, and a suit instituted by a county attorney is illegal. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

**Art. 7405. Forfeiture of charter by court; duty of clerk.**—Upon the rendition by the district court of any judgment or forfeiture under the provisions of this chapter, the clerk of that court shall forthwith mail to the secretary of state a certified copy of such judgment; and, upon receipt thereof, he shall endorse upon the record of such charter in his office the words, "judgment of forfeiture," and the date of such judgment. In event of an appeal from such judgment by writ of error or otherwise, the clerk of the court from which such appeal is taken shall forthwith certify to the secretary of state the fact that such appeal has been perfected, and he shall endorse upon the record of such charter in his office the word, "appealed," and the date upon which such appeal was perfected. When final disposition of such appeal shall be made, the clerk of the court making such disposition thereof shall forthwith certify such disposition and the date thereof to the secretary of state, who shall briefly note same upon the record of such charter in his office and the date of such final disposition. [Id. sec. 15.]

**Review of proceedings.**—A proceeding for ouster and unpaid franchise taxes must be had under Art. 7404, and not under Art. 6398; and hence, as this article contemplates review of the judgment by writ of error, a motion to dismiss the writ to the judgment, because proceedings under Art. 6398 were reviewable only by appeal, must be denied. *Oriental Oil Co. v. State* (Civ. App.) 135 S. W. 722.

Even if the proceeding for ouster and for delinquent franchise taxes be construed to be both under Art. 6398 and under Art. 7404, the writ of error would stand as to everything in the judgment, except the naked item of ouster. *Id.*

**Art. 7406. Payment of tax by corporations in process of liquidation.**—In case a corporation is actually in process of liquidation, such corporation shall only be required to pay a franchise tax calculated upon the difference between the amount of stock actually issued and the amount of liquidating dividends actually paid upon such stock; provided, that the president and secretary of such corporation shall make affidavit as to the total amount of capital stock issued and as to the amount of liquidating dividends actually paid and that such corporation is in an actual bona fide state of liquidation. [Id. sec. 15a.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Recovery of tax paid under protest.**—A foreign corporation paying a franchise tax under protest, on the ground of the illegality of the statute imposing the tax, held not entitled to recover the same, on the ground that it was only doing an interstate business, and was not subject to the franchise tax. *Gaar, Scott & Co. v. Shannon*, 52 C. A. 634, 115 S. W. 361.

## CHAPTER FOUR

### STATE INTANGIBLE TAX BOARD

Art.		Art.	
7407.	State tax board, of whom composed; tax commissioner, appointment of.	7416.	Statement of intangible assets; to contain what.
7408.	Bond of tax commissioner.	7417.	Date of receipt to be endorsed on statement; board may demand additional statements.
7409.	Secretary.	7418.	Statements placed before board, when.
7410.	Duties of board.	7419.	Duties and powers of board in passing upon statements.
7411.	Same.	7420.	Same.
7412.	Powers of board.		
7413.	Failure to obey subpoena; penalty.		
7414.	Tax on intangible assets; law applies to whom.		
7415.	Same.		



Art. 7421.	Unincorporated companies and individuals; capital, how ascertained.	Art. 7424.	Failure to make statement, etc.; penalty.
7422.	Board to certify amount of intangible assets to assessors.	7425.	Receivers and trustees in bankruptcy to make reports, etc.
7423.	Failure of tax assessor to comply; penalty.	7426.	Persons complying with this chapter relieved of other taxes.

**Article 7407. State tax board, of whom composed; tax commissioner, appointment of.**—There is hereby created a state tax board, which shall be composed of the comptroller of public accounts, the secretary of state and a third member, to be known as tax commissioner of the state of Texas. Except as herein otherwise provided, such tax commissioner shall be appointed by the governor in accordance with and subject to the provisions of section 12 of article 4 of the constitution of Texas, and shall hold his office for two years and until his successor shall be appointed and qualified, and shall receive an annual salary of two thousand five hundred dollars, in equal installments payable at the end of each month. A majority of said board shall constitute a quorum to do business. A record of the proceedings of said board shall be kept at the state capitol, and shall be open to the inspection of the public. [Acts 1909, p. 469.]

**Constitutionality.**—Acts 1905, c. 146, p. 351, re-enacted with modifications and additions and embodied in this chapter, is not unconstitutional, and an injunction will not lie to restrain the state tax board from exercising or attempting to exercise any of the powers and functions conferred on them by the act. *Missouri, K. & T. Ry. Co. v. Shannon*, 100 T. 379, 100 S. W. 138, 10 L. R. A. (N. S.) 681, affirming (Civ. App.) 97 S. W. 527.

This act, Acts 1907, c. 17, embodied in this chapter, is not repugnant to or violative of article 8, sections 11, 14, of the state constitution. *Lively v. M., K. & T. Ry.*, 102 T. 545, 120 S. W. 852.

**Art. 7408. Bond of tax commissioner.**—Before the tax commissioner shall enter upon or proceed with the discharge of his official duties, he shall execute a bond payable to the state of Texas, at Austin, in Travis county, Texas, in the sum of ten thousand dollars, with two or more good and sufficient sureties, to be approved by the governor, conditioned for the faithful discharge of his official duties as such tax commissioner, and shall take and subscribe the oath of office prescribed by the constitution of this state, which bond and oath shall be filed in the office of the secretary of state. [Id. sec. 2.]

**Art. 7409. Secretary.**—The state [tax] board may employ for not more than four months in each year a secretary, who shall be an expert stenographer, and who shall receive for his services as secretary and stenographer a salary of one hundred dollars per month. [Id. sec. 3.]

**Art. 7410. Duties of board.**—It shall be the duty of said tax board—

(a) To make such rules and regulations as said board shall deem proper with respect to its own meetings and procedure, and to effectually carry out the purposes for which said board is constituted.

(b) To examine all books, papers and accounts and to interrogate under oath, or otherwise, any and all persons whom said board, or any member thereof, may desire to examine for the purpose of obtaining or acquiring any and all information that may in any manner aid in securing a compliance with any tax law or revenue law of this state by any and all persons, companies, corporations or associations liable to taxation or to pay any license fee under any law of this state, which is now in force, or which may hereafter be enacted.

(c) To make diligent investigation and inquiry concerning the revenue laws and systems of other states and countries, so far as the same are made known by published reports, or statistics, or can be ascertained by correspondence with officers thereof; and, with the aid of information thus or otherwise obtained, together with experience and observation of the operation of the laws of this state, to recommend to the legislature at each regular session thereof, such amendments, changes or modifications of the laws of this state, and such additional laws as

may to said board, or any member thereof, seem necessary or proper to remedy injustice or irregularity in taxation, and to facilitate the assessment of taxes and collection of public revenues.

(d) To report to the legislature, at each regular session thereof, the whole amount of state revenues collected in this state for all purposes, and the sources thereof, the amount of such revenues which may be lost to the state through failure to make collection and the cause of such losses, a summary of the proceedings of said board since the date of its last report, and such other matters concerning the public revenues as said board, or any member thereof, may deem to be of public interest. [Id. sec. 4.]

**Art. 7411. Same.**—Said tax board, or any member thereof, or the state revenue agent under the direction of said board or of the governor of Texas, shall, at least once in each year, visit such counties of the state as said board, or the said governor, may direct, for the purpose of investigating into and aiding in the enforcement of all revenue laws of this state, and especially those concerning the rendition, assessment and collection of taxes. [Id. sec. 5.]

**Art. 7412. Powers of board.**—Each member of said state tax board shall have power to administer oaths and to subpoena and examine witnesses, and to issue subpoenas duces tecum, and shall have access to and power to order the production before such board, or any member thereof, of any and all books, documents and papers which may be in the possession or under the control of any person, company, corporation or receiver, assignee, trustee in bankruptcy, or bailee, whenever such board, or any member thereof, may consider same necessary or proper in the prosecution of any injury [inquiry] under or in the execution of any provision of this chapter; and all such process shall be served under the provisions of law governing the service of process in civil cases, in so far as applicable. [Id. sec. 6.]

**Art. 7413. Failure to obey subpoena; penalty.**—Any person who shall disobey any such subpoena, or subpoena duces tecum, issued by any member of said board, or any such order of said board, or who shall fail or refuse to attend as by such subpoena directed, or to testify when so required to do so by any member of said board, under the provisions of this chapter, shall be deemed guilty of contempt, and may be punished therefor by said board under the provisions of laws applicable to the district courts in such cases. [Id. sec. 7.]

**Art. 7414. Tax on intangible assets; law applies to whom.**—Each and every incorporated railroad company, ferry company, bridge company, turn-pike or toll company, doing business wholly or in part within the state of Texas, whether incorporated under the laws of this state, or of any other state, territory, or foreign country, and every other individual, company, corporation or association doing business of the same character in this state, in addition to the ad valorem taxes on intangible properties which are or may be imposed upon them, respectively, by law, shall pay an annual tax to the state, beginning with the first day of January of each year, on their intangible assets and property, and local taxes thereon to the counties in which its business is carried on; which additional tax shall be assessed and levied upon such intangible assets and property in the manner provided in this chapter. The county or counties in which such taxes are to be paid, and the manner of the apportionment of the same, shall be determined in accordance with the provisions of this chapter. [Id. sec. 8.]

**Valuation for assessments.**—Intangible assets of a railroad company must be assessed at the same uniform rate as all other property in the county, in this case (Dallas county) at 66% cents on the dollar. *Lively v. M., K. & T. Ry.*, 102 T. 545, 120 S. W. 852.

**Review of assessment.**—It is not necessary for a railroad company to apply to the board of equalization of the county for relief in the matter of assessing its intangible

assets, because that board has no power to grant such relief. *Lively v. M., K. & T. Ry.*, 102 T. 545, 120 S. W. 855.

**Art. 7415. Same.**—Between the second day of January and the first day of March of each year, every individual, company, corporation and association embraced within the provisions of the next preceding article of this chapter, or coming within its scope and intent, shall make out and deliver into the possession of said tax commissioner a statement containing the information required of it by this chapter, which statement shall be duly verified by the affidavit of the individual, or one of the officers of the company, corporation or association in whose behalf it is made, or by the receiver, assignee, or trustee in bankruptcy thereof. [Id. sec. 9.]

**Art. 7416. Statement to contain what.**—Each such statement shall show the following items and particulars as the same stood on the first day of January next preceding, to-wit:

(a) The name of the individual, company, corporation, or association making such statement, and the character of its business.

(b) If incorporated, the authority by which it was incorporated and the purposes of its incorporation as expressed in its original or amended articles of incorporation or articles of association.

(c) The locality of its principal office and the amount and kind of business done by it in this state and the total gross receipts derived from its business within this state, including a due proportion of its interstate business, if it has done any business of that character.

(d) Its total authorized capital stock and the number of shares thereof which have been issued and are outstanding, and the par face value of each such share, and the amount of the capital actually employed in the aforesaid business within the state.

(e) The market value of said shares of stock, or, if they have no market value, the actual value thereof.

(f) The assessed value and also the true value of all the tangible property owned by such individual, company, corporation or association in each county in this state and the total assessed value and also the true value thereof.

(g) The assessed value and also the true value of the tangible property of such individual, company, corporation or association, outside of this state, and not specifically used in the business of such individual, company, corporation or association, same to be given by states, and the total assessed value and also the true value of the same.

(h) A statement of each and every existing lien, mortgage or other charge upon the whole, or any part, of the property of such individual, company, corporation or association, and of the property thereby charged or encumbered, and of the amount of unpaid debt secured by each such mortgage, lien or charge, and of the interest charged thereon, and to what extent such interest has been paid, and of the true and fair market value of every such debt.

(i) A statement of the gross receipts and net income and earnings for the next preceding twelve months, including therein all interest on investments, and all rents, fruits, revenues and receipts from every source whatsoever, and a statement of the income used for repairs, and of the amounts used for betterments, and the amount used for extensions within that period of time.

(j) Every such railroad company shall also show in each statement made by it:

1. The total length of all lines of said company, whether within or without this state.

2. The total length of such lines as are within the state.

3. The length of its lines in each of the counties in this state into which its lines extend. [Id. sec. 10.]

**Art. 7417. Date of receipt to be endorsed on statement; board may demand additional statements.**—The tax commissioner shall receive all tax statements rendered to him under the provisions of this chapter, and shall endorse upon each the date of receipt thereof, signing such endorsement officially. Said state tax board shall examine all such statements as soon as may be practicable; and, if said board shall deem any of them insufficient, or shall believe other or further information necessary or proper, said board shall at once demand of such individual, company or corporation, or association, such additional statements and such further information as it may think proper. [Id. sec. 11.]

**Art. 7418. Statements placed before board, when.**—On the first Monday after the first day of March of each year, or as soon thereafter as may be practicable, said tax commissioner shall place before said state tax board all such statements, facts and information as may have come into its possession or knowledge under the provisions of this chapter. [Id. sec. 12.]

**Art. 7419. Duties and powers of board in passing upon statement.**—Said state tax board shall thereupon carefully examine and consider the said statements, facts and information; and, if they deem it advisable to do so, shall hear evidence, and shall require such individual, company, corporation or association to make such additional reports, if any, as such board may deem proper, and shall otherwise secure further additional information so far as may be in their power, to show the true value of the properties aforesaid, and the true value of that portion of every such property which is situated within the state and within the respective counties thereof, sufficient to enable said board to make the preliminary estimate herein provided for; and, for that purpose as well as for the purpose of carrying into effect any and all the provisions of this chapter, said board, and each member thereof, may require and compel, as provided in this chapter, any and all such individuals, companies, corporations and associations, and the officers and agents thereof, and such receivers, trustees in bankruptcy, assignees and bailees, to appear before such board at a time or times to be designated by said board, with any and all such books, papers, documents and information as said board may require, and to submit themselves to examination by said board. Upon consideration of such statements and information and such additional evidence, books, papers, documents and information, if any, said state tax board shall make in accordance with the provisions of this chapter, a preliminary estimate, valuation and apportionment of the true value of the intangible property within this state, of each of said individuals, companies, corporations, or associations, and shall, on or before the thirty-first day of May of each year, by registered mail, notify each and every such individual, company, corporation, or association, receiver or assignee, trustee in bankruptcy, or other person holding such property for the benefit of creditors, of such preliminary estimate, valuation and apportionment, and the amounts thereof; and all such individuals, companies, corporations, associations, receivers, assignees, trustees and other persons shall have fifteen days from the time of mailing such notice by registered mail to appear before such state tax board, at Austin, in Travis county, Texas, on a date to be fixed in such notice, and request of such board a change or changes in such valuation and apportionment, or either, or a cancellation of such valuation and apportionment; and said individuals, companies, corporations, associations, receivers, assignees, trustees and other persons may appear before such board, in person or by attorney, or in person and by attorney, and introduce evidence. Said board may, upon its own motion, or upon the written request of any interested party, and each member of said board may summon, swear and examine witnesses under the same rules which govern the summoning, swearing and ex-

amination of witnesses in the district courts of this state; and such board shall have the same jurisdiction, authority and power, under the same penalties, to require the production and to secure the examination of any and all books, documents and papers of such individuals, companies, corporations and associations, receivers, assignees, trustees and other persons as is now or may hereafter be conferred by the laws of this state upon the railroad commission of Texas. Upon or after such hearing, said board may change such valuation and apportionment, or either, or cancel such valuation and apportionment, as said board may deem just and proper in the premises. [Id. sec. 13.]

**Art. 7420. Same.**—In so far as the other evidence and information adduced before said state tax board does not make it appear to the members of said board to be improper or unjust to do so, said board shall, in fixing the true value of the entire property of such individual, company, corporation or association embraced within the provisions of this chapter, take as a basis therefor the aggregate market or true value of all its shares of stock, adding thereto the aggregate market or true value of all indebtedness secured by any mortgage, lien or other charge upon its property or assets, and the sum so produced shall be deemed and treated as the true value of said entire property. And where the individual, company, corporation or association does business and has property, both within this state and outside of it, in ascertaining the true value of its property within this state, said tax board shall next ascertain from said statements, reports and evidence, if any, or otherwise, the true value, in the locality where the same is situated, of each such several pieces of real estate situated outside of this state, and of its other properties, if any, outside thereof, and not specifically used in the business of said individual, company, corporation or association, and the aggregate of said value shall be deducted from the gross value of the property as above ascertained; and the result of said deduction and the sum or value thereby obtained shall be deemed and treated as the true value of all property of such individual, company, corporation or association in actual use in its business. Said tax board shall then fix the true value of the property of such individual, company, corporation or association within this state, using as a basis and being guided so far as it shall not believe it unjust to do so, by the proportion which it finds to exist between the total lines or total receipts within this state and outside of it, and lines controlled or operated, or the receipts obtained, entirely within this state, so that there shall be apportioned to this state, as the true value of the property within its borders of each individual, company, corporation and association doing business within and outside of its limits, such proportion of the true value of all the property of such individual, company, corporation or association which is specifically used in its business, as is borne by its total lines or total receipts within this state when compared with the total lines or total receipts both inside and outside of the state of Texas. From the entire value of the property within this state, when ascertained as directed by this chapter, said state tax board shall deduct the true value of all the tangible property of such individual, company, corporation or association within this state, as so ascertained by said state tax board, and the residue and remainder of value shall be by said state tax board fixed, determined and declared as the true value of the intangible properties owned and held by such individual, company, corporation or association within this state. Said state tax board shall apportion the sum of the said total taxable values within this state to the counties in which such individual, company, corporation or association does business, in proportion to the amount of business done in and the receipts derived from each such county, except that, in case of a railroad company, the apportionment to each county shall be in proportion to the line or lines of such in-

dividual, company, corporation or association therein. In apportioning the value of the aforesaid properties, said state tax board shall have the right and it shall be its duty to make use of and consider all evidence which may be put before it and all material facts at its command; and, if it shall believe that some method of calculation other than that specifically prescribed in this chapter is necessary in order to produce just and lawful results, said board shall follow that method of calculation which it believes best calculated, under all circumstances, to bring about a just, fair, equitable and lawful valuation and apportionment of such property. [Id. sec. 14.]

**Art. 7421. Unincorporated companies and individuals; capital, how ascertained.**—Whenever any person, or association of persons, not being a corporation, nor having a capital stock, shall engage in this state in any character of business embraced within the provisions of article 7414, then the capital and property, or the certificate or other evidences of the rights or interests of such person or association of persons engaged in such business, shall be deemed and treated as the capital stock of such person, or association of persons, for the purpose of taxation, and for all other purposes, under this chapter, and shall be estimated and valued; and the intangible property of such person or association of persons, when ascertained, shall be apportioned, distributed, assessed and taxed under the provisions of this chapter, in like manner as if such person or association of persons were a corporation; and each such person and association of persons shall, annually, within the time and in the manner provided in this chapter, make the statements and reports and furnish and supply the information required by this act of the aforesaid companies, corporations and associations, and shall be subject in like manner as the aforesaid companies, corporations and associations to all the terms and provisions of this chapter, including penalties. [Id. sec. 15.]

**Art. 7422. Board to certify amount of intangible assets to assessors.**—Thereafter, and not later than the twentieth day of June of each year, said state tax board shall make, in accordance with the provisions and requirements of this chapter, a final valuation and apportionment of the intangible assets aforesaid, of each and every such individual, company, corporation and association, and shall, as soon after such twentieth day of June as practicable, certify to the tax assessor of each county in this state to which any portion of such intangible assets of any such individual, company, corporation or association is found by said board to be apportionable for taxation and so apportioned, the amount thereof, as fixed, determined and declared by said board, and thereunto apportioned by said board, together with the name and place of residence or place of business of the owner or owners of the property embraced in such valuation and apportionment; provided, that such final valuation and apportionment of such intangible assets, properly apportionable and apportioned by such state tax board to any unorganized county shall be by said board so certified to the tax collector of the county to which such unorganized county is attached for judicial purposes. It shall be the duty of the tax assessor of such county, upon receiving such certificate or certificates of said state tax board, to place, set down and list, upon forms prescribed by the comptroller of public accounts for such purpose, upon the tax rolls of his county, and of each unorganized county which is attached to his county for judicial purposes, as the case may be, any and all such intangible assets, at the value so fixed, determined, declared and certified by said state tax board. Such county tax assessor shall extend and prorate upon said rolls the state and county taxes upon all such intangible assets in the same manner as taxes upon other property are extended and prorated. Said assessment, valuation and apportionment of such intangible assets so fixed, determined, de-

clared and certified by such state tax board shall not be subject to review, modification or change by the tax assessor of such county, nor by the board of equalization of such county; and the state and county taxes thereon shall be collected by the tax collector of such county and accounted for by him in the same manner and under the same penalties as taxes upon other property. All state and county ad valorem taxes upon all intangible property in this state belonging to any individual, company, corporation or association embraced by this chapter, shall be assessed under its provisions and not otherwise; but ad valorem taxes upon all other property of any and all such individuals, companies, corporations and associations shall be assessed as is now or as may hereafter be provided by law. [Id. sec. 16.]

**Art. 7423. Failure of tax assessor to comply; penalty.**—Any county tax assessor who shall violate or in any respect fail to comply with any of the provisions of this chapter, and any member of any board of equalization and any county tax assessor who shall modify or change, or vote to modify or change, in any manner whatsoever the finding, valuation or apportionment of any of said intangible assets as so fixed, determined, declared and certified by said state tax board, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished as provided in the Penal Code. [Id. sec. 17.]

**Art. 7424. Failure to make statement, etc.; penalty.**—Every individual, company, corporation and association, embraced within the provisions of this chapter, which shall fail to make any return, statement and report provided for by this chapter, within fifteen days after the day on which it is required by this chapter to be made, or to make any additional report or statement, or to furnish any additional information which may be required by said state tax board, or any member thereof, under the provisions of this chapter, within fifteen days after the mailing of a registered notice or demand therefor in writing, signed by any member of said board and addressed to such individual, company or corporation or association, at its proper postoffice address or principal place of business, shall forfeit and pay to the state of Texas not more than five thousand dollars, which amount may be recovered by suit which may be brought therefor in behalf of the state by the attorney general; and venue of such suits is hereby fixed within the county of Travis, in said state; and the courts of said county are hereby vested with jurisdiction of said causes. [Id. sec. 18.]

**Art. 7425. Receivers and trustees in bankruptcy to make reports, etc.**—If the property of any such individual, company, corporation or association shall be in the hands of any receiver, assignee, trustee in bankruptcy, or other person holding under any court, or for the benefit of any creditor or creditors, then the statements, reports, information, books and papers aforesaid shall be furnished by such receiver, assignee, trustee or other person, by some officer or agent acting under him, in the same manner and to the same extent as is hereinbefore provided in cases where an individual, company or association is in possession; and as to such receiver, assignee, trustee in bankruptcy or other person, officer or agent, all of the provisions of this chapter, in so far as they are applicable, shall apply and govern. [Id. sec. 19.]

**Art. 7426. Persons complying with this chapter relieved of other taxes.**—Whenever any individual, company, corporation or association, embraced within article 7414, shall pay in full, and within the year for which same may be assessed, all its state and county taxes for that year upon all its intangible properties as determined, fixed and assessed under the provisions of this chapter, such individual, company, corporation or association shall thereby be relieved from liability for and from payment of any and all occupation taxes measured by gross receipts

for or accruing during that year under any law of this state; but no such individual, company, corporation or association shall be entitled to any such exemption, except for the year for which it shall, before same shall become delinquent, pay all its aforesaid intangible state and county taxes for that year. [Id. sec. 21.]

## CHAPTER FIVE

### TAX ON LIQUOR DEALERS

<p>Art. 7427. Tax to be collected. 7428. "Retail liquor dealer" defined. 7429. "Retail malt dealer" defined. 7430. Liquor dealer's license. 7431. Malt dealer's license. 7432. Right of wine growers to sell wine. 7433. Transfer of license, etc. 7434. Forfeiture of license. 7435. Application of license. 7436. Comptroller may revoke license. 7437. Same. 7438. Same. 7439. Same. 7440. Same. 7441. Same. 7442. Same. 7443. Same. 7444. Same. 7445. Number of licenses limited, etc. 7446. Petition for license. 7447. License not to be granted for business within three hundred feet of a church. 7448. Judge shall head petition, etc. 7449. Clerk to furnish certified copy of judgment. 7450. Clerk to issue license, when.</p>	<p>Art. 7451. Regulating hours of closing, etc. 7452. Bond. 7453. Unearned portion returned in case of death. 7454. Clerk to make statement. 7455. Duty of clerk to certify forfeitures, etc. 7456. Act of servant deemed to be the act of master. 7457. No license issued to person whose license has been revoked until five years. 7458. Licenses not to be issued, when. 7459. Law not to conflict with local option law. 7460. License to be posted. 7461. List of licenses to be delivered to grand jury. 7462. District judge to charge law to grand jury. 7463. Fees of officers. 7464. In case of forfeiture may dispose of stock in bulk. 7465. "Intoxicating liquor" defined. 7466. Law to be valid, though part is held to be invalid.</p>
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[In addition to the notes under the particular articles, see also notes of decisions under superseded acts, at end of chapter.]

**Article 7427. Tax to be collected.**—There shall be collected from every person, firm or association of persons selling spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, in this state, not located in any county, or subdivision of a county, justice precinct, city or town where local option is in force under the laws of Texas, an annual tax of three hundred and seventy-five dollars on each separate establishment as follows: For selling such liquors or medicated bitters in quantities of one gallon or less than one gallon, three hundred and seventy-five dollars; for selling such liquors or medicated bitters in quantities of one gallon or more than one gallon, three hundred and seventy-five dollars; provided, that in selling one gallon the same may be made up of different liquors in unbroken packages aggregating not less than one gallon; for selling malt liquors exclusively sixty-two dollars and fifty cents; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law. The commissioners' courts of the several counties in this state shall have the power to levy and collect from every person or asso-



ciation of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half of the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners' court of the county in which such city or town is situated; provided, that where any special charter gives the right to any city to refuse a license for the sale of intoxicating liquors, no license issued on behalf of the state or county shall become operative therein until a license therefor has been issued by such city. [Acts 1909, 1 S. S., p. 293, sec. 1.]

See *Watts v. State*, 61 Cr. R. 364, 135 S. W. 585; *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Applicability in general.**—The statute imposing an occupation tax on the occupation of selling malt liquors does not apply to one following the occupation in a local option district. *Hall v. State*, 48 Cr. R. 514, 90 S. W. 503.

There is no repugnancy between Acts 1907, c. 133, p. 259, re-enacted with modifications and additions in 1909 and embodied in this chapter, and the general Sunday law, and both may and can stand in perfect harmony. *Ex parte Wright*, 56 Cr. R. 504, 120 S. W. 869.

Sales are in T. county so as not to subject one to the occupation tax of pursuing the business of selling intoxicating liquors in C. county, where he sends circulars from T. county to C. county, soliciting orders, and on orders being received delivers the liquor in T. county to the buyer or to a carrier for him, the seller not undertaking to deliver in C. county. *State v. Texas Brewing Co.* (Sup.) 157 S. W. 1166.

**Saloon limits fixed by city ordinance.**—An ordinance of a city prohibiting saloons within certain described limits does not contravene this article, giving one the right to sell liquors who has paid state and county occupation tax. *Garonsik v. State*, 50 Cr. R. 533, 100 S. W. 374.

Where the charter of a city defines limits within which saloons shall not be kept, one can be enjoined under Acts 1907, p. 166, from keeping a saloon within said limits, even though he has obtained a license under this law. *Paul v. State*, 48 C. A. 25, 106 S. W. 451.

The provisions of a city charter empowering the board of commissioners to fix saloon limits for the city were not repealed by Acts 1907, p. 258. *Ex parte King*, 52 Cr. R. 383, 107 S. W. 549.

**Contracts—Validity of.**—Where a license to carry on a business is required for the sole purpose of raising revenue, and a statute inflicts a penalty by way of securing payment of the license named, a sale without a license is not invalid and the price of the goods may be recovered. *Eberstadt v. Jones*, 19 C. A. 480, 43 S. W. 558.

**Clubs.**—A country club held not a person, under the law, engaged in the occupation or business of selling intoxicating liquors. And the possession of an internal revenue liquor license by a club held not to fix on the officers thereof the liabilities of a retail liquor dealer. *State v. Duke*, 104 T. 355, 137 S. W. 654, 138 S. W. 385.

Organized clubs are not required or permitted to take out a license for sales of liquors to members as an incident to their organization and not as a business for profit. *Adams v. State* (Cr. App.) 145 S. W. 940.

A social club may sell liquors to its members, without taking out a license. *Trezevant v. State* (Cr. App.) 145 S. W. 1191.

A social club organized in Oklahoma, but which has not complied with the laws of Texas by filing its charter, etc., may not sell liquor in Texas, without a license; there being no showing that the law of Oklahoma permitted a club to sell liquor without a license. *Pace v. State* (Cr. App.) 156 S. W. 1192.

**Druggists.**—In view of past legislation, which at all times exempted druggists from any of the requirements applicable to liquor dealers, except the payment of the tax, the second clause of Art. 7428, though applying generally to all persons selling in quantities less than a gallon, would not include druggists, and hence the requirements of an application, petition, and bond would not refer to druggists, and this is so, since otherwise there was no necessity of placing a proviso that druggists should not be exempt from payment of the annual tax, and since Arts. 7435, 7446, and 7452 were special provisions applying only to liquor sold to be drunk on the premises, and would not affect druggists who cannot sell for that purpose. *Kirk v. Morley* (Civ. App.) 127 S. W. 1109.

**Refunding license tax in local option district.**—See Title 88.

**Art. 7428. "Retail liquor dealer" defined.**—A "retail liquor dealer" is a person or firm permitted by law, being licensed under the provisions of this law, to sell spirituous, vinous and malt liquors, and medicated bitters capable of producing intoxication, in quantities of one gallon or less, which may be drunk on the premises. Any person who sells intoxicating liquors in quantities less than one gallon shall be governed by the provisions of this law and be required to take out license hereunder. [Acts 1909, 1 S. S., p. 294, sec. 2.]

See *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Definitions—"Retail liquor dealer."**—One sale of liquor taken from a licensed saloon by an employé of the saloon keeper would not constitute the employé a "retail liquor dealer," under this article. *Cassidy v. State*, 58 Cr. R. 454, 126 S. W. 600.

**Druggists.**—See notes under Art. 7427.

**Art. 7429. "Retail malt dealer" defined.**—A "retail malt dealer" is a person or firm permitted by law, being licensed under the provisions of this law, to sell malt liquors capable of producing intoxication, exclusively in quantities of one gallon or less, which may be drunk on the premises. [Id. sec. 3.]

See *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Art. 7430. Liquor dealer's license.**—No person shall, directly or indirectly, sell spirituous or vinous liquors capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail liquor dealer. [Id. sec. 4.]

Nature of license.—See notes under Art. 7435.

Revocation of license.—See notes under Arts. 7434, 7436.

**Art. 7431. Malt dealer's license.**—No person shall sell, directly or indirectly, malt liquor capable of producing intoxication, in quantities of one gallon or less, without taking out a license as a retail malt dealer; provided, that this article shall not apply to a retail liquor dealer, and that a retail liquor dealer's license shall be construed to embrace a retail malt dealer's license. [Id. sec. 5.]

Nature of license.—See notes under Art. 7435.

Revocation of license.—See notes under Arts. 7434, 7436.

**Art. 7432. Right of wine growers to sell wine.**—This law shall not be so construed as to deny the right of wine growers to sell wine of their own production in any quantity without license; provided, that such wine grower shall not permit nor suffer any wine so sold by him to be drunk on his premises; and provided, further, that this article shall not be so construed as to give any wine grower the right to sell any wine to any minor without the permission of the parent, master or guardian of such minor first had and obtained, or any habitual drunkard, after being notified by any relative of such drunkard not to make such sale, gift or disposition. [Id. sec. 6.]

Constitutionality.—This article does not make an unreasonable discrimination in favor of producers of native wines, and is not void under the fourteenth amendment to the constitution of the United States. *Douthit v. State*, 98 T. 344, 83 S. W. 796, affirming *Douthit v. State*, 36 C. A. 396, 82 S. W. 353.

**Art. 7433. Transfer of license, etc.**—No retail liquor dealer nor retail malt dealer shall carry on said business at more than one place at the same time under the same license, nor shall any such license be voluntarily assigned more than once; but, before the assignee of such license can engage in business thereunder, he shall comply with the provisions of this law, as required of the original licensee; and provided, further, that the sale of such license, whether in the name of the original licensee or assignee, may be made under execution or mortgage; and the purchaser of such license at such sale shall have the right to surrender such license to the state or county which issued the tax receipt which is the basis therefor, and shall receive therefor the pro rata unearned portion of such license; provided, further, that, should said original licensee, or his assignee, desire to change the place designated in said license, he may do so by applying to the county judge as in case of original application for license as provided in article 7435 of this chapter, but it shall not be necessary to furnish another certificate from the comptroller of public accounts. [Id. sec. 7.]

Temporary transfer of place of business as affecting right to conduct business.—Right to conduct liquor business at the place specified in the license held not lost by temporary transfer of business to another place, without transfer of license. *McLeod v. State*, 33 C. A. 170, 76 S. W. 216.

Injunction at suit of private citizen and taxpayer.—See notes under Title 69.

**Art. 7434. Forfeiture of license.**—Any person or firm having a license as a retail liquor dealer, or a retail malt dealer, who shall violate any of the provisions of this law, or the provisions or conditions of the liquor dealer's bond required by this law to be given by such person or firm, shall forfeit his or their license as a retail liquor dealer, or

retail malt dealer, as the case may be; and, if affidavit is filed by any property taxpaying citizen in the office of the clerk of the county court that such person or firm, having either of such licenses, has been guilty of violating any of the provisions of this law, or the provisions or conditions of said liquor dealer's bond, it shall be the duty of the judge of said county court to immediately cause to be issued a notice in writing to such person or firm so having such license, notifying them of the filing of such affidavit; and it shall also be the duty of the judge of said county court to set a time for the hearing of said affidavit and evidence upon the same at a time not less than six days nor more than ten days after the date of filing of said affidavit; and, upon the hearing of said affidavit and the proof for and against the same, if it shall be determined that said person or firm so having such license has violated any of the provisions of this law, or any of the provisions or conditions of their said liquor dealer's bond, then it shall be the duty of the judge of said court to enter an order on the minutes of said court declaring the said license forfeited, and said license shall be canceled from said date. In case it is determined that the said person or firm so having such license has violated any of the provisions of this law, or any of the provisions or conditions of his said liquor dealer's bond, it shall be the duty of the clerk of said court to immediately notify the comptroller of public accounts of the state of Texas, at Austin, Texas, of the result of such hearing. It shall be the duty of the county attorney to prosecute all complaints made as hereinbefore provided for, or in any other manner in this law provided for, against any person or firm engaged in the business of a retail liquor dealer, or a retail malt dealer, as the case may be, at the time which is designated by the county judge for the hearing of said complaint. In case either party make affidavit showing good cause why he can not at that time try the matters in issue, then said hearing may be postponed for a time not to exceed three days; and provided that no more than two postponements shall be granted to either party. [Id. sec. 8.]

**Grounds for revocation of license.**—An agreement relating to obtaining a liquor license held contrary to law, so that the state may, at its election, cancel the license. *Leon Mercantile Co. v. Anderson*, 56 C. A. 481, 121 S. W. 868.

**Nature of proceedings to revoke.**—A proceeding to revoke a retail liquor license for violation of law, is administrative and not judicial; the power being vested in the county judge rather than in the county court, and no appeal lies from his order, for want of statutory provision therefor. *Hernandez v. State* (Civ. App.) 135 S. W. 170. And it is not a suit by the state to recover a forfeiture, within the constitution, as affecting the jurisdiction of the court of civil appeals. *Id.*

**Constitutional provisions, applicability of.**—A liquor license is a permit, and not a vested property or contract right, and is revocable by the state, though subject to sale or mortgage or execution. *Baldacchi v. Goodlet* (Civ. App.) 145 S. W. 325.

One procuring a liquor license is charged with notice of the right to revoke it, and cannot assert that his constitutional rights are invaded, when the state seeks to exercise such right. *Id.*

— **Effect of revocation.**—Where two licenses were issued to sell intoxicating liquors at two different places in the same county, the revocation of one license for a violation of the liquor law does not ipso facto revoke the other license, so as to render retailer's sales under it illegal. *Ex parte Hewgley* (Cr. App.) 150 S. W. 1174.

**Jurisdiction on certiorari.**—Under Const. art. 5, § 8, a district court has no jurisdiction to remove before it, by certiorari, proceedings by a county judge to cancel a liquor license; such proceedings being administrative or ministerial, and not judicial. *State v. De Silva*, 105 T. 95, 145 S. W. 330.

**Druggists.**—See notes under Art. 7427.

**Art. 7435. Application for license.**—Any person or persons desiring to obtain a retail liquor dealer's license in this state or a retail malt dealer's license shall, before filing his or their petition for such license with the county judge as now provided by this law, make application under oath to the comptroller of public accounts of this state for a permit to apply for a license to engage in such business, which application shall be in form substantially as follows:

To the Comptroller of Public Accounts of the State of Texas:

I, or we, ..... and ..... of the county of ..... state of Texas, hereby apply for a permit to apply for a license to engage

in the business of retail liquor dealer or dealers (or retail malt dealer or dealers under the laws of this state, said business to be conducted at No. .... street, in ..... in the county of ..... state of Texas; that there is now no statute or ordinance of the city in force prohibiting the retail sale of liquors at said place that I, or we, have resided for the past two years in ..... county, state of Texas, and during said time have been engaged in the business of .....; that I am, or we are, not disqualified under the laws of this state from engaging in the proposed business; that no other person or corporation is in any manner interested in or to be interested in the proposed business; that I, or we, have not, since the first day of May, A. D. 1909, as owner, or as the representative, agent or employé of any other person, kept open any saloon or place of business where spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, were sold, or sold, aided, or advised any other person selling in or near any such house or place of business any such liquor after 12 o'clock midnight on Saturday, and between that hour and 5 o'clock a. m. of the following Monday of any week; and have not since the 1st day of July A. D. 1913, as owner or as the representative, agent or employé of any other person kept open any saloon or place of business where spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication were sold, or sold, aided or advised any other person in selling in or near any such house or place of business any such liquor after 9:30 o'clock p. m. on Saturday and between that hour and 6 o'clock a. m. of the following Monday of any week or between the hours of 9:30 p. m. and 6 o'clock a. m. of the following morning of any week day; or since said date, either in person or by agent or employé, knowingly sold or permitted to be sold or given away in or near any such place of business, any spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of 21 years, or to any student of any institution of learning, or to any habitual drunkard, after having been notified in writing through the sheriff or other peace officer, by the wife, sister, father, mother or daughter of such person not to sell to such habitual drunkard; or permitted any person not over the age of 21 years to enter and remain in such house or place of business, or permitted any games prohibited by the laws of this state to be played, dealt or exhibited in or about such house or place of business, or rented or let any part of the house or place of business in which such business was conducted to any person or persons for the purpose of conducting any game or games prohibited by the laws of this state; or knowingly sold or given away any adulterated or impure liquors of any kind, or sold or permitted, aided or advised in selling under a retail malt dealer's license any other liquors than those defined by the law as malt liquors. And if the permission herein sought be granted and the said retail license be issued, I or we, will not either in person, or knowingly by an agent, employé or representative, during the year for which such license shall run, keep open house or place where liquors shall be sold under such license or transact any business in such house or place of business after 9:30 o'clock p. m. on Saturday and between that hour and 6 o'clock a. m. on the following Monday of any week; or between the hours of 9:30 p. m. and 6 a. m. of the following morning of any week day; or knowingly sell in or near any such place of business, or give away, or permit to be given away, any spirituous, vinous or malt liquors or medicated bitters, capable of producing intoxication, to any person under the age of 21 years, or to any student of any institution of learning, or to any habitual drunkard, after having been notified in writing, through the sheriff or other peace officer, by the wife, mother, father, daughter or sister not to sell to such habitual drunkard; or to permit any person not over the age of 21 years to enter and remain in such house or place of business; or

permit any game prohibited by the laws of this state to be played, dealt or exhibited in or about such house or place of business, or rent or let any part of the house or place of business in which such business is conducted to any person or persons, for the purpose of conducting any game or games prohibited by the laws of this state; or knowingly sell or give away any impure liquor or adulterated liquors of any kind; and if the application be for a retail malt dealer's license, it shall further state that he or they under the said license, will not sell any other liquors than those defined by law as "malt liquors." And it is hereby agreed that if the license to be applied for be issued, that the same will be issued upon condition that it shall remain in force only so long as I, or we, observe and carry out each and all of the declarations herein made, and that in the event, I, or we, violate any of the promises or do or perform any one or more of the acts which it is herein declared shall not be done or performed, or in the event that I, or we, violate any law of this state relating to the regulation, sale or transportation of intoxicating liquors that either the county judge or the comptroller of public accounts of the state of Texas, in the manner provided in this law, may rescind, cancel and annul the said state and county license granted in pursuance of this application, and that all money paid for such license shall be forfeited to the state and county or city to whom paid; and I, or we, will at once, upon the cancellation of such license, close up the place where such business is being conducted, and cease to do such business, and will not within five years from that date, again, either as owner, agent, representative or employé of any other person, attempt to enter into or engage in the retail liquor business, unless the order of the comptroller cancelling and rescinding such license shall be annulled, in case such license shall have been cancelled by the comptroller.

.....  
 Sworn to and subscribed before me, ....., within and for the county of ..... state of Texas, by ....., on this, the .... day of ..... 19.....

.....  
 (Signature of Officer.)

(L. S.)

That upon receiving such application, it shall be the duty of the comptroller to file the same and keep it as a permanent record in his office, to examine and act upon the same; and, if he is satisfied that such applicant is entitled to such permit, he shall, upon the payment to him by the applicant of \$2.00, issue to him such permit, under his hand and the seal of his office, which together with a copy of such application, duly certified to under the hand and seal of the comptroller, shall be delivered by him to the applicant; and the said permit, together with the certified copy of said application, shall be filed with the county judge, together with the petition for license to be filed with the county judge, and shall remain a permanent record in the office of the county judge; and no petition for a license shall be entertained by the county judge until said certified copy and permit have been filed with him by the applicant. [Acts 1909, 1 S. S., p. 294, sec. 9. Acts 1913, S. S., p. 55, sec. 1, amending Art. 7435, Rev. St. 1911.]

See *Lyttleton v. Downer* (Civ. App.) 124 S. W. 994.

**Definitions—"Place."**—The word "place" used in the provision in regard to the contents of the application does not mean house, but only the general locality in which the business was to be carried on, either city, town, village or hamlet as the case might be. *Green v. Southard*, 94 T. 470, 61 S. W. 706.

— **"Interested."**—An owner of property who leases it for a saloon for a specified sum per month, and a part of the profits of the business, is not interested in the business within this article; the word "interested" meaning an interest in the business itself. *Doyle v. Scott* (Civ. App.) 134 S. W. 829.

**Requisites of application.**—Where the houses in a town were not numbered, an application for a liquor license and the bond for the sale of liquor in such town was not ob-

jectionable for failure to give the number of the house in which the liquor was to be sold. *Douthitt v. State*, 36 C. A. 396, 82 S. W. 352.

Description of premises in an application for a liquor license held not to have necessarily embraced two separate places of business. *Cox v. Thompson*, 37 C. A. 607, 85 S. W. 34.

An application for a liquor license and the bond executed and license issued thereunder held to sufficiently fulfill the requirements of the law as to description of the place at which the liquor was to be sold. *Douthitt v. State* (Civ. App.) 87 S. W. 190.

**Amendments to application.**—A county judge may permit a petition for a license to be amended on the day it is heard by inserting a necessary allegation, and failure to grant contestants 10 days' time after the amendment is filed would not render void the order granting the petition. *Moss v. Warren* (Civ. App.) 123 S. W. 1157.

**Requisites and validity of license.**—A license which designates the town in which the liquors are to be sold but which fails to designate the particular house in a place where the streets and houses are not numbered is valid and a liquor dealer's bond is not void because it fails to designate the house in which the liquors are to be sold. *Green v. Southard*, 94 T. 470, 61 S. W. 706, reversing *Southard v. Green* (Civ. App.) 59 S. W. 839.

Failure to include in an application for a license to sell liquors all of the statutory requirements does not render the license void. *Moss v. Warren* (Civ. App.) 123 S. W. 1157.

**Nature of license.**—A license to sell intoxicants is a mere permit to do what would otherwise be unlawful, and is subject to the police power. *Hernandez v. State* (Civ. App.) 135 S. W. 170.

It is not property within the constitutional prohibition against deprivation of property without due process. *Id.*

It is a revocable privilege, and not a property right. *State v. De Silva*, 105 T. 95, 145 S. W. 330.

While, as against the state, a licensee has no "property right" in a retail liquor license, he has such a right therein as against every one else within the constitutional guaranty against the deprivation of property without due process of law. *Lane v. Hewgley* (Civ. App.) 155 S. W. 348.

**Art. 7436. Comptroller may revoke license.**—In addition to the power conferred by this law upon the county judge to cancel or revoke license, the comptroller of public accounts of the state of Texas shall likewise have power to cancel or revoke such license in the following manner:

If the comptroller shall at any time be advised, or receive information, that any person or persons to whom a retail liquor dealer's license, or retail malt dealer's license, has been issued, has violated any of the conditions and provisions set out in the application filed with the comptroller for a permit to apply for such license, as provided in the preceding article, it shall be his duty to at once institute an inquiry and ascertain, if possible, the names and residences of all persons who know and will testify to the facts concerning such violation; and, if it shall be necessary in making such inquiry to do so, he may call to his aid the state revenue agent, whose duty it shall be, upon the request of the comptroller, to make a careful investigation of the charges and ascertain the names of the persons by whom such facts can be proven; and neither the comptroller nor the state revenue agent shall disclose the name of any person who shall become an informer, or who shall aid in securing the names of such witnesses, or evidence relating to such matters. [Acts 1909, 1 S. S., p. 294, sec. 9a.]

See *Lane v. Hewgley* (Civ. App.) 155 S. W. 348; *Id.*, 156 S. W. 911.

**Validity of statute in general.**—This article is constitutional. *Lane v. Schultz & Buss* (Civ. App.) 146 S. W. 1009.

**Delegating judicial power.**—A proceeding for the revocation of a liquor license under this article and Arts. 7437, 7438, 7441, 7442, is ministerial, not involving the guilt or innocence of the licensee, except as incidental to the ascertainment of the facts authorizing a revocation; and the statute is not violative of Const. art. 1, § 2, as delegating power which may be exercised only by the judiciary. *Baldacchi v. Goodlet* (Civ. App.) 145 S. W. 325.

A proceeding, authorized by this article and Arts. 7437, 7438, 7441, 7442, for the revocation by the comptroller of public accounts of liquor licenses for violations of the law by liquor dealers is not a suit by the state for a "forfeiture" or "penalty," within Const. art. 5, § 8, conferring on the district court exclusive jurisdiction of such suits; for, though an official act may be judicial as involving the exercise of discretion and judgment, yet, when discretion is conferred on an executive officer in the discharge of administrative or executive duties, the acts of the officer are not judicial. *Id.*

**Disqualification of officer.**—The comptroller of public accounts is not disqualified from proceeding, under this article and Arts. 7437, 7438, 7441, 7442, for the revocation of a liquor license, merely because he has expressed an opinion by publicly declaring that on the receipt of depositions to be taken he will forfeit the license, especially where he states that he will decide the question according to the preponderance of the credible testimony adduced on the hearing. *Baldacchi v. Goodlet* (Civ. App.) 145 S. W. 325.

**Notice.**—Under this article and Arts. 7437, 7438, 7441, 7442, a five-day notice of the time and place of investigation is sufficient. *Baldacchi v. Goodlet* (Civ. App.) 145 S. W. 325.

**Effect of revocation.**—Where two licenses were issued authorizing relator to sell intoxicating liquors at two different places in the same county, the revocation of one license for a violation of the liquor law does not ipso facto revoke the other license, when no notice of a declaration of a forfeiture has been given, so as to render relator's sales made under the authority of the second license illegal. *Ex parte Hewgley* (Cr. App.) 150 S. W. 1174.

**Judicial review.**—In the absence of anything in the statute indicating it, the suit against the comptroller, authorized by Art. 7443, to reinstate a retail liquor license annulled by him is not required to be heard solely on the depositions taken under authority of the comptroller, pursuant to Arts 7436-7442, in the proceedings for the annulment. *Lane v. Hewgley* (Civ. App.) 156 S. W. 911.

**Art. 7437. Same.**—Upon securing the names of such witnesses, it shall be the duty of the comptroller to, in his discretion, either notify the county judge of the proper county of the alleged violation of this law by the licensee, or to issue a commission addressed to an officer to be selected by the comptroller, who is authorized under the laws of this state to take depositions in the county in which the place of business is located, where he is advised such violation occurred, stating therein the violation of the law charged, and the name or names of the persons charged therewith, and directing him to take the deposition of the witnesses named in the commission, and the depositions of such other persons as may be required or necessary, and, when such depositions are taken, to return the same to the comptroller in like manner as is provided by law governing the taking of depositions in civil suits in this state; provided, that if the comptroller shall notify the county judge as above provided, it shall be his duty to proceed at once to cause to be instituted against such licensee the proper proceedings in his court as provided by this law, and, if the county judge shall within ten days after receiving such notice cause to be instituted against such licensee the proper proceedings in his court, then the comptroller shall proceed no further in the premises; but, if the county judge shall upon receiving such notice, fail or refuse to cause such proceedings to be instituted against the licensee, or should the comptroller elect to proceed himself without notifying the county judge, then, in either of such cases, the comptroller shall proceed himself as in this law provided. [Id. sec. 9b.]

See notes under Art. 7436.

**Art. 7438. Same.**—Upon receipt of said commission, such officer shall set a day for taking the depositions of the witnesses, and shall issue a subpoena commanding them to appear before him and testify on said day, and place the same in the hands of the proper officers for service on said witnesses; and shall also notify the county attorney of such county of the time when and the place where said depositions shall be taken, requesting him to appear at said time and place and interrogate said witnesses; and he shall also notify the person or persons who are charged with having conducted such business in violation of the law, and whose conduct is to be investigated, of the character of the charge, and of the time and place where said investigation will be conducted, and that he or they shall have the right to appear in person, or by attorney, and cross examine the said witnesses, and, if they so desire, to testify themselves or to offer the testimony of other witnesses relating to the matter under investigation; and the person whose conduct is to be investigated shall have the right to all proper process to compel the attendance of witnesses whose testimony he may desire. [Id. sec. 9c.]

See notes under Art. 7436.

**Art. 7439. Same.**—If the said witnesses shall fail to obey the said subpoena, then the said officer shall issue and cause to be served upon them attachments to compel their attendance; and he may punish them for contempt for failure to attend and testify as provided by law in case of taking depositions in civil suits in this state. [Id. sec. 9d.]

**Art. 7440. Same.**—If the county attorneys shall fail or refuse to appear and conduct the examination of said witnesses, the said officer authorized to take such depositions may appoint some practicing attorney of said county to act in the absence of the county attorney, as special county attorney; and the said officer taking the depositions shall have the power, independently of the county attorney or any other person, to interrogate the witnesses so as to develop fully the facts. [Id. sec. 9e.]

**Art. 7441. Same.**—At the time fixed, the said officer shall proceed to take the depositions of said witnesses in answer to oral questions to be propounded to them, and shall cause the questions and answers to be written down, and the depositions to be subscribed and sworn to by the witnesses, respectively, as provided by law for taking depositions; and such officers shall make a thorough investigation of the facts relating to the charges and he may summon other witnesses than those whose names have been furnished to him; and, when the taking of the testimony is concluded, and the depositions subscribed and sworn to by the witnesses, he shall certify thereto and shall seal up the commission together with the depositions in an envelope or package in like manner as is required by law in returning depositions in civil suits in this state, and deposit the same in the postoffice, postage prepaid, addressed to the comptroller of public accounts of the state of Texas at Austin, Texas. [Id. sec. 9f.]

See notes under Art. 7436.

**Art. 7442. Same.**—Upon receipt of the said depositions, the comptroller shall, open and proceed to consider the same, and, if he shall determine from the preponderance of the credible evidence therein contained, that at any time after the issuance of said license the house or place where the business of selling liquors under said license was conducted was kept open and business conducted therein after 9:30 p. m. on Saturday and between that hour and 6 o'clock a. m., on the following Monday of any week, or between the hours of 9:30 p. m. and 6 a. m. of the following morning of any week day, or that any intoxicating liquors or medicated bitters capable of producing intoxication were knowingly sold, permitted to be sold or given by the holder or holders of such license to any person under the age of 21 years, or to any student of any institution of learning, or to any habitual drunkard after having been notified in writing through the sheriff, or other peace officer, by the wife, mother, father, daughter or sister of such habitual drunkard not to sell same to him, or that any person not over the age of twenty-one years had been permitted to enter and remain in such house or place of business, or that games prohibited by laws of this state had been permitted to be played, dealt or exhibited in or about such house or place of business, or that the person or persons holding such license had rented or let any part of the said house or place of business where such business is conducted to any person or persons for the purpose of conducting any game or games prohibited by the laws of this state, or that the person or persons holding such license had knowingly sold or given away any adulterated or impure liquors of any kind, or sold or knowingly permitted to be sold, or aided or advised in selling, under a retail malt dealer's license, any other liquors than those defined by law as malt liquors, he shall rescind, vacate and withdraw such license, and shall issue a certificate in triplicate under his hand and the seal of said office, declaring the rescission of such license, theretofore issued, to such person or persons, one copy of which certificate shall remain on file in his office, and one copy shall be forwarded by the comptroller by mail to the county judge of the county where the place of business of the person or persons whose license is withdrawn and rescinded is located, and the other copy shall be forwarded by mail to the person or persons whose



license has been so rescinded and withdrawn; and it shall be unlawful thereafter for such person or persons to continue such business, and any attempt to do so shall subject him or them to the penalty herein provided for pursuing such business without a license; and any person or persons whose license has been so rescinded and withdrawn shall forfeit to the state, county and city all money paid therefor, and they shall never have any claim against the state, county or city on account of any money paid for such license. [Acts 1909, 1 S. S., p. 294, sec. 9g. Acts 1913, S. S., p. 57, sec. 1, amending Art. 7442, Rev. St. 1911.]

See notes under Art. 7436.

**Art. 7443. Same.**—Any person feeling himself aggrieved by the action of the comptroller in vacating, annulling and rescinding such license under this law, may bring suit in the district court of the county of his residence in Texas against the comptroller to reinstate such license, but the business conducted under such license shall be suspended during the pendency of such suit, and shall not be reopened, unless the order of the comptroller shall be set aside by final judgment of the proper court; but, if such order shall be by a final judgment set aside, then such licensee shall have the right to pursue such occupation under such license without paying any additional tax for a period to be added to the time of the license equal to the time his right to do business was suspended. [Acts 1909, 1 S. S., p. 294, sec. 9h.]

**In general.**—Under this article, the right to relief from the acts of the comptroller is limited by the act except where an act of the comptroller is outside of his granted powers. *Lane v. Schultz & Buss* (Civ. App.) 146 S. W. 1009.

**Constitutionality of provision in general.**—Const. art. 5, § 8, as amended in 1891, giving district courts "such other jurisdiction \* \* \* as may be provided by law," authorizes this article. *Lane v. Hewgley* (Civ. App.) 156 S. W. 911.

**Action for reinstatement of license as "civil case."**—An action under this article, is a "civil case," within Const. art. 5, § 6, conferring on courts of civil appeals appellate jurisdiction in all civil cases of which the district or county courts have original or appellate jurisdiction, a civil case being a proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or for the redress or prevention of a private wrong, and hence the comptroller could appeal from a judgment reinstating such a license (citing 2 Words and Phrases, 1182). *Lane v. Hewgley* (Civ. App.) 155 S. W. 348.

It is not necessary that this article should expressly provide for an appeal; such suit being a civil action, and Art. 2078 providing that an appeal may be taken to the court of civil appeals from every final judgment of the district court in civil cases. *Lane v. Hewgley* (Civ. App.) 156 S. W. 911.

**Judicial review.**—In the absence of anything in the statute indicating it, the suit against the comptroller, authorized by this article to reinstate a retail liquor license annulled by him is not required to be heard solely on the depositions taken under authority of the comptroller, pursuant to Arts. 7436-7442, in the proceedings for the annulment. *Lane v. Hewgley* (Civ. App.) 156 S. W. 911.

**Art. 7444. Same.**—The county attorney, or his substitute, shall receive five dollars per day for attending the taking of depositions and interrogating the witnesses during the time necessarily consumed in the investigation herein provided for; the officer taking the deposition shall receive the same fees as are provided by the law for taking depositions, and the witnesses shall receive the same fees provided in criminal cases, the amount of which shall be fixed by the certificate of the officer taking the depositions, and shall be paid by the state upon warrants issued by the comptroller. [Id. sec. 9i.]

**Art. 7445. Number of licenses limited.**—The comptroller of public accounts of the state of Texas shall not issue any permits to any person or firm for any city or town or justice precinct of any county in excess of the number of permits actually issued and existing on the twentieth day of February, 1909, in such city or town, or justice precinct, respectively, unless such number of permits are less than one for each five hundred inhabitants, in which event he shall, if applied for, issue permits not exceeding one for each five hundred inhabitants of such city or town or justice precinct. In case the number of permits issued and existing on the twentieth day of February, 1909, for each said city or town or justice precinct is in excess of one for each five hundred inhabitants,

the number of permits existing on the twentieth day of February, 1909, as applied for, shall be granted; but that number shall not be increased until the number of inhabitants of such city or town or justice precinct increases to the extent that the permits issued and actually in existence on February 20, 1909, is less than one for each five hundred inhabitants; but the provisions of this article shall not apply to hotels now in existence, or which may hereafter be opened, when located in the business section of a city or town having a population of over twenty thousand; and provided that in granting permits for licenses as a retail liquor dealer, or a retail malt dealer, the comptroller of public accounts shall give preference to those applicants who apply for a permit to do business at the places and locations in said city or town, or justice precinct, where permits had heretofore been issued and granted; provided, further, that at least one permit may be issued in any city, town or justice precinct, where local option is not in force. The population of each city, town and justice precinct in the state shall be ascertained by the commissioners' court of such county at the August term thereof of each and every year in the following manner: It shall be the duty of the superintendent of public instruction for such county, upon the request of such commissioners' court, to inform such commissioners' court of the total school census of each city and town and justice precinct; and it shall be the duty of the commissioners' court in determining the population of such city, town or justice precinct to estimate the population at the rate of six persons for every one name on such scholastic census, and upon such basis, at the August term of said court of each year, to ascertain and determine the population of such city, town and justice precinct, and to enter an order and decree upon the minutes of said court finding and determining what such population is, and shall send a certified copy thereof to the comptroller of public accounts of the state of Texas. [Id. sec. 9j.]

**Number of licenses in general.**—This article only restricts the number of permits in localities where not more than the stated number were engaged in business on February 20, 1909, and does not require that issuance of permits up to the number of persons engaged in such business on that date can only be made to the persons then engaged in such business, but if the applications exceed the persons then engaged in such business, applicants for renewal licenses should be preferred. *Moss v. Warren* (Civ. App.) 123 S. W. 1157.

**Art. 7446. Petition for license.**—Any person or firm desiring a license as a retail liquor dealer, or as a retail malt dealer, may, in vacation or in term time, file a petition with the judge of the county court of the county in which he desires to engage in such business, which petition shall have attached thereto as exhibits the permit and copy of application required by article 7435, and shall state that the applicant is a law-abiding, taxpaying male citizen of the state of Texas, over the age of twenty-one years, and has been a resident of the county wherein such license is sought for more than two years next before the filing of such petition; and that his license as a retail liquor dealer, or retail malt dealer, has not been revoked or forfeited within five years next before the filing of such petition; that he desires a license as a retail liquor dealer, or as a retail malt dealer, as the case may be, specifically stating the place where such business is to be conducted, describing with reasonable certainty the house or place wherein the same is to be conducted, and, if the place of business be in any block or square of any town or city where there are more bona fide residences than there are business houses in said block or square, or in any block where there is a church or school, then said petition shall be accompanied with written consent of a majority of the bona fide householders or residents in said block or square, who have resided for at least six months preceding such application, and those within three hundred feet of such place of business. Upon the filing of the petition herein provided for, the county judge shall set the same for hearing at a time not less than ten or more than twenty days from the filing of

same, and if, upon the trial or hearing thereof, he finds that facts stated in said petition are true and that the same is accompanied by the permit aforesaid, he shall grant a license such as prayed for; provided, however, that, upon the filing of such petition, the clerk of the county court shall give notice of the filing thereof, by posting on the court house door a written notice of such petition, together with the substance thereof; and the petition when filed shall remain with said clerk until the same is acted upon by the county judge and shall be open to the inspection of any person desiring to see the same. And any resident taxpaying citizen residing or owning property in the block or square where said business is to be conducted, or any such citizen residing or owning property within three hundred feet of the proposed place of business, or the county or district attorney shall be permitted to contest the facts stated in such petition and the applicant's right to obtain the license sought, upon giving security for all costs which may be incurred in such suit, should the same be decided in favor of applicant; provided, no county nor district attorney shall be required to give bond for such costs, but the county or state, as the case may be, shall be liable therefor. [Id. sec. 10.]

**Former law.**—Acts 1907, ch. 138, is not in conflict with an ordinance of a city making limits within which intoxicating liquors shall not be sold, when the charter of the city authorizes such ordinance. *Andrews v. City of Beaumont*, 51 C. A. 625, 113 S. W. 616, 617.

**Requisites of petition in general.**—In petition to county judge for license to sell liquors it must be shown that applicant is entitled thereto. One requisite is that the place where the liquor is to be sold is not in local option territory. *Harrison v. Dickinson*, 52 C. A. 85, 113 S. W. 776.

**Residence of applicant.**—The requirement of two years' residence does not conflict with the constitution of the United States and is a reasonable exercise of the police power of the state. *De Grazier v. Stephens*, 101 T. 194, 105 S. W. 993, 16 L. R. A. (N. S.) 1033, 16 Ann. Cas. 1059.

**Time of hearing.**—This article requires the judge to pass on the application in vacation, and not at a regular term. *Moss v. Warren* (Civ. App.) 123 S. W. 1157.

**Druggists.**—See notes under Art. 4727.

**Art. 7447. License not to be granted for business within three hundred feet of a church.**—The county judge shall in no case grant a license in any village, town or city, where the proposed place of business is within three hundred feet of a church, school or other educational or charitable institution, the measurements to be along the property lines of the street fronts, and from front door to front door, and in a direct line across intersections where they occur; provided, the proposed place of business is not within a business block, or within three hundred feet thereof, as such block is defined in the preceding article. [Id. sec. 10a.]

Cited, *Lyttleton v. Downer* (Civ. App.) 124 S. W. 994.

**Art. 7448. Judge shall hear petition, etc.**—Upon the hearing of the petition, as provided in article 7446, the county judge shall determine the truth or falsity of the facts alleged, and shall render his judgment granting or refusing the license accordingly, and shall cause the same to be recorded at length in a book kept for that purpose, which book shall be a record of said court and shall be preserved by the clerk as an archive of his office. [Id. sec. 11.]

**Art. 7449. Clerk to furnish certified copy of judgment.**—Upon the granting of a license by the county judge, as provided by law, the clerk shall furnish the applicant with a certified copy of the judgment, which, when exhibited to the county tax collector of the license tax herein provided for, said collector shall receive said license tax and issue to such applicant his receipt therefor, showing the amount paid, date of payment, for what paid, whether retail liquor dealer's or retail malt dealer's license, and where such business is to be conducted. [Id. sec. 12.]

**Art. 7450. Clerk to issue license, when.**—Upon the presentation to the county clerk by the applicant of the tax collector's receipt provided for in the preceding article, and delivery to him of the bond provided for in article 7452 of this chapter, he shall examine such bond and re-

ceipt; and, if such bond conforms to the provisions of said article 7452, and if the said receipt conforms to the judgment authorizing the same, he shall issue to the applicant the proper license, which shall be by him signed, be under the seal of his office, be dated, state on its face for what it is issued, the date when it will expire, by whom and where such business is to be conducted, and shall describe the place where the same is to be kept. [Id. sec. 13.]

**Art. 7451. Regulating hours of closing, etc.**—Every person or firm having a license under the provisions of this law, who may be engaged in or who may hereafter engage in the sale of intoxicating liquors to be drunk on the premises in any locality of this state, other than where local option is in force, shall close and keep closed their houses and places of business and transact no business herein or therefrom from and after 9:30 o'clock p. m. on Saturday and between that hour and 6:00 o'clock a. m. on the following Monday of any week; or between the hours of 9:30 p. m. and 6:00 a. m. of the following morning of any week day, and shall close and keep closed their houses and places of business and transact no business therein or therefrom from and after 9:30 p. m. Saturday until 6:00 a. m. of the following Monday of each week; and between the hours of 9:30 p. m. and 6:00 a. m. of any week day. [Acts 1909, 1 S. S., p. 294, sec. 14. Acts 1913, S. S., p. 58, sec. 1, amending Art. 7451, Rev. St. 1911.]

Cited, in dissenting opinion, *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

**Affidavit charging violation of provision.**—An affidavit, stating that a certain person had a retail license to sell liquor at a certain place on a certain date, and that on such date, at a prohibited time, he sold liquor, in violation of this article, was sufficient to authorize the county court to issue the notice provided for in section 8, informing him, in effect, that the matter of canceling his license would be heard at a certain time. *State v. De Silva*, 105 T. 95, 145 S. W. 330.

**Art. 7452. Bond.**—Every person or firm desiring to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters, capable of producing intoxication to be drunk on the premises, shall, before engaging in such sale, be required to enter into a bond in the sum of five thousand dollars; provided, however, that any person or firm dealing exclusively in malt liquors shall be required to give bond only in the sum of one thousand dollars, with at least two good, lawful and sufficient sureties, and the sureties required by law on the bonds of liquor dealers shall make affidavit, before some officer authorized to administer oaths, that they, in their own right, over and above all exemptions, are each worth the full amount of the bond they sign as sureties; and no county judge shall approve any such bond unless the affidavit as provided for in this article shall have been duly made. The approval of any such bond by the county judge without such affidavit shall make said county judge liable for any penalty recovered on such liquor dealer's bond; and any person who shall make any false affidavit, as required by this law, shall be punished as provided for in the Penal Code of this state; provided, that nothing herein shall prevent the making of such bond by a surety company, as permitted by law, payable to the state of Texas, to be approved as to security by the county judge; which bond shall be conditioned that said person or firm so selling spirituous, vinous or malt liquors or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, shall not, either in person or knowingly by any agent, employé or representative, during the year for which such license shall run, keep open the house or place where liquors shall be sold under such license for the sale thereof, or transact such business in such house or place of business, after 9:30 o'clock p. m. on Saturday and between that hour and 6 o'clock a. m. on the following Monday of any week, or between the hours of 9:30 p. m. and 6 a. m. of the following morning of any week day, and that such person or firm shall keep an open, quiet and

orderly house or place for the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, and that such person or firm, or his or their agent or employé, will not sell or permit to be sold in his or their house or place of business, nor give nor permit to be given any spirituous, vinous, or malt liquors, or medicated bitters capable of producing intoxication, to any person under the age of 21 years, or to a student of any institution of learning, or any habitual drunkard, after having been notified in writing, through the sheriff or other peace officer, by the wife, father, mother, daughter or sister of such habitual drunkard, said notice shall be in force and effect for a period of two years, not to sell to any such person, and that he or they will not permit any person under the age of 21 years to enter and remain in such house or place of business; that he or they will not permit any games prohibited by the law of this state to be played, dealt or exhibited in or about such house or place of business, and that he or they will not rent or let any part of the house or place in which he or they have undertaken to sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any quantity, to be drunk on the premises, to any person or persons for the purpose of running or conducting any game or games prohibited by the laws of this state, and that he or they will not adulterate the liquors sold by them in any manner, mixing the same with any drug, and that he or they will not knowingly sell or give away any impure or adulterated liquors of any kind, and that he or they will not violate any law of this state relating to the regulation, sale or transportation of intoxicating liquors, which said bond shall be filed in the office of the county clerk of the county where such business is conducted, and shall be recorded by such clerk in a book to be kept for such purpose; for which service said clerk shall be entitled to a fee of seventy-five cents; which said bond may be sued on at the instance of any person or persons aggrieved by the violations of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for such infraction of the conditions of such bond; and the said bond shall not be void on the first recovery, but may be sued on until the full penal sum named therein shall have been recovered. In addition to civil proceedings for individual injuries brought on said bond, as above indicated, if any person or firm shall violate any of the conditions of the bond herein required, it shall be the duty of the county and district attorneys, or either of them, to institute suit thereupon; or any person owning real property in the county may institute suit thereupon in the name of the state of Texas, for the use and benefit of the county, but no compensation shall be allowed such citizen, and he may be required to give security for costs; and the amount of five hundred dollars as a penalty shall be recovered from the principals and sureties upon the liquor dealer's bond, upon the breach of any of the conditions thereof; and thereafter when any recovery is had by any person or by any county or district attorney, for the use and benefit of the county in any action in any court of competent jurisdiction, upon the bond of any person or firm engaged in the sale of spirituous, vinous, or malt liquors or medicated bitters capable of producing intoxication, or malt liquors exclusively, to be drunk on the premises, in any locality other than where local option is in force, upon the ground that such licensee sold, or permitted to be sold, or gave or permitted to be given, any such liquors to a minor in his place of business, or permitted a minor to enter or remain in his place of business, or sold such liquor to any habitual drunkard, after having been notified in writing not to sell to such habitual drunkard, or that such licensee permitted prostitutes or lewd women to enter and remain in his place of business, or permitted any games prohibited by the law to be played, dealt or exhibited in or about his

place of business, or of renting or letting his place of business, or any part thereof, for such purpose or purposes, the license of such person or firm shall, by reason of such recovery, be forfeited, revoked and cancelled; and that court entering judgment of recovery shall also enter an order declaring forfeited, revoked and cancelled such license; and the unearned portion of the occupation tax paid therefor shall not be refunded, but shall be forfeited to the state and county, city or town to which the money for the same may have been paid. And any person or firm who shall sell any such liquors or medicated bitters in any quantity, to be drunk on the premises, without first giving bond, as required by law, or who shall sell the same after said license shall have been forfeited, revoked or cancelled, shall be deemed guilty of a misdemeanor, and, on conviction shall be fined in the same amount provided for sales where no license has been obtained. An open house in the meaning of this chapter, is one in which no screens or other device is used or placed inside or outside of such house or place of business for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicating liquors are sold to be drunk on the premises. A quiet house or place of business, in the meaning of this chapter, is one in which no music, loud or boisterous talking, yelling or indecent or vulgar language is allowed, used or practiced, or any other noise calculated to disturb or annoy any person residing or doing business in the vicinity of such house or place of business, or those passing along the streets or public highways. By an orderly house, is meant one in which no prostitutes or lewd women are allowed to enter or remain; and it is further provided that said house must not contain any vulgar or obscene pictures. Any surety on such bond may relieve himself from further liability thereon by giving the principal in said bond notice in writing that he will no longer remain as surety thereon, and filing with the county judge an affidavit that such notice has been given; and, if within five days after such notice the principal fails to make a new bond, he shall cease to pursue said business until a new bond is given. Any person who shall continue to pursue said business after such notice is given and such affidavit is filed, shall be guilty of a misdemeanor and shall be punished as provided in cases where no license has been procured; provided, that where the sale was made in good faith, or the minor permitted to enter and remain in good faith, with the belief that the minor was of age, and there is good ground for such belief, that shall be a valid defense to any recovery on such bond; provided, further, that where the sale to any habitual drunkard is made in good faith, with the belief that he is not an habitual drunkard, and there are good grounds for such belief, that shall be a valid defense to any recovery on such bond; provided, the provisions of this law shall apply to suits by the state or of any individual. Provided, that no license shall be issued under this law to any person who has been convicted of a felony and served such term of conviction. [Acts 1909, 1 S. S., p. 294, sec. 15. Acts 1913, S. S., p. 58, sec. 1, amending Art. 7452, Rev. St. 1911.]

See *Edgett v. Finn* (Civ. App.) 36 S. W. 830; *Peavy v. Goss*, 90 T. 89, 37 S. W. 317; *Id.* (Civ. App.) 37 S. W. 990; *Guisti v. Galveston Tribune*, 105 T. 497, 150 S. W. 874, 152 S. W. 167.

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|----------------------------------------|-------------------------------------------------------------------------|
| 1. Former law.                         | 13. Grounds of action and liability on bond in general.                 |
| 2. In general.                         | 14. — Extinguishment of right of recovery by repeal of statute.         |
| 3. Definitions—"Enter and remain."     | 15. Sales contrary to notice.                                           |
| 4. — "House or place of business."     | 16. — Revocation or withdrawal of notice.                               |
| 5. — "Open house."                     | 17. Sales to minors or permitting minors to enter and remain in saloon. |
| 6. — "Quiet, orderly house."           | 18. Sales to students.                                                  |
| 7. — "Vulgar"—"Obscene."               | 19. Permitting music in saloon.                                         |
| 8. Validity of bond in general.        | 20. Allowance of gambling.                                              |
| 9. — Death of a surety.                |                                                                         |
| 10. — Estoppel.                        |                                                                         |
| 11. — Approval and filing.             |                                                                         |
| 12. Termination of liability on bonds. |                                                                         |

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|----------------------------------------------------|-------------------------------------------------------|
| 21. Defenses in general.                           | 28. Pleading.                                         |
| 22. Right of saloon keeper to prevent disturbance. | 29. Limitations.                                      |
| 23. Persons entitled to sue.                       | 30. Jury—Questions for.                               |
| 24. Persons liable—Social club.                    | 31. Amount of recovery—In general.                    |
| 25. Druggists.                                     | 32. — Interest on judgments on liquor dealers' bonds. |
| 26. Jurisdiction.                                  | 33. Evidence—Sufficiency of.                          |
| 27. Abatement of action.                           | 34. Objections for insufficiency of evidence.         |

1. **Former law.**—Art. 5060g, Rev. St. 1895, superseded by this article, is not repealed by Acts 1907, c. 138, p. 258, known as the Baskin-McGregor law, regulating the sale of liquor. The latter law only repeals laws in conflict with it. It re-enacts that part of this law relating to sale of liquor to habitual drunkards. *Coughtry v. Haupt*, 47 C. A. 452, 105 S. W. 516; *Jessee v. De Shong* (Civ. App.) 105 S. W. 1013-1016; *Price v. Wakeham*, 48 C. A. 339, 107 S. W. 133; *Markus v. Thompson*, 51 C. A. 239, 111 S. W. 1076; *Farenthold v. Tell*, 52 C. A. 110, 113 S. W. 635.

2. **In general.**—This act was passed in lieu of and as a substitute for former acts, and, containing no saving clause in favor of causes of action accruing under former laws, defeated a right of action under a former law, although an action was pending at the time of its enactment. *Goodrich v. Wallis* (Civ. App.) 143 S. W. 285.

Where a liquor dealer continued his business after the passage of Acts 1909, c. 17, section 35 of which provides for the determination of existing liquor licenses, without taking out a new license, it will be presumed that he accepted the terms of the law, so that he would be liable for the penalties prescribed in the law and in his bond for acts in violation of the terms of his bond committed thereafter. *Adams v. State*, 105 T. 374, 150 S. W. 591.

3. **Definitions—"Enter and remain."**—While the entry of a minor into a saloon with the purpose of attempting to induce his father, who was intoxicated, to leave the saloon, does not constitute a breach of the liquor dealer's bond, conditioned that he would not permit minors to "enter and remain" in his saloon, where the evidence showed that the father frequently resorted to defendant's saloon, and there became intoxicated, and that his minor sons on various occasions came to the saloon to take their father away, it was a question of fact whether such condition of the bond was broken, in view of the fact that the word "remaining" does not mean a tarrying after the execution of some purpose not unlawful in itself, and the expression "enter and remain" means to stay for some indefinite length of time; that is, longer than is required for an immediate exit. *Haynes v. Habertzette* (Civ. App.) 152 S. W. 717.

4. **"House or place of business."**—The words "house or place of business" included an arbor kept by defendant for the purpose of selling liquors. So held in suit on bond for keeping a disorderly house. See case for sufficiency of petition. *Whitcomb v. State*, 21 S. W. 976, 2 C. A. 301.

5. **"Open house."**—The intention of the statute is that no obstruction, partial or otherwise, shall be placed in a retail liquor dealer's place of business to prevent those passing along the street from seeing what is taking place inside the place of business. Any screen or device which materially defeats that object is unlawful. *Componovo v. State* (Civ. App.) 39 S. W. 1114.

It is not a breach of the condition in the bond to keep an "open house" for the bar to be located at the back end of the house, in an angle so that it and the persons standing by it could not be seen from the street in front, and when no screen or other obstruction was used to prevent a view from the front door, and when the bar was at the most suitable place in the house for it, and the house was of an irregular shape, but not built for a saloon. *State v. Langran & Co.*, 39 C. A. 69, 87 S. W. 714.

A saloon conducted in a wing of the entrance lobby of a hotel in plain view of the entrance thereto is conducted in an "open house." *Doyle v. Scott* (Civ. App.) 134 S. W. 829.

6. **"Quiet, orderly house."**—A quiet, orderly house or place for the sale of liquor, within the condition of a bond, is one in which no music, loud or boisterous talking, yelling, or indecent, vulgar language is allowed, or any other noise calculated to disturb persons residing or doing business in the vicinity. *Adams v. State* (Civ. App.) 146 S. W. 1086.

Disturbances of the peace, committed in an inclosure in the rear of a saloon, held covered by the liquor dealer's bond, conditioned for his keeping a quiet, orderly house. *Id.*

7. **"Vulgar"—"Obscene."**—See this case for definition of the words "vulgar" and "obscene" by the trial court held to be erroneous, and also a proper definition by the appellate court. *Raley v. State*, 47 C. A. 426, 105 S. W. 343, 344.

8. **Validity of bond in general.**—A bond payable to the county judge instead of to the state is void. *State v. Vinson*, 23 S. W. 807, 5 C. A. 315.

A bond is not invalidated by the omission of the name of the county in which the business is to be carried on. *State v. Setterle* (Civ. App.) 26 S. W. 764.

A liquor dealer's bond held not defective because not reciting that the liquors were to be drunk on the premises. *McMonigal v. State* (Civ. App.) 45 S. W. 1038.

If the license is void the bond falls with it and is also void. *Southard v. Green* (Civ. App.) 59 S. W. 841.

The fact that the house is not designated in the license does not render the bond invalid, although the statute requires the house to be designated in the license. *Green v. Southard*, 94 T. 470, 61 S. W. 706; *Douthit v. State*, 98 T. 344, 83 S. W. 796.

Using "to" instead of the word "through" in the sentence "through doors opening out," etc., does not make the bond more onerous than the law requires. *State v. Wharton*, 26 C. A. 262, 63 S. W. 915.

When license was issued to sell liquors at a certain place in a city and afterwards the licensee determined to have the license transferred to another particular place but by some means a different place was designated in the license than the one where the business was carried on, the sureties on the bond were not liable for the dealer's selling liquor to an habitual drunkard. It would be otherwise if the license had been changed

to cover the place to which the dealer removed. *Saffroi v. Cobun*, 32 C. A. 79, 73 S. W. 829, 830.

Where a person engaged in the exclusive sale of malt liquors voluntarily gave bond in the sum of \$5,000, such bond was not more oppressive or burdensome than the bond required by statute, so as to render same void, but it was enforceable as against the sureties thereon to the extent of the statutory penalty. In this case the bond that he was required to give was \$1,000. *Meador v. Adams*, 33 C. A. 167, 76 S. W. 239, 240.

The fact that one intended to sell other than malt liquors, and did so sell, and paid the tax therefor, does not render the bond for \$1,000, given by mistake instead of a \$5,000 bond, void as a malt liquor dealer's bond. *Jones v. State* (Civ. App.) 81 S. W. 1012.

Liquor dealer's bond held not void for failure to particularly designate the house in which liquor was to be sold. *Morris v. Mills* (Civ. App.) 82 S. W. 334.

Where a liquor license and the bond on which the action was brought were in legal form and properly issued, it was immaterial that the application for the license was defective. *Castellano v. Marks*, 37 C. A. 273, 83 S. W. 729.

That an application for a liquor license, in describing the place of business, included two separate places, did not preclude a recovery in an action on the bond. *Cox v. Thompson*, 37 C. A. 607, 85 S. W. 34.

A liquor dealer's bond having but one surety held not a valid statutory bond. *Hillman v. Mayher*, 38 C. A. 377, 85 S. W. 818.

A bond intended to be taken as a statutory liquor dealer's bond held not good as a common-law bond. *Id.*

A bond of two persons engaging in the liquor business held valid, though conditioned only that one of them conform to the statute. *State v. Harper & Crow*, 99 T. 19, 86 S. W. 920, reversing *State v. Harper & Crow* (Civ. App.) 85 S. W. 294.

Certain irregularities held not to vitiate a retail liquor dealer's bond. *State v. Harper & Crow* (Civ. App.) 87 S. W. 878.

The validity of a liquor dealer's bond is not affected, because purporting to bind the heirs and legal representatives of the obligors. *McLaury v. Watelsky*, 39 C. A. 394, 87 S. W. 1045.

A bond with a bonding company as surety instead of two individuals as sureties is in compliance with Art. 4928, and sufficient. *Taggart v. Hillman*, 42 C. A. 71, 93 S. W. 245; *Taggart v. Graham* (Civ. App.) 93 S. W. 246.

Where the first part of the bond shows that the principal desired to sell spirituous, vinous and malt liquors, the bond is not fatally defective, because in the condition it is not specified what he is not to sell. The first part shows that the sales referred to are intoxicating liquors. *Edgar v. State*, 46 C. A. 171, 102 S. W. 440.

A liquor dealer's bond not signed by the principal until after it had been approved and filed and the acts complained of had been committed held invalid. *State v. Teague*, 50 C. A. 535, 111 S. W. 234.

9. — **Death of a surety.**—Death of a surety on a liquor dealer's bond does not make such bond void as against the principal and surviving surety. *McMonigal v. State* (Civ. App.) 45 S. W. 1038.

10. — **Estoppel.**—See notes under Art. 3687, Rule 37.

11. — **Approval and filing.**—It is not enough that the bond be approved by the county judge. Until it is filed for record it has no force, and no recovery can be had on it for violations of its provisions where the tax had been paid and the bond given and approved, but not filed for record. *Allen v. Houck & Dieter Co.* (Civ. App.) 92 S. W. 994, 995.

The failure of the county judge to approve the bond held not to render it invalid, where the issuance of the license and the conduct of the business were otherwise proved. *Munoz v. Brassel* (Civ. App.) 108 S. W. 417.

12. **Termination of liability on bond.**—A right of action to recover the statutory penalty for infractions of a liquor dealer's bond is terminated by the taking effect of a local option law in the county before the trial of the action. *Long v. A. L. Green & Co.* (Civ. App.) 95 S. W. 79.

Right to recover on a liquor dealer's bond the statutory penalty for selling intoxicants to a minor is held not terminated by the taking effect of local option. *Kerr v. Mohr*, 47 C. A. 1, 103 S. W. 210.

Where the bond of a liquor dealer was conditioned to secure the performance of the duties imposed by a liquor license, the obligation of the company signing as surety terminated when the license ceased to exist as authority to the licensee to sell liquor. *Adams v. State*, 105 T. 374, 150 S. W. 591.

13. **Grounds of action and liability on bond in general.**—Principal on the bond responsible for the acts of his employé. *Grady v. Logan*, 2 App. C. C. § 265; *Maier v. State*, 21 S. W. 974, 2 C. A. 296.

The statute does not apply to a minor who is sent by his employer to a saloon to buy beer. *Laing v. State*, 28 S. W. 1040, 9 C. A. 136.

A retail liquor dealer and the sureties on his bond are liable for the act of the dealer's employé in allowing a minor to enter and remain in the dealer's place of business. *Manning v. Morris*, 28 C. A. 502, 67 S. W. 906.

The statute authorizing a recovery of liquidated damages by the person aggrieved in case of a breach of a liquor dealer's bond is penal in its nature, and should be strictly construed. *Choate v. Vha*, 40 C. A. 566, 89 S. W. 1082.

No action lies on a liquor dealer's bond for a violation of its terms committed before the filing thereof. *Allen v. Houck & Dieter Co.* (Civ. App.) 92 S. W. 993.

The principal in the bond is liable if the illegal sales are made, not by himself, but by his agents or employés. *Edgar v. State*, 46 C. A. 171, 102 S. W. 440.

A suit by an aggrieved party on a liquor dealer's bond to recover statutory liquidated damages for breaches thereof is in the nature of recovery of statutory penalties. *Jessee v. De Shong* (Civ. App.) 105 S. W. 1011.

In an action on a liquor dealer's bond to recover statutory penalties held unnecessary to expressly prove the issuance of the saloon license. *Munoz v. Brassel* (Civ. App.) 108 S. W. 417.



In an action on a retail liquor dealer's bond, plaintiff's motives in instituting the same held immaterial. *Farenthold v. Tell*, 52 C. A. 110, 113 S. W. 635.

An action cannot be maintained on a liquor dealer's bond without proof that at the time of the breach the liquor dealer had a valid license to sell. *Hillman v. Gallagher* (Civ. App.) 120 S. W. 505.

A dramshop keeper held liable on his bond for acts committed in a new building erected after the execution of the bond on the lot described therein. *McElroy v. Sparkman* (Civ. App.) 139 S. W. 529.

A liquor dealer accepting the terms of the statute and continuing in business after its passage without taking out a new license, held liable for the penalties prescribed therein and in his bond for acts committed in violation of the terms of his bond. *Adams v. State*, 105 T. 374, 150 S. W. 591.

Acts 31st Leg. (1st Ex. Sess.) c. 17, § 35, which took effect July 12, 1909, providing for the determination of existing liquor licenses, must be held to give the canceled license the special effect of permitting the carrying on of the business during the 60 days of privilege granted, and to provide a new license during such 60 days rather than to continue the old, so that a surety upon a bond given on a license issued before the passage of the act could not be charged with any offense of the dealer committed after its passage. *Id.*

A valid local option election resulting in the adoption of the law is essential to any liability on a liquor dealer's bond given under the local option law. *State v. Savage*, 105 T. 467, 151 S. W. 530.

14. — **Extinguishment of right of recovery by repeal of statute.**—The right of a wife to recover on a liquor dealer's bond may be extinguished by a repeal of the statute. *Goodrich v. Wallis* (Civ. App.) 143 S. W. 285.

15. **Sales contrary to notice.**—The notice to the dealer not to sell liquor to persons named in this section should be in writing and made by delivering to the dealer either the original notice or a copy thereof. Merely reading the notice to the person to be served therewith is not sufficient. *Reagan v. Wooten*, 4 App. C. C. § 133, 16 S. W. 546.

As to sale to habitual drunkards; provisions of statute considered. *Campbell v. Jones*, 21 S. W. 723, 2 C. A. 263.

Wife can recover on the bond although she gave notice before the bond was executed, and although the place of business of defendants stated in the notice is different from that stated in the license. *Rintleman v. Hahn*, 20 C. A. 244, 49 S. W. 174.

Where a wife has given a liquor dealer notice not to sell whisky to her husband and she thereafter consents to such a sale she cannot recover on the bond for a breach thereof. *Tipton v. Thompson*, 21 C. A. 143, 50 S. W. 641.

That a wife either failed to give or withdrew notice to one saloon keeper against selling liquor to her husband does not affect her right of action against other saloon keepers to whom such notice had been given. *Tarkington v. Brunett* (Civ. App.) 51 S. W. 274.

In a prosecution for violation of the local option law by sale to an habitual drunkard, defendant held entitled to a certain instruction on the question whether the sale was to the drunkard, or to a third person, for whom the drunkard acted as agent. *Douthitt v. State* (Civ. App.) 87 S. W. 190.

A bond of a liquor dealer conditioned, as required by this article, that he will not sell liquor to any habitual drunkard after having been notified in writing by the wife of the drunkard not to sell to him, is breached by a sale made at any time, however short, after notice has been given in the statutory manner. *McNeil v. Lewis* (Civ. App.) 145 S. W. 305.

Under this article a wife suing on the bond may prove that the dealer was notified not to sell by the direct testimony of the officer giving the notice. *Id.*

16. — **Revocation or withdrawal of notice.**—A notice not to sell intoxicating liquor to a person not an habitual drunkard may be withdrawn. *Farenthold v. Tell*, 52 C. A. 110, 113 S. W. 635.

To render a revocation of a notice not to sell liquor to plaintiff's husband available as a defense, it must be shown that the revocation was by plaintiff. *Id.*

In an action on a retail liquor dealer's bond, held no defense that notices to other liquor dealers than defendant not to sell to plaintiff's husband had been revoked. *Id.*

In an action for damages through the sale of liquors to plaintiff's husband, it was immaterial that plaintiff withdrew notice to saloonmen not to sell to her husband; such withdrawal not having been communicated to defendant. *Birkman v. Farenthold*, 52 C. A. 335, 114 S. W. 428.

17. **Sales to minors or permitting minors to enter and remain in saloon.**—A liquor dealer is charged with notice of minority. *McGuire v. Glass*, 4 App. C. C. § 52, 15 S. W. 127; *State v. Meyer* (Civ. App.) 23 S. W. 427.

Breach of bond in sale of liquor to a minor. *Maier v. State*, 21 S. W. 974, 2 C. A. 296.

A liquor dealer's bond is violated where a minor is permitted to enter and drink a glass of soda water. *Qualls v. Sayles*, 18 C. A. 400, 45 S. W. 839.

An action by the state on a liquor dealer's bond for permitting a minor to work in the saloon held not barred by the consent of the father of such minor. *McMonigal v. State* (Civ. App.) 45 S. W. 1038.

A father may recover a penalty under the statute for selling intoxicating liquors to his minor son, though the sales were not made on the exact day as alleged, or though he was not aggrieved by the sale. *Kruger v. Spachek*, 22 C. A. 307, 54 S. W. 295.

Where a minor was a partner in the business, held, an action could not be maintained for breach of a saloon keeper's bond in allowing him to remain in the saloon and act as bartender. *State v. Jordan*, 23 C. A. 136, 56 S. W. 601.

Where, in a suit on a liquor dealer's bond, plaintiff sought to recover damages for an unlawful sale of liquor to his son, it was not necessary for plaintiff to put defendant's license in evidence. *Lucas v. Johnson* (Civ. App.) 64 S. W. 323.

To render a liquor dealer and his sureties liable to a parent whose minor child is permitted by the saloon keeper to "enter and remain" in the saloon, it is necessary that

such minor both "enter" and "remain." *Cox v. Thompson*, 32 C. A. 572, 75 S. W. 819; *Minter v. State*, 33 C. A. 182, 76 S. W. 312.

There is no civil liability for selling liquor to a minor, where the liquor dealer believed and had good reason to believe that the minor was over 21 years of age. *Tinkle v. Sweeney* (Civ. App.) 78 S. W. 248.

The bond is not breached by permitting minor to enter a saloon and remain momentarily, where proprietor called a minor into the saloon to have him fix a gasoline lamp, and the minor came in, looked at the lamp, walked around it, examining it, said that he could not fix it, and walked out. *Douthit v. State*, 98 T. 344, 83 S. W. 797, reversing *Douthit v. State*, 36 C. A. 396, 82 S. W. 352.

The law requires more of a dealer than that he will not knowingly permit liquors to be given to a minor in his place of business. It is his duty, if reasonably within his power, to prevent such. *Holly & Co. v. Simmons*, 38 C. A. 124, 85 S. W. 327.

A seller of intoxicating liquors held not liable on his bond for the giving of liquor to a minor in his place of business by a third person. *Holly v. Simmons*, 99 T. 230, 89 S. W. 776.

In an action on a liquor dealer's bond to recover a statutory penalty for permitting plaintiff's minor son to enter saloon, charges as to the necessity to a recovery, of defendant's knowledge of the minor's presence held properly refused. *Munoz v. Brassel* (Civ. App.) 108 S. W. 417.

A liquor dealer's liability for selling liquor to a minor is statutory; the bond being merely security for its enforcement. *Hillman v. Gallagher* (Civ. App.) 120 S. W. 505.

A saloon keeper who sells liquor to a minor is liable on his bond under the provision relating to sale, and not to that relating to permitting minors to "enter and remain" in the saloon, and there is no liability under the latter provision where the minor enters and stays only momentarily, and does not in fact remain in the saloon. *Haynes v. Haberzettle* (Civ. App.) 152 S. W. 717.

The act of minors in entering a saloon to induce their father, who was intoxicated, to leave the same, could not be said as matter of law not to be a breach of the condition of the liquor dealer's bond against permitting minors to "enter and remain" in his saloon, where it appeared that the father had repeatedly resorted to defendant's saloon, and the children had on many occasions entered the saloon to take him away. *Id.*

18. Sales to students.—To constitute a breach of a liquor dealer's bond by sale of whisky to college students, the students need not be minors. *Daniels v. College*, 20 C. A. 562, 50 S. W. 205.

A dealer's bond obligating him not to sell to students is broken by such a sale, whether or not he had been notified not to sell to the student. *Id.*

In an action on a bond given by a liquor dealer, obligating him not to sell to a student, it is immaterial where liquors so sold were drunk. *Id.*

19. Permitting music in saloon.—A liquor seller's bond is forfeited by his permitting any music in his saloon. *State v. Rockwall Co.*, 8 C. A. 506, 28 S. W. 134.

20. Allowance of gambling.—In an action for breach of liquor bond in permitting plaintiff's minor son to gamble in saloon, want of consent of plaintiffs held inferable from fact that plaintiffs were then in a distant state. *Krick v. Dow* (Civ. App.) 84 S. W. 245.

21. Defenses in general.—In a suit against a retail liquor dealer and the sureties on his official bond for knowingly permitting a minor to enter upon and remain in the retail liquor dealer's place of business, it was held that the consent of the parent to the employment of his minor child in such a place of business did not protect the liquor dealer against the enforcement of the penalty of the bond. *Goldsticker v. Ford*, 62 T. 385.

The fact that the seller had reason to believe and did believe that the minor to whom he was selling was an adult and the sale was made with no intention of violating the law is not a defense to an action on the bond. But such belief is a defense in a criminal prosecution. *McGuire v. Glass*, 4 App. C. C. § 52, 15 S. W. 127.

That liquor sold to a minor was sold by an employé of the liquor dealer is no defense. *Maier v. State*, 21 S. W. 974, 2 C. A. 296.

In an action by a college under the civil damage laws for a sale to a student, a compromise with the student's father held no defense. *Daniels v. College*, 20 C. A. 562, 50 S. W. 205.

Where liquor dealers unlawfully sell liquor to a minor, whose father sues on their bond, and they do not deny the execution of the same, it is proper to admit the application for a license and the bond in evidence. *Lucas v. Johnson* (Civ. App.) 64 S. W. 323.

Knowledge of the fact that the parties to whom the beer is sold are students of an institution of learning is not material to a saloon keeper's liability on his bond. *Peacock v. Limburger*, 95 T. 253, 66 S. W. 765.

Emancipation of minor held not a defense to parent's action on liquor dealer's bond for permitting the minor to enter and remain in saloon. *Cox v. Thompson*, 96 T. 468, 73 S. W. 950; *Price v. Wakeham*, 48 C. A. 339, 107 S. W. 132. Or for selling the minor liquor. *Id.*

The fact that a liquor dealer in good faith believes a minor, whom he permits to enter and remain in his saloon, to be of age, is no defense to an action permitting such entry and remaining. *Cox v. Thompson*, 32 C. A. 572, 75 S. W. 819.

Where a minor enters a saloon to procure a drink, and remains no longer than necessary for such purpose, the saloon keeper, who honestly believes him to be of age, is not liable for permitting a minor to enter and remain in saloons. *Id.*

If a minor enters a saloon for a lawful purpose, and leaves after he accomplishes it, no liability attaches to the saloon keeper, under statute giving parent right of action when minor enters and remains in a saloon. *Id.*

Consent of a parent to certain liquor dealer's selling liquor to his minor son held no defense to an action for a sale to him by another dealer. *Roach v. Springer* (Civ. App.) 75 S. W. 932.

What a minor, when purchasing liquor, said as to his father's consent, is not admissible in an action by the father against the liquor dealer for making the sale. *Id.*

Good faith in believing that a minor, entering and remaining in one's saloon, was an adult is no defense. The change in the law allowing good faith in believing that the per-

son was an adult applies to sales to a minor and not to allowing him to enter and remain in the saloon. *Minter v. State*, 33 C. A. 182, 76 S. W. 313, 314.

If within the meaning of the statute a minor is permitted to enter and remain in the house or place, the good faith of the owner will not prevent this from being a breach of the bond. *State v. Dittfurth & Friederichs* (Civ. App.) 79 S. W. 53.

That a liquor dealer believed that a minor, entering and remaining in his saloon, was of age, is no defense to an action on his bond. *Gilbreath v. State* (Civ. App.) 82 S. W. 807.

Neither the appearance of the minor nor signs stating that minors are not allowed to remain in a saloon justifies the saloon keeper in permitting a minor to gamble in his saloon. *Krick v. Dow* (Civ. App.) 84 S. W. 245.

In an action on a bond for furnishing liquor to a minor and permitting him to remain in the saloon, an instruction requiring the same to have been "knowingly done" to entitle plaintiff to recover held error. *Findley v. Holley*, 37 C. A. 637, 85 S. W. 24.

An instruction defining the term "remain," as used in a special interrogatory as to permitting a minor to "remain" in saloon, as used in the sense of "tarry or loiter," held error. *Id.*

Good faith in believing that minors are over 21 years of age is no defense, when the ground of breach of the bond is permitting the giving of intoxicating liquors to minors. Good faith is applicable only to sales to minors and habitual drunkards. *A. E. Holly & Co. v. Simmons*, 38 C. A. 124, 85 S. W. 325.

In an action on a liquor bond for a sale to a minor, the use, in an instruction, of the word "knowingly," to qualify the word "permit," used in the statute, making it a breach of the bond to permit a minor to enter or remain in a saloon, is error. *Wakeham v. Price* (Civ. App.) 89 S. W. 1093.

The fact that a father's course of conduct toward his minor son tended to encourage him in dissipated habits held not, as a matter of law, to prevent the father from recovering damages on the liquor bond for a sale of liquor to the minor. *Id.*

The fact that a father acquiesced in the sale of liquor to his minor son by a liquor dealer is a defense to an action by the father on the liquor dealer's bond for such a sale. *Price v. Wakeham*, 48 C. A. 339, 107 S. W. 132.

Under the law in force at the trial of an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, the dealer's good faith in believing the minor to be of age was no defense. *Markus v. Thompson*, 51 C. A. 239, 111 S. W. 1074.

In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, it was no defense that plaintiff, the minor's father, had authorized other dealers to sell liquor to the minor. *Id.*

22. Right of saloon keeper to prevent disturbance.—Saloon keepers, being under bond to keep orderly houses, may eject persons creating disturbances therein. *Hampton v. State* (Cr. App.) 65 S. W. 526.

23. Persons entitled to sue.—A suit on the bond may be brought by the party aggrieved or by the state. *McGuire v. Glass*, 4 App. C. C. § 51, 15 S. W. 127.

A married woman cannot maintain an action for the recovery of liquidated damages for the breach of a liquor dealer's bond in violation of the statute prohibiting the sale of liquor to a minor. *Wartelsky v. McGee*, 10 C. A. 220, 30 S. W. 69.

Where a wife has given notice not to sell to her husband, she may sue and recover the damages allowed by the state without showing any damages to her person or property by a sale contrary to such notice. *Fay v. Williams* (Civ. App.) 41 S. W. 497.

Under Act May 6, 1893, sec. 9 (Rev. St. 1895, art. 5060g), re-enacted with modifications in this article, a widow can recover damages against a saloon keeper and his bondsmen for liquor sold to her minor son. *Frobese v. Peavy* (Civ. App.) 43 S. W. 900.

A father may recover on a liquor dealer's bond for sales to the minor without showing that he is aggrieved. *Qualls v. Sayles*, 18 C. A. 400, 45 S. W. 839.

The state can bring an action on a liquor dealer's bond for permitting a minor to work in his place of business, although the father hired him. *McMonigal v. State* (Civ. App.) 45 S. W. 1038.

A wife held authorized to prosecute on a liquor dealer's bond required by Rev. St. 1895, art. 3380, substantially identical with this article, without joining her husband. *Wright v. Tipton*, 92 T. 163, 46 S. W. 629.

A wife, having once notified a liquor dealer not to sell to her husband, need not renew the notice, to entitle her to recover damages for sales made to her husband under a subsequent license. *Rintleman v. Hahn*, 20 C. A. 244, 49 S. W. 174.

A college may sue as the aggrieved party, on a dealer's bond, for sales to a student. *Daniels v. College*, 20 C. A. 562, 50 S. W. 205.

A wife can recover on liquor dealer's bond, though her reputation for chastity be bad. *Tipton v. Thompson*, 21 C. A. 143, 50 S. W. 641.

Wife of habitual drunkard may sue on liquor dealer's bond for the act of the dealer in selling liquor to her husband. *Burlew v. Schiller*, 41 C. A. 202, 92 S. W. 814.

A mother of a minor held entitled to maintain an action on a liquor dealer's bond for sales made to the minor during the life of his father, who died pending an action by him on the bond for such sales. *Ellis v. Brooks*, 101 T. 591, 102 S. W. 94, 103 S. W. 1196.

A father of a minor to whom liquor was sold, and who was permitted to remain in a saloon, in violation of the law and the liquor dealer's bond, held, without further showing, a person "aggrieved," who could sue on the bond. *White v. Manning*, 46 C. A. 298, 102 S. W. 1160.

One held not barred from recovery on a liquor dealer's bond, for sale to his minor son and allowing him to remain in the saloon, because he had occasionally permitted the son to drink beer in his presence. *Id.*

A mother is entitled to sue on the bond where liquor is sold to her son who is a habitual drunkard, and she need not give notice to the dealer not to sell, to entitle her to sue. *Coughtry v. Haupt*, 47 C. A. 452, 105 S. W. 517.

In an action on a liquor dealer's bond for permitting a minor to enter and remain in his saloon, brought by the minor's father, it was unnecessary for the father to prove that he was aggrieved by defendant's act. *Markus v. Thompson*, 51 C. A. 239, 111 S. W. 1074.

A widow who for many years has had the care, nurture and maintenance of her brother, a minor and orphan, and has had the responsibility of the correct rearing and training of said minor (who is eighteen years old at time of bringing suit) stands in loco parentis towards said minor and is entitled to sue on liquor dealer's bond for selling liquor to said minor as "one aggrieved." *Saunders v. Alvido & Laserre*, 52 C. A. 356, 113 S. W. 993.

The court may assume that a mother, who is the only surviving parent of a minor child, is the person aggrieved by a dramshop keeper permitting the minor to enter and remain in his saloon. *McElroy v. Sparkman* (Civ. App.) 139 S. W. 529.

24. **Persons liable—Social club.**—A social club dispensing spirituous liquors to its members and acting in good faith is not within this article. *State v. Austin Club*, 89 T. 20, 33 S. W. 113, 30 L. R. A. 500.

25. **Druggists.**—See notes under Art. 7475.

26. **Jurisdiction.**—The county court does not have jurisdiction of a suit on the bond. *State v. Stoutenberger*, 4 App. C. C. § 247, 16 S. W. 304.

The district court held to have jurisdiction of an action to recover liquidated damages on a liquor dealer's bond for selling liquor to a minor. *Coburn v. Gill* (Civ. App.) 60 S. W. 974.

27. **Abatement of action.**—A suit against a liquor dealer to recover the statutory penalty for breach of the bond abates on the death of the liquor dealer. *State v. Schuene-mann*, 18 C. A. 485, 46 S. W. 260.

A suit on a liquor dealer's bond by a father for selling liquors to his son, does not abate on the death of the principal in the bond (the liquor dealer) although an action by the state on such bond for penalties for a breach of the bond does abate on the happening of such an event. *Nolan v. Tennison*, 21 C. A. 332, 50 S. W. 1028.

The designation (in the caption) of the recovery as liquidated damages should not control in the interpretation of this article. Considering the caption and all the provisions of the law it is held to be penal and the sum to be recovered as penalty, and an action on the bond for the recovery of the bond does not survive, and on death of the principal in the bond the action abates as to the sureties. *Johnson v. Rolls*, 97 T. 453, 79 S. W. 513.

In an action on a liquor dealer's bond to recover a penalty for permitting plaintiff's minor son to enter a saloon, an action begun by the father and mother may be continued by the latter alone on the former's death. *Munoz v. Brassel* (Civ. App.) 108 S. W. 417.

28. **Pleading.**—See Title 37.

29. **Limitations.**—See Art. 5687.

30. **Jury—Questions for.**—See notes under Art. 1971.

31. **Amount of recovery—In general.**—A father held entitled to recover a separate penalty as liquidated damages for each infraction of defendant's liquor bond. *Coburn v. Gill* (Civ. App.) 60 S. W. 974.

The statute relating to actions on a liquor dealer's bond held to authorize the state to recover more than one penalty, where there has been more than one breach. *Jones v. State* (Civ. App.) 81 S. W. 1010.

The bond can be entirely exhausted by the county and district attorneys, or either of them, in the name of the state, for the penalty, for the use and benefit of the county. There may be a recovery for more than one breach of the bond. *Douthitt v. State*, 36 C. A. 396, 82 S. W. 353.

The state can have successive recoveries upon the bond until it is exhausted, either by suits in its own behalf or by suits brought by parties aggrieved, or by both. *Douthitt v. State*, 98 T. 344, 83 S. W. 797.

In an action by the state on a liquor dealer's bond, in which more than one breach is alleged, the state may recover more than one penalty. *Douthitt v. State* (Civ. App.) 87 S. W. 190.

The state held entitled to recover on a liquor dealer's bond a penalty of \$500 for each violation up to the penalty of the bond. *Hawthorne v. State*, 39 C. A. 122, 87 S. W. 839.

There may be several actionable breaches of a liquor dealer's bond for permitting the same minor to be in his saloon on the same day. *Markus v. Thompson*, 51 C. A. 239, 111 S. W. 1074.

32. **Interest on judgments on liquor dealers' bonds.**—See notes under Art. 4973.

33. **Evidence—Sufficiency of.**—In an action to recover the penalty for selling liquor to plaintiff's husband, evidence held not to establish his habitual drunkenness. *Herley v. Kettle* (Civ. App.) 65 S. W. 48.

Evidence held not to sustain a judgment for infractions of a liquor dealer's bond, by selling liquor to a minor and permitting him to remain in the saloon. *Dickson v. Holt*, 30 C. A. 297, 70 S. W. 342.

The petition and the proof in a suit on a liquor dealer's bond held, as against a general denial, to import the allegation and proof that a license had been issued to the principal in the bond. *Earl v. State*, 33 C. A. 161, 76 S. W. 207.

Evidence held not to justify recovery on a liquor dealer's bond, though sale was to a minor. *Tinkle v. Sweeney*, 97 T. 190, 77 S. W. 609.

Evidence held not to show breach of condition of liquor dealer's bond relative to minors entering and remaining in place of business. *Tinkle v. Sweeney* (Civ. App.) 78 S. W. 248.

Evidence held not to show that a minor entered and remained in a saloon, within the statute. *Ghio v. Stephens* (Civ. App.) 78 S. W. 1084.

In an action to recover a statutory penalty on a liquor dealer's bond, plaintiff is required to establish his case only by a preponderance of the evidence. *Cox v. Thompson*, 37 C. A. 607, 85 S. W. 34.

In an action on a liquor dealer's bond, evidence held to justify a finding that the principal defendant knowingly permitted liquors to be given to minors. *A. E. Holly & Co. v. Simmons*, 38 C. A. 124, 85 S. W. 325.

In an action on a liquor dealer's bond, evidence held to establish a breach in permitting games to be exhibited and played about his place of business. *Hawthorne v. State*, 39 C. A. 122, 87 S. W. 839.

In an action against a retail liquor dealer and the sureties on his bond for the statutory penalty for selling liquor to a minor, evidence held not to raise the issue of a sale in good faith under the statute. *Creel v. Cordon*, 44 C. A. 367, 98 S. W. 387.

That a minor was allowed to remain in a saloon, in violation of the liquor dealer's bond, held sufficiently proved. *White v. Manning*, 46 C. A. 298, 102 S. W. 1160.

In an action on a liquor dealer's bond for damages through the sale of liquor to plaintiff's husband, testimony that, during a period from a date preceding the bond to the filing of the suit, there were 10 violations was not proof that any certain number of violations occurred during the life of the bond. *Birkman v. Fahrenthold*, 52 C. A. 335, 114 S. W. 428.

In an action on a dramshop keeper's bond, evidence held to justify a finding that the keeper permitted a minor to enter and remain in his saloon. *McElroy v. Sparkman* (Civ. App.) 139 S. W. 529.

In an action on a liquor dealer's bond for selling liquor by the dealer to an habitual drunkard, evidence held to show that notice was given to the dealer not to sell liquor. *McNeil v. Lewis* (Civ. App.) 145 S. W. 305.

34. **Objections for insufficiency of evidence.**—Objection to sufficiency of evidence in action for penalty for breach of liquor dealer's bond cannot be first raised on appeal. *Cox v. Thompson*, 37 C. A. 607, 85 S. W. 34.

**Art. 7453. Unearned portion returned in case of death.**—In the event of the death of any licensee under this law leaving an unearned portion of any license issued under this law, the heirs, executors, administrators or legal representatives of such deceased person may present the license of such person to the state and county and receive payment of the unearned portion of such license tax collected by them, respectively. [Acts 1909, 1 S. S., p. 294, sec. 16.]

**Art. 7454. Clerk to make out statement.**—The clerk of the county court shall make out a statement of all such licenses granted by him and the amount paid the collector on each for state and county taxes and report the same to the comptroller of public accounts of the state. [Id. sec. 17.]

**Art. 7455. Duty of clerk to certify forfeitures, etc.**—Hereafter, when the license issued to any person or firm to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, or malt liquors exclusively, to be drunk on the premises, in the locality other than where local option is in force, has been declared forfeited, by either the county or district court, revoked or canceled, it shall be the duty of the clerk of the county or district court to immediately certify such forfeiture under the seal of such court to the comptroller of public accounts of the state of Texas, which said certificate shall state the date of such forfeiture, the number and the nature of the cause, and the name and residence of the licensee or defendant, the name of the person and style of the firm, and the names and places of residence of the individual members of any such firm, or the name and place of residence of any such person, as the case may be, as shown by the application for license filed by such person or firm in the county court; for which service the clerk shall receive a fee of one dollar, to be taxed against the defendant or defendants. And it shall be the duty of the comptroller, upon receiving any such certificate, to file and record the same in a book to be kept by him for such purpose, and he shall likewise record all such forfeitures by him made; and thereafter no permit or license shall be issued to any such person or firm, or to any member of any such firm, to engage in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, or malt liquors exclusively, within the period of five years from and after the date of entry of such forfeiture. [Id. sec. 18.]

Cited in dissenting opinion, *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

**Art. 7456. Act of servant deemed to be act of master.**—Any sale, gift or other disposition of intoxicating liquors knowingly made to any minor, or to any habitual drunkard, or on any Sunday or election day by an agent, clerk or other person acting for any retail liquor dealer or retail malt dealer, or other person, shall be deemed and taken to be for all purposes of this law as the act of such retail liquor dealer or retail malt dealer or other person. [Id. sec. 20.]

**Art. 7457. No license issued to person whose license has been revoked, until five years.**—No retail liquor dealer's, nor retail malt dealer's license shall be issued to any person whose license as either a retail liquor dealer or retail malt dealer has been revoked or forfeited within five years before the filing of his application for license, or who has had in his employ in his business of retail liquor dealer, or retail malt dealer, any person whose license has been revoked or forfeited within five years next before the filing of such application. [Id. sec. 22.]

**Art. 7458. License not to be issued, when.**—No license shall be granted to any person as a retail liquor dealer, or as a retail malt dealer, who shall have carried on any such business after the expiration of his license previously issued and without having received a license for such purpose, or whose license shall have been revoked or forfeited under the provisions of this law, within five years before the filing of his application for such license. No license shall be issued to any person to do business as a retail liquor dealer, or retail malt dealer, in any house or building used for the purpose of prostitution, or as a house of assignation, or as a house of ill-fame, or gambling house. If, after a license has been issued to a retail liquor dealer, or retail malt dealer, the building in which the same is located shall be used for the above mentioned purposes, or any of them, with the knowledge and consent of such licensee, his license may be revoked, as hereinbefore provided. [Id. sec. 23.]

**Denial of license and judicial relief.**—Refusal of a liquor license on the ground that the place where it is proposed to open the saloon is unsuitable held not an abuse of discretion. *Ex parte Abrams*, 56 Cr. R. 465, 120 S. W. 883, 18 Ann. Cas. 45; *Ex parte Clark*, 56 Cr. R. 494, 120 S. W. 892; *Ex parte Parker*, 56 Cr. R. 544, 120 S. W. 892.

An applicant for a liquor license in the city of Texarkana held not entitled to a license because the city council had discriminated against him in refusing him a license under a provision of the charter which it had violated in other instances. *Id.*

Mandamus will not lie to compel a county judge to issue a liquor license, where the proceedings to obtain it were taken under a law enacted in 1907 (Acts 1907, c. 138), and before the hearing on appeal that law had been repealed by Acts 1909, c. 17, embodied in this chapter. *Lytleton v. Downer* (Civ. App.) 124 S. W. 994.

**Art. 7459. Law not to conflict with local option law.**—This law, or any of the provisions thereof, shall not be construed to be in conflict with any local option law now or hereafter to be in force in this state, and no license to any retail liquor or retail malt dealer shall be issued or shall be effective at any place where local option law is in force and operation. [Id. sec. 27.]

See, in dissenting opinion, *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

**Application in general.**—The provisions of this law do not apply to local option territory, and are not to be construed to be in conflict with any local option law. *Snead v. State*, 55 Cr. R. 533, 117 S. W. 987.

**Art. 7460. License to be posted.**—Any license required by this law shall be posted in some conspicuous place in the house where the business or occupation for which such license is necessary is carried on before engaging in such business or occupation. [Id. sec. 28.]

**Manner of proving issuance of license.**—Whether or not a license to sell intoxicants had been issued to accused is a fact which may be proved otherwise than by the exhibition of the license, this being particularly true in view of this article. *Woods v. State* (Cr. App.) 151 S. W. 296.

**Art. 7461. List of licenses to be delivered to grand jury.**—The county clerk of any county in this state where intoxicating liquors are sold, having a population of more than fifty thousand inhabitants, shall make out a list of all persons then having a license under the provisions of this law, and shall deliver the same to each grand jury impaneled in such county. Said list shall be arranged in alphabetical order, shall give the names of the persons to whom same were issued, the date of its issue, the date it will expire, stating whether the same is a retail liquor dealer's, or retail malt dealer's license, and shall describe where said license was to be used. [Id. sec. 30.]

**Art. 7462. District judge to charge law to grand jury.**—The judges of the district courts in this state shall give this law in special charge to each grand jury impaneled in their respective districts. [Id. sec. 31.]

**Art. 7463. Fees of officers.**—The county clerk, county judge and other officers shall receive for services rendered in the carrying out of this law such fees as are now allowed by law for similar services. [Id. sec. 32.]

**Art. 7464. In case of forfeiture, may dispose of stock in bulk.**—In case the license of any retail liquor dealer, or retail malt dealer, is forfeited under any of the provisions of this law, nevertheless such licensee shall be authorized to sell or dispose of in bulk any stock of intoxicating liquors he may have on hand at the time such license is forfeited. [Id. sec. 33.]

**Art. 7465. "Intoxicating liquor" defined.**—The term "intoxicating liquor," as used in this law, shall be construed to mean fermented, vinous or spirituous liquors, or any composition of which fermented, vinous or spirituous liquors is a part; and all of the provisions of this law shall be liberally construed as remedial in character. [Id. sec. 34.]

See *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Definitions—"Intoxicating liquor."**—Where, in a prosecution for the sale of intoxicating liquor in local option territory, there is no evidence raising the issue that the article sold, which was beer, was not intoxicating, but the case was tried on the theory that it was intoxicating and prohibited, there was no error in refusing an instruction based on the theory that the beer sold was not an intoxicating liquor, the courts will take judicial knowledge that beer is an intoxicating liquor. *Moreno v. State*, 64 Cr. R. 660, 143 S. W. 156.

**Art. 7466. Law to be valid, even though part is held to be invalid.**—If, for any reason, any article or part of this chapter shall be held by the courts to be unconstitutional or invalid, then that fact shall not invalidate any other part of this chapter, but the same shall be enforced without reference to the parts, if any, which shall be so held to be invalid, unless the entire chapter shall be held to be invalid. [Id. sec. 35a.]

#### DECISIONS UNDER SUPERSEDED ACTS

**Termination of licenses.**—The intent of Acts 1907, p. 258, ch. 138, is that those having licenses under the old law (*Sayles' Ann. St.* 1897, arts. 5060a-5060i) should have a reasonable time in which to comply with the provisions of this law, during which they could continue to sell under the old law, and would merely be awarded a reasonable time to comply with the new law. Two months is not a reasonable time. *Ex parte Vaccarezza*, 52 Cr. R. 105, 105 S. W. 1120; *Barckell v. State* (Civ. App.) 106 S. W. 192; *Ex parte Vaccarezza*, 52 Cr. R. 311, 106 S. W. 392; *Williams v. State*, 52 Cr. R. 371, 107 S. W. 1126.

## CHAPTER SIX

### TAX ON SALE OF INTOXICATING LIQUORS IN LOCAL OPTION TERRITORY

Art.		Art.	
7467.	Tax for selling intoxicating liquors on prescription in local option territory.	7472.	Licenses to be posted.
7468.	Counties may levy.	7473.	County clerk to report application for license to state revenue agent.
7469.	Prerequisites to issue of license to sell.	7474.	Producers of domestic wines to be exempt.
7470.	License to issue when.	7475.	Dealer must give bond before license will issue.
7471.	License to issue for one year and shall designate place of sale, etc.		

**Article 7467. [5060a] Tax for selling intoxicating liquors on prescription in local option territory.**—There shall be collected from every person, firm, corporation or association of persons, for every separate establishment selling vinous, malt or spirituous liquors or medicated bitters, within this state and located within a county, subdivision of a county, justice precinct, town or city, in which local option is in force.

under the laws, the sum of two hundred dollars; provided, the same shall not be sold in such locality, except on prescription and in compliance with the laws governing sales in such localities; provided, further, that nothing in this article shall be so construed as to exempt druggists who sell spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, on the prescription of a physician or otherwise, in either locality as above set forth, from the payment of the tax herein imposed; provided, further, that this article shall not apply to the sale by druggists of tinctures and drug compounds, in the preparation of which such liquors or medicated bitters are used and sold on the prescription of a physician or otherwise, and which tinctures and compounds are not intoxicating beverages prepared in the evasion of the provisions of this chapter nor the local option law. [Acts 1897, p. 223.]

See *Ex parte Flake* (Cr. App.) 149 S. W. 146.

**Legislative power.**—The legislature can require parties in local-option districts to pay tax for privilege of selling liquors. *Snearly v. State*, 40 Cr. R. 507, 52 S. W. 547, 53 S. W. 344.

**Construction and operation.**—A person engaged in the sale of liquors in a county or subdivision of a county where the local option law is in force is not liable to the occupation tax imposed by general laws of 1893 on retail liquor dealers. *Rathburn v. State* (Civ. App.) 32 S. W. 45.

Each one of the occupations named in this article is separate and distinct from the others and requires a license to pursue or engage in the particular business of selling in quantities from one gallon or under gallon in local option precinct, as the case may be. *Williamson v. State*, 41 Cr. R. 461, 55 S. W. 569.

Before a party can sell liquor in a local option territory he must have the required license to sell on prescription. *Watson v. State*, 42 Cr. R. 13, 57 S. W. 102; *Snead v. Same*, 55 Cr. R. 583, 117 S. W. 986.

If the malt liquor sold in a local option territory is not intoxicating, a license tax for the sale thereof is not required. *Ex parte Gray* (Cr. App.) 83 S. W. 828.

One cannot be punished for selling liquor after he has been notified by the county judge to file a new bond when the sale is under a physician's prescription, regular in form and under a license and under a bond which has not been annulled. *Holland v. State*. 51 Cr. R. 157, 101 S. W. 1004.

**Art. 7468. [5060b] Counties may levy.**—The commissioners' courts of the several counties in this state shall have the power to levy and collect from every person or association of persons selling spirituous, vinous or malt liquors, or medicated bitters, a tax equal to one-half the state tax herein levied; and where any such sale is made in any incorporated city or town, such city or town shall have the power to levy and collect a tax upon such sale equal to that levied by the commissioners' court of the county in which such city or town is situated. [Acts 1893, p. 177.]

**Art. 7469. Prerequisites to the issue of license to sell.**—Every person, firm, corporation or association of persons, desiring to engage in the business of selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in this state, in any county, justice precinct, school district, town, city, or other subdivision of a county where the qualified voters thereof have, by a majority vote, determined that the sale of such intoxicating liquors shall be prohibited therein, except for sacramental and medicinal purposes, shall, before engaging in such business, and in addition to all the requirements of law now in force, file with the county judge of the county in which the said business is to be pursued, an application in writing for a license to engage therein, and shall state the county and the particular portion thereof in which the said business is to be pursued, and describe the building in which it is to be pursued; said application shall give the name, residence and address of every person connected with the said association, corporation, or other applicant, and shall state that each person so connected with said applicant is a bona fide resident of the county where said business is to be pursued; said application shall have attached thereto a petition addressed to said county judge, requesting that a license be granted to said applicant or applicants, naming them, authorizing them to engage in the business of selling such liquors on



prescriptions of physicians in a justice precinct and building to be named therein; said petition to be signed in person by a majority of the qualified voters of the justice precinct where said business is to be conducted at the time said petition is filed; said majority of qualified voters to be determined by the poll tax receipts and the exemption certificates issued by the tax collector of said county. There shall be attached to said petition an affidavit from some credible person or persons to the effect that every name signed to said petition is the genuine signature of the person represented to have signed the same. Upon the filing of said application for license and said petition with the county judge, the said judge shall set the same down for hearing, either in term time or in vacation, for some day not less than ten nor more than fifteen days from the day the same is filed; and said judge shall at once notify the county attorney of the day said hearing will be had. Upon the day so designated, or at some time thereafter to which the same may be postponed, the said county judge shall hear the said matter; and the county attorney, or any bona fide citizen of said justice precinct, may appear and contest the genuineness of the signatures to said petition, and whether or not a majority of the qualified voters have signed the same; and upon such hearing, if the said judge is convinced that the applicant or applicants have complied with all the requirements of law, he shall make his order authorizing the issuance of said license by the county clerk of said county, when the said applicant or applicants shall have paid all occupation taxes, given the required bond, and met all other requirements of existing laws concerning said business; but in no case shall such license be issued for a longer or shorter period than one year. [Acts 1910, 3 S. S., p. 35.]

**Art. 7470. [5060d] License to issue, when.**—After the county judge has entered an order authorizing the issuance of a license, as provided in article 7469, and the applicant shall have complied with the provisions of said order, the county clerk of said county shall issue to said applicant a license to sell spirituous, vinous, or malt liquors, or medicated bitters, at the place and in the manner and quantities set forth in the application, and no sale shall be made until such license is procured. The receipt of the tax collector shall be evidence of the payment of the tax. For issuing licenses herein provided for, county clerks shall be entitled to charge a fee of twenty-five cents for each license. [Acts 1893, p. 177.]

**Art. 7471. [5060e] License to issue for one year, and shall designate place of sale, etc.**—No license shall be granted for a longer or shorter period than one year. The particular place and house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous, or malt liquors, or medicated bitters, at any other place or house than that designated in the license; provided, that if any person, or association of persons, having a license to sell such liquors, desires to change his or their place of business, such change may be made by presenting the license to the clerk of the county and having the new place of business inserted therein, but in no case to admit of the temporary closing of one place of business to sell at another place. [Id.]

**Requisites of license.**—See notes under Art. 7435.

**Art. 7472. Licenses to be posted.**—The license provided for in this chapter, and the occupation tax receipts, together with the internal revenue receipt issued by the United States, shall be posted by the licensee in a conspicuous place in his or their place of business; and, on failure to so post such license, receipt or internal revenue receipt, he or they so failing shall be considered as having no license and subject to all the pains and penalties as if no such license had issued.

**Art. 7473. [5060f] County clerk to report applications for license to state revenue agent.**—The county clerk in each and every county in this state shall, between the first and tenth day in each month, forward to the state revenue agent a sworn statement, giving the names of all persons who have filed applications for license during the preceding month; and the tax collector of each county shall keep a register in which shall be entered the names of all persons paying taxes under this chapter, with the date of payment, and shall, between the first and tenth day of each month, make to the state revenue agent a sworn report, giving the names of all persons who have paid a liquor tax during the preceding month, and the character of tax paid by each. The reports provided for in this article shall be made upon blank forms to be furnished by the comptroller. [Acts 1893, p. 177.]

**Art. 7474. [5060i] Producers of domestic wines exempt.**—The provisions of this chapter shall not apply to wines produced from grapes grown in this state, while the same is in the hands of the producers or manufacturers thereof.

See notes under Art. 7432.

**Art. 7475. [5060j] Dealer must give bond before license will issue.**—Every person, firm, corporation or association of persons, before engaging in the sale of spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, in any county, subdivision of a county, justice precinct, town or city, in which local option is in force, shall enter into a bond in the sum of twenty-five hundred dollars, with at least two good and sufficient sureties, payable to the state of Texas, to be approved by the county judge of the county in which such sales are to be made, conditioned that said person, firm, corporation or association of persons, so selling spirituous, vinous or malt liquors, or medicated bitters capable of producing intoxication, shall not sell in any quantity, except on the prescription of a regular practicing physician, addressed to such person, firm, corporation or association of persons, written with ink on white paper in the handwriting of such physician, dated, numbered and signed by such physician, giving his and applicant's place of residence, and certifying on his honor, that he has in person carefully examined the applicant or patient, and that he finds him or her actually sick, giving the malady or disease with which he or she is suffering, as near as he can ascertain, and that he or she is in immediate need of an alcoholic stimulant, such as prescribed; and there shall not be sold more than one quart on any one prescription, which shall be sold at one time and in one package, and delivered to the purchaser at time of sale; and that he or they shall not permit the same to be drunk on the premises where sold, nor on any other premises owned or controlled by him or them; and that he or they shall not sell more than once on the same prescription, and shall not sell on any prescription bearing the same number of another prescription given by the same physician and dated during the same year; and that he or they shall not sell on a prescription bearing date more than three days prior to the date of its presentation nor upon the prescription of a physician not known to him or them to be a regular practicing physician, authorized under the laws of Texas to practice his profession, nor permit a minor to remain on his premises or his place of business, except the house or place of business of a regular pharmacist; and that he or they shall not permit any games prohibited by the laws of this state to be played, dealt or exhibited in or about such house or place of business; and that he or they shall not rent or let any part of the house or place of business or premises in which or on which they are selling such liquors or medicated bitters, to any one, for the purpose of carrying on any business in violation of the local option laws, or the penal laws of the state; and that he or they shall not adulterate the liquors or medicated bitters sold by him or them, nor knowingly sell or

give away such adulterated liquors; and that he or they shall keep an open, orderly house, and shall not use any screen or other device for the purpose of or which shall obstruct the view through the door or doors opening out on the street or alley; which said bond shall be filed in the office of the county clerk of the county where such business is carried on, and recorded by him in a book to be kept for that purpose; and for recording same he shall receive a fee of seventy-five cents. For every breach or violation of any of the provisions of said bond, the person, firm, corporation or association of persons, and the sureties on said bond, shall be liable in damages to any person, firm, corporation or association of persons injured thereby. In addition to the proceedings by parties sustaining damages by the violation, it shall be the duty of the county and district attorneys to institute suit in the name of the state of Texas for each and every infraction or violation thereof, for the use and benefit of the county; and the sum of two hundred and fifty dollars shall be recovered for each infraction, against the principal and sureties on said bond, as liquidated damages; which said sum shall be paid into the county treasury and become a part of the road fund of said county. Said bond shall not be void on the first recovery, but may be sued upon for each infraction thereof until the full penal sum named therein shall be exhausted. If said bond shall be exhausted, or become in danger of being exhausted by suits, said person, firm, corporation or association of persons shall be required to execute another bond; notice of such requirement shall be given by the county judge of the county, and such parties shall have ten days after notice to comply, and upon failure to do so shall be subject to all the pains and penalties from the time such notice was given as if no bond had been given in the first instance; provided, that, in case the county judge shall fail to give the notice herein required, then any citizen of the county, over the age of twenty-one years, may do so; and in case of failure to execute another bond within the time required, as above set forth, said person may bring suit in the district court of the county to require such person, firm, corporation or association of persons to execute a new bond; provided, further, that, in case the sureties on such bond shall become insolvent, or found to be insolvent after the execution of such bond, it shall be the duty of the county judge of the county to require of them a new bond, the same as above set forth; and, in case of his failure to do so, any citizen, as above set forth, may proceed in the district court aforesaid to compel them to execute such bond; and in case the insolvency of said sureties or either of them is established, which shall be done under the rules of evidence governing other like cases, or in case it is shown that said bond is exhausted or in danger of being exhausted by suit, said court shall enter up its judgment requiring said parties to enter into a new bond within ten days from the date of the judgment, and adjudge the cost against defendants, and assess a reasonable attorney's fee against them as cost. In case of an appeal from such judgment, the bond shall be in an amount sufficient to cover all costs and damages, to be fixed by the judge trying the cause; and, in addition to the conditions now required in appeal bonds, be conditioned further to pay all damages occasioned by the breach or violation of the local option and penal laws of the state from the date of the institution of the suit until the final termination of such suit. In case appellants are cast in the suit and the same is finally determined against him or them, said appeal bond may be sued upon and recoveries had the same as provided in this chapter and article for suits and recovery on the original bond; provided, further, that, when suit is instituted hereunder by a citizen, the suit shall be prosecuted without bond for cost or appeal bond. [Acts 1897, p. 223.]

**Definitions of terms in statute and bond.**—See notes under Art. 7452.

**Requisites and validity of bond.**—See notes under Art. 7452.

**Liability on bond.**—See, also, notes under Art. 7452.

In an action on a prescription liquor dealer's bond, the court properly charged that a sale made on a prescription bearing the same number of another prescription, given by the same physician, and dated during the same year, was a violation of the bond, whether given to the same or different persons. *Edgar v. State*, 46 C. A. 171, 102 S. W. 439.

## CHAPTER SEVEN

### TAX ON DEALERS IN NON-INTOXICATING MALT LIQUORS

Art.

7476. Amount of tax.

7477. Application for license to state what; must be paid in advance.

Art.

7478. County clerk to report license.

**Article 7476. Amount of tax.**—There is hereby levied upon all firms, persons, associations of persons and corporations, selling non-intoxicating malt liquors, an annual state tax of two thousand dollars. Counties, incorporated cities and towns where such sales are made may each levy an annual tax of not exceeding one thousand dollars upon all such persons, firms or corporations; provided, that this article shall not prevent the sale of such proprietary remedies as "malt extract," "malt medicine" and "malt and iron" manufactured and used exclusively as medicine and not as a beverage, when sold upon the prescription of a regular practicing physician; provided, further, that not more than one sale shall be made upon any one prescription. [Acts 1909, p. 51, sec. 1.]

**Constitutionality.**—Acts 1907, c. 112, imposing an occupation tax is unconstitutional, in that the taxes levied are not equal and uniform. *Ex parte Woods*, 52 Cr. R. 575, 108 S. W. 1171-1179, 16 L. R. A. (N. S.) 450, 124 Am. St. Rep. 1107.

This chapter is a valid exercise of the state's police power, and not invalid as imposing a prohibitive tax, and as preventing pursuit of a lawful business. *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

This chapter is not invalid as imposing different rates in different parts of the state from those established by chapter 5, which applies only to the sale of intoxicating liquors. *Id.*

**Art. 7477. Application for license to state what; must be paid in advance.**—Each person and each firm and each corporation and each association of persons desiring to engage in the business mentioned in the preceding article, before engaging in same, shall file with the county clerk of the county in which the business is proposed to be pursued an application in writing for a license to engage therein and shall state the place or house in which said business is to be pursued, and, if within the corporate limits of any incorporated city or town, that fact shall be so stated; and any such person or firm or corporation or association of persons shall pay to the tax collector of the county the entire amount of annual tax levied by the state and the entire amount of the annual tax upon such business as may be levied by the commissioners' court of said county, and, if the business is to be pursued in an incorporated city or town, shall pay to the collector of taxes of such city or town the tax that may be levied on such business by said city or town; and all such taxes shall be paid in advance; and no license shall be issued by the county clerk until the person, or firm, or corporation, or association of persons, applying therefor shall exhibit receipts showing the payment of all taxes levied and authorized by this chapter; and the county clerk shall be entitled to charge a fee of twenty-five cents for the issuance of such license; and it shall be unlawful to carry on business under said license in more than one place at the same time, or in any place other than that named in said application for said license, unless the party carrying on said business shall first file with the county clerk of the county in which said business is carried on a written statement showing such change of place of business. [Acts 1909, p. 51. Amended 2 S. S., p. 397.]

See *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Art. 7478. County clerk required to report licenses.**—The county clerk is hereby required to make report of all licenses issued by authority of this chapter, as in other cases. [Acts 1909, p. 51, sec. 3.]

## CHAPTER EIGHT

### TAX ON PERSONS SOLICITING ORDERS OR OPERATING COLD STORAGE FOR INTOXICATING OR NON-INTOXICATING BEVERAGES IN LOCAL OPTION DISTRICTS

<p>Art. 7479. Amount of tax for soliciting orders.</p> <p>7480. Amount of tax for keeping cold storage.</p>	<p>Art. 7481. Application for license.</p> <p>7482. County clerk to report licenses issued.</p>
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**Article 7479. Amount of tax for soliciting orders.**—In all counties, justice precincts, towns, cities or other subdivisions of a county, where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, associations of persons and corporations that pursue the business of selling, or offering for sale, any intoxicating liquors by soliciting or taking orders therefor in any quantities whatsoever, in any such county, justice precinct, town, city, or other subdivision of a county, an annual state tax of four thousand dollars; and each county and also each incorporated city or town may levy an annual tax not exceeding two thousand dollars in any such county or incorporated city or town where such business is pursued. [Acts 1909, p. 53, sec. 1.]

**Constitutionality.**—This chapter is general, and not local or special, within the prohibition of Const. art. 3, §§ 56, 57. *Edmanson v. State*, 64 Cr. R. 413, 142 S. W. 887.

And is a valid exercise of the police power. *Id.*

And is not unconstitutional as levying an excessive tax on the occupation. *Id.*

And does not contravene Const. art. 8, § 2, requiring all occupation taxes to be equal and uniform on the same class of persons within the limits of the authority levying the tax. *Id.*

**Art. 7480. Amount of tax for keeping cold storage.**—In all counties, justice precincts, towns, cities or other subdivisions of a county, where the qualified voters thereof have by a majority vote determined that the sale of intoxicating liquors shall be prohibited therein, there is hereby levied upon all firms, persons, associations of persons and corporations that pursue the business of keeping, maintaining or operating what is commonly known as a "cold storage," or any place by whatever name known or whether named or not, where intoxicating or non-intoxicating liquors or beverages are kept on deposit for others, or where any such liquors are kept for others under any kind or character of bailment, an annual tax of two thousand dollars. Counties, incorporated cities and towns, where such business is located, may each levy an annual tax of not exceeding one thousand dollars upon each such place so kept, run, maintained or operated. [*Id.* sec. 2.]

**Definitions.**—"Nonintoxicating liquors and beverages."—The words "nonintoxicating liquors and beverages," in this article considered in connection with the evil intended to be corrected and with the history of the legislation upon the same subject, have reference to alcoholic or spirituous fluids, either distilled or fermented, and do not include liquids such as water, milk, etc. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

**Constitutionality.**—This article is authorized by state constitution, which provides a mode whereby it may be determined whether the sale of intoxicating liquors shall be prohibited in a given territory, since such provision implies that it is within the power, and is the duty of the legislature to enact all laws necessary to enforce prohibition in localities where it is adopted. *Ex parte Flake* (Cr. App.) 149 S. W. 146.

And does not violate Const. art. 3, § 35, providing that no statute shall contain more than one subject, though it provides for the regulation and prohibition of the liquor traffic in prohibition territory; such object and purpose constituting but one subject. *Id.*

And is a police regulation, and not a revenue measure, though incidentally revenue may be derived from its enforcement. *Id.*

The classification by this article is reasonable, and based on what is for the best interest of the state and the welfare of its citizens. Id.

And being within police power inherent in the state, does not violate Const. U. S. Amend. 14. Id.

The fact that the license prescribed by this article is so large as to be prohibitive of the business, does not render it violative of Const. art. 1, § 19, by depriving citizens of the state of their property rights, privileges, and immunities. Id.

This article bears equally upon all citizens seeking to do such cold storage business in local option territory, and hence does not deprive citizens of their equal right to transact business. Id.

**Uniformity of taxes.**—The fact that this article applies only to local option territory does not render it violative of Const. art. 8, §§ 1, 2, providing that taxes shall be uniform throughout the state. Ex parte Flake (Cr. App.) 149 S. W. 146.

**Right to question validity.**—One charged with violating this article, by storing "intoxicating liquors" in local option territory without having obtained a license, could not complain or raise the question as to what other liquors the statute does or does not apply. Ex parte Flake (Cr. App.) 149 S. W. 146.

**Art. 7481. Application for license.**—Each person and each firm and each corporation and each association of persons desiring to engage in the business mentioned in articles 7479 and 7480 of this chapter in said local option territory, before engaging in same shall file with the county clerk of the county in which the business is to be pursued an application in writing for a license to engage therein, and shall state the county, or portion of the county, in which the business is to be pursued; and, if within the corporate limits of any incorporated city or town, that fact shall be so stated; and any such person or firm or corporation or association of persons shall pay to the tax collector of the county the entire amount of annual tax levied for the state, and the entire amount of the annual tax upon such business as may be levied by the commissioners' court of said county, and, if the business is to be pursued in an incorporated city or town, shall pay to the collector of taxes of such city or town the tax that may be levied on such business by said city or town; and all such taxes shall be paid in advance; and no license shall be issued by the county clerk until the person or firm or corporation or association of persons applying therefor shall exhibit receipts showing the payment of all taxes levied and authorized by this chapter, and the county clerk shall be entitled to charge a fee of twenty-five cents for the issuance of such license. [Id. sec. 3.]

**Art. 7482. County clerk to report licenses issued.**—The county clerk shall be and is hereby required to make report of all licenses issued by authority of this chapter as in other cases. [Id. sec. 4.]

## CHAPTER NINE

### OCCUPATION TAX ON HANDLING LIQUORS C. O. D.

Art.

7483. Amount of tax.

7484. Penalty for failure to pay tax.

7485. No one required to keep office for handling liquors C. O. D.

Art.

7486. Invalidation of part not to affect whole chapter.

**Article 7483. Amount of tax.**—Any person, firm or corporation doing business in this state shall, at each office or place kept, operated or maintained by such person, firm or corporation at which intoxicating liquors legally deliverable are delivered upon payment of purchase money therefor, commonly designated as shipments C. O. D., pay annually for each office or place so kept an annual occupation tax to the state of Texas of five thousand dollars; and any county or any incorporated city or town, wherein such office or place is located, may levy an annual occupation tax upon such person, firm or corporation herein referred to for each of said offices, not to exceed one-half of the amount hereby

levied by the state, such tax to be due and payable annually. [Acts 1907, p. 3.]

**Constitutionality.**—This chapter is valid as a police regulation of the handling of liquors, since the legislature had authority to abrogate the C. O. D. feature of the liquor traffic, or impose any burden thereon which tended to prevent the evasion of the local option statutes. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

And is not in violation of Const. art. 8, §§ 1, 2, providing that taxation and all occupation taxes shall be equal and uniform, upon the class of subjects within the limits of the authority levying the tax, since the delivery of liquor C. O. D. constitutes a business in itself, and is not necessarily a part of an express company's business. *Id.*

**Statute as revenue law.**—This chapter is a revenue law, and not prohibited by Const. art. 3, § 48, providing that the legislature shall not levy taxes or impose burdens on the people except to raise revenue sufficient for the economical administration of the government. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

**Rights and liabilities of express companies.**—This chapter was sufficient to warrant an express company in refusing to carry liquor in that manner, since it could either pay the license tax or refuse to carry the liquor C. O. D. *L. Craddock & Co. v. Wells-Fargo Company Express* (Civ. App.) 125 S. W. 59.

Where an express company had contracted to carry packages of intoxicating liquor C. O. D. for plaintiff, and the legislature by this chapter rendered this business unlawful, the express company was thereby excused from collecting the price and plaintiff on ordering the goods returned cannot recover the return charges paid on such packages on the ground that defendant's failure to perform the contract of transportation deprived plaintiff of all benefit thereunder. *Id.*

**Art. 7484. Penalty for failure to pay tax.**—The maintaining or operating such office or offices, place or places, by any person, firm or corporation in this state without paying the occupation tax required in section one [article 7483] of this chapter shall subject such person, firm or corporation so operating and maintaining such office or offices, place or places, to pay to the state of Texas the sum of fifty dollars, and to the county and any incorporated city or town in which said offices or places are located, each the sum of fifty dollars for each day such office or offices, place or places, may be maintained or operated, and for each office or place so operated; and the state or county, or any incorporated city or town, may sue for and recover, either jointly or severally, each the said sum, for each day that each of said offices or places may be maintained and operated without prepayment of the aforesaid occupation tax. [Id. sec. 2.]

**Art. 7485. No one required to keep office.**—No person, firm or corporation shall be required to keep, operate or maintain any office at which intoxicating liquors are deliverable upon the payment of the purchase price thereof, nor shall any such person, firm or corporation be compelled to receive, transport or deliver any intoxicating liquors, the purchase price of which, or any part thereof, is to be paid said person, firm or corporation on delivery. [Acts 1907, p. 149, sec. 2a.]

**Art. 7486. Invalidity of part not to affect whole chapter.**—In the event any article of this chapter should be attacked, or for any reason held invalid, such action shall not affect the force or legality of the other articles of this chapter. [Acts 1907, p. 149, sec. 2c.]

## CHAPTER TEN

### INHERITANCE TAX

Art. 7487. Property subject to the tax.	Art. 7494. Property withheld until tax paid.
7488. Property passing in two or more estates.	7495. Taxes charged on real estate, when.
7489. Property bequeathed to executor or trustee in lieu of commission, taxed when.	7496. Tax paid, when.
7490. Inventory to be filed when; penalty.	7497. Collector to sue for tax, when.
7491. County court to appoint administrator.	7498. Collector pays tax to state treasurer.
7492. Appraisers appointed; notice to be given, etc.	7499. Tax deposited to credit of general revenue.
7493. County judge to regulate tax.	7500. Tax refunded when.
	7501. Final account of executor, etc., not allowed till tax paid.
	7502. Appointment of administrator dispensed with.

**Article 7487. Property subject to the tax.**—All property within the jurisdiction of this state, real or personal, corporeal or incorporeal, and any interest therein, whether belonging to inhabitants of this state or not, which shall pass absolutely or in trust by will, or by the laws of descent of this or any other state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or donor, shall upon passing to or for the use of any person except the father, mother, husband, wife or direct lineal descendants of the testator, intestate, grantor or donor, or any public corporation or charitable, educational or religious organization within this state when such bequest, gift or devise is to be used for charitable, educational or religious purposes within this state, be subject to a tax for the benefit of the state, as follows:

1. If passing to or for the use of a lineal ascendant or a brother or sister, or a lineal descendant of a brother or sister, the tax shall be two per cent on any value in excess of two thousand dollars, and not exceeding ten thousand dollars; two and one-half per cent of any value in excess of ten thousand dollars, and not exceeding twenty-five thousand dollars; three per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; three and one-half per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; four per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars; and five per cent on any value in excess of five hundred thousand dollars.

2. If passing to or for the use of an uncle or aunt, or a lineal descendant of an uncle or aunt of the decedent, the tax shall be three per cent on any value in excess of one thousand dollars, and not exceeding ten thousand dollars; four per cent on any value in excess of ten thousand dollars, and not exceeding twenty-five thousand dollars; five per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; six per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; seven per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars, and eight per cent on any value in excess of five hundred thousand dollars.

3. If passing to or for the use of any other person, natural or artificial, the tax shall be four per cent of any value in excess of five hundred dollars, and not exceeding ten thousand dollars; five and one-half per cent on any value in excess of ten thousand dollars, and not exceeding twenty-five thousand dollars; seven per cent on any value in excess of twenty-five thousand dollars, and not exceeding fifty thousand dollars; eight and one-half per cent on any value in excess of fifty thousand dollars, and not exceeding one hundred thousand dollars; ten per cent on any value in excess of one hundred thousand dollars, and not exceeding five hundred thousand dollars, and twelve per cent on any value in excess of five hundred thousand dollars. [Acts 1907, p. 496, sec. 1.]

**Art. 7488. Property passing in two or more estates.**—If the property passing as aforesaid shall be divided into two or more estates, as an estate for years or for life and a remainder, the tax shall be levied on each estate or interest separately according to the value of the same at the death of the decedent. The value of estates for years, estates for life, remainders and annuities shall be determined by the "Actuaries' Combined Experience Tables," at four per cent compound interest.

**Art. 7489. Property bequeathed to executor or trustee in lieu of commission, taxed when.**—If a testator bequeaths or devises to his executor or trustee property in lieu of the latter's commission, the value of such property in excess of reasonable compensation, as determined by



the county judge on his own motion, or on the application of any officer on behalf of the state, shall be subject to taxation under this chapter.

**Art. 7490. Inventory to be filed when; penalty.**—Every executor, administrator and trustee of the estate of a decedent leaving property subject to taxation under this chapter, whether such property passes by will or by the laws of descent or otherwise, shall, within three months after his appointment, make and file an inventory thereof in the county court having jurisdiction of the estate of the decedent. Any executor, administrator or trustee, refusing or neglecting to comply with the provisions of this article, shall be liable to a penalty not exceeding one thousand dollars, to be recovered in an action brought in behalf of the state by the district or county attorney upon notice from the judge of the county court.

**Art. 7491. County court to appoint administrator.**—If within three months after the death of a decedent leaving property subject to taxation under this chapter, no application for letters testamentary or of administration shall be made, it shall be the duty of the county court to appoint an administrator. It shall be the duty of the county attorney to report to the judge of the county court all such estates, whether the property subject to taxation passes by will or by laws of descent or otherwise. For each decedent's estate thus reported, the county attorney shall receive a compensation of ten per cent of the tax payable, but not to exceed twenty dollars in any one estate. Such payment shall be made by the collector of taxes, on the certificate of the county judge, out of the taxes paid him on property belonging to such estate.

**Art. 7492. Appraisers appointed; notice to be given, etc.**—Said tax shall be assessed upon the actual or market value of the property. The judge of the county court having jurisdiction of the estate of the decedent shall, as often as and whenever occasion may require, appoint two competent disinterested persons as appraisers to fix the value of property subject to said tax. The appraisers, being first sworn, shall forthwith give notice to all persons known to have a claim or interest in the property to be appraised, including the executor, administrator or trustee, and the collector of taxes of the county, of the time and place when they will appraise the same. At such time and place they shall appraise such property at its actual or market value at the time of the death of the decedent, and shall thereupon make report thereof in writing to said county judge, who shall file such report. Each appraiser shall be paid, on the certificate of the county judge, two dollars for each day employed in such appraisal, together with his actual necessary expenses incurred therein, which payments shall be made by the collector of taxes out of any moneys in his hands received under this chapter; provided, however, that upon the agreement of the parties interested to dispense with the appointment of appraisers, the county judge shall himself appraise the property and make and file a report thereof. If the same decedent shall leave property subject to this tax to more than one person, a separate appraisal and report shall be made for the property of each person.

**Art. 7493. County judge to regulate tax.**—Immediately upon the filing of the report of the appraisement, the county judge shall calculate and determine the amount of tax due on such property under this chapter, and shall in writing certify such amount to the collector of taxes, to the executor, administrator or trustee, and to the person to whom or for whose use the property passes. Said tax shall be a lien upon such property from the death of the decedent until paid, and shall bear interest from such death until paid, unless payment shall be made within six months after such death, in which case no interest shall be charged.

**Art. 7494. Property withheld until tax paid.**—If such property be in the form of money, the executor, administrator or trustee shall de-

duct the amount of the tax therefrom before paying it to the party entitled thereto; if it be not in the form of money, he shall withhold the property until the payment by such party of the amount of tax; in any case the executor, administrator or trustee shall be liable for the amount of the tax and shall have the right, in case of neglect or refusal after due notice of the party entitled to the property to pay such amount, to sell, at public sale, after due notice to such party, the property, or so much thereof as may be necessary. Out of the sum realized on such sale, the executor, administrator or trustee shall deduct the amount of the tax and the expenses of the sale, and shall pay the balance to the party entitled thereto.

**Art. 7495. Tax charged on real estate, when.**—Whenever any legacy subject to said tax shall be charged upon or payable out of real estate, the heir or devisee, before paying the legacy, shall deduct the amount of the tax therefrom, and pay the amount so deducted to the executor, administrator or trustee; the amount of the tax shall remain a charge on such real estate until paid, and the payment thereof shall be enforced by the executor or trustee in the same manner as the payment of the legacy itself could be enforced.

**Art. 7496. Tax paid, when.**—All taxes received under this act by any executor, administrator or trustee, shall be paid by him within thirty days thereafter to the collector of taxes of the county whose county court has jurisdiction of the estate of the decedent. Upon such payment, the collector shall make duplicate receipts thereof; he shall deliver one to the party making payment, the other he shall send to the comptroller of public accounts, who shall charge the collector with the amount thereof, and shall countersign and affix his seal of office to such receipt and transmit same to the party making payment.

**Art. 7497. Collector to sue for, when.**—In case such tax shall not be paid to the collector of taxes within six months after the county judge has notified the amount thereof as hereinbefore provided, the collector shall commence an action to recover the amount of such tax against the executor, administrator or trustee, and the party to whom or for whose use the property has passed; provided, that the county judge may by certificate to the collector extend such time of payment whenever the circumstances of the case require.

**Art. 7498. Collector pays to state treasurer.**—The collector of taxes of each county shall, on or before the fifteenth day of each month, pay to the state treasurer all taxes received by him under this law before the first day of that month, deducting therefrom all lawful disbursements made by him under this act, and also his compensation at the rate of one per cent of all taxes collected under this act.

**Art. 7499. Tax deposited to credit of general fund.**—The moneys received by the state treasurer under this chapter shall be deposited in the state treasury to the credit of the fund now there existing and known as the general revenue fund.

**Art. 7500. Tax refunded when.**—Whenever any debts shall be proven against the estate of a decedent after the distribution of property on which the tax has been paid, and a refund is made by the distributee, a due proportion of the tax so paid shall be repaid to him by the executor, administrator or trustee, if still in his hands, or by the collector of taxes, if it has been paid to him. The collector shall pay such sums upon the order of the county judge out of any money in his possession under this law; and the comptroller of public accounts shall credit the collector with all sums so paid out by him.

**Art. 7501. Final account not allowed until tax is paid.**—No final account of an executor, administrator or trustee shall be allowed by the county judge, unless such account shows and said judge finds that all

taxes imposed under this law on any property or interest passing through his hands as such have been paid; and the receipt of the collector of taxes for such taxes shall be the proper voucher for such payment.

**Art. 7502. Appointment of administrator dispensed with.**—If for any reason administration of the estate of a decedent, leaving property subject to taxation under this law, shall not be necessary in this state, except in order to carry out the provisions of this chapter, it shall be in the discretion of the county judge, upon the filing of a satisfactory inventory of the taxable property by the trustee or owner, to dispense with the appointment of an administrator. Upon the filing of such inventory, the appraisal and other proceedings required by this chapter shall be had as in other cases.

## CHAPTER ELEVEN

### OF THE PROPERTY SUBJECT TO TAXATION AND THE MODE OF RENDERING THE SAME

Art. 7503. All property to be taxed.	Art. 7509. How to be rendered (continued).
7504. Real property includes what.	7. Receivers.
7505. Personal property what.	8. Corporations.
7506. Definition of terms.	9. Copartnership.
Credits.	10. Manufactories.
Tract or lot.	11. Nurseries.
Singular and plural.	7510. Where to be rendered.
Oath.	7511. To be rendered in but one county.
Town or district.	7512. Live stock, pastures, etc.
Value.	7513. Taxes not to be paid twice.
Person.	7514. Vessels, where to be listed.
7507. Exemptions from taxation.	7515. Railroads, telegraphs, etc.
1. Schools and churches.	7516. Listing for others.
1a. Young Men's and Young Women's Christian Associations.	7517. Shall be under oath, etc.
2. Cemeteries.	7518. The statement and its requisites.
3. Public property.	7519. Certain credits and stocks not to be listed.
4. County buildings.	7520. Rendition of real estate.
5. Poor-houses.	7521. Rendition by banker, broker, etc.
6. Public charities.	7522. Assessments of real estate by national banks.
7. Fire engines.	7523. No deductions in certain cases.
8. Market houses, etc.	7524. Assessments by railroads.
9. Public libraries.	7525. Railroads to return sworn statements when, etc.
10. Furniture.	7526. Assessments of corporate property, etc.
11. Pensions.	7527. Assessments to be in owner's name.
7508. When to be rendered.	7528. Lien for taxes.
7509. How to be rendered.	7529. Leasehold interest in public lands.
1. By the owner.	7530. Valuation of property for taxation.
2. As agent.	7531. United States paper money taxable.
3. Minor.	7532. Assessed as money on hand.
4. Wife.	
5. Idiot.	
6. Cestui que trust.	

**Article 7503. [5061] All property to be taxed.**—All property, real, personal or mixed, except such as may be hereinafter expressly exempted, is subject to taxation, and the same shall be rendered and listed as herein prescribed. [Act Aug. 21, 1876, p. 275, sec. 1.]

In general.—The essentials of a valid tax are: (1) a levy by competent legislative authority, and (2) a valid assessment of the property upon which such tax is levied, by the officer or tribunal to whom this duty is committed by law. *George v. Dean*, 47 T. 73.

In construing a legislative act which incorporated within city limits property used exclusively for rural purposes, it will be conclusively presumed, on a question of taxation, that the legislature, in passing the act, determined with a view solely to the public good the benefits to accrue to the public and to the property owner. It would be a usurpation of power by the judiciary were it to assume the right to revise the legislative action because of the inequality of benefits resulting from municipal taxation of such property. *Norris v. City of Waco*, 57 T. 635.

Taxes are within the meaning of the constitution (art. 8, sec. 1) "equal and uniform," when no person or class of persons in the territory is taxed at a higher rate than are other persons in the same district upon the same value or thing, and when the objects of taxation are the same, by whomsoever owned or whatever they be. *Id.*

**Taxation defined.**—Taxation defined. *City of Austin v. Nalle*, 102 T. 536, 120 S. W. 996.

**Power to tax.**—The power of a state as to the mode, form, and extent of taxation of lands within its jurisdiction is limited only by the federal constitution. *Hutcheson v. Storrie* (Civ. App.) 48 S. W. 785.

Power to tax for governmental purposes is limited by the constitution only. *Stratton v. Commissioners' Court of Kinney County* (Civ. App.) 137 S. W. 1170.

**Property subject to taxation in general.**—A state may tax all property, real and personal, within its jurisdiction, irrespective of the domicile of the owner. *State v. Fidelity & Deposit Co. of Maryland*, 35 C. A. 214, 80 S. W. 544.

The state can exercise its power to impose taxes on all property within its jurisdiction and such taxes may be imposed on all property, tangible and intangible, with a permanent situs and location within the state. *Hall v. Miller* (Civ. App.) 110 S. W. 165.

— **Property held by agent.**—This article and Art. 7509 are broad enough to include every species of property held by an agent for any person or corporation that could possibly exist. *Jesse French Piano and Organ Co. v. City of Dallas* (Civ. App.) 61 S. W. 942.

**Art. 7504. [5062] Real property includes what.**—Real property, for the purpose of taxation, shall be construed to include the land itself, whether laid out in town lots or otherwise, and all the buildings, structures and improvements, or other fixtures of whatsoever kind thereon, and all the rights and privileges belonging or in any wise appertaining thereto, and all mines, minerals, quarries and fossils in and under the same. [Id. sec. 2.]

**In general.**—One locating two surveys under a Confederate land scrip cannot demand a patent until the land commissioner has selected one of them for the school fund, and hence until then his survey is not taxable. *Abney v. State*, 20 C. A. 101, 47 S. W. 1043.

The plain purpose of this article is to require that in assessing real estate for taxation, whether held by a natural person or a corporation, not only is the land itself included as mere land together with the improvements thereon, but also all franchises and privileges appurtenant thereto, and all the advantages for a profitable prosecution of the business to which it is appropriated. As a rule the value of improved real estate is proportional to the net income which it will yield. *State v. Austin & N. W. Ry. Co.*, 94 T. 530, 62 S. W. 1050.

The rendition by a corporation under the general law included its franchise to exist as a corporation and its franchise to do business in the operation of the railroad. It was not the intention of the legislature to tax the franchise of a railroad as a property separate from its real estate. *State v. Galveston, H. & S. A. Ry. Co.*, 100 T. 153, 97 S. W. 71.

Minerals contained in land are property, and when severed from the land by a proper conveyance may be taxed separately from the land itself. *State v. Downman* (Civ. App.) 134 S. W. 787.

**Art. 7505. [5063] Personal property includes what.**—Personal property shall, for the purposes of taxation, be construed to include all goods, chattels and effects, and all moneys, credits, bonds and other evidences of debt owned by citizens of the state, whether the same be in or out of the state; all ships, boats and vessels belonging to inhabitants of this state, if registered in this state, whether at home or abroad, and all capital invested therein; all moneys at interest, either within or without this state, due the person, to be taxed over and above what he pays interest for, and all other debts due such person over and above their indebtedness; all public stock and securities; all stock in turnpikes, railroads, canals and other corporations (except national banks) out of the state, owned by inhabitants of this state; all personal estate of moneyed corporations, whether the owners thereof reside in or out of this state, and the income of any annuity, unless the capital of such annuity be taxed within the state; all shares in any bank organized or that may be organized under the law of the United States; all improvements made by persons upon lands held by them, the title to which is still vested in the state of Texas, or in any railroad company, or which have been exempted from taxation for the benefit of any railroad company, or any other corporations, or any other corporation whose property is not subject to the same mode and rule of taxation as other property. [Acts 1879, ch. 40, p. 39, sec. 3.]

**In general.**—This article was not intended to limit the broad terms of Art. 7503, but was passed to remove any doubt as to the taxable character of personal property about which contention might probably arise. *Jesse French Piano & Organ Co. v. City of Dallas* (Civ. App.) 61 S. W. 946.

The object of this article was to amplify and increase the scope, if possible, of Art. 7503 and not to confine taxation to the property of inhabitants (of the state). *Hall v. Miller* (Civ. App.) 110 S. W. 169.

This article and the act of 1905, levying taxes for general revenue (Acts 1905, p. 436, ch. 8), taken together show that the legislature intended to enlarge the tax laws, so as to embrace property which otherwise might escape taxation. Hence vendor lien notes held in Texas for collection are taxable although owned by a nonresident. *Hall v. Miller*, 102 T. 289, 115 S. W. 1169.

**Taxable personal property.**—This article and Arts. 7503, 7504, subject to taxation, in addition to tangible property, all money belonging to the taxpayer and any excess that may exist of his credits over his indebtedness. *Griffin v. Heard*, 78 T. 607, 14 S. W. 892.

Cattle shipped into the state under bill of lading allowing their being fed therein for an indefinite period held taxable in the state while being fattened at the owner's pens. *Waggoner v. Whaley*, 21 C. A. 1, 50 S. W. 153.

Municipal bonds and securities bear a concrete form and tangible status, and constitute property which may acquire a situs for purposes of taxation other than domicile of its owner. *State v. Fidelity & Deposit Co. of Maryland*, 35 C. A. 214, 80 S. W. 544.

The term "personal property" includes bonds, notes, credits, and choses in action. *Id.* The law requires foreign corporations engaged in the surety and guaranty business in this state to deposit with the state treasurer, in order to be permitted to transact business here, good securities of the cash market value of \$50,000. This property, under this article, is properly subject to assessment and rendition for taxes, and to the payment of taxes thereon. The fact that the property is also subject to taxation in the state of Maryland, the domicile of the corporation owning the property, does not make the payment of taxes on it in Texas double taxation within the meaning of the law. *Id.*

Fact that property of foreign corporation is taxed in state of its creation does not prevent its taxation here, where its situs here is such as to give this state jurisdiction. *Id.*

Legal fiction that personal property attaches to the owner, and is subject only to laws of his domicile, does not extend to a case of property situated in another jurisdiction, which assumes control over it for taxation purposes. *Id.*

Notes given for the purchase price of land within the state and left by a nonresident owner with resident agents for collection held to have a situs within the state for purposes of taxation. *Hall v. Miller* (Civ. App.) 110 S. W. 165.

Bonds and notes owned by nonresident are taxable where they have acquired a situs within the state, and are used in the state in connection with the business carried on for the owner. *Hall v. Miller*, 102 T. 289, 115 S. W. 1168.

Vendor lien notes given for lands in Texas payable in Texas and held in Texas for collection are subject to taxation in Texas under this article, although the owner thereof is a nonresident, and although the money paid on the notes as they mature is withdrawn from the state. *Id.*

Personal property which has its permanent situs within the state is subject to taxation therein, regardless of the domicile of the owner. But personal property of a nonresident only temporarily within the state is not subject to taxation. *Carmody v. Clayton* (Civ. App.) 154 S. W. 1067.

Where one who had lived within the state for more than 12 years kept his personal property there, except when away on short trips, taking it out of the state only at the time of assessment, the property had a permanent situs in the state and was subject to taxation therein, though the owner still retained his citizenship in a foreign state. *Id.*

Within the purview of the tax laws, one who has lived within a state for over 12 years, though expressing an intention at some future time to leave, is a citizen, even though he has never exercised political rights within the state, and claims to be a citizen of a foreign state. *Id.*

**Deductions of indebtedness.**—This article standing alone permits the deduction of all indebtedness, but this article is modified by Art. 7523, which specifically designates certain classes of indebtedness which shall not be deducted. *Primm v. Fort*, 23 C. A. 605, 57 S. W. 86, 972.

And an owner of national bank stock held not entitled to deduct his indebtedness from the value of his stock for the purpose of taxation. *Id.*

**Art. 7506. [5064] Definition of terms.**—The term, "money," or, "moneys," wherever used in this title shall, besides money or moneys, include every deposit which any person owning the same or holding in trust and residing in this state, is entitled to withdraw in money on demand.

**"Credits."**—The term, "credits," wherever used in this title, shall be held to mean and include every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due or to become due, and all claims and demands secured by deed or mortgage, due or to become due.

**"Tract or lot."**—The term, "tract or lot," and, "piece or parcel," of real property, and piece and parcel of land, wherever used in this title, shall each be held to mean any quantity of land in possession of, owned by or recorded as the property of the same claimant, person, company or corporation.

**"Singular and plural."**—Every word importing the single number only may extend to and embrace the plural, and every word importing

the plural number may be applied and limited to the singular number; and every word implying the masculine gender only may be extended and applied to females as well as males.

**"Oath."**—Wherever the word, "oath," is used it shall be held to mean oath or affirmation; and the word, "swear," may be held to mean affirm.

**"Town or district."**—The words, "town or district," wherever used shall be held to mean village, city, ward or precinct, as the case may be.

**"Value."**—The term, "true and full value," wherever used shall be held to mean the fair market value, in cash, at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale.

**"Person."**—The term, "person," shall be construed to include firm, company or corporation. [Acts 1876, p. 275, sec. 4.]

*In general.*—Deposit in bank subject to sight check is cash. *Campbell v. Wiggins*, 20 S. W. 730, 2 C. A. 1.

*In prosecution for perjury for making false statement in assessing money in bank the indictment should allege that the money rendered was in said bank payable on demand as required by this article.* *Parker v. State*, 44 Cr. R. 147, 69 S. W. 76.

**Art. 7507. [5065] Exemption from taxation.**—The following property shall be exempt from taxation, to-wit:

1. **Schools and churches.**—Public school houses and houses used exclusively for public worship, the books and furniture therein and the grounds attached to such buildings necessary for the proper occupancy, use and enjoyment of the same, and not leased or otherwise used with a view to profit. All public colleges, public academies, all buildings connected with the same, and all the lands immediately connected with public institutions of learning, and all endowment funds of institutions of learning and religion not used with a view to profit, and when the same are invested in bonds or mortgages, or in land or other property which has been, or shall hereafter be, bought in by such institutions under foreclosure sales made to satisfy or protect such bonds or mortgages; provided, that such exemption of such land and property shall continue only for two years after the purchase of the same at such sale by such institutions and no longer; and all buildings used exclusively and owned by persons or associations of persons for school purposes. This provision shall not extend to leasehold estate of real property held under authority of any college or university of learning.

1a. **Young Men's and Young Women's Christian Associations.**—That, Young Men's Christian Association Buildings, and Young Women's Christian Association Buildings, used exclusively for the purpose of furthering religious work, and acting under the approval and co-operation of the state and international Young Men's Christian Association committees and the Young Women's Christian Association committees, the books and furniture contained in such buildings, and the grounds attached thereto necessary for the proper occupancy of such buildings, use and enjoyment of the same, and not leased or otherwise used with a view to profit other than for the purpose of maintaining the buildings and association, and all endowment funds of the above mentioned religious institutions, not used with a view to profit, but for the purpose of maintaining the association and buildings in doing religious work, shall be exempt from taxation. [Acts 1913, p. 153, sec. 1.]

2. **Cemeteries.**—All lands used exclusively for graveyards or grounds for burying the dead, except such as are held by any person, company or corporation with a view to profit, or for the purpose of speculating in the sale thereof.

3. **Public property.**—All property, whether real or personal, belonging exclusively to this state, or any political subdivision thereof, or the

United States, except that in each county in this state, where the state of Texas has heretofore or may hereafter acquire and own land for the purpose of establishing thereon state farms and employing thereon convict labor on state account, it shall be the duty of the penitentiary board or board of penitentiary commissioners, or other officers of the penitentiary having the managing of same, to render said land for taxes to the tax assessor of said county; and the taxes on same shall be assessed and collected in the manner required by law for the assessment and collection of other taxes; provided, that said taxes shall be assessed and collected for county purposes only; and said county taxes shall be paid annually out of the revenue derived from such state farms respectively, by the officer or officers having the management thereof, and same shall be charged to the expense account of operating such farm; and no debt shall be created against the general revenue of the state in case of the failure to pay said taxes out of the revenues of any such farm; and provided, further, that in arriving at the amount to be paid in taxes to the counties the value of the land only shall be considered and not the value of the buildings and other improvements owned by the state and situated on said land.

4. **County buildings.**—All buildings belonging to counties for holding courts, for jails, or for county officers, with the land belonging to and on which such buildings are erected.

5. **Poor-houses.**—All lands, houses and other buildings belonging to any county, precinct or town, used exclusively for the support or accommodation of the poor.

6. **Public charities.**—All buildings belonging to institutions of purely public charity, together with the lands belonging to and occupied by such institutions not leased or otherwise used with a view to profits, unless such rents and profits and all moneys and credits are appropriated by such institutions solely to sustain such institutions and for the benefit of the sick and disabled members and their families and the burial of the same, or for the maintenance of persons when unable to provide for themselves, whether such persons are members of such institutions or not. An institution of purely public charity under this act is one which dispenses its aid to its members and others in sickness or distress, or at death, without regard to poverty or riches of the recipient, also when the funds, property and assets of such institutions are placed and bound by its laws to relieve, aid and administer in any way to the relief of its members when in want, sickness and distress, and provides homes for its helpless and dependent members and to educate and maintain the orphans of its deceased members or other persons.

7. **Fire engines.**—All fire engines and other implements owned by towns and cities used for the extinguishment of fires, with the buildings used exclusively for the safekeeping thereof.

8. **Market houses, etc.**—All market houses, public squares, or other public grounds, town or precinct houses or halls used exclusively for public purposes, and all works, machinery or fixtures belonging to any town used for conveying water to such town.

9. **Public libraries.**—All public libraries and personal property belonging to the same.

10. **Furniture.**—All household and kitchen furniture not exceeding at their true and full value two hundred and fifty dollars to each family, in which may be included one sewing machine. [Acts 1876, p. 275, sec. 24.]

11. **Pensions.**—All annual pensions granted by the state, or United States. [Acts 1907, p. 302. Amended Acts 1910, S. S., p. 122.]

**Equal and uniform taxation.**—Taxation is "equal and uniform" when the objects and rates of taxation are the same for all persons. *Norris v. City of Waco*, 57 T. 635.

**School buildings and grounds as exempt.**—A schoolhouse used and occupied for a boarding school, but in which the owner resides with his family, is not exempt from taxation. *Red v. Johnson*, 53 T. 284.

The word "building" is construed to embrace the land used in connection with it. It has been the policy of the state to encourage educational enterprises by exempting them from the burdens of government, and there is nothing to warrant the inference that the framers of the constitution, in the use of the word "building," intended to discriminate against private schools. Ground used for the recreation of the students and to supply the school table with vegetables, which was necessary and used for the proper and economical conduct of the school, is exempt. *Cassiano v. Ursuline Academy*, 64 T. 673.

The exemption of buildings used for school purposes includes the lots upon which they are situated, but does not apply to land included in a farm cultivated in connection with a boarding school. *St. Edward's College v. Morris*, 82 T. 1, 17 S. W. 512; *Cassiano v. Ursuline Academy*, 64 T. 676; *Red v. Morris*, 72 T. 554, 10 S. W. 681; *Morris v. Masons*, 68 T. 698, 5 S. W. 519.

A house used for school purposes and a residence is not within the statute. *Edmunds v. City of San Antonio*, 14 C. A. 155, 36 S. W. 495.

Buildings in which plaintiff conducted a school and in which he resided with his family are not used exclusively for school purposes, and exempt from taxation. *City of San Antonio v. Seeley (Civ. App.)* 57 S. W. 688.

**Public property—School lands.**—School lands of a county are not subject to taxation. The leasehold cannot be taxed as the property of the lessee. *Daugherty v. Thompson*, 71 T. 192, 9 S. W. 99; *Davis v. Burnett*, 77 T. 3, 13 S. W. 613; *Land & Cattle Co. v. Board*, 80 T. 489, 16 S. W. 312.

— **Property of municipal corporations.**—In the absence of any statute controlling the subject, such property as a municipal corporation owns and uses for a public purpose is not affected by general laws regulating taxation. *Galveston Wharf Co. v. Galveston*, 63 T. 14.

The exemption of "public property used for public purposes" applies to property ownership of which is in the state or some one of its municipal subdivisions. *St. Edward's College v. Morris*, 82 T. 1, 17 S. W. 512.

— **State lands.**—Until the commissioner of the land office selects one of the two surveys made by virtue of a Confederate land certificate the title to the land remains in the state and is not subject to taxation. *Abney v. State*, 20 C. A. 101, 47 S. W. 1043.

— **Property of United States.**—See Art. 5277.

— **Legal tender notes and United States bonds.**—Legal tender notes and United States bonds belonging to corporations or individuals are exempt from taxation. *Rosenberg v. Weekes*, 67 T. 578, 4 S. W. 899. But see Art. 7531.

**Art. 7508. [5066] When property to be rendered.**—All property shall be listed for taxation between January 1 and April 30 of each year, when required by the assessor, with reference to the quantity held or owned on the first day of January in the year for which the property is required to be listed or rendered. Any property purchased or acquired on the first day of January shall be listed by or for the person purchasing or acquiring it. If any property has, by reason of any special law, contract or fact, been exempt or has been claimed to be exempted from taxation for any period or limit of time, and such period of exemption shall expire between January 1 and December 31 of any year, said property shall be assessed and listed for taxes as other property; but the taxes assessed against said property shall be for only the pro rata of taxes for the portion of such year remaining. [Acts 1909, p. 373.]

**Art. 7509. [5067] How to be rendered.**—All property shall be listed or rendered in the manner following:

1. **By the owner.**—Every person of full age and sound mind, being a resident of this state, shall list all of his real estate, moneys, credits, bonds or stock of joint stock or other companies (when the property of such company is not assessed in this state), moneys loaned or invested, annuities, franchises, royalties, and all other property.

2. **As agent.**—He shall also list all lands or other real estate, all moneys and other personal property invested, loaned or otherwise controlled by him as agent or attorney, or on account of any other person, company or corporation whatsoever, and all moneys deposited subject to his order, check, or drafts and credits due from or owing by any person, body corporate or politic.

3. **Minor.**—The property of a minor child shall be listed by his guardian, or by the person having such property in charge.

4. **Wife.**—The property of a wife, by her husband, if of sound mind; if not, by herself.



5. **Idiot.**—The property of an idiot or lunatic, by the person having charge of such property.

6. **Cestui que trust.**—The property of a person for whose benefit it is held in trust by the trustee of the estate; of a deceased person, by the executor or administrator.

7. **Receivers.**—The property of corporations whose assets are in the hands of receivers, by such receivers.

8. **Corporations.**—The property of a body politic or corporate, by the president or proper agent or officer thereof.

9. **Copartnership.**—The property of a firm or company, by a partner or agent thereof.

10. **Manufactories.**—The property of manufacturers and others in the hands of an agent, by such agent, in the name of his principal, as real, personal and merchandise.

11. **Nurseries.**—The stock of nurseries, growing and otherwise, in the hands of nurserymen shall be listed and assessed as merchandise. [Id. sec. 7.]

See notes under Arts. 7503-7506, 7527.

**Owner—Who is.**—A seller of cattle under an unexecuted contract held liable for taxes assessed before delivery. *Edwards v. Irvin* (Civ. App.) 45 S. W. 1026.

County school land sold on an executory contract held to be taxable to the purchaser. *Taber v. State*, 38 C. A. 235, 85 S. W. 835.

The owner of property on January 1st of any year held personally liable for taxes of that year. *C. B. Carswell & Co. v. Habberzettle*, 39 C. A. 493, 87 S. W. 911.

A vendee of land is for the purpose of taxation considered the owner, though a vendor's lien is retained for the price. *Harvey v. Provident Inv. Co.* (Civ. App.) 156 S. W. 1127.

**Rendering by agent.**—Under this article and Art. 7503, notes taken by agents of a foreign corporation selling pianos from a store kept in the state held liable to taxation in the state. *Jesse French Piano & Organ Co. v. City of Dallas* (Civ. App.) 61 S. W. 942.

**Art. 7510. [5068] Where to be rendered.**—All property, real and personal, except such as is required to be listed and assessed otherwise, shall be listed and assessed in the county where it is situated; and all personal property, subject to taxation and temporarily removed from the state or county, shall be listed and assessed in the county of the residence of the owner thereof, or in the county where the principal office of such owner is situated. [Acts 1897, p. 203.]

**Place of rendering for assessment.**—If one whose pasture lies partly in the county of his residence and partly in an adjacent county renders for taxation his cattle feeding on the pasture and pays taxes thereon in the county of his residence and where the herd feeding in the pasture is controlled, he complies with the statute. *Court v. O'Connor*, 65 T. 334; *Hardesty v. Fleming*, 57 T. 400.

Personal property, belonging either to a corporation or a natural person, must be assessed and the taxes thereon paid in the county where it is situated, unless such county has not been organized, in which event the assessment must be made and the taxes collected in the county to which it is attached for judicial purposes. *Cattle Co. v. Faught*, 69 T. 402, 5 S. W. 494.

Personal property, except when otherwise provided, is taxable where the owner resides. Tangible personal property in a town or city is subject to taxation at that place. Intangible personal property, such as credits, are taxable at the place of the residence of the owner. *Ferris v. Kimble*, 75 T. 476, 12 S. W. 689; *Connor v. City of Waxahachie* (Sup.) 13 S. W. 30.

Under this article cattle held taxable in the county where being pastured on January 1st, and not in the county where the owner resides. *Clampitt v. Johnson*, 17 C. A. 281, 42 S. W. 866.

For purpose of taxation the situs of intangible property of a railroad, consisting of franchise, good will, etc., is considered as located wherever its tangible property is distributed. *State v. Austin & N. W. R. Co.* (Civ. App.) 60 S. W. 886.

The assessor of one county has no right to assess money of a party which is in a bank of a county other than that in which the assessor resides. *Parker v. State*, 44 Cr. R. 147, 69 S. W. 76.

When the property is physical in character, it must be taxed in the county where actually situated or located. *City of Galveston v. J. M. Guffey Petroleum Co.*, 51 C. A. 642, 113 S. W. 585.

**Art. 7511. [5069] To be rendered in but one county.**—Lands lying on county boundaries, which have not been accurately and legally surveyed, determined or fixed, shall not be assessed or taxed in more than one county. [Acts 1879, p. 153. Amend. 1895, No. 104, Sen. Jour., p. 485.]

**Art. 7512. [5070] Live stock, when and how rendered.**—All persons, companies and corporations owning pastures in this state which lie on county boundaries shall be required to list for assessment all live stock of every kind owned by them in said pastures in the several counties in which such pastures are situated, listing in each county such portion of said stock as the land in such county is of the whole pasture. All persons, companies and corporations owning any kind of live stock in pasture not their own shall list said live stock in the several counties in which such pastures are situated in the same manner; and in both cases the tax upon such live stock shall be paid to the tax collectors of the several counties in which such live stock is listed and assessed. [Acts 1889, p. 29.]

**In general.**—When a pasture lies partly in two counties, the owner may render the stock in the county of his residence. *Court v. O'Connor*, 65 T. 334.

Place of taxation of cattle moved and pastured on lands in another county with intent to have them removed to the county of the residence of the owner determined. *Clampitt v. Johnson*, 17 C. A. 281, 42 S. W. 866.

An assessment of live stock by the assessor of the county of the owner's residence, made under Art. 7566, held in violation of Const. Art. 8, § 11, where the situs of the stock was fixed in other counties by this article. *Cammack v. Matador Land & Cattle Co.*, 30 C. A. 421, 70 S. W. 454.

In this article the legislature intended to fix the situs of live stock where running on the range in pastures located on the borders of different counties, and the stock must be assessed in each county in such proportion as the land in the county bears to the whole pasture. *Id.*

**Art. 7513. [5071] Taxes not to be paid twice, etc.**—Any lands which may have been assessed in any county according to the abstract of land titles, and the taxes paid thereon according to law, shall not be afterwards subject to the payment of taxes for the same period in a different county, although a subsequent survey and determination of the county boundaries may show said lands to be in a different county from that in which they were originally assessed; and any sales of such lands for alleged delinquency shall be illegal and void. [Acts 1879, p. 153, sec. 2.]

**Double taxation.**—The franchise of a railroad is not taxable as a property separate from its real estate; to so tax it would be double taxation. *State v. Austin & N. W. Ry. Co.*, 94 T. 530, 62 S. W. 1051.

Where a telegraph company has paid taxes on its real and personal property, a taxation of its franchise is double taxation. *Southwestern Telegraph & Telephone Co. v. Meerscheidt* (Civ. App.) 65 S. W. 381.

Assessment of railroad property for taxation held not to be double. *Galveston & W. Ry. Co. v. City of Galveston*, 33 C. A. 384, 77 S. W. 269.

An assessment of mineral rights severed from the ownership of the surface held not invalid because the owners of the surface were required to pay the same tax as other owners who had not severed the mineral rights in their land. *State v. Downman* (Civ. App.) 134 S. W. 787.

**Remedy to prevent.**—As to the remedy to prevent a double assessment, see *Rosenberg v. Weekes*, 67 T. 578, 4 S. W. 899; *Chisholm v. Adams*, 71 T. 678, 10 S. W. 336.

**Art. 7514. [5072] Vessels, where listed.**—All persons, companies and corporations in this state owning steamboats, sailing vessels, wharf boats and other water crafts shall be required to list the same for assessment and taxation in the county in which the same may be enrolled, registered or licensed, or kept when not enrolled, registered or licensed. [Acts 1876, p. 277.]

**Jurisdiction to assess.**—A city has no jurisdiction to assess for taxation vessels which have acquired an actual situs at another place, although enrolled in the United States customhouse in such city. *City of Galveston v. J. M. Guffey Petroleum Co.*, 51 C. A. 642, 113 S. W. 585.

For the purpose of taxation, vessels may acquire an actual situs, and the place of enrollment and registration is not controlling, if the actual situs is elsewhere. *Id.*

Coasting vessels that have no physical situs, but ply from point to point in the state, are taxable in the county of their owners' domicile, although they were enrolled in the county of Galveston. *State v. Higgins Oil & Fuel Co.* (Civ. App.) 116 S. W. 618.

**Art. 7515. [5073] Railroads, telegraphs, etc.**—All railroad, telegraph, plank road and turnpike companies shall list all of their real and personal property, giving the number of miles of roadbed and line in the county where such roadbed and line is situated, at the full and true value, except when such company may own personal property or real estate

in an unorganized county or district, then they shall list such property to the comptroller. [Id. sec. 11.]

Valuation of railroad.—See notes under Art. 7524.

**Art. 7516. [5074] Listing for others.**—Persons required to list property on behalf of others shall list it in the same manner in which they are required to list their own, but they shall list it separately from their own, specifying in each case the name of the person, estate, company or corporation to whom it belongs. [Id. p. 278, sec. 12.]

**Art. 7517. [5075] Shall list under oath.**—Each person required by law to list property shall make and sign a statement, verified by his oath, as required by law, of all property, both real and personal, in his possession, or under his control, and which he is required to list for taxation, either as owner or holder thereof, or as guardian, parent, husband, trustee, executor, administrator, receiver, accounting officer, partner, agent or factor. [Id. sec. 13.]

**Art. 7518. [5076] The statement and its requisites.**—Such statement shall truly and distinctly set forth:

1. The name of the owner, and a description sufficient for the identification of any real estate belonging to such owner.
2. The number of acres.
3. The value of the land.
4. The number of the lot or lots.
5. The number of the block.
6. The value of town lots.
7. The name of the city or town.
8. The number of miles of railroad in the county.
9. The value of railroads and appurtenances.
10. Number of miles of telegraph in the county.
11. Value of telegraph and appurtenances in the county.
12. Number and amount of land certificates and value thereof.
13. Number of horses and mules and the value thereof.
14. Number of cattle and the value thereof.
15. Number of jacks and jennets and value thereof.
16. Number of sheep and value thereof.
17. Number of goats and value thereof.
18. Number of hogs and dogs and value thereof.
19. Number of carriages, buggies, wagons, automobiles, bicycles, motor cycles, or other vehicles of whatsoever kind and the value of each one thereof.
20. Number of sewing machines, and knitting machines and value thereof.
21. Number of clocks and watches and value thereof.
22. Number of organs, melodeons, piano fortes, and all other musical instruments of whatsoever kind and value thereof.
23. The value of household and kitchen furniture over and above the amount of two hundred and fifty dollars.
24. Office furniture and the value thereof.
25. The value of gold and silver plate.
26. The value of diamonds and jewelry.
27. Every annuity or royalty, the description and value thereof.
28. Number of steamboats, sailing vessels, wharf boats, barges or other water craft, and the value thereof.
29. The value of goods, wares and merchandise of every description which such person is required to list as a merchant (in hand on the first day of January of each year.)
30. Value of materials and manufactured articles which such person is required to list as a manufacturer.
31. Value of manufacturers' tools, implements and machinery other than boilers and engines, which shall be listed as such.

32. Number of steam engines, including boilers, and the value thereof.

33. Amount of moneys of bank, banker, broker or stock jobber.

34. Amount of credits of bank, banker, broker or stock jobber.

35. Money on hand or on deposit, in or out of the state, with banks, trust companies, corporations, firms or individuals, and subject to order, check or draft, including certificates of deposit.

36. Amount of credits other than of bank, banker, broker or stock jobber.

37. Amount and value of bonds and stocks other than United States bonds.

38. Amount and value of shares of capital stock companies and associations not incorporated by the laws of this state.

39. Value of all property of companies and corporations other than property hereinbefore enumerated.

40. Value of stock and furniture of saloons, hotels and eating houses.

41. Value of every billiard, pigeon hole, bagatelle or other similar tables, together with the number thereof.

42. Every franchise, the description and value thereof.

43. Value of all other property not enumerated above. [Acts 1876, p. 278. Amended Acts 1905, p. 357.]

See *State v. Downman* (Civ. App.) 134 S. W. 787.

**Application in general.**—This article, in prescribing the requisites of an assessment for state and county taxes, does not apply to assessments for city taxes. *Eustis v. City of Henrietta*, 90 T. 468, 39 S. W. 567.

**Assessment in cities.**—See notes under Title 22, Chapter 7.

**Bank deposits.**—Deposit in bank subject to sight check regarded as cash. *Campbell v. Wiggins*, 20 S. W. 730, 2 C. A. 1.

**Intangible corporate assets.**—If a company have intangible assets, although it have no real estate, they may be assessed and valued as provided in this article. *Missouri, K. & T. Ry. Co. v. Shannon*, 100 T. 379, 100 S. W. 145.

**Real estate.**—Under this article the three essential requirements are the name of the owner, if known, the description of the property, and its value, and hence, where an owner of city lots listed them for assessment as 15 acres of the J. survey, valued at \$3,000, and this assessment was not objected to either by the assessor or the board of equalization, and the owner paid taxes levied on such assessment, a subsequent assessment of the property by lots and blocks to unknown owners constituted a double assessment, in violation of Art. 7694, which the city had no right to make. *McMickle v. Rochelle* (Civ. App.) 125 S. W. 74.

**Art. 7519. [5077] Certain credits and stocks not to be listed.**—No person shall be required to list or render a greater portion of his credits than he believes will be received or can be collected, or to include in his statement as a part of his personal property which is required to be listed any share or portion of the capital stock or property of any company or corporation which is required to list or return its capital and property for taxation. [Id. sec. 14.]

**Art. 7520. [5078] Rendition of real estate.**—Persons listing or rendering real estate shall make a statement, duly signed and under oath, which shall truly and distinctly set forth:

1. The name of the owner, abstract number, number of survey, the number of the certificate, the name of the original grantee, the number of acres, and the true and full value thereof.

2. The number of the lot and block and the true and full value thereof, together with the name of the town or city.

3. When the name of the original grantee, or abstract number, or number of certificate, or number of survey is unknown, say "unknown," and give such description so that land or lot can be identified and the true and full value thereof can be determined. [Id. p. 279, sec. 15.]

**Art. 7521. [5079] Assessment of personal property by rendition by banker, broker, etc.**—Every bank, whether of issue or deposit, banker, broker, dealer in exchange, or stock jobber, shall at the time fixed by this chapter for listing personal property, make out and furnish the assessor of taxes a sworn statement showing:

1. If a national bank, the president or some other officer of such bank shall furnish to the assessor of the county in which such bank is located a list of the names of all the shareholders of the stock, together with the number and amount of the shares of each stockholder of stock in said bank; and the shareholders of the stock in national banks shall render to the tax assessor of the county in which said bank is located the number of their shares and the true and full value thereof. All shares of stocks in national banks not rendered to the assessor of taxes in the county where such bank is located within the time prescribed by law for listing property for taxes shall be assessed by the assessor against the owner or owners thereof as unrendered property is assessed; but the tax roll shall show the name of the owner or owners thereof as per statement furnished by the president or other officers of said bank.

2. National banks shall render all other bonds and stocks of every kind, except United States bonds, and all shares of capital stocks or joint stock or stocks of other companies or corporations held as an investment or in any way representing assets, together with all other personal property belonging or pertaining to said bank, except such personal property as is specially exempted from taxation by the laws of the United States.

3. National banks shall be required to render all of their real estate as other real estate is rendered; and all the personal property of said national banks herein taxed shall be valued as other personal property is valued.

4. All other banks, bankers, brokers or dealers in exchange, or stock jobbers shall render their list in the following manner:

(1) The amount of money on hand or in transit or in the hands of other banks, bankers, brokers or others subject to draft, whether the same be in or out of the state.

(2) The amount of bills receivable, discounted or purchased and other credits due or to become due, including accounts receivable, interest accrued but not due, and interest due and unpaid.

(3) From the aggregate amount of the items named in the first and second of the last two subdivisions shall be deducted the amount of money on deposit.

(4) The amount of bonds and stocks of every kind, except United States bonds, and all shares of capital stocks or joint stocks of other companies or corporations held as an investment or in any way representing assets.

(5) All other property belonging or appertaining to said bank or business, including both personal property and real estate, shall be listed as other personal property and real estate. [Acts 1895, p. 37.]

**Application of statute in general.**—Art. 7522 operates to except incorporated state banks from the provisions of this article in so far as it provides a basis of assessing the personal property of such banks, and provides a means of taxing the personal property of state banking corporations in the hands of the shareholders, so that a state bank as a corporation is not liable for any taxes except those assessed against its real property, and an assessment against such a bank by a city of a personal tax on its stock, surplus, and undivided profits was unauthorized. *City of Marshall v. State Bank of Marshall* (Civ. App.) 127 S. W. 1083.

**Property subject to taxation.**—All the property, both real and personal of a bank chartered under the laws of Texas is subject to taxation. To tax the shares of such a bank, which are but evidence of an interest in property already taxed, would be in effect to impose a double taxation. The fact that the bank fails to render its property for taxation will not authorize an assessor to list for taxation its shares of stock. *Gillespie v. Gaston*, 67 T. 599, 4 S. W. 248.

In Rev. St. 1879, Art. 4684 (re-enacted with modifications in this article), "the amount of money on deposit" is meant the amount of debt due depositors, and not money belonging to others and held by the bank as bailee. The words "except United States treasury notes" refer to money on hand or in transit, and not to "money in the hands of other banks, bankers or brokers, or others, subject to draft." *Griffin v. Heard*, 78 T. 607, 14 S. W. 892.

**Assessment of bank property.**—The real estate of a bank is to be taxed in its own name, and its personal property in the names of its shareholders. *Engelke v. Schlenker*, 75 T. 559, 12 S. W. 999.

**Art. 7522. [5080] Assessment of real estate by banks.**—Every banking corporation, state or national, doing business in this state shall, in the city or town in which it is located, render its real estate to the assessor of taxes at the time and in the manner required of individuals. At the time of making such rendition the president or some other officer of said bank shall file with said assessor a sworn statement showing the number and amount of the shares of said bank, the name and residence of each shareholder, and the number and amount of shares owned by him. Every shareholder of said bank shall, in the city or town where said bank is located, render at their actual value to the assessor of taxes all shares owned by him in such bank; and in case of his failure so to do, the assessor shall assess such unrendered shares as other unrendered property. Each share in such bank shall be taxed only for the difference between its actual cash value and the proportionate amount per share at which its real estate is assessed. The taxes due upon the shares of banking corporations shall be a lien thereon, and no banking corporation shall pay any dividend to any shareholder who is in default in the payment of taxes due on his shares; nor shall any banking corporation permit the transfer upon its books of any share, the owner of which is in default in the payment of his taxes upon the same. Nothing herein shall be so construed as to tax national or state banks, or the shareholders thereof, at a greater rate than is assessed against other moneyed capital in the hands of individuals. [Acts 1885, p. 106.]

**In general.**—The object of this statute was to incorporate in the law of this state the provision of the federal statute for the protection of national banks; adding thereto so much as was necessary to accord the same protection to state banks. *Primm v. Fort*, 23 C. A. 605, 57 S. W. 86, 972.

This article operates to except incorporated state banks from the provisions of Art. 7521 in so far as that article provides a basis of assessing the personal property of such banks, and provides a means of taxing the personal property of state banking corporation in the hands of the shareholders, so that a state bank as a corporation is not liable for any taxes except those assessed against its real property, and an assessment against such a bank by the city of a personal tax on its stock, surplus, and undivided profits was unauthorized. *City of Marshall v. State Bank of Marshall* (Civ. App.) 127 S. W. 1083.

**Art. 7523. [5081] No deductions in certain cases.**—No person, company or corporation shall be entitled to any deduction on account of any bond, note or obligation of any kind given to any mutual insurance company, nor on account of any unpaid subscription to any religious, literary, scientific or charitable institution or society, nor on account of any subscription to or installment payable on the capital stock of any company, whether incorporated or unincorporated. [Acts 1876, p. 280, sec. 17.]

**In general.**—Under no circumstances can the owners of national bank stock be permitted to deduct their indebtedness from the value of their stock for the purpose of taxation. *Primm v. Fort*, 23 C. A. 605, 57 S. W. 92, 972.

**Art. 7524. [5082] Assessment by railroads.**—It shall be the duty of every railroad corporation in this state to deliver a sworn statement, on or before the thirtieth day of April of each year, to the assessor of each county and incorporated city or town, into or through which any part of their road may run or in which they own or are in possession of real estate, a classified list of all real estate owned by or in possession of said company in said county, town or city, specifying:

1. The whole number of acres of land, lot or lots, exclusive of their right of way and depot grounds, owned, possessed or appropriated for their use, with a valuation affixed to the same.

2. The whole length of the railroad and the value thereof per mile, which valuation shall include right of way, roadbed, superstructure, depots and grounds upon which said depots are situated, and all shops and fixtures of every kind used in operating said road.

3. All personal property of whatsoever kind or character, except the rolling stock belonging to the company or in their possession in each respective county, listing and describing the said personal prop-

erty in the same manner as is now required of citizens of this state. [Acts 1909, p. 373.]

**Intangible personal property.**—The value of a railroad is not the mere value of its right of way, roadbed and superstructure, its depot grounds and structures thereon, but the value of all these as an operating going concern, and this value is in general determined by the profits resulting from its operation. *State v. Austin & N. W. Ry. Co.*, 94 T. 530, 62 S. W. 1050.

The assessment of the intangible personal property of a railroad company, consisting of its right, privileges, immunities, good will, contracts, and franchise to do and carry on its business at a lump sum, is invalid. Even if taxable at all, each specific article of property must be valued by itself. There is no law for assessing for taxation property by the vague description of rights, privileges, immunities, good will, contracts, and franchises, as the property of any individual or corporation. *Id.*

**Manner of assessing railroad.**—A railroad is assessed as an entirety, and not as so many distinct miles of road or distinct parts of the surveys over which it passes. *State v. St. Louis S. W. Ry. Co.*, 43 C. A. 533, 96 S. W. 70.

**Art. 7525. [5083] Railroads to return sworn statements, when, etc.**  
—It shall be the duty of every railroad corporation in this state to deliver a sworn statement, on or before the first day of April in each year, to the assessor of the county in which its principal office is situated, setting forth the true and full value of the rolling stock of said railroad, together with the names of all the counties through which it runs, and the number of miles of roadbed in each of said counties; and said statement shall be submitted to the board of equalization of the county in which its principal office is situated for review, as is provided by article 7564 of this Code, and the other laws of this state, in respect to boards of equalization, on the first Monday in June in each year, or as soon thereafter as practicable; and such board shall certify such final valuation when made without delay to the comptroller of public accounts, who shall proceed at once to apportion the amount of such valuation among the said counties in proportion to the distance such roads shall run through any such county, and shall certify such apportionment to the assessors of such counties, and the same shall constitute part of the tax assets of such counties; and the assessor of each of said counties shall list and enter the same upon the rolls for taxation as other personal property situated in said county. And said railroad corporation shall also report in a separate sworn statement all rolling stock operated by it, under rental, hire, lease or other form of contract, which it does not render for taxation, giving the true and full value of such rolling stock and the amount paid or promised to be paid for rental, hire, lease or use under other form of contract, together with the name of person, firm, corporation or association owning such rolling stock, and together with the postoffice address of such person or firm, or if it be a corporation or association, then the city, county and state of its principal office; and if from said statement it appear that said rolling stock belongs to any person residing in the state of Texas, or to any firm doing business in the state of Texas, or to any corporation or association organized under the laws of the state of Texas, then said statement shall be certified by the tax assessor to whom it is made to the tax assessor of the county in which such person lives, or such firm does business, or such corporation or association has its principal office; and said statement shall be, by the tax assessor to whom it is certified, submitted to the board of equalization of the county for review, and the same shall be equalized by the board of equalization of such county, and certified to the comptroller, and apportioned by the comptroller in the same manner as other rolling stock is certified and apportioned under the preceding provisions of this article; and, if it appears from said statement that the person, firm, corporation or association owning such rolling stock is a non-resident of the state of Texas, then said statement shall be submitted to the board of equalization of the county in which the principal office of the railroad company using the same under rental, hire, lease or other form of contract is situated, which statement shall be reviewed by said board of equalization, and said property assessed against the owner, and certified to the comptroller, and the valuation

apportioned against said owner by the comptroller in the same manner as rolling stock belonging to the railroad corporation furnishing the list. [Acts 1885, p. 30. Amended Acts 1907, p. 192.]

**In general.**—Under this article and Art. 939, and Const. art. 8, §§ 5, 8, a city containing the principal office of a railroad company was not, for that reason, authorized to levy municipal taxes on all the railroad's rolling stock, only a small portion of which would necessarily be within the city on the 1st day of January of each year; the term "lying or being within the limits of any city or incorporated town," etc., when applied to tangible movable property, meaning only such property as is actually and physically within the limits of the city. *City of Tyler v. Coker* (Civ. App.) 124 S. W. 729.

**Art. 7526. [5084] Assessments and collections of corporate property.**—All property of private corporations, except in cases where some other provision is made by law, shall be assessed in the name of the corporation; and in collecting the taxes on the same all the personal property of such corporation shall be liable to be seized whenever the same may be found in the county, and sold in the same manner as the property of individuals may be sold for taxes. All statements and lists made by corporations that are required to be sworn to shall be verified by the affidavit and signature of the secretary of said corporation, and, if they have no secretary, the officer who discharges the duties of secretary of said corporation. [Acts 1876, p. 280, secs. 20, 21.]

**Art. 7527. [5085] Assessments in owner's name.**—All real property subject to taxation shall be assessed to the owners thereof in the manner herein provided; but no assessment of real property shall be considered illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof. [Id. sec. 21.]

**In general.**—Where the name of the owner was unknown, the act of 1848 required lands to be assessed by a description thereof, one of the essential particulars of which was the name of the grantee. *Yenda v. Wheeler*, 9 T. 408.

See what is said in this case as to land being taxed in the name of the present owner instead of in the name of the original grantee. *Pitts v. Booth*, 15 T. 453.

When there is an abstract number, the name of original grantee, number of acres and value, and there being no certificate or survey number, a mistake in the name of the owner will not affect the tax lien on the land. *Taber v. State*, 38 C. A. 235, 85 S. W. 835.

**Art. 7528. [5086] Lien for taxes.**—All taxes upon real property shall be a lien upon such property until the same shall have been paid. And should the assessor fail to assess any real estate for any one or more years, the lien shall be good for every year that he should fail to assess for; and he may, in listing property for taxes any year thereafter, assess all the back taxes due thereon, according to the provisions of this title. [Id. sec. 22.]

**Liens.**—Taxes assessed against a homestead are a lien thereon, and it may be sold therefor, notwithstanding Const. art. 16, § 50, protecting the homestead against forced sale, and providing that no mortgage, deed of trust, or other lien on the homestead shall be valid; the words "other lien" including only those created by contract. *City of San Antonio v. Toepperwein*, 104 T. 43, 133 S. W. 416.

**Foreclosure.**—Under this article and Art. 5683, and Const. art. 8, § 15, where defendants, in adverse possession of certain land, had not been in possession for the 10 years required to confer title when the state instituted suit to foreclose its lien for unpaid taxes, so that they were not proper parties to such action, they were still bound by the judgment, though not served with notice, as provided by Art. 7698, and hence were not entitled to hold the land as against the purchaser from the state and those claiming under him. *Patton v. Minor*, 103 T. 176, 125 S. W. 6.

**Art. 7529. [5087] Leasehold interests in public lands.**—Property held under a lease for a term of three years or more, or held under a contract for the purchase thereof, belonging to this state, or that is exempt by law from taxation in the hands of the owner thereof, shall be considered for all the purposes of taxation, as the property of the person so holding the same, except as otherwise specially provided by law. Timber held by persons or corporations, heretofore or hereafter purchased from the state under the various laws for that purpose, shall likewise be subject to assessment for taxes, and the value thereof for taxation shall be ascertained as the value of other property is ascertained. And, should the owner of such timber fail or refuse to pay the taxes assessed against it, the same shall be sold for the taxes thereon, as provided in this title for the sale of personal property for taxes, provided the same



can be found by the collector; but, if the timber can not be found, then the collector shall collect the taxes due as the taxes on other personal property are collected; provided, further, that the commissioner of the general land office shall furnish by the first of January each year to the various commissioners' courts and the tax assessors of the state of Texas a full and complete list of all timber sold by the state belonging to the school funds, giving the number of acres, price and to whom sold, in the respective counties where the timber so sold is situated. In case of the sale of such timber for taxes as herein provided, the purchaser shall take and hold the same under the same terms and conditions as the original purchaser thereof from the state. [Acts 1905, p. 72.]

See *State v. Downman* (Civ. App.) 134 S. W. 787.

**In general.**—School lands leased for a term of years cannot be assessed against the lessee at the value of the land, but only at the value of the leasehold determined as provided by Art. 7530. *Daugherty v. Thompson*, 71 T. 192, 9 S. W. 99.

The lessee for a term of years of city water-works is liable for taxes on the value of the leasehold interest, and not on the value of the property leased. *State v. Taylor*, 72 T. 297, 12 S. W. 176.

A lease in which the state reserves the right to sell and thereby terminate the lease at any time is not such title as contemplated in this article. See Art. 7503. *Trammell v. Faught*, 74 T. 557, 12 S. W. 317.

The timber growing upon county lands after it has been sold is taxable as well as timber purchased from the state and growing upon public lands of the state. *Montgomery v. Peach River Lumber Co.*, 54 C. A. 143, 117 S. W. 1063.

**Art. 7530. [5088] Valuation of property for taxation.**—Each separate parcel of real property shall be valued at its true and full value in money, excluding the value of crops growing or ungathered thereon.

In determining the true and full value of real and personal property, the assessor shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation, nor shall he adopt as a criterion of value the price for which such property would sell at auction or a forced sale, or in the aggregate with all the property in his county; but he shall value each tract or lot by itself, and at such sum and price as he believes the same to be fairly worth in money at the time such assessment is made.

In valuing any real property on which there is a coal or other mine, or stone or other quarry, or springs possessing medicinal properties, the same shall be valued at such a price as such property, including a mine or quarry or spring, would probably sell at a fair voluntary sale for cash.

Taxable leasehold estates shall be valued at such a price as they would bring at a fair voluntary sale for cash.

Personal property of every description shall be valued at its true and full value in money.

Money, whether in possession or on deposit, or in the hands of any member of the family, or any other person whatsoever, shall be entered in the statement at the full amount thereof.

Every credit for a sum certain, payable either in money or property, of any kind, shall be valued at the full value of the same so payable. If for a specified article or for a specified number or quantity of property of any kind, it shall be valued at the current price of such property at the place where payable. Annuities or moneys payable at stated periods shall be valued at the price that the person listing the same believes them to be worth in money. [Id. sec. 24.]

See *State v. Downman* (Civ. App.) 134 S. W. 787.

**Definitions.**—“Cash market value.”—Where in a suit to restrain the collection of taxes on bank stock, because assessed at a higher rate than other property in the county, the evidence showed that land had a market value in the county and what it was, an instruction that the true cash market value of a commodity such as bank stock or land is the amount of cash or its equivalent for which the commodity can be bought or sold in due course of trade was not objectionable for failing to make a distinction between cash market value and the real or intrinsic value of property, since the law contemplates that all property shall be taxed according to its reasonable market value, where it has a market value. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

**Valuation of property for taxation.**—The general rule is that the owner of real estate leased is taxed upon the entire value of the property. This satisfies the constitutional requirement that all property in this state, whether owned by natural persons, or corporations other than municipal, shall be taxed according to its value. *Daugherty v. Thompson*, 71 T. 192, 9 S. W. 99.

When a leasehold is taxed its value should be deducted from the taxable interest of the owner. *Id.*

The legality of an assessment of a tax on the property of a national bank which does not exceed its true value is not affected by the custom of the assessor to assess other property at a uniform valuation less than its true value. *Engelke v. Schlenker*, 75 T. 569, 12 S. W. 999.

A bank may accumulate United States treasury notes over its counter and such sum be exempt from taxation; otherwise if the treasury notes had been procured for the special purpose of avoiding taxation by the exchange of taxable money or property. *Griffin v. Heard*, 78 T. 607, 14 S. W. 892. See Arts. 7521, 7531.

Deposit in bank subject to sight check is cash, and as such is not subject to set-off by the liabilities of the taxpayer. *Campbell v. Wiggins*, 2 C. A. 1, 20 S. W. 730.

Under this article, the several tracts owned by a property owner should be assessed separately, and not as a whole. *Lufkin Land & Lumber Co. v. Noble* (Civ. App.) 127 S. W. 1093.

**Art. 7531. [5088a] United States paper money taxable.**—Circulating notes of national banking associations and United States legal tender notes and other notes and certificates of the United States, payable on demand and circulating or intended to circulate as currency, and gold, silver and other coin, shall be hereafter subject to taxation as money on hand or on deposit, under the laws of this state. [Acts 1895, p. 49.]

Former law.—Legal tender notes and United States bonds of a corporation or an individual are not taxable. *Rosenberg v. Weekes*, 67 T. 578, 4 S. W. 899.

**Art. 7532. [5088b] Assessed as money on hand.**—The assessor of taxes shall assess the same in the same manner as money on hand or on deposit or other personal property, as provided for in the general assessment laws of this state. [*Id.*]

## CHAPTER TWELVE

### OF THE ASSESSMENT OF TAXES—ELECTION AND QUALIFICATION OF THE ASSESSOR

Art. 7533. Election and term of assessor.	Art. 7568. Assessor to follow instructions.
7534. Vacancies, how filled.	7569. Equalization of assessments.
7535. Oath and bond.	7570. Boards may equalize without complaint.
7536. Purview of the bond.	7571. Penalty for neglect of duty by assessor.
7537. New bond.	7572. Oath of assessor.
7538. Bond for county taxes.	7573. Oath of board.
7539. May appoint deputies.	7574. Neglect of duty cause for removal from office; attorney general to file suit.
7540. Authority of deputies.	7575. Assessor to furnish list of delinquents.
7541. May administer oaths.	7576. And submit lists to board of equalization.
7542. The oath.	7577. Shall make out rolls in triplicate.
7543. Where and how the oath may be made.	7578. Also rolls of unrendered property.
7544. Penalty for failure to attest oath.	7579. And add up columns.
7545. Fraud upon the public revenue.	7580. And return and oath.
7546. Taxpayer to make oath.	7581. All lists, etc., filed in the county clerk's office.
7547. When assessments to be made.	7582. Rolls, how distributed.
7548. Irregular assessments.	7583. Compensation.
7549. If taxpayer is absent.	7584. How paid by the state.
7550. Or refuses to list.	7585. By the county.
7551. Duty of assessor in such cases.	7586. Penalty for neglect of duty.
7552. Commissioner of general land office to furnish abstracts to assessors.	7587. Lands of non-residents in unorganized counties.
7553. Books to be furnished assessors.	
7554. How to be filed by assessors.	PROPERTY IN UNORGANIZED COUNTIES
7555. Blocks and lots in cities.	7588. Lands of residents in.
7556. Duties of assessors as to same.	7589. Duties of comptroller in relation thereto.
7557. To be kept in office.	7590. Same.
7558. Lands not on abstract to be put there, when and how.	7591. Same.
7559. Certificate from board of equalization.	7592. Same.
7560. Substitutes to be employed, when.	7593. May appeal from comptroller's assessment.
7561. Unorganized counties.	7594. May levy upon and sell, when.
7562. Manner and form of assessing.	7595. Sale.
7563. Assessment of property not rendered.	
7564. Boards of equalization.	
7565. Assessment of real property for previous years.	
7566. Assessment of back taxes on personal property, how made.	
7567. Unlisted property; supplemental roll.	

Art.		Art.	
7596.	May be bought by state, when.	7601.	County taxes to be paid, where.
7597.	Redemption.	7602.	Comptroller to keep taxes of unorganized county.
7598.	Tax deed.	7603.	Same.
7599.	List of purchasers to be kept in office.	7604.	Special deposit to be made by comptroller.
7600.	Deeds shall vest good title, when.		

**Article 7533. [5089] Election and term of assessor.**—There shall be elected by the qualified electors of each county within this state, at the same time and under the same law regulating the election of state and county officers, an assessor of taxes, who shall hold his office for two years, and until his successor is elected and qualified. [Const., art. 8, sec. 14. Act Aug. 21, 1876, p. 265, sec. 1.]

**Assessment for taxes by cities.**—See notes under Title 22, Chapter 7.

**Assessment of benefits for drainage.**—See notes under Title 47.

**Assessment for taxes for improvement districts.**—See Title 83, Chapter 2.

**Assessment for taxes for construction of sea walls.**—See Title 83, Chapter 3.

**Assessment in irrigation district.**—See Title 73, Chapter 3.

**Assessment for taxes for navigation districts.**—See Title 96.

**Art. 7534. [5090] Vacancies, how filled.**—In case of a vacancy in the office of assessor of taxes, the same shall be filled by the county commissioners' court for the unexpired term only, and until the election and qualification of an assessor at the succeeding general election; and the person appointed to fill such vacancy shall qualify in the same manner as is prescribed by law for assessors of taxes, and shall have all the rights and perform all the duties required by law of the assessor elected.

**Art. 7535. [5091] Oath and bond.**—Every assessor of taxes, within twenty days after he shall have received notice of his election or appointment, and before entering upon the duties of his office, shall execute a bond, payable to the governor and his successors in office, in a sum which shall be equal to one-fourth the amount of the state tax of the county, as shown by the last preceding assessment, but not to exceed ten thousand dollars, with at least three good and sufficient sureties, to be approved by the commissioners' court of his county, conditioned that he will faithfully discharge all the duties of said office; and shall take and subscribe the oath prescribed by the constitution, which oath, together with said bond, shall be recorded in the office of the clerk of the county court of said county, and be forwarded by the county judge of the county to the comptroller, to be deposited in his office. [Id. p. 266, sec. 2.]

**Art. 7536. [5092] Purview of the bond.**—Said bond shall be deemed to extend to the faithful performance of the duties of his office as assessor of taxes for and during the full term for which he was elected or appointed, and shall not become void upon the first recovery, but suit may be maintained thereon until the whole amount thereof be recovered. [Id.]

**Art. 7537. [5093] New bond.**—Assessors of taxes may be required to furnish a new bond and additional security whenever, in the opinion of the commissioners' court, it may be advisable; and, should any assessor of taxes fail to give a new bond and additional security when required, he shall be suspended from the further discharge of his duties by the commissioners' court of his county, and be removed from office in the mode prescribed by law for the removal of county officers. [Id.]

**Art. 7538. [5094] Bond for county taxes.**—The assessor of taxes shall give a like bond with like conditions to the county judges of their respective counties and their successors in office, in a sum not less than one-fourth of the amount of the county tax of the county, as shown by the last preceding assessment, but not to exceed five thousand dollars, with at least three good and sufficient sureties, to be approved by the commissioners' court of his county; which bond shall be recorded and

deposited in the county clerk's office of the county. A new bond and additional security may be required, and the assessor of taxes may be removed from office for a failure to furnish a new bond or additional security in the manner prescribed by law. [Id. sec. 3.]

**Art. 7539. [5095] May appoint deputies.**—Each assessor of taxes may appoint one or more deputies to assist him in the assessment of taxes, and may require such bond and security from the person so appointed as he deems necessary for his indemnity; and the assessor of taxes shall in all cases be liable and accountable for the proceedings and misconduct of his deputies. [Id. p. 267, sec. 7.]

**Art. 7540. [5096] Authority of deputies.**—The deputies appointed in accordance with the provisions of the preceding article shall do and perform all the duties imposed and required by law of assessors of taxes; and all acts of such deputies done in conformity with law shall be as binding and valid as if done by the assessor of taxes in person. [Id. sec. 8.]

**Authority of de facto deputy assessors.**—The acts of de facto deputy assessors, in raising the valuation of property listed for taxes, are not rendered invalid because they may have been legally disqualified from acting as deputies by reason of their holding other offices. *T. & P. R. R. Co. v. Harrison County*, 54 T. 119.

**Art. 7541. [5097] May administer oaths.**—Assessors of taxes are hereby authorized and empowered to administer all oaths necessary to obtain a full, complete and correct assessment of all taxable property situated in their respective counties. [Id. p. 266, sec. 4.]

**Art. 7542. [5098] The oath.**—The assessor of taxes shall also require each person rendering a list of taxable property to him for taxation, under the assessment laws, to subscribe to the following oath or affirmation, which shall be written or printed at the bottom of each inventory, to-wit: "I, . . . . ., (filling the blank with the name of the person subscribing) do solemnly swear (or affirm) that the above inventory rendered by me contains a full, true and complete list of all taxable property owned or held by me in my own name (or for others, as the case may be, naming the person or firm for whom he rendered the list) in this county, subject to taxation in this county, and personal property not in this county subject to taxation in this county by the laws of this state, on the first day of January, A. D. 19. . (filling the blank with the year), and that I have true answers made to all questions propounded to me touching the same. So help me God." [Id. p. 267, sec. 5. Amended Acts 1897, p. 204.]

**Administering oath.**—It is the imperative duty, under penalty of a fine, for the assessor to administer the oath as contained in this article after the property has been rendered according to the other provisions of the law on taxation. *Parker v. State*, 44 Cr. R. 147, 69 S. W. 76.

To predicate perjury on this article, it should be alleged in the indictment that the oath was administered setting out the oath and the evidence should establish the allegations of the indictment. *Id.*

Under this article and Arts. 7547, 7576, 7577, tax rolls are to be made up from lists by the assessors made out from information furnished by the property owners. *Lofton v. Miller*, 55 C. A. 253, 118 S. W. 911.

**Art. 7543. [5099] Where and how the oath may be made.**—The owner or agent who is required under the laws of this state to render any property for taxation may render the same in the county where the same is situated by listing the same and making oath thereto, as required in this title, before any officer authorized to administer oaths in this state, or any officer out of this state that is authorized by law to take acknowledgments of instruments for record in this state, and may forward the same to the assessor of the county by mail or otherwise, and the assessor shall enter the said property on his tax rolls. If the assessor is satisfied with the valuation as rendered in said list, he shall so enter the same; if he is not satisfied with the valuation, he shall refer the same to the board of equalization of the county for their action, and shall immediately notify, by mail or otherwise, the person

from whom he received said list that he has referred said valuation to the board of equalization. [Acts 1876, p. 267, sec. 5.]

**Art. 7544. [5100] Penalty for failure to attest oath, etc.**—The assessor of taxes, for every failure or neglect to administer the oath or affirmation prescribed in article 5098 to each person rendering a list of taxable property to him, unless the person refuses to qualify, shall forfeit fifty dollars, to be deducted out of his commissions upon full and satisfactory information furnished the county judge; and for each and every failure or neglect to attest the oath subscribed to as provided in said article, shall forfeit the sum of fifty dollars upon satisfactory information furnished the county judge. The forfeitures imposed by this article shall be deducted from the assessor's commissions on the assessment for county taxes. [Id. sec. 6.]

**Art. 7545. [5101] Fraud upon the public revenue.**—Any evasion by means of artifice or temporary or fictitious sale, exchange or pretended transfer upon any bank books, of gold and silver coin, bank notes or other notes or bonds subject to taxation under the laws of this state for United States nontaxable treasury notes or any notes or bonds not so subject to taxation, and any such pretended sale, exchange or transfer not made in good faith, and by actual exchange and delivery of the funds so sold, exchanged or transferred and made only by entry on bank books, or by any express or implied understanding not to immediately make a bona fide and permanent sale, shall be deemed prima facie to be a fraud upon the public revenue of this state. [Acts 1891, p. 39, sec. 1.]

**Art. 7546. [5102] Taxpayer to make oath.**—All assessors of taxes in this state shall require all taxpayers when assessed by them to make oath as to any such sale, exchange or transfer made by them on the first day of January or within sixty days before said first day of January of any year for which any such assessment is made, as to the good faith and bona fide business transaction of any such sale, exchange or transfer, as above set forth, if any such should have been made by them; and, if it should be disclosed that any such pretended sale, exchange or transfer has been made for the purpose of evading taxation, then and in that event the assessor shall list and render against such person the coin, bank notes or other notes or bonds subject to taxation under the laws of this state; provided, that if any person shall make a false affidavit as to any of the foregoing facts he shall be deemed guilty of perjury and be punished as is now provided by law. [Id. sec. 3.]

**Art. 7547. [5103] When assessments to be made.**—Assessors of taxes shall, between the first day of January and the thirtieth day of April of each year, proceed to take a list of taxable property, real and personal, in his county and assess the value thereof in the manner following, to-wit: By calling upon the person, or by calling at the office, place of business or the residence of the person and listing the property required by law in his name, and requiring such person to make a statement under oath as prescribed by article 7542, of such property in the form hereinafter prescribed. [Acts 1876, p. 265, sec. 9. Amended Acts 1909, p. 373.]

**In general.**—Under this article and Arts. 7542, 7547, 7576, 7577, tax rolls are to be made up from lists by the assessors, made out from information furnished by the property owners. *Lofton v. Miller*, 55 C. A. 253, 118 S. W. 911.

**Art. 7548. [5104] Irregular assessments valid.**—Should any property be listed or assessed for taxation after the thirtieth day of April of any year, or should the assessor of taxes or his deputy fail to administer the requisite oath or attest the same in the mode prescribed by law, or should the party rendering property for taxation fail to subscribe to the list, yet the assessment shall, nevertheless, be as valid and binding to all intents and purposes as if made in strict pursuance of law. [Id.]

**Art. 7549. [5105] If taxpayer is absent, etc.**—If any person, who is required by this title to list property, shall be sick or absent when the

assessor calls for a list of his property, the assessor shall leave at the office, or usual place of residence or business of such person, a written or printed notice requiring such person to meet him and render a list of his property at such time and place as the assessor of taxes may designate in said notice. The assessor of taxes shall carefully note in a book the date of leaving such notice. [Id. p. 268, sec. 10.]

**Art. 7550. [5106] Or refuses to list.**—In every case where any person whose duty it is to list any property for taxation has refused or neglected to list the same when called on for that purpose by the assessor of taxes, or has refused to subscribe to the oath in regard to the truth of his statement of property, or any part thereof, when required by the assessor of taxes, the assessor shall note in a book the name of such person who refused to list or to swear; and in every case where any person required to list property for taxation has been absent or unable from sickness to list the same, the assessor of taxes shall note in a book such fact together with the name of such person. [Id. sec. 11.]

**Art. 7551. [5107] Duty of assessor in such cases.**—In all cases of failure to obtain a statement of real and personal property from any cause, it shall be the duty of the assessor of taxes to ascertain the amount and value of such property and assess the same as he believes to be the true and full value thereof; and such assessment shall be as valid and binding as if such property had been rendered by the proper owner thereof. [Id. sec. 12.]

**Art. 7552. [5108] Commissioner of general land office to furnish abstracts to assessors.**—The commissioner of the general land office shall furnish to each assessor of taxes in this state a correct abstract of all the surveys of land and number of acres therein in their respective counties; and on the first day of January of each year said commissioner of the general land office shall furnish said assessors an additional list of all new valid surveys in his county during the year; provided, that, in case the records of the land office do not show the quantity of acres in a survey, the surveyor of the district shall furnish said assessor a certified statement of the number of acres therein. [Acts 1879, p. 24.]

**Art. 7553. [5109] Books to be furnished assessors; how to be filled by assessors.**—The commissioners' courts of each county in this state shall procure and furnish the assessor of said county three well-bound books of not less than six hundred and forty pages each, and an index book for same, and such other stationery as may be necessary; said books to be of the best material and make, and shall have printed headings as per following form: [Id. sec. 2.]

Abstract No..... Assessor's Abstract for .....Co. ....

PATENT						CERTIFICATE				
No.	Vol.	To Whom Issued	Date			Acres	No.	Class	Character	To Whom Issued
			Month	Day	Year					

Rendered for Taxation

Year	By Whom Rendered	Acres	Value	Year	By Whom Rendered	Acres	Value

**Art. 7554. [5110] How to be filled by assessor.**—The blanks to be filled by the assessor with the abstract number, name of party to whom the certificate was issued, the number, class and character of the certificate, the name of the party to whom the patent issued, number of volume of patent, the month, day and year it was issued, and the number of acres each survey contains; which whole survey shall stand as a debit against the assessor. [Id. sec. 2.]

**Art. 7555. [5111] Blocks and lots in cities.**—Each assessor shall be required to make an abstract of all the blocks or subdivisions of each of the cities or towns or villages of his county, in a book or books of at least four hundred and eighty pages each, to be furnished him by the commissioners' court of his county for that purpose, with an index book to the same, which said book or books shall have a blank space for a diagram or plot of each block or subdivision, giving the number of the lots as per form following:

Block No..... Assessor's Abstract of City Lots in.....County, City of .....

Year	Owner's Name	No. Lot	Value	
Year	Owner's Name	No. Lot	Value	

And the said assessor shall draw a plot of each block in the blank space left for that purpose, giving the number of each lot. And the whole of said block or subdivision shall be a debit against the assessor. [Id. sec. 3.]

**Object of provision.**—The purpose of this article and of Art. 7563 is to cause property to be so described by the assessor as to identify it. *Haynes v. State*, 44 C. A. 492, 99 S. W. 408.

**Description of property.**—The lots of land must be definitely and distinctly described, and parcel proof cannot supply the deficiency in the description or boundaries. These must be ascertained from what is written. The question is not one of intention, but of fact. What did the assessor do? On what specific lot was the tax laid? These questions must be answered from the record. *House v. Stone*, 64 T. 677.

Where two lots belong to one owner and form one parcel of land, they may be assessed for taxation together, in the absence of any constitutional or statutory provision to the contrary. *Guerguin v. City of San Antonio*, 19 C. A. 93, 50 S. W. 140.

Where there was only one location of land in the county for a certain volunteer, and that of a tract of 269 acres, a description of the tract on the tax roll as his location of 320 acres, the tract being otherwise identified, was sufficient. *Barrett v. Spence*, 28 C. A. 344, 67 S. W. 921.

Tax assessment held not invalid because stating that tract contained less number of acres than it did in fact. *Kenson v. Gage*, 34 C. A. 547, 79 S. W. 605.

Where assessor adopted rendition by state treasurer of property for taxation, he made such rendition his assessment, and it sufficiently complied with the law. *State v. Fidelity & Deposit Co. of Maryland*, 35 C. A. 214, 80 S. W. 544.

Where the land is sufficiently identified therein, the assessment for taxation is valid, though it contains no certificate or survey number. *Taber v. State*, 38 C. A. 235, 85 S. W. 835.

Unless the several lots of a taxpayer are used together for one purpose and as one piece of property, he is entitled to have each lot assessed separately. *City of Houston v. Stewart*, 40 C. A. 499, 90 S. W. 49.

But a taxpayer held not entitled to complain of the assessment of several lots in bulk. *Id.*

A description in tax roll as "owner unknown, abstract No. —, certificate No. —, survey No. —; original grantee, —; acres in grant, —; city or town of Dallas; number of lot, 4; number of block, L; value, \$100; Cockrell's Fairland Addition"—is sufficient. *Haynes v. State*, 44 C. A. 492, 99 S. W. 405.

An assessment held to sufficiently describe the property sought to be assessed. *Slaughter v. City of Dallas* (Civ. App.) 103 S. W. 218.

No more particularity of description of property is required in a tax assessment than in a conveyance or a partition decree. *Slaughter v. City of Dallas*, 101 T. 315, 107 S. W. 48.

An assessment of a city lot held invalid for uncertainty of description. *Id.*

The rigid observance of statutory requirements respecting the description of property listed for taxation by an assessor, does not apply to lists filed by the property owner. *McMickle v. Rochelle* (Civ. App.) 125 S. W. 74.

— **Sufficiency of description as against purchaser.**—An assessment of real estate which sufficiently describes the property as against the owner is sufficient as against a subsequent purchaser. *Slaughter v. City of Dallas* (Civ. App.) 103 S. W. 218.

**Misdescription of property as ground for injunctive relief against tax.**—See notes under Art. 4643.

**Art. 7556. [5112] Duties of assessor as to same.**—Each assessor in this state, when he shall have made the assessment of his county for each year, shall, on the first day of June of each year, or as soon thereafter as practicable, carry from each person's assessment the number of acres and its value on each survey of lands, lots or blocks to that particular survey, lot or block found on the abstract books provided in articles 5110, 5111 and 5119 [7554, 7555 and 7563]; and that all the parts of each survey or block placed on said abstract books shall be a credit to the assessor on that particular survey. And said assessor shall deduct the total number of acres rendered on each survey or block from the total number of acres of the whole survey or block as is shown by said abstract; and, if any part is left unrendered, then he shall assess the same to the owner or owners thereof, if known, and, if unknown, then to "unknown owners," and the value thereof shall be affixed by him, sanctioned by the board of equalization; provided, that the owner or owners of any survey and grant of land may show by a survey, to be made by the county surveyor of the county, that the survey and grant in which they are interested does not contain the full complement of acres, showing how many acres are in fact embraced within the calls of the particular survey and grant. [*Id.* sec. 4.]

**Art. 7557. [5113] To be kept in office.**—The assessor's abstracts shall be kept in his office at the county seat of his county, as records of his office, and shall be at all times subject to the inspection of the public. The index book shall show the original grantee, the number of acres, the abstract number, and the volume and page in which each survey is placed. [*Id.* sec. 5.]

**Art. 7558. [5114] Lands not on abstract to be placed there.**—Should there be any survey of lands, lots or blocks not on the abstract book or books which are by law subject to taxation, the assessor shall enter such lands, lots or blocks on the assessment list as though the same appeared on said abstract books. [*Id.* sec. 6.]

**Art. 7559. [5115] Certificate from board of equalization.**—Each assessor of taxes shall procure from the board of equalization of his county a certificate that all the surveys and parts of surveys of lands in his county, and all the lots and blocks of the cities and towns of his county, are rendered for taxation; which certificate shall be forwarded to the comptroller of this state before he shall issue to said assessor a draft on the tax collector of his county. And the same rule shall apply to the commissioners' court before they issue drafts on the county treasurer for his pay for assessing the county taxes. [*Id.* sec. 7.]

**Art. 7560. [5116] Substitute to be employed if assessor fails.**—The board of equalization or the county commissioners' court shall, if the assessor fails to perform the duties required by this chapter within a



reasonable time, employ some other competent person to have the requirements of this law carried out, and the compensation therefor shall be deducted from the assessor's pay for that year. [Id. sec. 8.]

**Art. 7561. [5117] Unorganized counties.**—The comptroller of this state shall be required to have this law carried out in the unorganized counties of this state, where lands are located. [Id. sec. 9.]

**Art. 7562. [5118] Manner and form of assessing.**—The manner and form for assessing property for taxation shall be substantially as follows, to-wit:

1. The name of the owner.
2. Abstract number.
3. From whom and how acquired.
4. The name of the original grantee.
5. The number of acres.
6. The value of the land.
7. The number of the lot or lots.
8. The number of the block.
9. The value of town lots.
10. The name of the city or town.
11. Number of miles of railroad in the county.
12. The value of railroads and appurtenances, including the proportionate amount of rolling stock to the county after the assessment of such rolling stock and its apportionment among the several counties by the comptroller as hereinafter provided.
13. Number of miles of telegraph in the county.
14. Value of telegraph and appurtenances in the county.
15. Number and amount of land certificates, and value thereof.
16. Number of horses and mules and value thereof.
17. Number of cattle and value thereof.
18. Number of jacks and jennets, and value thereof.
19. Number of sheep and value thereof.
20. Number of goats and value thereof.
21. Number of hogs and value thereof.
22. Number of carriages, bicycles or tricycles, buggies or wagons of whatsoever kind and value thereof.
23. Number of sewing machines and knitting machines and the value thereof.
24. Number of clocks and watches and the value thereof.
25. Number of organs, melodeons, piano fortes, and all other musical instruments of whatsoever kind and value thereof.
26. The value of household and kitchen furniture over and above the amount of two hundred and fifty dollars.
27. Office furniture and the value thereof.
28. The value of gold and silver plate.
29. The value of diamonds and jewelry.
30. Every annuity or royalty, the description and value thereof.
31. Number of steamboats, sailing vessels, wharves, boats, barges, or other water craft, and the value thereof.
32. The value of goods and merchandise of every description which such person is required to list as a merchant in hand on the first day of January of each year.
33. The value of material and manufactured articles which such person is required to list as a manufacturer.
34. The value of manufactures, tools, implements and machinery other than boilers and engines, which shall be listed as such.
35. Number of steam engines and boilers and value thereof.
36. The amount of moneys of bank, banker, broker, stock jobber or any other person.

37. The amount of solvent credits of bank, banker, broker, stock jobber or any other person.

38. The amount and value of bonds and stocks other than United States bonds.

39. The amount and value of shares of capital stock companies and associations not incorporated by the laws of this state.

40. The value of property of companies and corporations other than property hereinbefore enumerated.

41. The value of stock and furniture of saloons, hotels and eating houses.

42. The value of every billiard, pigeon hole, bagatelle, and other similar table, together with the number thereof.

43. Every franchise, the description and value thereof.

44. The value of all other property not enumerated as above. [Acts 1895, p. 38.]

**Nature of assessment.**—An assessment of property for taxes involves a listing of the property to be taxed and an estimation of the sums to guide the apportionment. *Sullivan v. Bitter*, 51 C. A. 604, 113 S. W. 193.

**Delegation of power to make assessment.**—The assessment of taxes is a quasi judicial act which the comptroller may not delegate to a clerk, and, where an assessment for taxation is made by a clerk, a tax sale is void. *Morrow v. Conway* (Civ. App.) 157 S. W. 430.

**Name of owner.**—In assessing property for taxation the name of the owner must be given. *Connell v. State* (Civ. App.) 55 S. W. 981.

**Franchises.**—The franchises of a railroad appurtenant to the use of its property are a part of its real estate and not subject to a separate tax. *State v. Austin & N. W. R. Co.*, 94 T. 530, 62 S. W. 1050.

The franchises of a street railroad appurtenant to the use of its property held not subject to a separate tax. *Dallas Consol. Electric St. Ry. Co. v. City of Dallas* (Civ. App.) 65 S. W. 201.

The description on the assessment roll of a city, "The \* \* \* Company franchise," is not sufficient. *Southwestern Telegraph & Telephone Co. v. City of San Antonio*, 32 C. A. 101, 73 S. W. 859.

**Valuation.**—The primary meaning of figures in the columns of tax rolls set apart for values held to be dollars, where there was nothing to show what they denoted. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

**Art. 7563. [5119] Assessment of property not rendered.**—If the assessor of taxes discovers any real property in his county subject to taxation which has not been listed to him, he shall list and assess such property in the manner following, to-wit:

1. The name of the owner; if unknown, say "unknown."
2. Abstract number and number of certificate.
3. Number of the survey.
4. Name of the original grantee.
5. Number of acres.
6. The true and full value thereof.
7. The number of lot or lots.
8. The number of the block.
9. The true and full value thereof.
10. The name of the city or town, and give such other description of the lot or lots or parcels of land as may be necessary to better describe the same; and such assessment shall be as valid as if rendered by the owner thereof. [Acts 1876, p. 269, sec. 14.]

**In general.**—The authority for the officer's making the assessment is that the property has not been listed to him as declared in the statute, and the assessment should show in some appropriate manner that it was done by the assessor in accordance with such authority, and that the assessment thus made was of property within the category of such as was thus subject to taxation and had accordingly been assessed by him. *House v. Stone*, 64 T. 677.

Any requisite of this article need not be complied with, where good cause is shown for such noncompliance. *State v. St. Louis S. W. Ry. Co.*, 43 C. A. 533, 96 S. W. 70.

The purpose of this article and Art. 7555 is to cause the property to be so described by the assessor as that it can be identified. The latter has reference more particularly to acreage property and should not be made to control over this article in assessing property which has been laid out into lots and blocks and made an addition to a city or town. It is sufficient if the description in the tax rolls taken in connection with the map addition is enough to identify the property on the ground. *Haynes v. State*, 44 C. A. 492, 99 S. W. 408.

**Name of owner.**—The listing of the property on the tax rolls under a wrong name and omitting to give the survey number are fatal to the assessment and render the tax sale void. *Pfeuffer v. Bodies*, 42 C. A. 55, 93 S. W. 222.

**Description of property.**—The lots into which town or city blocks are subdivided are generally regarded as separate and distinct tracts or parcels of land, as much so as separate and distinct though adjoining surveys or grants in the country; and each lot should be separately assessed. *State v. Baker*, 49 T. 763.

The failure of an assessor in listing property for taxation to give the survey number of the grant as required by this article renders subsequent proceedings to enforce collection of the tax illegal, unless good cause can be shown why the requirement of the statute in this regard was not complied with. It would be a sufficient description, when an entire survey is assessed, to give the owner's name if known, or to state that it is unknown, together with the abstract number, certificate number, survey number, name of original grantee and number of acres; but when only a portion of a survey is assessed, some further description is necessary in order to identify the particular portion assessed. *Morgan v. Smith*, 70 T. 637, 8 S. W. 528.

The assessment rolls are defective if they fail to give either the certificate or survey number of the tract, and no good reasons are shown why they were not given. *State v. Farmer* (Civ. App.) 57 S. W. 86.

When there are two tracts of land containing the same number of acres and having the same original grantee, the abstract number is not a sufficient description for the purpose of assessment. *State v. Farmer*, 94 T. 232, 59 S. W. 543, affirming (Civ. App.) 57 S. W. 84.

This article simply requires that the number of miles of roadbed in the county and the full and true value thereof be given. The assessor could not be required to give a more particular description of the property in listing it for back taxes than the owner was required to give in rendering the same. *State v. St. Louis S. W. Ry. Co.*, 43 C. A. 533, 96 S. W. 70.

**Art. 7564. [5120] Boards of equalization.**—The commissioners' courts of the several counties of this state shall convene and sit as boards of equalization on the second Monday in May of each year, or as soon thereafter as practicable before the first day of June, to receive all the assessment lists or books of the assessors of their counties for inspection, correction or equalization and approval.

1. They shall cause the assessor to bring before them at such meeting all said assessment lists, books, etc., for inspection, and see that every person has rendered his property at a fair market value, and shall have power to send for persons, books and papers, swear and qualify persons, to ascertain the value of such property, and to lower or raise the value on the same.

2. They shall have power to correct errors in assessments.

3. They shall equalize improved lands in three classes, first-class to embrace the better quality of land and improvements, the second class to embrace the second quality of lands and improvements, and the third-class to embrace lands of but small or inferior improvements. The unimproved lands shall embrace first, second and third class, and all other property made as nearly uniform as possible.

4. After they have inspected and equalized as nearly as possible, they shall approve said lists or books and return same to the assessors for making up the general rolls, when said board shall meet again and approve the same, if same be found correct.

5. Whenever said board shall find it their duty to raise the assessment of any person's property, it shall be their duty to order the county clerk to give the person written notice who rendered the same, that they desire to raise the value of the same. It shall be their duty to cause the county clerk to give ten days written notice before their meeting by publication in some newspaper, but, if none is published in the county, then by posting a written or printed notice in each justice's precinct, one of which must be at the court house door.

6. The assessors of taxes shall furnish to the board of equalization, on the first Monday in May of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refuse to swear or to qualify or to have signed the oath or affirmation as required by law, together with the assessment of said person's property made by him through other information; and the board of equalization shall examine, equalize and correct assessments so made by the assessor, and when so revised, equalized and corrected, the same shall be approved.

[Acts 1879, p. 44. Amend. 1895, Sen. Jour., No. 108, p. 486. Amended Acts 1909, p. 373.]

**Definitions**—"Assessment roll."—The town assessors made up a tax roll, compiled from the county assessor's rolls, which was adopted by the council, and thereafter they made assessments, shown by assessment lists, against residents who had rendered property for taxation, but whose names were not on the tax roll. Held, that the assessment list was not an "assessment roll," within this article and Art. 7577. *Warrener v. Lambrecht* (Civ. App.) 146 S. W. 633.

**Authority of board.**—The board has no power to add to or strike from the assessment roll property placed thereon by the assessor or omitted by him. *County of Galveston v. Galveston Gas Co.*, 72 T. 509, 10 S. W. 583; *County of Galveston v. Galveston Wharf Co.*, 72 T. 557, 10 S. W. 587; *Davis v. Burnett*, 77 T. 3, 13 S. W. 613; *San Antonio St. Ry. Co. v. City of San Antonio*, 22 C. A. 341, 54 S. W. 907; *Sullivan v. Bitter*, 51 C. A. 604, 113 S. W. 195.

The board has power to revise and increase the valuation of any property upon the assessment rolls. *Duck v. Peeler*, 74 T. 268, 11 S. W. 1111. County boards of equalization have the power to raise and lower the value of property, and to correct errors in the assessments, and raising the value means raising the assessment. *San Antonio St. Ry. Co. v. City of San Antonio*, 22 C. A. 341, 54 S. W. 907.

Board of equalization cannot direct property rendered for taxes by the owner to be listed as unrendered property. *Cook v. Railway Co.*, 24 S. W. 544, 5 C. A. 644.

The county commissioners' court constitute a board of equalization for the state and county and not for the city. *Scollard v. City of Dallas*, 16 C. A. 620, 42 S. W. 640.

After the approval of the roll by the board of equalization, it has no further jurisdiction in the matter and an order reducing the assessment is void for want of authority in the board to make the order. *Clawson Lumber Co. v. Jones*, 20 C. A. 208, 49 S. W. 909.

**Terms of court.**—The commissioners' court sitting as a board of equalization is a regular session. *Abbott v. State*, 42 Cr. R. 8, 57 S. W. 98.

The term created by this article is a regular and not a called term, so that a county tax could be levied at such term under Art. 2244. *Staten v. State*, 63 Cr. R. 592, 141 S. W. 525.

**Notice to property owners.**—An admission "that defendant had notice of such raise in valuation" by the commissioners' court held an admission that he had due notice. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

Where a taxpayer does not object to an assessment, the board of equalization need not notify him to appear before it. *Clawson Lumber Co. v. Jones*, 20 C. A. 208, 49 S. W. 909.

The fact of a corporate officer's sickness held no excuse for failure of the corporation to appear before the board of equalization and object to an assessment. *Id.*

A national bank may be held liable for the taxes on the value of its stock as voluntarily rendered, but an equalization board could not, without its consent, augment its conceded liability. *First Nat. Bank v. City of Lampasas*, 33 C. A. 530, 78 S. W. 42.

**Necessity of application to board for relief.**—Where an assessment of property to plaintiff by a board of equalization was void, he was not bound to apply to the board for relief before suing to have the assessment annulled and the tax enjoined. *Sullivan v. Bitter*, 51 C. A. 604, 113 S. W. 193.

**Conclusiveness of equalization.**—The action of the board of equalization in revising or increasing the valuation of property is final. *Duck v. Peeler*, 74 T. 268, 11 S. W. 1111; *Johnson v. Holland*, 17 C. A. 210, 43 S. W. 71.

Whether property assessed for taxation has been undervalued cannot be determined by the courts; the action of the assessor and the commissioners' court being *res judicata*. *State v. Couts' Estate* (Civ. App.) 149 S. W. 281.

**Fraud of board as defense to action for taxes.**—In an action to recover taxes the fraud of a board of equalization in raising an assessment may be pleaded as a defense in a suit to recover taxes. *Mann v. State*, 18 C. A. 701, 46 S. W. 652.

**Failure of assessor to present list to commissioners' court.**—Failure of a tax assessor to list certain property and present the list to the commissioners' court for approval held not to render assessment void. *Haynes v. State*, 44 C. A. 492, 99 S. W. 405.

**Art. 7565. [5120a] Assessment of real property for previous years.**  
—If the assessor of taxes shall discover in his county any real property which has not been assessed or rendered for taxation for any year since 1870, he shall list and assess the same for each and every year for which it has not been assessed, in the manner prescribed in the preceding article; and such assessment shall be as valid and binding as though it had been rendered by the owner thereof; but no such real property shall be assessed by the assessor, unless he has ascertained by the certificate of the comptroller of public accounts the fact that the records of his office do not show that the property has been rendered or assessed for the year in which he assesses it. [Acts 1876, p. 265, sec. 15. *Id.* 1895, Sen. Jour., p. 486.]

Note.—The words "preceding article" would seem to refer to Art. 7563.

**Art. 7566. [5121] Assessment of back taxes on personal property.**  
—If the assessor of taxes shall discover in his county any property, or, outside of his county but belonging to a resident of the county, and

personal property which has not been assessed or rendered for taxation every year for two years past, he shall list and assess the same for each and every year thus omitted which it has belonged to said resident, in the manner prescribed for assessing other property; and such assessment shall be as valid and binding as though it had been rendered by the owner thereof. [Acts 1887, p. 127.]

**Applicability.**—This article is not effective as to assessing stock outside of the county in which it is situated, since Art. 7512 has been added to the statutes providing for listing stock in the county in which it is situated. *Cammack v. Matador Land & Cattle Co.*, 30 C. A. 421, 70 S. W. 455, 456.

**Validity of assessment.**—An assessment under this article which does not assess the property in the owner's name is void. *Connell v. State* (Civ. App.) 55 S. W. 980.

Personal property must be assessed in the same manner prescribed for assessment for other property. *Id.*

**Art. 7567. [5121a] Unlisted property; supplemental roll.**—Collectors of taxes of counties, cities and towns, when any taxpayer applies to them for the purpose of ascertaining the amount of his taxes, and the collector finds that his name or his property does not appear on the tax roll, shall, and it is hereby made their duty to, assess said taxpayer then and there, collect the taxes and enter the same upon a supplemental tax roll to be made by him. He shall make out, on forms to be furnished by the comptroller, three copies of such supplemental roll, one copy to be delivered to the comptroller of public accounts, one to be delivered to the county clerk, and one to be filed in the collector's office. Said supplemental tax roll shall be made out and delivered to the county commissioners' court with all other papers pertaining to the final settlement of said tax collector, and the same shall be examined and approved by the county commissioners' court, in like manner as upon the tax roll of the tax assessor. The collectors of taxes are hereby authorized and empowered to administer all oaths necessary to obtain a full and correct assessment of all taxable property assessed by them under this act. The oath shall be the same as is administered by tax assessors under existing law. The collector of taxes shall receive the following compensation for his services on all assessments made by him under this act, to-wit: For assessing the state and county taxes, four cents for each one hundred dollars of property so assessed, and for assessing the poll tax, five cents for each poll; which fee shall be paid in the same way as the tax assessor's fee in article 5133 [7583]. [Acts 1895, p. 103.]

**Art. 7568. [5122] Assessor to follow instructions.**—The assessors of taxes, in the execution of their duties, shall use the forms and follow the instructions which shall from time to time be prescribed by the comptroller of public accounts, and furnished to them by the county judge in pursuance of law. [Acts 1876, p. 265.]

See *Woolen v. State* (Cr. App.) 150 S. W. 1165.

**In general.**—A general order by the comptroller directing the tax upon cattle feeding in a pasture which lies in two counties to be paid in the county where the owner resides is valid. *Court v. O'Connor*, 65 T. 334.

Persons rendering their property for taxation in accordance with such regulations comply with the law and their property is free from taxation in any other county than the one in which it is rendered. *Id.*

A direction to an assessor to assess mineral rights severed from the surface in a conveyance held not to render such assessment invalid for inequality. *State v. Downman* (Civ. App.) 134 S. W. 787.

**Art. 7569. [5123] Equalization of assessments.**—Hereafter when any person, firm or corporation renders his, their or its property in this state for taxation to any tax assessor, and makes oath as to the kind, character, quality and quantity of such property, and the said officer accepting said rendition from such person, firm or corporation of such property is satisfied that it is correctly and properly valued according to the reasonable cash market value of such property on the market at the time of its rendition, he shall list the same accordingly; but, if the assessor is satisfied that the value is below the reasonable cash market value of such property, he shall at once place on said rendition opposite each piece of property so rendered an amount equal to the reasonable cash

market value of such property at the time of its rendition, and, if such property shall be found to have no market value by such officer, then at such sum as said officer shall deem the real or intrinsic value of the property; and, if the person listing such property or the owner thereof is not satisfied with the value placed on the property by the assessor he shall so notify the assessor, and if desiring so to do may make oath before the assessor that the valuation so fixed by said officer on said property is excessive; then it shall be the duty of such officer to furnish such rendition, together with his valuation thereon and the oath of such person, firm or officer of any corporation, if any such oath has been made, to the commissioners' court of the county in which said rendition was made, which court shall hear evidence and determine the true value of such property as is hereinafter provided; and in this connection it is provided that such officer or court shall take into consideration what said property could have been sold for any time within six months next before the rendition of said property. [Id. p. 270, sec. 17. Amended Acts 1907, p. 459.]

**Art. 7570. [5124] Boards may equalize without complaint.**—The boards of equalization shall have power, and it is made their official duty, to supervise the assessment of their respective counties, and, if satisfied that the valuation of any property is not in accordance with the laws of the state, to increase or diminish the same and to affix a proper valuation thereto, as provided for in article 7569 of this chapter; and, when any assessor in this state shall have furnished said court with the rendition as provided for in article 7569 of this chapter, it shall be the duty of such court to call before it such persons as in its judgment may know the market value or true value of such property, as the case may be, by proper process, who shall testify under oath the character, quality and quantity of such property, as well as the value thereof. Said court, after hearing the evidence, shall fix the value of such property in accordance with the evidence so introduced and as provided for in article 7569 of this chapter; and their action in such case or cases shall be final. [Id.]

See notes under Art. 7564.

**Remedy against illegal acts of assessor.**—The remedy against the illegal act of an assessor in raising an assessment without authority is by application to the board of equalization. *Duck v. Peeler*, 74 T. 263, 11 S. W. 1111.

**Art. 7571. [5124a] Penalty for neglect of duty by assessor.**—If any tax assessor in this state shall fail, refuse or neglect to place upon any rendition as provided for in article 7569 of this chapter, the true value or market value in accordance with the method of fixing such value as provided for herein, or shall fail, refuse or neglect to return to the commissioners' court such rendition, together with the oath of the owner or person listing such property for taxes when such oath has been made, as provided for in this chapter, or, if the assessor accepts the rendition from any person rendering property for taxation without reading to such person the oath and having it signed and sworn to as provided by law, such failure, refusal or neglect shall be deemed malfeasance on the part of such officer, and shall be cause for his removal from office. [Acts 1907, p. 459.]

**Art. 7572. [5124b] Oath of assessor.**—Every tax assessor and deputy tax assessor in this state, in addition to the oath prescribed by the constitution of this state, shall, before entering upon the duties of his office, take and subscribe to the following oath: "I, \_\_\_\_\_, tax assessor (or deputy tax assessor, as the case may be) in and for \_\_\_\_\_ county, Texas, do solemnly swear that I will personally view and inspect all the real estate and improvements thereon subject to taxation lying in said county that may be rendered to me for taxation by any corporation or individual, or by their agent or representative, as fully as may be practicable, and that I will, as fully as is practicable, view and inspect all

other taxable property in said county rendered to me as aforesaid; that I will to the best of my ability make a true estimate of the cash value, the market value of such property, if such property has a market value, and if it has no market value, then the real value of all such property, both real and personal, on the first day of January next preceding; and that I will make up and attach to each assessment sheet made up and sworn to by the said property owners, their agents or representatives, a true assessment and valuation of said property, together with a memorandum of all facts which I may learn bearing upon the value of said taxable property, and that I will make all possible inquiry relative to the true value of such property; and that I will attach said memoranda and statement of facts that I may ascertain as aforesaid to the said assessment sheets of the respective property owners. That I have read and understand the several provisions of the constitution and laws of this state relative to the valuation of taxable property, and that I will faithfully do and perform every duty required of me as tax assessor (or deputy tax assessor), by the constitution and laws of this state. So help me God." This oath shall be administered by the county clerk and shall be in duplicate; the original shall be by the clerk filed and recorded in the records of the county, and the duplicate shall be retained by the assessor, or the deputy, as the case may be. [Id.]

**Art. 7573. [5124c] Oath of board.**—When a commissioners' court in this state convenes as a board of equalization, before considering the subject of equalization of property values for the purposes of taxation, each member of the court, including the county judge, shall take and subscribe to the following oath: "I, \_\_\_\_\_, a member of the board of equalization of \_\_\_\_\_ county, for the year A. D. \_\_\_\_\_, hereby solemnly swear that, in the performance of my duties as a member of such board for said year, I will not vote to allow any taxable property to stand assessed on the tax rolls of said county for said year at any sum which I believe to be less than its true market value, or, if it has no market value, then its real value; that I will faithfully endeavor and as a member of said board will move to have each item of taxable property which I believe to be assessed for said year at less than its true market value, or real value, raised on the tax rolls to what I believe to be its true cash market value, if it has a market value, if not, then to its real value; and that I will faithfully endeavor to have the assessed valuation of all property subject to taxation within said county stand upon the tax rolls of said county for said year at its true cash market value, or, if it has no market value, then its real value. I further solemnly swear that I have read and understand the provisions contained in the constitution and laws of this state relative to the valuation of taxable property, and that I will faithfully perform all the duties required of me under the constitution and laws of this state. So help me God." Said oath shall be filed and recorded in the commissioners' court record as a part of the proceedings of that term of court. [Id.]

**Remedy for unlawful discrimination.**—Under this article and Const. art. 8, § 1, requiring all property to be taxed in proportion to its value, where bank stock is assessed at full value and land at 50 per cent. of its value, there is an unlawful discrimination against holders of bank stock, entitling them to enjoin the collection of the taxes on bank stock. *Porter v. Langley* (Civ. App.) 155 S. W. 1042.

**Art. 7574. [5124d] Neglect of duty cause for removal from office; attorney general to file suit.**—If, in passing upon the value of any property by a commissioners' court sitting as a board of equalization in this state, the court shall fix a value upon any property for the purpose of taxation and a minority of said court do not concur in the judgment of the court, the clerk shall record in the minutes of the court the names of the members, including the county judge, who do not concur in fixing such values (if the county judge shall cast the deciding vote in such matter); and, if any tax assessor or members of any commissioners'

court in this state shall knowingly fail or refuse to fix the value of property rendered for taxes in compliance with this chapter, and all other laws of this state, such failure, neglect or refusal shall constitute malfeasance in office on the part of such assessor or member or members of said court, and such failure, neglect or refusal shall be cause for his or their removal from office. Whenever the fact is brought to the knowledge of the attorney general of this state that any tax assessor, deputy tax assessor, county judge, or member of the commissioners' court, has failed, refused or neglected to comply with the provisions of this chapter, he shall at once file suit for the removal from office of such officer or officers thus offending. Such proceedings for the removal of such officer or officers herein provided for shall be brought in the district court of the county of such officer's residence; and such suit shall be brought by the attorney general of the state or under his direction. [Id. art. 5124e, R. S. 1895.]

Tax roll.—See notes under Art. 7576.

**Art. 7575. [5125] Assessor to furnish list of delinquents.**—The assessor of taxes shall furnish the board of equalization on the first Monday in June of each year, or as soon thereafter as practicable, a certified list of names of all persons who either refused to swear or to qualify, or to sign the oath or affirmation, as prescribed in this title; also a list of the names of those persons who refused to render a list of taxable property as required by this title. And should any person so failing or refusing to take the oath prescribed, or to render a list of their property, or to subscribe to the oath, as required by the provisions of this title, fail to give satisfactory reasons for such failure or refusal to the board of equalization within one month from the date of the filing of said list by the assessor, as required by this article, the board of equalization shall return a list of all persons who have failed to give satisfactory reasons for such failure or refusal to render, qualify or subscribe to the oath or affirmation, as the case may be, to the assessor of taxes, who shall present the said list to the grand jury of his county next impaneled after the board of equalization has furnished him with the list above required. [Acts 1876, p. 270, sec. 18.]

**Art. 7576. [5126] And submit lists to board of equalization.**—The assessor of taxes shall submit all the lists of property rendered to him prior to the first Monday in June to the board of equalization of his county on the first Monday in June, or as soon thereafter as practicable, for their inspection, approval, correction or equalization; and, after the board of equalization shall have returned the corrected and approved lists of taxable property, the assessor of taxes shall proceed to assess all the unrendered property of his county as provided for in this title, and shall proceed to make out and prepare his rolls or books of all the real and personal property listed to him, in the form and manner prescribed by the comptroller of the state. [Id. sec. 20.]

Tax roll.—Under this article and Arts. 7542, 7547, 7577, tax rolls are to be made up from lists by the assessors, made out from information furnished by property owners. *Lofton v. Miller*, 55 C. A. 253, 113 S. W. 911.

**Art. 7577. [5127] Shall make out rolls in triplicate.**—As soon as the board of equalization shall have examined, corrected and approved the assessor's list, the assessor of taxes shall prepare and make out a roll or book, as may be required by the comptroller, from the list so corrected and approved, and three exact copies of the same, the original to be furnished to the collector of taxes, the second to the comptroller of public accounts, and the third to be filed in the county clerk's office for the inspection of the public. He shall also prepare a roll or book, and two exact copies thereof, to be distributed, the first to the collector of taxes, the second to the comptroller, the third to be filed in the county



clerk's office, of all the real and personal property which has not been listed to him. [Id. sec. 19.]

See notes under Art. 7564.

**Art. 7578. [5128] Also rolls of unrendered property.**—The assessor of taxes shall, after his list of unrendered real and personal property shall have been examined, corrected and approved by the board of equalization as provided by law, prepare and make out his rolls or books of all unrendered real and personal property listed by him in the manner and form prescribed by the comptroller of the state. [Id. p. 271, sec. 21.]

**Art. 7579. [5129] And add up columns.**—The assessor of taxes shall add up and note the aggregate of each column on his roll or book, and he shall also make in each book or roll, under proper headings, a tabular statement showing the footings of the several columns upon each page, and he shall add up and set down under the respective headings the total of the several columns. [Id. sec. 22.]

**Art. 7580. [5130] Return and oath.**—The assessor of taxes shall, on or before the first day of August of each year for which the assessment is made, return his rolls or assessment books of the taxable property rendered to him or listed by him for that year, after they have been made in accordance with the provisions of this title, to the county board of equalization, verified by his affidavit, substantially on the following form:

The State of Texas, }  
..... County. }

I, ....., assessor of ..... county, do solemnly swear that the rolls (or books) to which this is attached contain a correct and full list of the real and personal property subject to taxation in ..... (fill the blank with the name of the county) county, so far as I have been able to ascertain the same; that I have sworn every person listing property to me in the county, or caused the same to be done in manner and form as provided by law, and that the assessed value set down in the proper column opposite the several kinds and descriptions of property is the true and correct valuation thereof as ascertained by law, and the footings of the several columns in said books and the tabular statement returned is correct, as I verily believe. [Id. sec. 23; Amend. Acts 1897, p. 204.]

**Proof of endorsement.**—Parol evidence is not admissible to prove the indorsement on the assessor's tax roll required by this article. Clayton v. Rehm, 67 T. 52, 2 S. W. 45.

**Supplemental roll—Necessity of affidavit.**—A supplemental roll for a given year is not admissible in evidence when it lacks the affidavit of the assessor, required by this article. Taber v. State, 38 C. A. 235, 85 S. W. 335.

**Remedy against illegal acts of assessor.**—See notes under Art. 7570.

**Art. 7581. [5131] All lists, etc., filed in county clerk's office.**—The assessor of taxes shall at the same time deliver to the board of equalization all the lists, statements of all property which shall have been made out or received by him, and arranged in alphabetical order, together with the roll withdrawn to aid him in the past assessment. The lists and statements shall be filed in the county clerk's office, and remain there for the inspection of the public. [Acts 1870, p. 271, sec. 24.]

**Admissibility of lists.**—See notes under Art. 3700.

**Art. 7582. [5132] Rolls, how distributed.**—After the board of equalization shall have examined the rolls or assessment books and made all corrections, if any be necessary, the assessor shall send one copy of each to the comptroller of public accounts, one copy of each to the collector of his county, and he shall file the other copies in the county clerk's office until the next assessment, when the assessor shall have the right to withdraw them and use as provided in this title. [Id. sec. 25.]

**Accrual of liability of taxpayer.**—An assessment roll does not fix any liability on the taxpayer or his property until the list has been approved by the board of equalization. Chisholm v. Adams, 71 T. 678, 10 S. W. 336.

**Art. 7583. Compensation.**—Each assessor of taxes shall receive the following compensation for his services, which shall be estimated upon the total values of the property assessed, as follows: For assessing the state and county tax, on all sums for the first two million dollars or less, five cents for each one hundred dollars of property assessed; and on all sums in excess of two million dollars and less than five million dollars, two and one-fourth cents on each one hundred dollars; and on all sums in excess of five million dollars, one and seven-tenths cents on each one hundred dollars; one-half of the above fees shall be paid by the state and one-half by the county; and for assessing the poll tax, five cents for each poll, which shall be paid by the state. The commissioners' court may allow to the assessor of taxes such sums of money, to be paid monthly from the county treasury, as may be necessary to pay for clerical work, taking assessments and making out the tax rolls of the county, such sums so allowed to be deducted from the amount allowed to the assessor as compensation upon the completion of said tax rolls; provided, the amount allowed the assessor by the commissioners' court shall not exceed the compensation that may be due by the county to him for assessing. [Acts 1883, p. 33. Amended Acts 1897, 1 S. S., p. 8, sec. 8.]

**Compensation.**—See Art. 3871.

**Conclusiveness of order fixing compensation.**—On order of the county commissioners' court approving a tax roll the determination as to assessor's compensation could not be attacked in a suit by him against the county to recover the amount due. *Dimmitt County v. Cavender* (Civ. App.) 65 S. W. 881.

**Art. 7584. [5134] How paid by state.**—The comptroller, on receipt of the rolls, shall give the assessor an order on the collector of his county for the amount due him by the state for assessing the state taxes, to be paid out of the first money collected for that year. [Id. sec. 27.]

**Art. 7585. [5135] By the county.**—The commissioners' court shall issue an order on the county treasurer of their county, to the assessor, for the amount due him for assessing the county tax of their county, to be paid out of the first money received from the collector on the rolls of that year. [Id. sec. 28.]

**Effect of order.**—The order of the commissioners' court approving the assessment rolls is tantamount to an adjudication of the amount the assessor is entitled to receive as compensation, and cannot be attacked by him in a suit against the county for his fees nor inquired into. *Dimmitt County v. Cavender* (Civ. App.) 65 S. W. 882.

**Art. 7586. [5136] Penalties for neglect of duty.**—Should any assessor of taxes fail or neglect to make out and return his rolls or books to the commissioners' court in the time and manner provided for in this chapter, it shall be competent for the commissioners' court to deduct from his compensation such amount as they may deem proper and right for such neglect or failure; and, should his rolls or books, when presented for approval to the commissioners' court, prove to be imperfect or erroneous, the court shall have the same corrected or perfected, either by the assessor or some other person than the assessor of taxes. Such person so employed by the commissioners' court shall be entitled to such part of the commissions to which such assessor is entitled as the court may allow; and said court shall so certify to the comptroller, who shall pay such person in the same manner as the assessor of taxes is paid; and the amount so paid shall be deducted by the comptroller from the commissions of the assessor of taxes, whose duty it was to have performed such work. [Id. sec. 29. See Acts 1879, ch. 47.]

**Art. 7587. [5137] Lands of non-residents in unorganized counties, etc.**—Lands lying in and owned by non-residents of unorganized counties, and lands lying in the territory not laid off into counties, shall be assessed by the comptroller of public accounts in accordance with such regulations as he may adopt and establish for that purpose. [Const., art. 8, sec. 12.]

**In general.**—Acts 1895, c. 42 (amended in 1897 and embodied in chapter 15 of this article), providing for the collection of taxes, did not repeal Arts. 7594-7596, originally enact-

ed in 1879, since the act of 1895 only sought to regulate the collection of taxes such as had been and were thereafter to be assessed and collected by local officers, who, before the passage of that act, were not empowered to collect any of the taxes, provision for the collection of which was made by Arts. 7587-7604, also dating from 1879. *Wolffarth v. De Lay* (Civ. App.) 142 S. W. 617.

**Proceedings constituting due process of law.**—The proceedings provided for by Arts. 7587-7604, relating to the sale of lands of nonresidents in unorganized counties for non-payment of taxes, and the notice of sale prescribed thereby, when substantially complied with, constitute due process of law. *Wolffarth v. De Lay* (Civ. App.) 142 S. W. 617.

## PROPERTY IN UNORGANIZED COUNTIES

**Art. 7588. [5138] Lands in unorganized counties.**—All lands and other property situated in the unorganized counties of this state, owned by residents of such unorganized counties, shall be assessed by the assessor of the organized county to which such unorganized county is attached for judicial purposes, and the taxes collected by the collector of such organized county; and the same remedies for the enforcement of the assessment and collection of such taxes shall apply as the law directs for the assessment and collection of the taxes on property situated in organized counties of this state. [Acts 1879, p. 141.]

**In general.**—Acts 24th Leg. c. 42 (amended in 1897 and embodied in chapter 15 of this article), concerning collection of delinquent taxes, and relating to the residents of counties unorganized and residents and nonresidents of organized counties, does not repeal Acts 16th Leg. c. 133 (Arts. 7588-7604), referring to nonresidents of unorganized counties owning land therein, authorizing the comptroller to assess and collect such taxes, and pointing out the method to be pursued. *De Lay v. Wolffarth* (Civ. App.) 154 S. W. 1030.

**Art. 7589. [5139] Duties of comptroller in relation thereto.**—The comptroller of the state is authorized, empowered and required to assess and collect the state and county taxes on all lands in this state which are situated in unorganized counties thereof and owned by non-residents thereof, in the manner hereinafter provided. [Id. sec. 2. Amended Acts 1897, p. 43.]

**Art. 7590. [5140] Same.**—The comptroller may at any time prior to the return of the assessment rolls to his office of the organized county to which such unorganized county or counties are attached for judicial purposes, receive the assessment of and collect the taxes on any lands situated in such unorganized county or counties which are owned by non-residents thereof. [Id. sec. 3.]

**Art. 7591. [5141] Same.**—As soon as the tax rolls of the organized county to which unorganized counties are attached for judicial purposes shall have been received by the comptroller, he shall, by comparing the lands rendered to the assessor of the organized county by the residents of such unorganized county or counties with those previously rendered to him by non-residents, make out a list of all unrendered lands situated in such unorganized county, and place such value upon the lands thus found to be unrendered as he, as a sworn officer, may deem just and fair; provided, nothing in this law shall be so construed as to prevent the comptroller from receiving the assessment and taxes due at any time prior to the completion of the unrendered list of such unorganized county. [Id. sec. 4.]

**In general.**—The provisions of this article must be complied with before the comptroller can make a valid sale. *Keenan v. Slaughter*, 49 C. A. 180, 108 S. W. 705.

**Art. 7592. [5142] Same.**—After the completion of the unrendered list provided for in this chapter, the owner or owners must pay according to the value and assessment made thereon by the comptroller. [Id. sec. 5.]

**Art. 7593. [5143] May appeal from comptroller's assessment.**—Assessment of lands rendered to the comptroller under the provisions of this chapter shall be made by the party rendering the same under oath as to their value; but if the comptroller thinks the valuation too low he shall object, and, if the comptroller and the party rendering the land can not agree, then the comptroller shall assess the same at such

value as he as a sworn officer may think it is worth; and, if the party rendering feels that the assessment is too high, he may appeal to the board of equalization, which for such purposes shall consist of the governor, attorney general and the secretary of state, and their decision shall be final. [Id. sec. 6.]

**Art. 7594. [5144] May levy upon and sell, when.**—Three months after the completion of the unrendered list of each unorganized county respectively, the comptroller shall proceed to levy upon and advertise all lands in such counties upon which the taxes are due and unpaid, giving notice of the amount due upon each separate tract of land, and giving such description of the land upon which taxes are due and unpaid as he may be in possession of; such notice to be given by publication in some weekly newspaper published in the state for four consecutive weeks; said notice to state that on a certain day therein named the comptroller will proceed to sell the land therein described, or so much thereof as may be necessary, to pay the state and county taxes due, and the cost of advertising the same. [Id. sec. 7.]

**In general.**—Acts 1895, c. 42 (amended in 1897 and embodied in chapter 15 of this title), providing for the collection of taxes, did not repeal this article and Arts. 7595, 7596, originally enacted in 1879, since the act of 1895 only sought to regulate the collection of taxes such as had been and were thereafter to be assessed and collected by local officers, who, before the passage of that act, were not empowered to collect any of the taxes, provision for the collection of which was made by Arts. 7587-7604, also dating from 1879. *Wolfarth v. De Lay* (Civ. App.) 142 S. W. 617.

**Notice of sale—Requisites of.**—Under this article the notice need not be addressed to the owner or to the unknown owner or to the nonresident owner or owners. *Wolfarth v. De Lay* (Civ. App.) 142 S. W. 617.

Under this article the fact that a notice published contained a description of some 500 sections of land arranged in columns and printed in 26-point type did not render the notice void. *Id.*

Though under this and the following articles the comptroller is only authorized to levy on and sell those lands owned by nonresidents at the time of the assessment, and this article does not in terms or substance provide to whom the notice of sale shall be addressed, nor its form, a notice addressed to "all parties interested," and which contains all other necessary requisites, is sufficient. *Id.*

A notice of sale of delinquent tax lands in unorganized counties by the comptroller was not void because it contained a description of some 500 sections arranged in columns and was printed in 26-point type. *Id.*

Description of lands in a notice of sale for taxes, as belonging to "C. & M. R. R. Co.," held sufficient, in the absence of other lands in the county to which the abbreviation might apply. *Id.*

That the records in the office of the commissioner of the general land office showed that a patent had been issued to K. in 1880 did not require him to take notice that the land was owned by K. or his heirs, in describing the same in a notice of sale for delinquent taxes. *Id.*

**Art. 7595. [5145] Sale.**—The sale shall commence on the day named in said notice, and may continue from day to day (Sundays and legal holidays excepted) until completed; such sale shall be had in front of the comptroller's office, in the city of Austin, between the hours of eight o'clock a. m. and four o'clock p. m. of each day. [Id. sec. 8.]

See notes under Art. 7594.

**In general.**—The provisions of this article must be complied with before the comptroller can make a valid sale. *Keenan v. Slaughter*, 49 C. A. 180, 108 S. W. 705.

**Art. 7596. [5146] May be bought by state, when.**—Should there be no purchaser of said lands, then the comptroller shall bid the same in to the state for the taxes due thereon and the costs of sale, and make a deed to the state to the same, including in one deed all lands bid in for the state or any one else. [Id. sec. 9.]

See notes under Art. 7594.

**Art. 7597. [5147] Redemption.**—Should the lands bid in by the comptroller for the state not be redeemed by the owner thereof or his agent within two years, by the party redeeming the same paying double the amount for which the said land was sold, then the said lands thus sold and unredeemed shall become vacant and revert to and become a part of the public free school fund, to be sold and disposed of as other lands belonging to the public free school fund are to be sold and disposed of by law. [Id. sec. 10.]

**Art. 7598. [5148] Tax deed.**—The comptroller shall give to the purchaser of any lands, the sale of which is provided for in this chapter, a deed to the same, giving in such deed such description of the land as may be necessary to identify the same, or such description as he may be in possession of. [Id. sec. 11.]

**Description.**—See notes under Chapter 15 of this title.

**Art. 7599. [5149] List of purchasers to be kept in office.**—The comptroller shall keep a list of the purchaser or purchasers of all such lands in his office, showing the name and postoffice of the purchaser or purchasers, together with the amount and description of the land sold and the amount for which it was sold, and the date of sale. [Id. sec. 12.]

**Art. 7600. [5150] Deed shall vest good title, when.**—The deed given to the purchaser or purchasers by the comptroller under the provisions of this chapter shall vest a good and sufficient fee simple title in the purchaser or purchasers, subject to be impeached only for actual fraud; provided, the former owner or owners thereof do not redeem the same within two years from the date of the deed, either by paying to the purchaser or purchasers double the amount for which said land was sold, or by making a tender of the same to him or his agent, or by depositing with the comptroller before the expiration of the two years double the amount for which such land was sold, to be paid by the comptroller, when called upon, to the purchaser or purchasers thereof. [Id. sec. 13.]

See *Holbein v. De La Garza* (Civ. App.) 126 S. W. 42.

**Art. 7601. [5151] County taxes to be paid, where.**—All county taxes collected under the provisions of article 5147 [7597] shall be paid into the county treasury of the organized county to which the unorganized county is attached for judicial purposes. [Id. sec. 14.]

**Art. 7602. [5152] Comptroller to keep taxes of unorganized counties until.**—All county taxes, other than taxes to pay pro rata of indebtedness to parent county, due unorganized counties, collected by the comptroller, shall be kept by him to the credit of such unorganized county until the total sum to the credit of the county shall reach the sum of five thousand dollars. Then he shall, upon the demand of the treasurer of the former unorganized county, when the same shall have organized, pay said sum, or whatever amount is held to the credit of said county, over to said treasurer. And all county taxes collected by the comptroller after the amount to the credit of such unorganized county shall reach the amount of five thousand dollars shall be paid into the county treasury of the organized county to which the unorganized county is attached for judicial purposes. [Id. sec. 15. Amended Acts 1897, p. 43.]

**Art. 7603. [5152a] Same.**—Where the amount to the credit of any unorganized county now exceeds five thousand dollars the comptroller shall keep said sum to be paid to the treasurer of such unorganized county when the same shall organize; and all county taxes, other than taxes collected to pay pro rata of indebtedness to parent county, hereafter collected by the comptroller in such counties, shall be paid into the county treasury of the organized county to which such county is attached for judicial purposes. [Acts 1897, p. 43.]

**Art. 7604. [5153] Special deposit to be made by comptroller.**—All money received by the comptroller on deposit for the redemption of land sold and bought by individuals shall be by him deposited in the state treasury as a special deposit, subject to the order of the party to whom the conditional deed to such land was given. So also shall all county taxes collected by the comptroller under the provisions of this law be

deposited in the state treasury as a special fund, subject to the order of the comptroller, to be paid to the county treasurers as provided in this chapter. [Id. sec. 16.]

## CHAPTER THIRTEEN

### OF THE COLLECTION OF TAXES; ELECTION AND QUALIFICATION OF THE COLLECTOR

Art. 7605.	Collector; election and term of office.	Art. 7634.	Advertisement of real property for sale.
7606.	Vacancies, how filled.	7635.	List to be posted.
7607.	Sheriff, collector when.	7636.	May be continued from day to day.
7608.	Bond and oath.	7637.	Homesteads liable only for.
7609.	New bond, etc.	7638.	Sales of land, how made.
7610.	Bond for county taxes.	7639.	Tax deed, and its requisites.
7611.	All bonds to be first approved.	7640.	Sales to be reported to commissioners' court.
7612.	May appoint deputies.	7641.	Redemption of land sold for taxes.
7613.	Rolls to be warrant, etc.	7642.	Redemption of land within two years.
7614.	Collector for all taxes.	7643.	Redemption from private purchasers.
7615.	Collections, when to begin.	7644.	Receipt of collector, notice when.
7616.	Shall keep office at county seat.	7645.	Relief, when.
7617.	Tax receipts and requisites.	7646.	Same.
7618.	Quarterly reports, requisites of.	7647.	Certificate of redemption from collector, notice when.
7619.	Duties of clerk and collector.	7648.	Lands to be bid in for state, when.
7620.	Report not to be approved, unless.	7649.	May redeem, how.
7621.	List of delinquents and insolvents to be made out.	7650.	If not redeemed.
7622.	Collector to endeavor to collect.	7651.	May redeem by paying costs.
7623.	Non-residents.	7652.	Commissioners' court to sit as board of inquiry, when.
7624.	Forced collections to begin, when.	7653.	Collector to file complaint, when.
7625.	Personal property may be pointed out.	7654.	Compensation.
7626.	When property about to be removed from county.	7655.	On occupation taxes.
7627.	Tax lien superior to assignment, attachment, inheritance or devise, except.	7656.	Compensation for one levy only, when.
7628.	Executions upon property in other counties than that where taxes are due.	7657.	Taxation upon lands in unorganized counties.
7629.	Tax collector not allowed credit for delinquents, when.	7658.	Payments of moneys.
7630.	All property liable for taxes.	7659.	Same.
7631.	Sales of property, how made.	7660.	Notification to pay.
7632.	If property is insufficient.	7661.	District and county attorneys to sue for taxes on personal property.
7633.	Sales of real property, when made.	7662.	Limitation not available to delinquent taxpayer.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 7605. [5154] Election and term of collector.**—In each county having ten thousand inhabitants, to be determined by the last preceding census of the United States, there shall be elected by the qualified voters, at the same time and under the same law regulating the election of state and county officers, a collector of taxes, who shall hold his office for two years and until his successor is elected and qualified. [Const., art. 8, sec. 16. Act Aug. 21, 1876, p. 259, sec. 1.]

Time of qualification—Evidence.—See notes under Art. 3687, Rule 9.  
Collectors in cities, towns and villages.—See Title 22, Chapters 7, 14.

**Art. 7606. [5155] Vacancies, how filled.**—Should the office of collector of taxes from any cause become vacant before the expiration of said term, it shall be the duty of the commissioners' court in the county in which such vacancy shall occur, to appoint a collector of taxes, who shall be qualified in the same manner and subject to like bonds as the collector of taxes elected; and the collector of taxes so appointed shall hold his office for and during the unexpired term of his predecessor and until his successor shall have been qualified; and the collector of taxes so appointed shall have all the rights and perform all the duties required by law of the collector of taxes elected. [Id.]

**Art. 7607. [5156] Sheriff a collector, when.**—In each county having less than ten thousand inhabitants, the sheriff of such county shall be the collector of taxes, and shall have and exercise all the rights, powers and privileges, be subject to all the requirements and restrictions, and perform all the duties imposed by law upon collectors; and he shall also give the same bonds required of a collector of taxes elected. [Const., art. 8, sec. 16. Id. sec. 2.]

**In general.**—In determining whether a sheriff elected in 1880 was, under section 16, article 8, of the constitution of 1876, also ex officio collector of taxes by reason of his county containing less than ten thousand inhabitants, "under the last preceding census of the United States," the list of the enumerator taking the tenth census for the county, if duly certified as such, and filed in the office of the county clerk, prior to his election, will govern. *Nelson v. Edwards*, 55 T. 389.

**Injunction against collection of taxes.**—See notes under Art. 4643.

**Art. 7608. [5157] Bond and oath.**—Every collector of taxes, within twenty days after he shall have received notice of his election or appointment, and before entering upon the duties of his office, shall give a bond based upon unincumbered real estate of the sureties subject to execution, payable to the governor and his successors in office, in a sum which shall be equal to the whole amount of the state tax of the county as shown by the last preceding assessment, with at least three good and sufficient sureties, to be approved by the commissioners' court of his county, which shall be further subject to the approval of the comptroller, and shall take and subscribe the oath prescribed by the constitution, which, together with said bonds, shall be recorded in the office of the clerk of the county court of said county and be forwarded by the county judge of the county to the comptroller to be deposited in his office. Said bond shall be conditioned for the faithful performance of the duties of his office as collector of taxes for and during the full term for which he was elected or appointed, and shall not become void upon the first recovery, but suit may be maintained thereon until the whole amount thereof be recovered. [Id. sec. 3.]

**Bonds.**—Evidence, see notes under Art. 3687, Introductory, § 53.

A tax collector must give bond for faithful performance of his duties for collection of state taxes and another like bond for collection of county taxes. *T. L. & C. Co. v. Hemphill County* (Civ. App.) 61 S. W. 335.

A tax collector for whom plaintiffs were sureties on his bond to the state, was not their agent so as to bar an action by plaintiffs for his wrong. *Boaz v. Ferrell* (Civ. App.) 152 S. W. 200.

— **Approval.**—Upon an actual approval of a tax collector's bond by the comptroller it is not necessary to its validity that the approval should be indorsed upon it. *Oglesby v. State*, 73 T. 658, 11 S. W. 873.

— **Liability in general.**—As to liability of collector and sureties for failure to collect taxes on county bonds, see Art. 694.

A tax collector does not occupy toward the state the relation of a mere bailee for hire, who is responsible for only so much care of the public money as a prudent man would take of his own; he is bound to account for and pay over the public money that he collects, less his commission, or his securities must pay it for him. *Boggs v. State*, 46 T. 10.

Neither the sheriff, as tax collector, nor his securities can set up the fact that no legal levy of taxes was made in an action against them for not paying over, when it is shown that the taxes were collected by the officer and were not paid over. *Webb County v. Gonzales*, 69 T. 456, 6 S. W. 781, following *Morris v. State*, 47 T. 583, and other cases cited.

In a suit against a defaulting tax collector, in the absence of evidence showing when his collections were made, or that he was in default before the end of the fiscal year, interest, under the provisions of this chapter, should be required of him on the amount for which he was in default, only, from the end of the fiscal year for which the collections were made. *Cordray v. State*, 55 T. 140.

Where a tax collector issued receipts to his creditors for taxes which he did not collect, the sureties on his bond were liable therefor. *Ward v. Marion County*, 26 C. A. 361, 62 S. W. 557, 63 S. W. 155.

Sureties of a defaulting tax collector held not entitled to claim the judgment recovered by the state against a taxpayer as a judgment recovered for their own use. *Texas & N. O. R. Co. v. State*, 43 C. A. 580, 97 S. W. 142.

Liability for money received by a sheriff as such is not covered by his bond as ex officio tax collector. *American Bonding & Trust Co. v. Garrett* (Civ. App.) 129 S. W. 398.

— **Payments by collector.**—A payment upon a draft upon the collector on account of the school funds is subject to the same rules as to the use of state funds, and the effect of using them in such payments, as if made directly to the treasury. That the comptroller was ignorant of the source from which funds have been received, which have been by him, without instruction from the collector, applied to his indebtedness for taxes for former years, does not deprive the sureties on the collector's bond, at the time such

taxes were collected, of the benefit of the payment of such funds into the treasury by their principal. *State v. Middleton*, 57 T. 185.

Taxes collected and paid into the treasury cannot lawfully be applied to the discharge of a pre-existing debt of the tax collector on a former account. The collector cannot authorize, nor can the comptroller apply it to the injury of the sureties of the collector. *Id.*

— **Indemnifying surety.**—A tax collector cannot assign uncollected taxes by the delivery of tax receipts to a surety on his bond in order to indemnify him for money advanced to pay a deficit in the collector's account. *Arbuckle v. State*, 81 T. 191, 16 S. W. 876.

— **Subrogation.**—Where collected tax money belonging to the state and to a county was commingled by the collector, and in part embezzled, and the balance paid to the county, the sureties on the collector's bond to the state, after payment to the state under the terms of the bond, were subrogated to the state's rights, as against the county and the sureties on the collector's county bond. *Boaz v. Ferrell* (Civ. App.) 152 S. W. 200.

**Evidence and burden of proof.**—See notes under Art. 3687.

**Art. 7609. [5158] New bond.**—The collector of taxes may be required to furnish a new bond or additional security whenever, in the opinion of the commissioners' court or comptroller of public accounts, it may be advisable. Should any collector of taxes fail to give a new bond and additional security, when required, he shall be suspended from office by the commissioners' court of his county, and immediately thereafter be removed from office in the mode prescribed by law. [*Id.*]

**In general.**—If the necessity arises, additional security may be required, and the collector cannot further discharge his official duties until further security is furnished. *Orange County v. T. & N. O. Ry. Co.*, 35 C. A. 361, 80 S. W. 671.

**Time to give new bond.**—An officer required to give a new bond is entitled to a reasonable time therefor. *Poe v. State*, 72 T. 625, 10 S. W. 737.

**Art. 7610. [5159] Bond for county taxes.**—Collectors of taxes shall give a like bond, with like conditions, to the county judges of their respective counties and their successors in office, in a sum not less than the whole amount of the county tax of the county, as shown by the last preceding assessment, with at least three good and sufficient sureties, to be approved by the commissioners' court of his county; which bond shall be recorded and deposited in the office of the clerk of the county court. A new bond and additional security may be required; and, for a failure to give such new bond or additional security, the collector of taxes may be removed from office in the manner prescribed by law. [*Id.* p. 260, sec. 4.]

**Art. 7611. [5160] All bonds to be first approved.**—No collector of taxes shall enter upon the discharge of the duties of the office until all the bonds required of him by law for the collection of any taxes, state, county or special, shall have been given and approved.

**Art. 7612. [5161] May appoint deputies.**—Each collector of taxes may appoint one or more deputies to assist him in the collection of taxes, and may take such bond and security from the person so appointed as he deems necessary for his indemnity; and the collectors, in all cases, shall be liable and accountable for his proceedings and misconduct in office. [*Id.* sec. 9.]

**Liability of deputies in favor of collector.**—Evidence, in an action by a tax collector for the recovery of money alleged to have been misappropriated by a deputy, held to warrant a finding that a certain amount sought to be recovered was received during the deputy's absence. *Hutton v. Graham* (Civ. App.) 140 S. W. 1185.

**Evidence held to sustain a judgment for defendant.** *Id.*

**Art. 7613. [5162] Rolls to be a warrant.**—When the collector of taxes of any county shall have received the assessment rolls or books of the county, he shall receipt to the commissioners' court for the same; and said rolls or books shall be full and sufficient authority for the county collector of taxes to receive and collect the taxes therein levied. [*Id.* sec. 5.]

**Art. 7614. [5163] Collector for all taxes.**—The collector of taxes shall be the receiver and collector of all taxes assessed upon the tax list in his county, whether assessed for the state or county, school, poorhouse or other purpose; and he shall proceed to collect the same according to law, and place the same when collected to the proper fund,



and pay the same over to the proper authorities, as hereinafter provided. [Id. sec. 6.]

See *Davis v. Riley* (Civ. App.) 154 S. W. 314.

**Authority of collector.**—A tax collector and his deputy collecting taxes in a district in which he has no authority to act is liable in actual damages as a trespasser. *Wright v. Jones*, 14 C. A. 423, 38 S. W. 249.

The duty of the tax collector to collect all taxes due the county and the state is one of the governmental ministerial functions which he alone can exercise. *Stringer v. Franklin County* (Civ. App.) 123 S. W. 1168.

**Amount and method of payment.**—Payment for taxes with a warrant calling for current money is equivalent to a payment with the money itself, and is good. *Ostrum v. City of San Antonio*, 30 C. A. 462, 71 S. W. 304.

The giving of credit to a tax collector held not to have amounted to payment of taxes. *Figures v. State* (Civ. App.) 99 S. W. 412.

A tax collector has no legal authority to agree with a taxpayer to substitute his responsibility for that of the taxpayer. *Graves v. Bullen*, 53 C. A. 261, 115 S. W. 1177.

A tax collector was not bound to accept a part of taxes due upon the owner's claim that the amount tendered was the whole amount due. *Lufkin Land & Lumber Co. v. Noble* (Civ. App.) 127 S. W. 1093.

**Art. 7615. [5164] Collections, when to begin.**—The collector of taxes of each county shall begin the collection of taxes annually on the first day of October, or so soon thereafter as he may be able to obtain the proper assessment rolls, books or data upon which to proceed with the business; and he shall post up notices—not less than three—at public places in each voting or magistrate's precinct in his county, at least twenty days previous to the day said taxpayers are required to meet him for the purpose of paying their taxes, stating in said notice the times and places the same are required to be paid; and it shall be the duty of said collector, or his deputy, to attend at such times and places for the purposes aforesaid, and shall remain at each place at least two days; and, if the collector shall, from any cause, fail to meet the taxpayers at the time and place specified in the first notice, he shall, in like manner, give a second notice. [Id. sec. 7.]

**Essentials of validity of tax.**—A valid assessment is essential to the validity of a tax. *Sullivan v. Bitter*, 51 C. A. 604, 113 S. W. 193.

**Time for payment of taxes.**—A taxpayer cannot pay his taxes to the tax collector of the county, so as to relieve him from liability to the county for his taxes, and from the tax lien, before the assessment rolls have been delivered to the collector, although the rolls had been duly made, and passed on and approved by the board of equalization, and although the collector had been duly elected, had qualified and was acting as tax collector, when he received the taxes (which he did not pay over to the county). A county tax collector has no authority to receive taxes before the assessment rolls have been delivered to him. The public must take notice of the authority under which a public officer acts. *Orange County v. T. & N. O. Ry. Co.*, 35 C. A. 361, 80 S. W. 670.

It is contemplated by the law that taxes are due and payable on October 1st for that year. The fact that seizure of property for taxes cannot be made prior to January 1st indicates a mere indulgence of the taxpayer and not that the taxes are not sooner due and payable. *Wall v. Club & Cattle Co.* (Civ. App.) 88 S. W. 536.

Payment of taxes to the county collector before the tax rolls are delivered to him and before he has any warrant to receive them held not a payment of the taxes as against the state. *Texas & N. O. R. Co. v. State*, 43 C. A. 580, 97 S. W. 142.

And a contract between an attorney general and the bondsmen of a defaulting tax collector held no defense to the state's action against the taxpayer to recover the tax. *Id.*

**Place of payment.**—See notes under Art. 7616.

**Art. 7616. [5165] Shall keep office at county seat.**—The collector of taxes shall keep his office at the county seat of his county; and it shall be the duty of every person who has failed to attend and to pay his taxes at the times and places in his precinct named by the collector, as provided in the preceding article, to call at the office of the collector and pay the same before the last day of December of the same year for which the assessment is made. [Acts 1887, p. 127.]

**Place of payment.**—Under this article, Arts. 2943–2945, 2957, 7615, and Terrell's Election Law, § 152 (Acts 29th Leg. 1st Called Sess. c. 11), providing that all poll taxes shall be paid on or before the 1st day of February of each year, and making it a penal offense for the collector to receive poll taxes and antedate the receipts therefor after such time, payment by a citizen of his poll tax at any other place than the office of the collector does not in law constitute a payment of the tax, so as to entitle the taxpayer to a receipt on which he can vote, unless made to a deputy in a town of 10,000 inhabitants other than the county seat, and payment of poll taxes by citizens not residing in such a town, on January 30, 1912, to a private agent authorized to pay the same to the tax collector and receive the receipts, which did not reach the tax collector until the 1st and 2d days of February, 1912, did not entitle the taxpayers to receipts dated as of January 31, 1912, so as to enable them to vote thereon. *Davis v. Riley* (Civ. App.) 154 S. W. 314.

**Art. 7617. [5166] Tax receipt and its requisites.**—The collector of taxes or his deputy, whenever any tax is paid, shall give to the person paying the same a receipt therefor, specifying the amount of state ad valorem tax, amount of state poll tax, the amount of county ad valorem tax, the amount of county poll tax, and the year or years for which such tax was levied; said receipt shall also show the number of acres of land in each separate tract, number, abstract and name of original grantee; the said receipt shall have a duplicate stub showing the name of the person, the date, the amount of each separate tax and the date of payment. The collector of taxes shall provide himself with a seal, on which shall be inscribed a star with five points, surrounded by the words, "Collector of taxes, ——— County" [the blank to be filled with the name of the county], and shall impress said seal to each receipt given by him for taxes collected on real estate; and said receipt having the seal attached shall be admissible to record in the county in which the property is situated in same manner as deeds duly authenticated, and when so recorded shall be full and complete notice to all persons of the payment of said tax. [Acts 1876, p. 261, sec. 10.]

**Payment of taxes—Evidence and presumptions.**—See, also, notes under Art. 3687, Rule 5, §§ 6, 65, and Rule 19.

**Evidence in trespass to try title, in which defendants' defense was limitations, based on the payment of taxes on the land, held not to show a payment.** Lofton v. Miller, 55 C. A. 253, 118 S. W. 911.

**Recovery of taxes notwithstanding receipts.**—Though tax receipts have been made out and delivered to taxpayers, the county may still recover the taxes indicated in such receipts if not actually paid. Graves v. Bullen, 53 C. A. 261, 115 S. W. 1177.

**Art. 7618. [5167] Quarterly reports; requisites of; duties of collector.**—1. At the end of each month, the collector of taxes shall, on forms to be furnished by the comptroller of public accounts, make an itemized report under oath to the comptroller, showing each and every item of ad valorem, poll and occupation taxes collected by him during said month, accompanied by a summarized statement showing full disposition of all state taxes collected.

2. He shall present such report, together with the tax receipt stubs, to the county clerk, who shall, within two days, compare said report with said stubs; and, if same agree in every particular as regards names, dates, and amounts, he (the clerk) shall certify to its correctness, for which examination and certificate he shall be paid by the commissioners' court twenty-five cents for each certificate and twenty-five cents for each two hundred taxpayers on said report.

3. The collector of taxes shall then immediately forward his reports so certified to the comptroller, and shall pay over to the state treasurer all moneys collected by him for the state during said month, excepting such amounts as he is allowed by law to pay in his county, reserving only his commissions on the total amount collected; and, to enable him to do so, he may, at his own risk, send the same to the state treasurer at the least cost to the state, on which he shall be allowed credit by the comptroller upon filing receipts showing actual amount of exchange paid; provided, that the state treasurer shall accept no payment other than money orders or direct cash payments, which may be made through express companies; banks, or any other source. The state treasurer, whenever he may receive a remittance from a collector of taxes, shall promptly pay the money so remitted to the state treasury, on the deposit warrant of the comptroller, and the money when so deposited shall be a credit to the said collector of taxes.

4. The collector of taxes shall pay over to the state treasurer all balances in his hands belonging to the state, and finally adjust and settle his account with the comptroller on or before the first day of May of each year; and, to enable him to do so, the commissioners' court shall convene on or before the third Monday in April for the purpose of examining and approving his final settlement papers.

5. The allowance of a delinquent and insolvent list to the collector, in accordance with article 7621, shall not absolve any taxpayer or property thereon from the payment of taxes; but it shall be the duty of the collector to use all necessary diligence to collect the amounts due thereon, after it is allowed by the commissioners' court; and he shall issue special tax receipts therefor, to be furnished by the comptroller; which blank receipts shall be numbered and charged to the collector, who shall account for same at his next annual settlement, in the same manner as occupation tax receipts; he shall also make itemized monthly reports of such collections, using special blanks for that purpose.

6. To enforce the prompt and speedy collection and remittance of taxes, and to provide for the proper accounting of same, the comptroller shall prescribe and furnish the forms to be used by collectors of taxes, and the mode and manner of keeping and stating their accounts, and shall adopt such regulations as he may deem necessary in regard thereto. It shall be his imperative duty to enforce a strict observance of all the provisions of these articles.

7. It shall be the duty of the comptroller to notify the district attorney of the district, or the county attorney of the county, in which the collector resides, and the sureties on the bond of the collector, of any failure to comply with any of the provisions of this article. [Acts 1893, p. 90.]

**Duties of comptroller of public accounts.**—See Title 65, Chapter 2.

**Art. 7619. [5168] Duties of clerk and collector.**—1. The collector of taxes shall at the end of each month make like reports to the commissioners' court of all the collections made for the county, conforming as far as applicable and in like manner to the requirements as to the collection and report of taxes collected for the state. The county clerk shall likewise, within two days after the presentation of said report by the collector, examine said report and stubs, and certify to their correctness as regards names, dates and amounts; for which examination and certificate he shall be paid by the collector of taxes fifty cents each month, which amount shall be allowed to the collector by the commissioners' court.

2. The clerk shall file said report intended for the commissioners' court, together with the tax receipt stubs, in his office for the next regular meeting of the commissioners' court.

3. The collector of taxes shall immediately pay over to the county treasurer all taxes collected for the county during said month, after reserving his commissions for collecting the same, and take receipts therefor, and file with the county clerk.

4. At the next regular meeting of the commissioners' court, the collector of taxes shall appear before said court and make a summarized statement, showing the disposition of all moneys, both of the state and county, collected by him during the previous three months. Said statement must show that all taxes due the state have been promptly remitted to the state treasury at the end of each month, and all taxes due the county have been paid over promptly to the county treasurer, and shall file proper vouchers and receipts showing same.

5. The commissioners' court shall examine such statement and vouchers, together with the itemized report and tax receipt stubs filed each month, and shall compare the same with the tax rolls and tax receipt stubs. If found correct in every particular, and if the collector of taxes has properly accounted for all taxes collected, as provided above, the commissioners' court shall enter an order approving said report, and the order approving same shall be recorded in the minutes, as other proceedings of said court.

6. The collector of taxes shall finally adjust and settle his account with the commissioners' court for the county taxes collected, at the

same time and in the same manner as is provided in the foregoing article in his settlement with the state. [Id.]

Limitations.—See notes at end of Title 87, § 43.

**Art. 7620. [5169] Report not to be approved, unless.**—If any collector of taxes shall have failed at the end of each month, or within three days thereof, to promptly remit to the state treasurer the amount due by him to the state, or pay over to the county treasurer the amount due by him to the county, the commissioners' court; at the next regular meeting, shall ascertain the facts; and, if the collector of taxes fails or refuses to pay or remit the same and file proper vouchers therefor, as provided in the foregoing article, the commissioners' court shall not approve his reports and accounts, but shall ascertain the amounts due by him, both to the state and county, and enter an order requiring him to pay the same to the proper treasurers, as is provided in articles 7658 and 7659 of the Revised Statutes, and notify such collector, as is provided for in article . . . . . [article 7660], under penalty for failure to do so, in section 4 of said article [as provided for in the Penal Code]. Whenever the collector of taxes shall fail or refuse to remit to the state treasurer the amounts due the state, when requested, the comptroller shall notify him under articles [7658], 7659, 7660 and 7661, and for such failure be subject to the penalties provided in the Penal Code. [Acts 1893, p. 90.]

**Art. 7621. [5170] List of delinquents and insolvents to be made out.**—The collector of taxes shall make out on forms, to be furnished for that purpose by the comptroller of public accounts, between April 1 and 15 of each year, list of delinquent or insolvent taxpayers, the caption of which shall be, the "list of delinquent or insolvent taxpayers." In this list he shall give the name of the person, firm, company, or corporation from whom the taxes are due, in separate columns; and he shall post one copy of these delinquent or insolvent lists at the court house door of the county, and one list at the court house door, or where court is usually held, in each justice precinct in his county; and the collector of taxes, upon the certificate of the commissioners' court that the persons appearing on the insolvent or delinquent lists have no property out of which to make the taxes assessed against them, or that they have moved out of the county, and that no property can be found in the county belonging to such persons, out of which to make the taxes due, shall be entitled to a credit on final settlement of his accounts for the amounts due by the persons, firms, companies, or corporations certified to by the commissioners' court, as above provided for. [Id.]

See notes under Art. 7629.

**Art. 7622. [5171] Collector to endeavor to collect delinquent list.**—The allowance of an insolvent list to the collector in accordance with the provisions of the preceding article shall not absolve any taxpayer or property thereon from the payment of taxes; but it shall be the duty of the collector to use all necessary diligence to collect the amounts due on the insolvent list after it is allowed, and report and pay over to the proper officers all amounts collected on the same. [Id. p. 262, sec. 13.]

**Art. 7623. [5172] Non-residents.**—Non-residents of counties, owing state or county taxes, are hereby authorized to pay the same to the comptroller of public accounts; provided, that all taxes due by said non-residents shall be paid at the comptroller's office on or before the first day of January next after the assessment of such taxes; provided, further, that the collectors of taxes shall be entitled to the commissions on all moneys paid by non-residents to the comptroller of public accounts, due their counties respectively. [Acts 1879, p. 41.]

In general.—Nonresidents can pay taxes to the comptroller, and a levy cannot be made before expiration of time within which comptroller can send his list of delinquent taxes to county collector. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200, 201.

**Art. 7624. [5173] Forced collections to begin, when.**—If any person shall fail or refuse to pay the taxes imposed upon him or his property by law, until the first day of January next succeeding the return of the assessment roll of the county to the comptroller, the collector of taxes shall, by virtue of his tax roll, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with all costs accruing thereon; provided, there shall be no levy on property when the owner thereof has the right to pay at the comptroller's office, until a list of the persons who have paid their taxes at said office has been furnished the collector of taxes by the comptroller. The comptroller shall forward said list of paid taxes on or before the first day of February of each year; and the tax collector shall, immediately on receipt of said list from the comptroller, levy on and sell the property of such non-residents as have not paid their taxes, in accordance with the law regulating the sale of property for taxes. [Acts 1887, p. 127.]

Enjoining collection of taxes.—See notes under Art. 4643.

**Art. 7625. [5174] Personal property may be pointed out.**—If any person shall point out to the collector of taxes sufficient personal property belonging to him to pay all taxes assessed against him before the first day of January of any year, the collector shall immediately levy upon and sell such property so pointed out, in accordance with the laws regulating tax sales of a similar class of property. [Id.]

**Art. 7626. [5175] When property about to be removed from county.**—If it comes to the knowledge of the collector that any personal property assessed for taxes on the rolls is about to be removed from the county, and the owner of such property has not other property in the county sufficient to satisfy all assessments against him, the collector shall immediately levy upon a sufficiency of such property to satisfy such taxes and all costs, and the same sell in accordance with the law regulating sales of personal property for taxes, unless the owner of such property shall give bond, with sufficient security, payable to and to be approved by the collector, and conditioned for the payment of the taxes due on such property, on or before the first day of January next succeeding. [Id.]

**Art. 7627. [5175a] Tax lien superior to assignment, attachment, inheritance or devise, except.**—In all cases where a taxpayer makes an assignment of his property for the payment of his debts, or where his property is levied upon by creditors, by writs of attachment or otherwise, or where the estate of a decedent is or becomes insolvent, and the taxes assessed against such person or party, or against any of his estate remains unpaid in part or in whole, the amount of such unpaid taxes shall be a first lien upon all such property; provided, that, when taxes are due by an estate of a deceased person, the lien herein provided for shall be subject to the allowances to widows and minors, funeral expenses, and expenses of last sickness; and such unpaid taxes shall be paid by the assignee, when said property has been assigned by the sheriff out of the proceeds of sale in case such property has been seized under attachment or other writ, and by the administrator or other legal representative of decedents; and, if said taxes shall not be paid, all said property may be levied on by the tax collector and sold for such taxes in whomsoever's hands it may be found. [Report Joint Committee, 1895, No. 111, Sen. Jour., p. 486.]

**In general.**—This article does not apply to a tax in favor of a municipal corporation incorporated under the general laws of this state. It creates a lien upon personal property when the conditions named in it exist. Such a lien does not exist independent of this article. *People's Nat. Bank v. City of Ennis* (Civ. App.) 50 S. W. 632.

This article does not amount to exemption, for it does not undertake to repeal any other legislation on the subject. Its purpose is to aid in collection of taxes, and is not for the benefit of individuals. *State v. Jordan*, 25 C. A. 17, 59 S. W. 826, 60 S. W. 1009.

**Priority of liens.**—This article has no bearing on the question as to the superiority of the landlord's lien, under Art. 5477, over the claim of the children of a deceased tenant for an allowance in lieu of exemptions, under Art. 3414. *Champion v. Shumate*, 90 T. 597, 34 S. W. 128, 362, 40 S. W. 394.

**Liability for proceeds.**—The court has authority to order taxes paid out of the proceeds of property sold under the foreclosure of a mechanic's lien. *Kahler v. Betterton* (Civ. App.) 51 S. W. 289.

**Art. 7628. Execution on property in other counties than that where tax is due.**—Whenever it shall appear to the collector of taxes in any county in this state that any person who is delinquent in the payment of his or her taxes has no property in his county out of which said amount of taxes can be collected, it shall be the duty of such collector to make out from the assessment list a true and complete list or schedule of the taxes due by said delinquent, which shall be certified to under the official seal and signature of said collector, and to forward the same to the collector of taxes of any county or counties where he shall have reason to believe said delinquent has property of any description, and, if said property is in any of the unorganized counties of this state, then to the collector of the county to which said unorganized county is attached for judicial purposes; and, when received by said collector, he shall at once proceed to the collection of said tax by seizure and sale, in the same manner as if said taxes were originally assessed and due in his said county, and shall report to the collector from whom said list was received the taxes so collected by him. [Acts 1905, p. 317.]

**Art. 7629. Tax collector not allowed credit for delinquents, when.**—No tax collector in this state shall be allowed credit for lists of delinquent or insolvent taxpayers, as provided by article 7621 of the Revised Statutes of this state, until he makes oath in writing that he has exhausted all resources to collect said delinquent taxes under this chapter and under articles 7624, 7625, 7626 and 7627. [Id.]

**In general.**—This article has reference to credits to which the tax collector is entitled for his lists of delinquent taxpayers as provided in Art. 7621, and not to fees he is entitled to receive in suits for the collection of taxes. *Unknown Owner v. State*, 55 C. A. 300, 118 S. W. 804.

**Art. 7630. [5176] All property liable for taxes.**—All real and personal property held or owned by any person in this state shall be liable for all state and county taxes due by the owner thereof, including taxes on real estate, personal property and poll tax; and the collector of taxes shall levy on any personal or real property to be found in his county to satisfy all delinquent taxes, any law to the contrary notwithstanding. [Acts 1879, p. 46.]

**Levy before sale for delinquent taxes.**—To constitute title or color of title all prerequisites must be shown and a levy must precede a sale for delinquent taxes. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200, 201.

**Art. 7631. [5177] Sales of property, how made.**—In making sales of personal property for taxes, the collector shall give notice of the time and place of sale, together with a brief description of the property levied on and to be sold, for at least ten days previous to the day of sale, by advertisements in writing to be posted at the court house door, and at two other public places in the county; and such sale shall take place at the court house door of the county in which the assessment is made, by public auction. [Acts 1876, p. 259, sec. 15.]

**Essentials of validity of tax sales in general.**—Certain facts held essential to the validity of a tax sale. *Lewright v. Walls*, 55 C. A. 643, 119 S. W. 721.

**Art. 7632. [5178] If property is insufficient.**—If personal property levied upon prove insufficient to satisfy the taxes and penalties due and costs accrued thereon, the collector shall levy upon and sell so much other personal taxable property belonging to the person as will be sufficient to satisfy such taxes, penalties and costs in the same manner as an original levy and sale; and, in all cases of sales for taxes, if there be an excess remaining in the hands of the collector, after satisfying all taxes, penalties and costs, the same shall be paid over to the original

owner by the collector, or deposited in the hands of the county treasurer subject to the order of such owner. [Id.]

**Art. 7633. [5179] Sales of real property, when made.**—If the delinquent is not possessed of a sufficiency of personal property in the county, subject to seizure and sale, to satisfy all taxes due by him, the collector of taxes shall seize so much of the real estate of such delinquent, situated in the county, as will be sufficient to satisfy such taxes and all costs, and the same sell in accordance with the provisions of the succeeding article. [Id. sec. 16.]

**Art. 7634. [5180] Advertisements of real property for sale, etc.**—In making sales of real property for taxes, the collector shall advertise the same for sale in some newspaper published in the county where the land is to be sold, for three successive weeks, if there be one; and the publisher of such newspaper shall receive as compensation not exceeding twenty-five cents for each tract or parcel of land so advertised, to be taxed as other costs of sale against such land; provided, the cost of advertising in a newspaper shall be deducted from the fees allowed the collector for advertising; and provided, that the comptroller shall allow the collector twenty-five cents per tract for each tract of land bid off by the state; and, if there be no newspaper published in the county, or, there being a newspaper published in the county, and the publisher thereof refuses to publish the advertisement at the price herein fixed, then advertisement shall be made by posting the same for thirty days previous to the day of sale, at the court house door and three other public places in the county where the land or lots are situated, giving in said advertisement such description as is given to the same on the tax rolls in his hands, stating the name of the owner, if known, and if unknown say "unknown," together with time, place and terms of sale; said sale to be for cash, to the highest bidder, at public outcry, at the court house door, and between legal hours, on the first Tuesday of the month. [Acts 1881, p. 15.]

**Contracts for publication.**—See notes under Art. 7687.

Where publishers of newspapers agree to submit bids for publishing delinquent tax lists at a certain price, and to share the proceeds, a contract with one of them at the price so fixed is void. *City of Wichita Falls v. Skeen*, 18 C. A. 632, 45 S. W. 1037.

**Necessity and requisites of notice.**—A failure to give the notice required by law of the place of sale vitiates the sale. *Henderson v. White*, 69 T. 103, 5 S. W. 374.

A sale of land for taxes advertised in the name of "J. A. Bowers," instead of "J. A. Rogers," held not voidable only. *Moore v. Rogers*, 100 T. 361, 99 S. W. 1023.

**Proof of notice of sale.**—See notes under Art. 3687, Introductory, § 54.

**Art. 7635. [5181] List to be posted.**—Prior to the sale of any real property for taxes in any county in this state, the collector of taxes shall advertise the same by posting a list of the names of the delinquents for thirty days as follows: One copy at the court house door of the county, and a copy at two other public places in the county where the lands or lots are situated. [Acts 1879, S. S., p. 46.]

**Posting of lists.**—Where a tax law requires copies of the assessment roll to be posted at certain places, a failure on the part of the assessor or collector to post the copies as required will invalidate the tax sale. *Yenda v. Wheeler*, 9 T. 408.

A failure of the assessor and collector to post a list of delinquent taxables, as prescribed by the statute, is a fatal objection to a tax title. *Pitts v. Booth*, 15 T. 453.

**Art. 7636. [5182] May be continued from day to day.**—As far as may be practicable, all the lands and town lots levied upon for taxes shall be advertised in one notice and be sold on the same day; and such sales may be continued from day to day until concluded; but at the close of each day's sale the collector of taxes shall make proclamation of such continuance on the following day. No sale shall be considered complete until the payment of the purchase money; and, if the same is not paid before the completion of the tax sales, the collector shall resell the property, and continue such sale until the same is complete. [Acts 1876, p. 289.]

**Art. 7637. [5183] Homesteads liable only for their own taxes.**—No real estate set apart, used or designated as a homestead shall be sold for taxes other than the taxes due on such homestead. [Id.]

**Liability of homestead.**—The homestead is not protected by the constitution from forced sale for lawful taxes that may be due on it. While that instrument throws the most ample protection around the homestead, it clearly intends that in return it shall bear its just proportionate share of the burdens imposed by government, and it is liable as other real property to all taxes, state, county or municipal, that are justly and lawfully laid on the property of the citizen. *Lufkin v. Galveston*, 58 T. 545.

The homestead is exempt from forced sale for taxes, except such as are assessed against the homestead itself, and a sale of it for other taxes as well as those assessed against it is inhibited by the constitution. *Wright v. Straub*, 64 T. 64.

**Liability of the homestead for taxes.** See *Higgins v. Bordages*, 88 T. 458, 31 S. W. 62, 803, 53 Am. St. Rep. 770.

Where the amount of taxes for which a homestead is alleged to have been bought is greater than the amount allowed by the Constitution, the sale is void. *Hayes v. Taylor*, 17 C. A. 449, 43 S. W. 314.

Taxes assessed against a homestead are a lien thereon, and it may be sold therefor, notwithstanding Const. art. 16, § 50, protecting the homestead against forced sale, and providing that no mortgage, deed of trust, or other lien on the homestead shall be valid; the words "other lien" including only those created by contract. *City of San Antonio v. Toepperwein*, 104 T. 43, 133 S. W. 416.

**Liability for costs.**—Costs of sale may be charged against a homestead sold under execution for taxes. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

Costs of a tax foreclosure suit of a homestead are a lien on the property so foreclosed. *City of San Antonio v. Berry*, 92 T. 319, 43 S. W. 496, affirming *Berry v. City of San Antonio* (Civ. App.) 46 S. W. 273.

**Art. 7638. [5184] Sales of land, how made.**—The collector of taxes, in making sales for taxes due upon real estate, shall sell at auction, at the time and place appointed, so much of said real estate as may be necessary to pay the taxes and penalties due and all costs accruing thereon, and shall offer said real estate to the bidder who will pay the taxes and penalties due, and costs of sale and execution of deed, for the least amount of said real estate, who shall be deemed the highest bidder. Should a less amount of said real estate than the whole tract or parcel of said real estate levied upon be sold for the taxes and penalties due and all costs of sale and execution and deed, the collector shall, in making his deed to the purchaser, begin at some corner of said tract or parcel of land or town lot and designate the same in a square as near as practicable. [Id. p. 263, sec. 17.]

**In general.**—This article does not apply to sales by the sheriff under foreclosure as provided by Chapter 15 of this title. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**Art. 7639. [5185] The tax deed and its requisites.**—The collector of taxes shall execute and deliver to the purchaser, upon the payment of the amount for which the estate was sold, and costs and penalties, a deed for the real estate sold, which deed shall vest a good and perfect title to said land in the purchaser, if not redeemed in two years, as hereinafter provided; which deed shall state the cause of sale, the amount sold, the price for which the real estate was sold, the name of the person, firm, company or corporation on whom the demand for the taxes was made, provided, the name is known, and if unknown say "unknown," the same description of the land as is given in the tax rolls, and such other description as may be practicable for better identification; and when real estate has been sold he shall convey, subject to the right of redemption provided for in Article 7641, all the right and interest which the former owner had therein at the time when the assessment was made. [Const., art. 8, sec. 13. Id. sec. 18.]

See notes under Chapter 15 of this title.

**Former law.**—The declaration in the twenty-fifth section of the tax law of 1840 (Hart. Dig. art. 3007) that the tax deed should be good and effectual, both in law and equity, must be regarded as giving no special sanction to the conveyance, beyond that derived from the general principles of the law. (But quære, if the doctrine had not been firmly established.) And hence, notwithstanding that provision, it is necessary for a plaintiff, claiming under a tax sale made by virtue of that law, to allege and prove that all the prerequisites were performed. *Hadley v. Tankersley*, 8 T. 12.

Where an assessment under the act of 1848 purported to be made in the name of the owner, but the name was not that of the owner and did not appear to be so, except from the county map, the tax sale was invalid, although the records of the county did not contain anything to show who was the true owner, other than the map as aforesaid. *Yenda v. Wheeler*, 9 T. 408.



Construing the act of March 20, 1848 (Hart. Dig. art. 3145), which provided that a tax collector's deed, "when recorded according to law, shall be prima facie evidence that all the requisites of the law have been complied with in making such sale," held, that such deed was not thereby made evidence of a compliance with the prerequisites to the acquisition and exercise of the power to sell. The statute applied only to the proceedings to be had after the right and power to sell were acquired. *Terrell v. Martin*, 64 T. 121, citing *Devine v. McCulloch*, 15 T. 491; *Kelly v. Medlin*, 26 T. 56, and other cases.

One claiming land under a tax sale made under the act of 1840 (Early Laws, art. 711) must aver and prove compliance on the part of the officer who executed the deed with all the essential requisites of the law for a valid tax sale. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847.

**Validity of tax deeds in general.**—See, also, notes under Art. 5675.

Where the tax deed assumes to convey the title of the unknown owner, without reference to the derivation of title or to the person under whom he claimed, and the proceedings have been otherwise regular, it may be effectual; but where the officer undertakes to convey a particular title, the purchaser takes the title so conveyed; none other will pass by the deed. *Yenda v. Wheeler*, 9 T. 408; *Wheeler v. Yenda*, 11 T. 562.

Where a tax deed was admitted in evidence without objection, without evidence of the facts necessary to give the assessor and collector power to sell, and the court charged the jury that the tax deed was prima facie evidence that all the requirements of the law had been complied with, but the jury found against such title, under the charge of the court on another point, a question being made in this court whether the finding on such other point could be sustained, the court said it was not necessary to decide the question, because the party did not prove the facts necessary to give the assessor and collector power to sell, and affirmed the judgment. *Devine v. McCulloch*, 15 T. 488.

A collector's deed to property subject to taxation, and sold in accordance with law, vests a good and perfect title, which can only be impeached for actual fraud. Such a deed would, therefore, constitute a cloud upon the title of land regularly sold, but not liable for the tax, to prevent or remove which equity may be invoked. *Cassiano v. Ursuline Academy*, 64 T. 673.

To be of any force a tax title must be proved to be the consummation of a valid sale. State taxes are levied by general law and are not required to be proved; county taxes are levied by the commissioners' court, and the levy must be proved or the sale will not appear to have been made for a legal demand. *Greer v. Howell*, 64 T. 638.

A tax deed was attacked upon the following, among other, grounds: 1. The tax rolls failed to show the number of the certificate by virtue of which the land was located. 2. The notice of sale fails to show when the land would be sold. 3. The deed made by the collector describes the land sold for taxes as being one hundred and sixty acres, patented to Jeremiah Heath, assignee of Benjamin F. Berry, describing it by metes and bounds, and excepting out of said tract eighty acres on which the taxes were paid by H. F. Heath. These objections are well taken. *Henderson v. White*, 69 T. 103, 5 S. W. 374.

A legal assessment, advertisement and tax sale of land must be clearly shown before any rights can be acquired under a tax title. *Railway Co. v. Poindexter*, 70 T. 98, 7 S. W. 316.

The petition alleged the existence of a void tax sale and that it was a cloud upon plaintiff's title. On the trial a tax deed for the land was produced, and there was no testimony to any fact upon which the legality of the tax sale could be based. Held, that it did not devolve upon the plaintiff to further show the invalidity of the tax deed. It being void, no testimony was required to authorize the court to treat it as invalid. *Dawson v. Ward*, 71 T. 72, 9 S. W. 106.

A tax sale of land for an amount greater than the tax collector is authorized by law to charge as fees is void. *Eustis v. City of Henrietta*, 91 T. 325, 43 S. W. 259.

Where several lots are separately assessed, tax deed showing the sale of them in gross is void. *Allen v. Courtney*, 24 C. A. 86, 58 S. W. 200.

A tax sale and the rights acquired thereunder are to be determined by the law in force at the time of the sale. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

A tax sale made during the civil war held not void. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

**Right to exercise power to sell.**—The power of the officer to sell land for the non-payment of taxes is a naked power, not coupled with an interest; and in all such cases the law requires that every prerequisite to the exercise of that power must precede its exercise; that the agent must pursue the power or his act will not be sustained by it. *Yenda v. Wheeler*, 9 T. 408.

**Tax deed as evidence of title.**—It is settled that tax titles, when in every respect complete, may constitute perfect assurances of title; they may constitute the basis of good title under the statute of limitations independent of any judicial determination as to their validity; and under certain circumstances they are to be deemed colorable titles. Though invalid, a tax title is not necessarily without meritorious consideration, if the owner had reasonable grounds for believing that his title was good. *Hatchett v. Conner*, 30 T. 104; *House v. Stone*, 64 T. 677.

A tax deed is of itself no evidence of title in the purchaser at tax sale. *Pratt v. Jones*, 64 T. 694; *Dawson v. Ward*, 71 T. 72, 9 S. W. 106.

Claimant under tax deed must show county tax levied by the county commissioners' court, and that collector had power to sell. *Houston v. Washington*, 16 C. A. 504, 41 S. W. 135. But tax deed held conclusive upon the purchaser claiming thereunder as to the facts relating to the sale therein stated. *Eustis v. City of Henrietta*, 91 T. 325, 43 S. W. 259.

Tax deeds are not evidence of title without proof of compliance with the prerequisites of the law. *Boyd v. Miller*, 22 C. A. 165, 54 S. W. 411.

Unless evidence is offered to show that the requirements of the law with reference to sale for taxes had been complied with, so that a valid conveyance could be made, a tax deed is no evidence of title. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

**Description—Necessity and sufficiency of.**—A falsity which might probably mislead the owner, in the designation or description in the assessment of lands not rendered for taxation, runs through and invalidates all subsequent proceedings. *Yenda v. Wheeler*, 9 T. 408.

Ordinarily it is requisite to the validity of a tax sale that the property sold shall have been described when listed for taxation by the number of the certificate under which it was surveyed. *Henderson v. White*, 69 T. 103, 5 S. W. 374; *McCormick v. Edwards*, 69 T. 106, 6 S. W. 32.

A deed purporting to convey land which describes it only by quantity, and as being part of a larger tract, with nothing whereby to identify what specific portion of the larger tract is intended to be conveyed, is void for uncertainty of description of tax title. *Lumber Co. v. Hancock*, 70 T. 312, 7 S. W. 724.

A conveyance by a tax collector or sheriff of a number of acres to be taken out of a larger survey is void for uncertainty. *Morgan v. Smith*, 70 T. 637, 8 S. W. 523.

A patent ambiguity in description of the land in a tax deed renders it void. *Crumbley v. Busse*, 11 C. A. 319, 32 S. W. 438.

Tax deed held void for want of sufficient description. *Ozee v. City of Henrietta*, 90 T. 334, 33 S. W. 768.

Tax deeds held not void for ambiguity and uncertainty of description. *Homes v. City of Henrietta* (Civ. App.) 41 S. W. 723. Nor for insufficiency of description. *Earle v. Same*, Id. 727.

A sheriff's tax deed held not void for insufficiency in description of property. *Murphy v. Williams* (Civ. App.) 56 S. W. 695.

**Presumptions.**—See notes under Art. 3687.

**Compensation for improvements.**—If a tax deed shows upon its face that it is void, it cannot be the foundation for a claim for the value of improvements made in good faith. *Hatchett v. Conner*, 30 T. 104; *House v. Stone*, 64 T. 677.

One claiming under an invalid tax title, not void on its face, is entitled to adduce evidence as to improvements under his suggestion of good faith, and to have that issue determined. *French v. Grenet*, 57 T. 273, and *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 63, approved, and *Robson v. Osborn*, 13 T. 298, questioned. *Hatchett v. Conner*, 30 T. 104; *House v. Stone*, 64 T. 677.

**Art. 7640. [5186] Sales to be reported to commissioners' court.**  
—When the collector of taxes shall have made sale of any real estate under this chapter, it shall be his duty to make immediate return of said sale to the commissioners' court, stating in said return the land sold, the name of the owner, if known, and if unknown, state the fact, the time of sale, the amount for which said sale was made, together with the name of the purchaser, which return shall be entered of record on the minute books of said court. [Id.]

**Art. 7641. [5187] Redemption of land sold for taxes.**—The owner of real estate sold for the payment of taxes, or his heirs or assigns or legal representatives, may, within two years from the date of sale, redeem the estate sold by paying or tendering to the purchaser, his heirs or legal representative, double the amount of money paid for the land. [Id. sec. 19.]

See notes under Arts. 7695-7697.

**In general.**—A tender to the purchaser at tax sale, under the third section of the act of June 2, 1873 (13th Leg. p. 187), concerning taxes, which is similar in terms to this article, the full amount of the purchase money paid for land at such sale, within twelve months, with one year's interest on the same, at the rate of 25 per cent. per annum, worked ipso facto an immediate redemption of the land by the original owner, and left the purchaser at tax sale without title. *Burns v. Ledbetter*, 54 T. 374.

An owner of land sold for taxes may redeem by payment of the required amount to the purchaser, even when such purchaser has transferred his interest. *Turner v. Smith*, 56 C. A. 1, 119 S. W. 922.

**Art. 7642. Redemption within two years, when.**—That the owner or any one having an interest in lands or lots heretofore sold to the state, or any city, or town, under decree of court in any suit or suits brought for the collection of the taxes thereon, or by the collector of taxes, or otherwise, shall have the right at any time within two years after the taking effect of this Act, to redeem the same upon the payment of the amount of taxes for which sale was made, together with all costs, penalties and interest now required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of said redemption. And where lands or lots shall hereafter be sold to the state, or to any city or town for taxes under decree of court in any suit or suits brought for collection of taxes thereon, or by a collector of taxes, or otherwise, the owner having an interest in such lands or lots shall have the right at any time within two years from

the date of sale to redeem the same after such sale upon payment of the amount of taxes for which sale was made, together with all costs and penalties required by law, and also the payment of all the taxes, interest, penalties and costs on or against said lands or lots at the time of redemption. [Acts 1909, p. 400, sec. 1. Acts 1913, S. S., p. 25, sec. 1, amending Art. 7642, Rev. St. 1911.]

**Art. 7643. [5188] Redemption from private purchasers.**—Any person having the right to redeem any land sold at tax sale may do so by payment, within the time prescribed by law, to the collector of taxes of the county in which the said land was sold, of the amount which the law requires to be paid; provided, that the owner of said land, or his agent, shall first have made affidavit before some officer authorized by law to administer oaths, that he has made diligent search in the county where said land is situated for the purchaser thereof at the tax sale, and has failed to find him, or that the purchaser at such tax sale is not a resident of the county in which the land is situated, or that he and the purchaser can not agree on the amount of redemption money. In such cases only shall the owner or agent be authorized to redeem the same by the payment to the collector of taxes. [Acts 1879, S. S., p. 29.]

**Art. 7644. [5189] Receipt of collector, notice when.**—It shall be the duty of any collector of taxes, to whom payment is made under the provisions of this chapter, to give a receipt therefor, signed by him officially, in the presence of two witnesses; which said receipt, when duly recorded, shall be notice to all persons that the land therein described has been redeemed; and the collector of taxes shall, on demand, pay over to the purchaser at said tax sale the money thus received by him. [Id. sec. 2.]

**Art. 7645. [5190] Relief, when.**—Any person whose land has been rendered for taxation, whether the same was rendered in the name of the original grantee or not, and has also been placed upon the unrendered rolls for the same year, shall be entitled to relief upon complying with the requirements hereinafter indicated. [Acts 1881, p. 107.]

**Art. 7646. [5191] Same.**—If any such lands shall have been sold for the taxes charged upon the unrendered rolls, and bought by the state, the owner thereof, his agent or attorney, shall present to the tax collector of the county in which the land is situated a sworn statement to the effect that the same land has been rendered for taxation, and placed upon the regular assessment rolls for the year mentioned. Said affidavit shall contain an accurate description of the land, and be accompanied with the certificate of the assessor that the same is true and correct; and the tax collector shall thereupon present such person with a written statement, officially signed, that said tax has been canceled, and make a note of the same upon the unrendered rolls; provided, the provisions of this article shall apply to such lands at any time after the collector shall receive the rolls until the same shall have gone into the hands of a private purchaser; and if the owner shall have paid the taxes charged upon the unrendered rolls at any time previous he shall be entitled to the warrant of the comptroller for the amount so paid, in the same manner as is provided in article 7647 of this chapter, in cases of redemption from individual purchasers; provided further, that the tax collector shall make no charge whatever for the duties herein mentioned. [Acts 1881, p. 107, sec. 2.]

**Art. 7647. [5192] Certificate of redemption from collector.**—When the owner of such lands shall have redeemed the same from a private purchaser, it shall be the duty of the tax collector to furnish him a certificate to that effect; and, upon presentation of said certificate to the comptroller, the comptroller shall issue to him a warrant upon the

treasury of the state for the amount of such tax. This warrant shall be receivable for all taxes to the state. For issuing the certificate provided for in this article, the tax collector shall be allowed the sum of fifty cents, to be paid by the applicant. [Id. sec. 3.]

**Art. 7648. [5193] Lands to be bid in for state, when.**—Should the collector of taxes fail to make sale of any real estate for want of a purchaser, he shall bid the same off for the state for the taxes and penalties due and all costs accruing thereon, and execute a deed to the state; and one deed shall include all tracts of land bid off to the state at such tax sale, and make due return thereof, under such forms and directions as the comptroller may furnish and direct; and, after sale and purchase by the state of any real estate, it shall not be lawful for said collector to levy upon or advertise or sell the same for any remaining or accrued taxes due thereon until the same shall have been redeemed by the owner or is sold by the state. Said collector shall, on final settlement of his accounts with the commissioners' court and the comptroller of public accounts, be entitled to a credit for the amount of taxes due the state and county, respectively, for which the land and lots were bid off to the state. [Acts 1879, S. S., p. 36, sec. 1.]

Presumption as to validity of sale.—See notes under Art. 3687, Rule 14.

**Art. 7649. [5194] May redeem, how.**—The owner, or his agent, of any lands that may have been conveyed to the state under the provisions of the foregoing article, desiring to redeem the same, may do so by depositing with the collector of the county in which the lands were sold double the amount of the purchase money and all accrued taxes thereon, within two years from the date of the deed to the state; and it shall be the duty of such collector to execute a receipt to such owner, or agents, giving therein the amount of money received, and a description of the land so as to identify the same, and sign and seal the same officially; and, upon presentation of such receipt to the comptroller of public accounts, he shall execute to the owner a relinquishment under his signature and seal of office, which may be admitted to record in like manner with other conveyances of land. [Id. sec. 2.]

**Art. 7650. [5195] If not redeemed.**—In case said land shall not have been redeemed as provided in article 7648 [7649], then the same may be sold as provided by article 7648. [Id. sec. 3.]

**Art. 7651. [5196] May redeem by paying costs, etc.**—The owner of real estate which has been bought in by the state for taxes, his heirs or assigns, may redeem the same at any time prior to the sale thereof, by the payment to the collector of the county in which such real estate is situated, or to the comptroller, if in an unorganized county, of the amount designated by the comptroller as due thereon with costs of advertisement; and provided, further, that if it shall at any time appear to the satisfaction of the comptroller that any land has been sold to the state for taxes which have been paid, or that the sale has not been made in accordance with the law authorizing the sale of land for taxes, he shall, upon the payment of the amount that may be due thereon, cancel such sale; and in all cases he shall deliver to the owner of the land, or his agent, a certificate under seal of his department, setting forth the fact that such land has been redeemed, or that such sale has been canceled; which certificate shall release the interest of the state, and the same may be recorded in the proper county as other conveyances of real estate are recorded. [Id. sec. 7.]

**Art. 7652. [5197] Commissioners' court to sit as a board of inquiry, when.**—The commissioners' courts of the several counties in this state shall, at the regular terms of said courts, sit as a court of inquiry in cases where land has been erroneously rendered for taxes; and any land

owner whose land has been or may be sold to the state for taxes may appear before said court in person or by proxy and show to the satisfaction of a majority of said court that the taxes for which his or her lands have been sold have been paid, although the same was rendered in an incorrect abstract number or survey or original grantee; thereupon said commissioners' court shall issue to the said land owner a certificate setting forth fully said facts, which certificate shall be signed officially by the county judge of said county; and, upon the presentation of said certificate to the comptroller of public accounts, he shall execute and deliver to said land owner a valid deed relinquishing all the right, title and interest the state may have acquired in and to said land by reason of such tax sale. [Acts 1889, p. 31.]

**Art. 7653. [5202] Collector to file complaint, when.**—It shall be the duty of the tax collector to make an affidavit before any justice of the peace against any person, firm or association of persons engaged in or pursuing any occupation on which, under the laws of this state, a tax is imposed, who fails or refuses to pay the same. [Acts 1887, p. 127.]

**Art. 7654. Compensation.**—There shall be paid for the collection of taxes, as compensation for the services of the collector, beginning with the first day of September of each year, five per cent on the first ten thousand dollars collected for the state, and four per cent on the next ten thousand dollars collected for the state, and one per cent on all collected over that sum; for collecting the county taxes, five per cent on the first five thousand dollars of such taxes collected, and four per cent on the next five thousand dollars collected, and one and one-fourth per cent on all such taxes collected over that sum; and, in counties owing subsidies to railroads, the collectors shall receive only one per cent for collecting such railroad tax; and, in cases where property is levied upon and sold for taxes, he shall receive the same compensation as allowed by law to sheriffs or constables upon making a levy and sale in similar cases, but in no case to include commissions on such sales. [Acts 1883, p. 101, sec. 1. Amended Acts 1897, 1 S. S., p. 8, sec. 9.]

*Former law.*—See Title 58, Chapter 3.

County tax collectors entitled to same compensation for selling property for taxes as sheriff gets for execution sales. *Eustis v. Henrietta*, 91 T. 325, 43 S. W. 259.

*Fees.*—A person duly elected to the office of tax collector held entitled to the office and emoluments as soon as he had taken the oath of office and qualified. *Graves v. Bullen*, 53 C. A. 261, 115 S. W. 1177.

**Art. 7655. [5207] For occupation tax.**—And on all occupations and license taxes collected, five per cent. [Acts 1883, p. 101, sec. 2.]

**Art. 7656. [5208] Compensation for one levy only, etc.**—In making levies upon different tracts of land belonging to the same individual, corporation or company, the collector shall be entitled to charge for only one levy; and in all cases of advertisement of lands for tax sales he shall be entitled to charge for any one tract the exact proportion of the amount paid for the whole advertisement which said tract bears to all other tracts advertised, and no more. And, for any greater charge under this article, the collector shall be deemed guilty of extortion and be punished as provided in the Penal Code.

*Compensation.*—Facts held to show that a tax sale was not in excess of the costs authorized by law. *Eustis v. City of Henrietta* (Civ. App.) 41 S. W. 720.

A county or city tax collector can charge for only one levy no matter how many pieces of property belonging to the same man are included in the levy. *Eustis v. Henrietta*, 91 T. 325, 43 S. W. 259.

**Art. 7657. [5209] Taxes upon lands of non-residents in unorganized counties.**—The taxes upon lands lying in and owned by non-residents of unorganized counties, and upon lands situated in the territory not laid off into counties, shall be paid and collected at the office of the

comptroller of public accounts, under such regulations as he may adopt for that purpose. [Const., art. 8, sec. 12.]

**Art. 7658. [5210] Payment of moneys.**—All tax collectors and other officers or appointees authorized to receive public moneys shall account for all moneys in their hands belonging to the state, and pay the same over to the state treasurer whenever and as often as they may be directed so to do by the comptroller of public accounts; provided, that tax collectors shall have thirty days from the date of such direction within which to comply with the same. [Acts 1879, S. S., p. 5.]

**Reports and remittances.**—See notes under Art. 957.

The collector's reports and remittances of taxes collected on account of the state and the county are independent of each other. *T. & L. C. C. v. Hemphill County* (Civ. App.) 61 S. W. 334.

After the collection, the collector is required under penalties to promptly report and remit all taxes collected by him to the state and county treasurers, without excepting cases in which suits, however promptly filed, may be instituted for the recovery thereof. *Id.*

Certain facts held not to excuse a county tax collector disobeying an order of the commissioners' court to make a payment. *Bailey v. Aransas County*, 46 C. A. 547, 102 S. W. 1159.

**Transfer of funds to public depositories.**—See Title 44.

**Art. 7659. [5211] Same.**—All tax collectors and other officers or appointees authorized to receive public moneys shall account for all moneys in their hands belonging to their respective counties, cities or towns, and pay the same over to the respective county treasurers or city treasurers, whenever and as often as they may be directed so to do by the respective county judges, or county commissioners' courts, or mayor or board of aldermen; provided, that tax collectors shall have ten days from the date of such direction within which to comply with the same. [Id. sec. 2.]

**Art. 7660. [5212] Notification to pay, etc.**—The notification and direction provided for in the two preceding articles may be verbal, written, or by telegram; and, if written or by telegram, proof of the deposit in the postoffice or telegraph office of such notification and direction, with postage or charges duly prepaid and correctly addressed, shall be prima facie evidence of the fact of such notification and direction having been given, and of the time when the same was given. [Id. sec. 3.]

**Art. 7661. [5212a] Duty of district and county attorneys to sue for taxes on personal property.**—Hereafter it shall be the duty of the district or county attorney of the respective counties of this state, by order of the commissioners' court, to institute suit in the name of the state for the recovery of all money due the state and county as taxes due and unpaid on unrendered personal property; and, in all suits where judgments are obtained under this act, the person owning the property on which there are taxes due the state and county shall be liable for all costs; provided, such suits may be brought for all taxes so due and unpaid for which such delinquent taxpayer may be in arrears for and since the year 1886; and provided, further, the state and county shall be exempt from liability for any costs growing out of such action; provided, all suits brought under this article for the recovery of taxes due on personal property shall be brought against the person or persons who owned the property at the time such property should have been listed or assessed for taxation; provided, that no suit shall be brought until after demand is made by the collector for taxes due; and provided, further, that no suit shall be brought for an amount less than twenty-five dollars. [Report Joint Committee, Sen. Jour., 1895, p. 486, No. 113.]

**In general.**—This article was not intended to create any liability for taxes, but only to provide an additional method of collecting taxes from the persons already liable. That is to say the taxes are not due from the person sued within the meaning of this article until there has been a valid assessment against him either as known or unknown owner. *Connell v. State* (Civ. App.) 55 S. W. 980.

**Right of action.**—No right of action exists for the nonpayment of an ad valorem property tax until assessment has been made as provided by law. *Connell v. State* (Civ. App.) 55 S. W. 980.

**Jurisdiction of courts.**—See notes under Art. 1705.

**Art. 7662. [5212b] Limitation not available to delinquent taxpayer.**—No delinquent taxpayer shall have the right to plead in any court or in any manner rely upon any statute of limitation by way of defense against the payment of any taxes due from him or her either to the state or any county, city or state [town]. [Acts 1895, S. S.]

**Historical.**—This article is the same as section 16 of the act of July 4, 1879, which, it seems, was omitted from the Revised Statutes of 1895, which went into effect September 1, 1895. There was, therefore, no law on the subject from September 1, 1895, to October 9th following, the date of the passage of the above article. See *Hernandez v. City of San Antonio* (Civ. App.) 39 S. W. 1022.

**In general.**—The two-years limitation does not operate against a claim for taxes, where a statute forbidding it was omitted from the Revision, but reinstated within the two years. *Abney v. State*, 20 C. A. 101, 47 S. W. 1043.

Statute of limitations cannot be pleaded as a bar against the recovery of delinquent taxes. *Id.*

**DECISIONS RELATING TO SUBJECT IN GENERAL**

**Recovery of taxes paid.**—A tax was imposed by the legislature, and in the ordinary course of business paid by persons taxed without any question having been made as to its illegality or the irregularity of the collection of that part of it claimed by the county. In a suit to recover back a portion of the tax claimed to have been illegally assessed, held: (1) That the plaintiffs did not have the right to bring their suit at any time within two years to recover back that portion of the tax claimed to be illegal. (2) The tax being voluntarily paid, it was not, under the circumstances, contrary to good conscience for the county to retain it. *Galveston County v. Gorham*, 49 T. 279.

Where illegally assessed taxes are paid under protest after seizure, the money paid may be recovered back in a suit promptly brought against the officer before he is required to pay it over. *Hardesty v. Fleming*, 57 T. 395.

In an action against a county and the tax collector to recover taxes paid on an alleged illegal valuation of the property, it was error for the court to grant a recovery for the county taxes paid, since such action was a collateral attack on the judgment of the commissioners' court fixing the value of the land. *Texas Land & Cattle Co. v. Hemphill County* (Civ. App.) 61 S. W. 333.

— **Recovery of illegal costs.**—See notes under Art. 1827, § 188.

— **Conditions precedent.**—After the entire property of a private corporation had been listed by it for taxation, the county assessor, without authority of law, made a further assessment on the corporation for property that it did not own, and the land of the corporation was advertised by the collector for sale, to satisfy said illegal assessment; thereupon the corporation paid the illegal tax under protest. Five months after payment a claim for the return of the money was presented to the commissioners' court, and in nine months more suit was brought against the county. Held: (1) That under section 13, article 8, of the constitution of 1876, and section 18 of the act of August, 1876, regulating the duties of tax collectors, a tax sale of the property of the corporation would have constituted a cloud on its title. (2) The taxes having been paid under protest to prevent the sale and consequent cloud on the title, the payment was so far compulsory as to allow of a recovery back, if sought with reasonable promptness. (3) Expressions of opinion in *Red v. Johnson*, 53 T. 284, noted and explained. (4) The necessity for action was sufficiently immediate and urgent to remove the payment made to the collector from the class of voluntary payments. (5) That an application for relief has been made to the county commissioners' court, and refused, would not bar a recovery back of the taxes illegally paid under protest. The question was not one of valuation, but of an illegal collection of money, to relieve against which the county court or board of equalization had no jurisdiction. *Galveston Gas Co. v. County of Galveston*, 54 T. 287.

The right to recover back taxes paid under protest exists, although the taxpayer had not appeared before the board of equalization and contested the assessment. *Hardesty v. Fleming*, 57 T. 395.

**Refunding of taxes.**—Whether a purchaser of land at tax sale whose title is invalid, but who neither knew, nor by proper diligence could have known, when he purchased, the invalidity of his deed, is entitled to have refunded to him taxes which were a charge upon the land before the entering of a decree canceling the tax deed, *quære*. *Stewart v. Kemp*, 54 T. 248.

**Reimbursement for taxes paid in trespass to try title.**—See notes at end of Title 128.

**CHAPTER FOURTEEN**

**OF THE ASSESSMENT AND COLLECTION OF BACK TAXES ON UNRENDERED LANDS**

Art.	Art.
7663. Back taxes on unrendered lands.	7670. Comptroller to make out lists of lands sold to state.
7664. Comptroller to prepare lists.	7671. Sale, when and how made.
7665. And forward to boards of equalization.	7672. Advertisement of sale and redemption by owner.
7666. Board to value such lands.	7673. Lands sold, how.
7667. And cause three rolls to be made.	7674. Sale may be continued, etc.
7668. Collector to give notice.	
7669. And enforce collection, when.	

Art.  
7675. Deed executed, when and how.  
7676. Same.  
7677. Effect of deed, etc.  
7678. Report of sales.

Art.  
7679. Proceeds of sale paid to whom.  
7680. Collections applied, how.  
7681. Costs deducted by collector.  
7682. Unsold lands reported to comptroller.

**Article 7663. [5213] Back taxes on unrendered lands.**—In all cases where lands or real estate have not been assessed for taxation for any year since the year one thousand eight hundred and seventy, the same shall be assessed and the taxes thereon collected in the mode prescribed in this chapter. [Act Aug. 19, 1876, p. 214, sec. 1.]

**Art. 7664. [5214] Comptroller to prepare list each year.**—On the first day of July of each year, the comptroller of public accounts shall cause to be prepared a list of all unrendered lands in each county subject to taxation and not assessed, in which shall be specified the name of the original grantee, the abstract number, the number of acres, the year for which such lands were unrendered, and the rate of state and county taxes for such year. [Id. sec. 2.]

**Art. 7665. [5215] And forward same to boards of equalization.**—Upon completion of such lists, the comptroller shall forward the same to the board of equalization of the respective counties, with the verification that the said list is a true and correct statement of all the unrendered land and real estate in \_\_\_\_\_ county for the year —, as shown by the records of his office. [Id.]

**Art. 7666. [5216] The board to value such lands.**—Upon receipt of such list or lists by the board of equalization of such county, it shall be their duty to value each and every tract of land or parcel of real estate so mentioned and described in the said lists at their true and full value, as near as can be ascertained, for the year it was omitted to have been rendered. [Id. sec. 3.]

**Art. 7667. [5217] And cause three rolls to be made.**—When the board of equalization shall have completed the valuation, they shall cause to be made out three separate rolls, in such manner as may be prescribed by the comptroller; they shall place one in the hands of the collector of taxes, forward one to the comptroller of the state, and file one in the office of the county clerk for the inspection of the public. [Id. sec. 4.]

**Art. 7668. [5218] Collector to give notice.**—Upon receipt of the rolls by the collector of taxes, he shall advertise in some weekly newspaper published in his county, and, if no paper is published in his county, by posting printed circulars in not less than eight public places in his county, for four consecutive weeks, that the rolls for the collection of taxes on unrendered land and real estate have been placed in his hands, and that unless the taxes are paid within sixty days after the date of said notice he will proceed to collect the same as provided by law for the collection of delinquent taxes. [Id. p. 215, sec. 5.]

**Art. 7669. [5219] And enforce collections after sixty days.**—After the expiration of said sixty days, if the taxes on any such lands are not paid, the collector of taxes shall proceed to enforce the collection of said taxes in the mode provided in the preceding chapter for the enforced collection of delinquent taxes; and he shall be entitled to the same fees and penalties as are allowed him for the collection of other delinquent taxes. [Id. sec. 6.]

**Art. 7670. [5220] Comptroller to make out list of lands sold to state, etc.**—It shall be the duty of the comptroller of public accounts, on or before the first day of each year, to make out and forward to the collector of taxes in each county of the state a full and complete list of all real estate situated in said county that has been previously, at tax sales, bid off to the state for taxes assessed in the county where the land is situated, since the thirty-first day of December, 1876, the owners of which



have failed to redeem the same within two years from the date of said sale by payment or tender of payment, to the proper officer of double the amount of taxes and costs for which said real estate was bid off to the state, together with all subsequent taxes that have become due on the same from the date of sale to the last date on which the same could have been redeemed. [Acts 1879, p. 79, sec. 1.]

**Art. 7671. [5221] Sale, when and how made.**—It shall be the duty of each collector of taxes, within ninety days after receipt of said list, to call to his aid the county surveyor of his county, and, near as may be, ascertain if any lands contained in said list do not in fact exist in said county, or are embraced in other surveys conflicting therewith, and upon which the taxes have been paid; and, after deducting the same from said list, he shall proceed to sell each tract of land therein described, whether belonging to residents or non-residents, for the payment of such sums of money as may be designated on said list as due thereon, together with all costs that may accrue in advertising and selling the same as herein provided. [Id. sec. 2.]

**Art. 7672. [5222] Advertisement of sale and redemption by owner.**—The collector of taxes shall, prior to the sale of any real estate that has been previously bid off to the state at tax sales, the owners of which have failed to redeem the same, advertise the real estate to be sold in some newspaper published in the county for six successive weeks, if there be such newspaper published therein, otherwise he shall post advertisements of said sale at the court house door and at one public place in each justice's precinct of his county for at least six weeks, giving in said advertisement, whether published or posted, such description of the lands to be sold as shall be given on the comptroller's list, and stating the time, place and terms of sale, which shall be between legal hours on the first Tuesday of some specified month at the court house door at public outcry, to the highest bidder for cash; provided, that no real estate shall in any case be sold for less than the amount designated by the comptroller as due thereon, together with all costs of advertisements and sale; and provided, further, that no sales shall be made under the provisions of this chapter until six months after the same goes into effect; and provided, further, that the former owner of any such real estate, his heirs or assigns, may redeem the same at any time prior to the sale thereof, by the payment to the collector of the county in which such real estate is situated, or to the comptroller, if in an unorganized county, of the amount designated by the comptroller as due thereon, with costs of advertisement; and provided, further, that, if it shall at any time appear to the satisfaction of the comptroller that any land has been sold to the state for taxes which have been paid, or that the sale has not been made in accordance with the law authorizing the sale of land for taxes, he shall, upon the payment of the amount that may be due thereon, cancel such sale; and in all cases he shall deliver to the owner of the land, or his agent, a certificate under seal of his department, setting forth the fact that such land has been redeemed, or that such sale has been canceled, which certificate shall release the interest of the state, and the same may be recorded in the proper county as other conveyances of real estate are recorded. [Acts 1884, S. S., p. 31. Id. sec. 3.]

**Art. 7673. [5223] Land sold, how.**—At the time and place appointed for said sale, the collector of taxes shall offer for sale each separate parcel of the real estate advertised, and shall sell the same to the bidder who will offer the largest amount of money therefor. [Acts 1879, p. 79, sec. 4.]

**Art. 7674. [5224] Sale may be continued, etc.**—If the sale of the real estate advertised as provided herein shall not be completed on the day it is commenced, said sale may be continued for ten consecutive

days, from day to day, by announcement of the tax collector to that effect; and the said collector may, if there be on any day a less number than three bidders present, adjourn said sale to the first Tuesday in the following month. [Id. sec. 5.]

**Art. 7675. [5225] Deed executed, when and how.**—When a sale has been made of any real estate as herein provided, the collector of taxes, upon payment of the amount bid for the same, shall make, execute and deliver to the purchaser a deed for such real estate, specifying in said deed the cause and date of sale, the number of acres sold, if the same can be ascertained, the name of the person, firm, corporation or company in whose name the land was assessed, and all such descriptive information as may be necessary to identify the property conveyed; provided, that the purchaser may, after payment, as described in this article, ask a delay of sixty days within which to have said real estate surveyed by the county surveyor, said survey to be made at the expense of the purchaser, and, upon a certificate from the collector directed to the surveyor that the person named in the certificate has purchased and paid for the same, not to exceed one dollar for each survey, to be paid for out of the sale of such survey. [Id. sec. 6.]

**Art. 7676. [5226] Same.**—When a survey has been made, as provided in the preceding article, and a copy of the field-notes, certified to as true and correct by the county surveyor, filed with the collector of taxes, the said collector shall thereupon make, execute and deliver to the purchaser a deed to said real estate, which deed shall, in addition to the requisite hereinbefore named, contain the field-notes certified by the county surveyor. [Id. sec. 7.]

**Art. 7677. [5227] Effect of deed, etc.**—Deeds made, executed and delivered by collectors of taxes under the authority of this chapter shall be held to vest a good and perfect title to the real estate therein described in the purchaser, and may be impeached only by frauds; provided, that the former owner shall have two years from the date of said deed to redeem the same by paying to the purchaser double the amount paid for said land by the purchaser at such sale, together with all subsequent taxes paid by the purchaser, with eight per cent interest on the amount of such subsequent taxes. [Id. sec. 8.]

**Art. 7678. [5228] Report of sales.**—Within thirty days after sales made under the provisions of this chapter, the collector of taxes shall make a report to the commissioners' court of his county, and also to the comptroller of public accounts, giving in said reports such description of the real estate sold as is given in the comptroller's list, and stating the amounts due the state, county and collector respectively, and the amount for which said land was sold, and the name of the party to whom each tract was sold. [Id. sec. 9.]

**Art. 7679. [5229] Proceeds of sale paid to whom.**—Collectors of taxes shall, within sixty days after payments for real estate sold under the provisions of this chapter, after deducting from the proceeds of sale all costs due to them or their predecessors in said office, pay into the county treasury of the county in which said real estate is situated the amount of taxes shown by the comptroller's list to be due to said county, and the balance of said proceeds shall be paid by him into the treasury of the state within the said sixty days, in such manner as may be directed by the comptroller of public accounts. [Id. sec. 10.]

**Art. 7680. [5230] Collections applied, how.**—Taxes collected by state or county, by sales made under the provisions of this chapter, shall be placed to the credit of the different funds for which originally assessed under the direction respectively of the comptroller of public accounts and the commissioners' court of the county in which the sale is made; the balance of the proceeds, after satisfying all taxes, penalties

and costs accrued, shall, under the direction of the comptroller, be placed in the treasury of the state as a special tax sale fund, and be subject to be reclaimed by the owner or owners of the land on proof as required in case of escheated estates. [Acts 1884, p. 31.]

**Art. 7681. [5231] Costs deducted by collector, etc.**—The collector of taxes shall be entitled to deduct and retain out of the proceeds of sale of each separate parcel of real estate sold, as hereinbefore provided:

1. Such amount as may be designated in the comptroller's list as costs due thereon to the collector.

2. If the advertisement of sale is published in a newspaper, such a proportion of the actual amount paid for advertising as the number of acres in such separate parcel sold bears to the whole number of acres advertised; or, if the advertisements are posted, the sum of one dollar.

3. Two dollars for every deed made, executed and delivered under the provisions of this chapter. [Acts 1879, p. 79, sec. 12.]

**Art. 7682. [5232] Unsold land reported to comptroller.**—If, after the expiration of ninety days after the receipt by the collector of taxes of the comptroller's list, any real estate described in said list shall remain unsold, it shall be the duty of the said collector to make separate reports of such fact to the commissioners' court of his county and the comptroller of public accounts respectively; and the said parcels of real estate shall be embraced in the next list furnished by the comptroller of public accounts to the collector of taxes. [Id. sec. 13.]

## CHAPTER FIFTEEN

### DELINQUENT TAXES

Art. 7683. Land and improvements subject to taxation.	Art. 7692. Assessor to list unpaid taxes annually.
7684. Delinquent taxes a lien on land.	7693. Law available to cities and towns.
7685. Tax collector to list delinquent lands.	7694. Exemptions from this chapter.
7686. County clerk to record delinquent lists.	7695. Delinquent owners may redeem before sale.
7687. Delinquent tax lists to be published.	7696. May redeem in two years by paying double.
7688. Suits to foreclose tax liens on delinquent lands.	7697. May redeem from state, when and how.
7689. Proceedings in suits to foreclose tax liens.	7698. Proceedings against unknown and nonresident owners.
7690. Sheriff to execute deeds.	7699. Similar proceedings by cities and towns.
7691. Attorneys to represent state, fees, etc.	7700. Lands to be platted and numbered.

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 7683. All land and improvements subject to taxation.**—For the purpose of taxation, real property shall include all lands within the state, and all buildings and fixtures thereon and appertaining thereto, except such as are expressly exempted by law. [Acts 1895, p. 50. Amended Acts 1897, p. 132.]

See *State v. Downman* (Civ. App.) 134 S. W. 787.

See notes under Chapters 12, 13.

**In general.**—This act provides an additional remedy for the collection of taxes and does not render nugatory Chapter 13, relating to the collection of taxes in general. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

Though a sale has been made by the collector to the state, under Rev. St. 1895, tit. 104, c. 4 (re-enacted with modifications in Chapter 13 of this title), the lien continues to exist on the land, and may be foreclosed under Acts 1895, p. 50 (amended in 1897 and embodied in this chapter), relating to the collection of delinquent taxes. *Id.*

This article is not retroactive and does not apply to taxes which became due prior to its enactment. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

A personal claim for taxes and foreclosure of lien on land held maintainable. *Central Hotel Co. v. State* (Civ. App.) 117 S. W. 880.

Acts 1895, c. 42, amended in 1897 and embodied in this chapter, did not repeal Arts. 7694-7696, originally enacted in 1879, since the act of 1895 only sought to regulate the col-

lection of taxes such as had been and were thereafter to be assessed and collected by local officers, who, before the passage of that act, were not empowered to collect any of the taxes, provision for the collection of which was made by Arts. 7587-7604. *Wolffarth v. De Lay* (Civ. App.) 142 S. W. 617.

Acts 24th Leg. c. 42, amended in 1897 and embodied in this chapter, do not repeal Acts 16th Leg. c. 133 (Arts. 7588-7604), referring to nonresidents of unorganized counties owning land therein, authorizing the comptroller to assess and collect such taxes, and pointing out the method to be pursued. *De Lay v. Wolffarth* (Civ. App.) 154 S. W. 1030.

**Consolidation of actions.**—Refusal to consolidate actions under this article and Art. 7700, for the collection of delinquent taxes on separate tracts assessed in separate assessments either to third persons as owners or to unknown owners, brought in the same court on the same day, against one claiming to own all the tracts at the time of the commencement of the actions, is not an abuse of discretion conferred by Art. 2182, authorizing the court, in its discretion, to consolidate actions. *McFaddin v. State* (Civ. App.) 139 S. W. 991.

**Art. 7684. Delinquent taxes a lien on land.**—All lands or lots which have been returned delinquent or reported sold to the state, or to any city or town, for taxes due thereon since the first day of January, A. D. 1885, or which may hereafter be returned delinquent or reported sold to the state, or to any city or town, shall be subject to the provisions of this act; and said taxes shall remain a lien upon the said land, although the owner be unknown, or though it be listed in the name of a person not the actual owner; and though the ownership be changed, the land may be sold under the judgment of the court for all taxes, interest, penalty and costs shown to be due by such assessment for any preceding year. [Id. sec. 2.]

**Lien for delinquent taxes.**—A tax lien cannot be defeated on the ground that the land was dedicated to the public use, unless the public claims the land under the dedication. *Traylor v. State*, 19 C. A. 86, 46 S. W. 81.

The state can enforce a tax lien on lands already bought by it for taxes. *Id.*

Where an assessment was void for uncertainty of description, the fact that a subsequent purchaser of the land had knowledge that such taxes were unpaid did not give the state the right to enforce a lien for their nonpayment. *State v. Farmer*, 94 T. 232, 59 S. W. 541.

Inadequacy of price held such that purchaser of land could not be protected as an innocent purchaser. *Green v. Robertson*, 30 C. A. 236, 70 S. W. 345.

Purchaser of lands subject to state tax liens held not an innocent purchaser. *Haynes v. State*, 44 C. A. 492, 99 S. W. 405.

That the owner of a lot who bought it subject to taxes, was an innocent purchaser could not be set up as a defense against a suit to enforce the tax lien. *Toepperwein v. City of San Antonio* (Civ. App.) 124 S. W. 699.

The lien on a lot securing subsequently accruing taxes, which a purchaser assumed, could not be enforced except by a suit against him. *Id.*

A wife and her husband having parted with all their interest in a lot, it was not subject to be administered as a part of her estate, and a tax lien on it could not be enforced through such proceeding. *Id.*

A purchaser of land subject to a lien for taxes and penalties held not personally liable for the taxes and penalties. *City of San Antonio v. Toepperwein*, 104 T. 43, 133 S. W. 416, affirming *Toepperwein v. City of San Antonio* (Civ. App.) 124 S. W. 699.

— **Liens against homestead.**—See notes under Art. 7637.

**Conclusiveness of judgment.**—Where the holder of a vendor's lien on certain land was not a party to a suit by the state against the purchaser for taxes, the legal title remaining in the vendor, a judgment against the purchaser had no adverse effect on the vendor's interest notwithstanding this article. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

**Art. 7685. Lands delinquent to be listed by tax collector.**—It shall be the duty of the commissioners' court of each county in this state immediately upon the taking effect of this chapter to cause to be prepared by the tax collector, at the expense of the county (the compensation for making out the delinquent tax record to be fixed by the commissioners' court), a list of all lands, lots or parts of lots sold to the state for taxes since the first day of January, 1885, and which have not been redeemed, in their respective counties and unorganized counties attached thereto, and to have such lists recorded in books to be called the "Delinquent Tax Record," showing when the lands or lots were reported delinquent or sold to the state for taxes, also the name of the owner at the time of such sale or delinquency, if known, the number of acres, the amount of taxes due when first sold, and the amount of all taxes assessed against the owner thereof and returned delinquent for each year as shown by the records of the tax collector's office; and, in making up the list or lists contemplated by this chapter, corrections and omissions in the description of any real estate embraced in such list

or lists shall be made, so that, when the corrections are made and the omissions supplied, the description will be such as is given in the abstracts of all the titled and patented lands in the state of Texas, or, as required in section 12 of this act [article 7694 of this chapter], such as may be furnished by the commissioner of the general land office, and it shall be required, in bulk assessments, to apportion to each tract or lot of land separately, its pro rata share of the entire tax, penalty and cost. The list for each county, when certified to by the county judge, and assessment rolls and books on file in the tax collector's office, shall be prima facie evidence that all the requirements of the law have been complied with by the officers charged with any duty thereunder, as to the regularity of listing, assessing, levying of all the taxes therein mentioned, and reporting as delinquent or sold to the state any real estate whatsoever, and that the amount alleged against said real estate is a true and correct charge; and, in cases in which the description of the property in said list or assessment rolls or books is not sufficient to properly identify the same, and of which property there is a sufficient description in the inventories in the assessor's office, then said inventories shall be admissible as evidence of the description of said property. This delinquent tax record for each county shall be delivered to and preserved by the county clerk in his office; and the commissioners' court shall cause a duplicate of same to be sent to the comptroller; provided, that, where the records are incomplete in any county, it shall be the duty of the comptroller to furnish such county with a certified copy of the delinquent list for any year or years. [Id. sec. 3.]

See *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**Contracts for delinquent tax lists.**—The purpose of this article is to empower the commissioners' court to require the tax collector to prepare the list; but, as such duty is not one of the governmental functions annexed to the office, the commissioners' court may employ another to do the work. *Stringer v. Franklin County* (Civ. App.) 123 S. W. 1168.

The commissioners' court of a county has no authority, under this article, to allow an individual, as compensation for preparing delinquent tax lists, the right to collect and retain all that portion of the taxes shown on the delinquent lists to belong to the county, since such a contract attempts to transfer the official duty of the tax collector in collecting delinquent taxes, and since it is an effort to barter to private individuals the county sources of revenue. *Id.*

A contract employing an individual to prepare delinquent tax lists, as authorized by this article, in consideration of the right to collect and retain all of the delinquent taxes shown by the delinquent lists to be due to the county, if valid at all, operates as an assignment to the individual of the claims and liens which the county had against the property included in the delinquent lists; and a subsequent attempt by the commissioners' court to rescind after the individual had performed the services is ineffectual, and the county is not liable on account thereof, and if the collector of taxes interferes and asserts his legal right to collect the delinquent taxes, the county is not liable for more than the sum appropriated by it. *Id.*

The fact that the consideration agreed on in a contract employing an individual to prepare delinquent tax lists, under this article, is in excess of the authority of the commissioners' court, and for that reason unenforceable, does not preclude a recovery of the reasonable value of the services, on the commissioners' court failing to exercise the statutory authority to fix the compensation. *Id.*

**Conclusiveness of lists.**—The delinquent list alone which the tax collector has made of lands sold to the state for taxes, is not prima facie evidence that the requirements of the law have been complied with in regard to assessment, but it is so only when taken in connection with the assessment rolls and other books on file in the tax collector's office. *Rouse v. State* (Civ. App.) 54 S. W. 32.

The list referred to in this article is not enough of itself to make prima facie case. *Watkins v. State* (Civ. App.) 61 S. W. 533.

**Allowance of fees.**—See notes under Art. 7691.

**Art. 7686. Delinquent tax lists to be recorded by county clerks.**—On receipt of such delinquent tax record containing a complete list of the lands or lots that have been reported delinquent or sold to the state for taxes for any year or number of years since January 1, 1885, and containing also the data and information mentioned in article 7685 of this chapter, it shall be the duty of the county clerk of each of the counties of this state, respectively, to certify the same to the commissioners' court for examination and correction, and shall thereafter cause the same to be recorded in a book, which book shall be labeled the "Delinquent Tax Record of ..... County." The delinquent tax record

shall be arranged numerically as to abstract numbers, and shall be accompanied by an index showing the names of delinquents in alphabetical order. [Id. sec. 4.]

**Art. 7687. Delinquent tax list to be published.**—Upon the completion of said delinquent tax record by any county in this state, it shall be the duty of the commissioners' court to cause the same to be published in some newspaper published in the county, for three consecutive weeks; but, if no newspaper is published in the county, such list may be published in a newspaper outside of the county, to be designated by the commissioners' court, by contract duly entered into, and a publisher's fee of twenty-five cents shall be taxed against such tract or parcel of land so advertised; which fee, when collected, shall be paid into the county treasury; and the commissioners' court of said county shall not allow for said publication a greater amount than twenty-five cents for each tract of land so advertised; and said publication, and any other publications in a newspaper provided for in this act, may be proved by the affidavit of the printer of the newspaper in which the publication was made, his foreman, or principal clerk, annexed to a copy of the publication, specifying the times when and the paper in which the publication was made; provided, that all corrections made in said record, under this article, be noted in the minutes of the commissioners' court, and shall be certified by the county clerk to the comptroller, who shall note the same upon his delinquent tax record; provided, that in the event such delinquent tax record be not published correctly in accordance with the copy furnished such newspaper, then no compensation shall be allowed for such publication. [Id. sec. 5.]

See *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**Contracts for publication.**—Provisions of a contract of a county for publishing a delinquent tax list recited, and held not to constitute a claim against the county. *Lillard v. Freestone County*, 23 C. A. 363, 57 S. W. 338.

As the commissioners' court of a county has no power to contract to pay the cost of publication of a notice to nonresident taxpayers, it cannot ratify such a contract when made by the county attorney. *Baldwin v. Travis County*, 40 C. A. 149, 88 S. W. 480.

**Art. 7688. Suits to foreclose tax liens on delinquent lands.**—Twenty days after the publication of such notice, or as soon thereafter as practicable, the commissioners' court, or the county judge acting for said court, shall file a list of all lands so advertised for taxes due for any year or number of years, the tax on which remains unpaid, with the county clerk of the county in which such lands are located, or if unorganized, then with the county clerk of the county to which said unorganized county may be attached for judicial purposes, and are to be sold under the provisions of this act, for all the taxes, interest, penalty, and costs, and shall cause suit to be filed in the name of the state of Texas, in the district court of said county, or if unorganized, then in the district court of the county to which said unorganized county is attached for judicial purposes, stating therein, by apt reference to lists or schedules annexed thereto, a description of all lands or lots in such county upon which taxes and penalty have remained unpaid for any year or number of years since the first day of January, 1885, and the total amount of such taxes, with interest computed thereon to the time fixed for the sale thereof at the rate of six per cent per annum, and shall pray for judgment for the payment of the several amounts so specified therein, and in default thereof, that such lands be sold to satisfy said judgment for all taxes, interest, penalty and costs, and for such other relief to which the state may be entitled under the law and facts. All suits to enforce the collection of taxes, as provided in this chapter, shall take precedence and have priority over all other suits pending in the district court. The petition in such suits shall be signed by the attorney bringing the suit, and shall be verified by the affidavit of said attorney, or the county judge, to the effect that the averments contained in said peti-

tion are true to the best knowledge and belief of affiant; and the pleadings of the defendant, except those of law, shall be verified by like affidavit of the defendant, his agent or attorney. The county collector, county clerk and county assessor shall furnish all affidavits, certified copies of the records of their respective offices, and such other evidence as may be in their possession by virtue of such office, as may be applied for by the county attorney. [Id. sec. 6.]

**In general.**—The rule that, to authorize a sale for taxes, it is necessary that the law regarding assessments must be strictly complied with and that the omission to give the number of the certificate or survey in the description, is, in the absence of some reasonable excuse, fatal, should be relaxed in cases of suits for taxes and foreclosure of liens, and hence in such a suit the description in the assessment was sufficient where the abstract and certificate numbers, the name of the original grantee, the number of acres, and the value were all properly given, though the survey number was omitted. *State v. Adams* (Civ. App.) 126 S. W. 674.

The right to sue for delinquent taxes and to foreclose a lien therefor, is wholly statutory, and the statute expressly removes from the jurisdiction of the district court specified cases. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**Petition—Requisites of, in general.**—See, also, notes under Art. 1827, §§ 62, 188.

The petition in a tax collection suit must conform to the law in every substantial requirement, or it will entirely fail to have any efficiency. It is the first step taken towards collecting delinquent taxes. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 77.

— **Verification.**—It is error to render judgment by default on an amended petition not sworn to although the original petition was verified. *Cockrell v. State*, 22 C. A. 568, 55 S. W. 579.

This article, so far as it required a verification of the petition, is directory and not mandatory, and a failure to verify the petition is not a jurisdictional defect. *Todd v. State* (Civ. App.) 134 S. W. 764.

**Defenses.**—A taxpayer is entitled to show want of authority to levy a tax as a defense to an action to recover it. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

In a suit to recover taxes, fraud of board of equalization in making assessment may be pleaded. *Mann v. State*, 18 C. A. 701, 46 S. W. 652.

Answer alleging fraud in assessment, and seeking to have the same set aside, held proper. *Id.*

**Objections to answer—How raised.**—If answer was not sworn to, or was defectively sworn to, objection on that account should have been specially made, when the defect could have been amended. The question could not be properly raised upon objection to the evidence. *State v. Quillen* (Civ. App.) 115 S. W. 661.

**Taxes recoverable.**—In a suit by the state alone, recovery can be had for the county taxes also. The remedy by foreclosure is applicable as well to county as to state taxes. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**Interest on delinquent taxes.**—Where judgment is rendered foreclosing state's tax lien it is proper to make the judgment bear six per cent. interest. *League v. State*, 93 T. 553, 57 S. W. 34, 35.

**Art. 7689. Proceedings in suits to foreclose tax lien.**—The proper persons shall be made parties defendant in such suits, and shall be served with process and other proceedings had therein as provided by law for suits of like character in the district courts of this state; and, in case of foreclosure, an order of sale shall issue, and the land sold thereunder as in other cases of foreclosure; but, if the defendant or his attorney shall, at any time before the sale, file with the sheriff or other officer in whose hands any such order of sale shall be placed a written request that the property described therein shall be divided and sold in less tracts than the whole, together with a description of such subdivisions, then such officer shall sell the lands in said subdivisions as the defendant may request, and in such case shall only sell as many subdivisions, as near as may be, to satisfy the judgment, interest, penalties and costs; and, after the payment of the taxes, interest, penalties and costs adjudged against it, the remainder of the purchase price, if any, shall be paid by the sheriff to the clerk of the court out of which said execution or other final process issued, to be retained by him subject to the order of the court for the period of two years, after which time the court may order the same to be paid to the state treasurer, who shall hold same in trust to be paid to the owner against whom said taxes were assessed; provided, any one claiming the same shall make proof of his claim to the satisfaction of the state treasurer, within ten years after the sale of said lands or lots, after which the same shall be governed by the law regulating escheats; provided, that no suit shall be brought to enforce such lien upon any land that a sufficient descrip-

tion to identify the same can not first be had; and provided, further, that, if there shall be no bidder for such land, that the county attorney shall bid said property off to the state for the amount of all taxes, penalties, interest and costs adjudged against said property; and, in the absence of the county attorney, the sheriff is authorized to bid to the state, when there are no bidders, and it shall be the duty of the district clerk to immediately make report of such sale in duplicate, one to the comptroller of public accounts, and one to the commissioners' court, on blanks to be prescribed and furnished by the comptroller. And, in all such cases where the property is bid off to the state, it shall be the duty of the sheriff to make and execute deeds to the state, using forms to be prescribed and furnished by the comptroller, showing in each case, the amount of taxes, interest, penalty and costs for which sold, and the clerk's fee for recording deeds as hereinafter provided. He shall cause such deeds to be recorded in the records of deeds, by the county clerk of his county, and when so recorded shall forward the same to the comptroller; and the county clerk shall be entitled to a fee of one dollar for recording each such deed to the state, to be taxed as other costs. And, when lands thus sold to the state shall be redeemed, it shall be the duty of the collector of taxes, when any such redemption is made, to make the proper distribution of the moneys received by him in such redemption, paying to each officer the amount of costs found to be due, and to the state and county the taxes, interest and penalties due each respectively. [Id. sec. 7.]

**In general.**—The law governing judgments of foreclosure in other cases is found in Art. 2000, and judgments must provide that an order of sale issue, etc. *Houssels v. Taylor*, 24 C. A. 72, 53 S. W. 192.

This article requires sales under tax liens to be made as in other cases of foreclosure. Formerly such sales were made as under execution and no notice to the defendant in the suit was required other than that obtained from posted notices. In 1895 the statute was amended so as to require further notice to be given "by delivering to the defendant in execution" a copy of the posted notice. By the act of 1903 the manner of giving notice was changed by requiring publication thereof in a newspaper and also a written notice to the defendant or his attorney of such sale either in person or by mail. A notice properly mailed is sufficient even though the defendant does not receive it. *Rogers v. Moore*, 100 T. 220, 97 S. W. 685.

**Parties.**—The wife need not be made a party in foreclosing a tax lien on a homestead. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

In an action to foreclose a tax lien upon a homestead, the wife is presumed to have only a homestead right. *Id.*

The wife is not a necessary party in foreclosing a lien for taxes on her husband's homestead. *City of San Antonio v. Berry*, 92 T. 319, 48 S. W. 496, affirming *Berry v. City of San Antonio* (Civ. App.) 46 S. W. 273.

Where defendants filed answers in a suit for taxes against unknown owners, and judgment was entered against unknown owners, an appeal by defendants will not be dismissed on the ground that they were not parties to the judgment. *Watkins v. State* (Civ. App.) 61 S. W. 532.

That suits for taxes were brought against unknown owners held not prejudicial to defendants, where they appeared and filed answers. *Id.*

Where the owner of land is in the actual occupation thereof, the state cannot deprive him of title by a suit for delinquent taxes against an unknown owner and without actual notice to him. *Hollywood v. Welhausen*, 23 C. A. 541, 68 S. W. 329.

In a suit under the delinquent tax act, all parties claiming any interest in the property must be made parties and be served with citation. *Ball v. Carroll*, 42 C. A. 323, 92 S. W. 1023.

**Citation—Sufficiency and service of.**—Judgment for sale of land for taxes held not subject to collateral attack, in trespass to try title, on account of insufficiency of citation. *Kenson v. Gage*, 34 C. A. 547, 79 S. W. 605.

The citation served by publication in an action for delinquent state and county taxes may be addressed directly to defendants, and it need not be addressed to any officer nor require any officer to make return thereof. *Gibbs v. Scales* (Civ. App.) 118 S. W. 188.

There can be no citation to an estate, as an estate, to appear to defend an action to foreclose a lien for taxes. *Perry v. Whiting*, 56 C. A. 550, 121 S. W. 903.

**Evidence.**—Introduction of tax roll showing an assessment of a mineral interest severed from the ownership of the surface of the land, held to establish a prima facie case for the state, in an action to recover taxes. *State v. Downman* (Civ. App.) 134 S. W. 787.

In an action to recover taxes on a mineral interest in certain land, evidence held insufficient to warrant a finding that an assessment of the surface included the mineral interest. *Id.*

In an action to foreclose a tax lien, evidence held to show that the 94½ acres, against which a foreclosure was sought, was a part of the 183 acres shown by a delinquent list; and hence the list was properly received in evidence. *McMahan v. State* (Civ. App.) 147 S. W. 714.



— **Burden of proof.**—See notes under Art. 3687, Rule 12.

**Judgment—Requisites and conclusiveness of.**—See, also, notes under Arts. 1994, 2000, and 7698.

A judgment directing sale of several tracts of land to pay taxes in gross does not violate article 8, section 13, state Constitution, as this article gives the owner the option to require the sheriff to sell each tract separately. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

An execution sale of several tracts of land in gross for taxes for which a judgment of foreclosure in gross has been rendered is not void. *Ryon v. Davis*, 32 C. A. 500, 75 S. W. 59.

Under this article and Arts. 6842, 7698, a judgment in proceedings to sell land for nonpayment of taxes held void, as residence of owner might have been ascertained from the records, and process was served as upon an unknown owner. *Wren v. Scales*, 55 C. A. 62, 119 S. W. 379.

**Order of sale.**—The requirement that land in towns and cities should be sold by lots is directory, and does not limit the power of the court to order the sale in the mode deemed most conducive to the interest of the parties. *Oppenheimer v. Reed*, 11 C. A. 367, 32 S. W. 325.

Issuing of two orders of sale on only one judgment held proper. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

The pasting of paper over printed words of an order of sale was immaterial. *Id.*

**Notice of sale.**—Sheriff's failure to notify nonresident owner or attorney of tax sale held, under facts, not to affect sale's validity. *Crosby v. Bonnowsky*, 29 C. A. 455, 69 S. W. 212.

Contention that property owners had not sufficient notice of sale for taxes held without merit. *Ross v. Drouilhet*, 34 C. A. 327, 80 S. W. 241.

Where the judgment and order of sale are valid and there is no fraud, a sale by the sheriff under execution will be upheld where he mailed notice to the judgment debtor, though he did not receive it. *Rogers v. Moore* (Civ. App.) 94 S. W. 113.

**Time of sale.**—In suit to set aside tax judgment and sale, held, that city attorney was not bound under agreement with plaintiffs to delay sale under judgment longer than he had. *Ross v. Drouilhet*, 34 C. A. 327, 80 S. W. 241.

**County attorney as purchaser.**—A county attorney who conducted the suit for taxes and obtains judgment of foreclosure can buy the land for himself at foreclosure sale. The statute requires the land to be bid in for the state only when there are no bidders. *Gibbs v. Scales* (Civ. App.) 118 S. W. 190.

**Disposition of proceeds of sale.**—Where the proceeds of a tax sale are insufficient to pay both taxes and costs, the entire costs made by either party must be first paid. *City of San Antonio v. Campbell* (Civ. App.) 56 S. W. 130.

Where there was a surplus on a sale of land for taxes, purchasers were not entitled thereto, nor were they responsible for the sheriff's misappropriation thereof. *Moore v. Rogers*, 100 T. 361, 99 S. W. 1023.

**Art. 7690. / Sheriff to execute deeds.**—In all cases in which lands have been sold, or may be sold, for default in the payment of taxes, it shall be lawful for the sheriff selling the same, or any of his successors in office, to make a deed or deeds to the purchaser or to any other person to whom the purchaser may direct the deed to be made, and any such deed shall be held in any court of law or equity in this state to vest a good and perfect title in the purchaser thereof, subject to be impeached only for actual fraud. [Id. sec. 8.]

See *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

**Former law.**—To establish a tax deed given 45 years before as evidence, it was unnecessary to show compliance with the prerequisites to a sale since under Sayles' Early Laws of Texas, art. 2865, p. 484, the deed is prima facie evidence of such compliance. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

**Title of purchaser at tax sale.**—Where plaintiff claimed title to land, and defendant by answer in chancery claimed title to land by sheriff's tax deed, he could not object to decree on ground that plaintiff had not shown title. *Murphy v. Williams* (Civ. App.) 56 S. W. 695.

Without an order of sale the sheriff can make no valid sale, and his deed "vests a good and perfect title" only when he sells by virtue of an order of sale. *Houssels v. Taylor*, 24 C. A. 72, 58 S. W. 192.

A purchaser at a tax sale held a tenant in common with certain owners of undivided interests in the land, entitled only to a lien against the interests for taxes paid by him. *Niday v. Cochran*, 42 C. A. 292, 93 S. W. 1027.

This article does not alter the rights of the party purchasing at tax sale or vest in him any title other than that of the unknown owner, as was the case under the former law. The constitutional provision declaring that a tax deed shall be held to vest good and perfect title in the purchaser does not in fact vest in the purchaser ownership of the land as against those not claiming under the unknown owner but adversely to him, and the provisions of this article do not alter the rule and cut off such adverse claimants. *Patton v. Minor* (Civ. App.) 117 S. W. 922.

— **Proof by purchaser.**—A claimant of lands under a sale for delinquent taxes held bound to prove that the taxes were duly assessed, were a charge on the land, and that the successive steps were taken which led to a lawful sale, at which he or his assignor became the purchaser. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

A sale of real estate for state and county taxes passes no title, in the absence of proof of a levy of the county tax. *Woody v. Strong*, 45 C. A. 256, 100 S. W. 801.

Recitals in tax deeds held insufficient to establish performance of prerequisites of tax sale. *Keenan v. Slaughter*, 49 C. A. 180, 108 S. W. 703.

**Art. 7691. Attorneys to represent state; fees, etc.**—The county attorney, or district attorney in counties where there is no county attorney, shall represent the state and county in all suits against delinquent taxpayers that are provided for in this act, and all sums collected shall be paid immediately to the county collector. In no case shall the compensation for said county attorney be greater than three dollars for the first tract in one suit, and one dollar for each additional tract, if more than one tract is embraced in same suit to recover taxes, interest, penalty and costs; provided, that those county attorneys, who may have heretofore or may hereafter institute said suits, shall be entitled to an equal division with their successors in office of the fees allowed herein on all suits instituted by them, where the judgment has not been obtained prior to the vacation of their office. The collector of taxes, for preparing the delinquent list and separating the property previously sold to the state from that reported to be sold as delinquent for the preceding year, and certifying the same to the commissioners' court shall be entitled to a fee of one dollar for each correct assessment of the land to be sold, said fee to be taxed as costs against the delinquent. The sheriff shall be entitled to a fee of one dollar for selling and making deed thereto to each purchaser of land that he sells under judgment for taxes, which fee shall be taxed as costs of suit; and the district clerk shall be entitled to a fee of one dollar and fifty cents in each case, to be taxed as costs of suit. And the county clerk for making out and recording the data of each delinquent assessment, and for certifying the same to the commissioners' court for correction, and for noting the same in the minutes of the commissioners' court, and for certifying the same, with corrections, to the comptroller, and noting the same on his delinquent tax record, shall receive the sum of one dollar, to be taxed as costs against the land in each suit; provided, that in no case shall the state or county be liable for such fees, but in each case they shall be taxed as costs against the land to be sold under judgment for taxes and paid out of the proceeds of sale of same after the taxes, penalty and interest due thereon to the state are paid; provided, that where two or more unimproved city or town lots belonging to the same person and situated in the same city or town shall all be included in the same suit and costs, except those of advertising, which shall be twenty-five cents for every ten lots, or any number less than ten, taxed against them collectively just as if they were one tract or lot; and provided, further, that where suits have been brought by the state against delinquents to recover tax due by them to the state and county, the said delinquent may pay the amount of the tax, interest, penalties and all accrued costs to the county collector during the pendency of such suit; and the county attorney shall receive as compensation therefor two dollars for the first tract and one dollar for each additional tract embraced in said suit; and the district clerk shall receive only one dollar, and the sheriff only one dollar in each case; but these fees shall be in lieu of the fees provided for such officers where suits are brought as hereinbefore provided. [Id. sec. 9.]

**Costs in general.**—The fee allowed to the officers named in this article can be charged for each year that the taxes are delinquent. *State v. Wolfe* (Civ. App.) 51 S. W. 657.

Under this article officers are entitled to a fee for each tract assessed, though the delinquent taxpayer has listed several tracts in one rendition. *Houston Oil Co. of Texas v. State* (Civ. App.) 141 S. W. 805.

The right of county collectors and county clerks to fees for preparing delinquent tax lists, etc., does not depend on their having been called on by the commissioners' court to perform that service. *Id.*

**Division of costs.**—If the suit is commenced by one county attorney and his term expires before judgment is rendered, and another is elected his successor, during whose term judgment is rendered, the attorney's fee should be divided equally between the attorney who filed the suit and the one in office when judgment was rendered. *Swayne v. Terrell*, 20 C. A. 31, 48 S. W. 218.

**Taxation of costs.**—Where unimproved lots are included in one suit for taxes thereon, they are to be treated as one lot in taxing costs, and not as separate lots and costs taxed for each lot. *Raht v. State*, 48 C. A. 106, 106 S. W. 900.

Under this article the costs provided for would be assessed in the same manner where a delinquent taxpayer paid his taxes without a suit therefor, as where a suit had been instituted to collect them. *Typer & Knudson v. Tom* (Civ. App.) 132 S. W. 850.

In an action by a delinquent taxpayer to recover costs collected upon payment of the taxes, upon the theory that but one charge should have been made by each officer performing services enumerated in the statute for all the lots collectively, instead of for each one separately, where plaintiff alleged that a certain sum was the highest sum collected on any one lot and offered to allow defendants a credit for that amount, and alleged that the lots were all owned by plaintiff and were unimproved and all situated in the same town, and alleged the sum total paid the collector and the difference between that sum and the amount averred as the highest sum collected on any one lot, as the amount sued for, the petition was sufficient, though neither the costs alleged to have been wrongfully collected, nor those which defendants had lawful authority to collect, were itemized, nor the names of officers other than the tax collector for whom costs were collected were alleged, nor the amount tendered by plaintiff to the tax collector, nor that the amount legally due was tendered. *Id.*

Under the statute, where delinquent taxes were owing on several lots owned by the same person, unimproved and situated in the same town, the lots should be grouped into one group and the costs, upon payment, taxed against them collectively, limiting each officer performing a service mentioned in the statute to one charge for the entire group; and where the lots had been purchased in four groups from four different persons, if any of the costs are legally taxable against the former owner, the rule for taxing the costs against all the lots collectively would apply to the group of lots purchased from such person, and such costs should be taxed against the group as a whole. *Id.*

**Art. 7692. Assessor to list unpaid taxes annually, etc.**—If any person shall fail or refuse to pay the taxes imposed upon him or his property by law until the thirty-first day of January next succeeding the return of the assessment rolls of the county to the comptroller, a penalty of ten per cent on the entire amount of such taxes shall accrue; which penalty, when collected, shall be paid proportionately to the state and county; and the collector of taxes shall, by virtue of his tax rolls, seize and levy upon and sell so much personal property belonging to such person as may be sufficient to pay his taxes, together with the penalty above provided, interest and all costs accruing thereon. If no personal property be found for seizure and sale, as above provided, the collector shall, on the thirty-first day of March of each year for which the state and county taxes, for the preceding year only, remain unpaid, make up a list of the lands and lots on which the taxes for such preceding year are delinquent, charging against the same all taxes and penalties assessed against the owner thereof. Said list shall be made in triplicate and shall be presented to the commissioners' court for examination and correction of any errors that may appear; and, when so examined and corrected by the commissioners' court, such lists in triplicate shall be approved by said court, and one copy thereof shall be filed with the county clerk, and one copy retained and preserved by the collector, and one copy forwarded to the comptroller with his annual settlement reports. When such list of lands and lots, delinquent for the preceding year only, is corrected, as provided for in this article, then such list shall be immediately advertised, as provided for in section 5 of this act [article 7687 of this chapter], and, after such advertisement, suit shall be instituted against delinquents for all taxes and penalties due, in the district court as above provided; and such list, as furnished by the tax collector, and corrected by the commissioners' court, and the assessment rolls or books on file in the collector's office, or either said list or assessment rolls or books, shall be prima facie evidence that all the requirements of the law have been complied with by the officers or courts charged with any duty thereunder as to the regularity of listing, assessing, levying all taxes therein mentioned, and reporting as delinquent any real estate whatsoever, and that the amount alleged against said real estate is a true and correct charge; and, in cases in which the description of the real estate in said list or assessment rolls or books is not sufficient to identify the same, and of which property there is a sufficient description in the inventories of the assessor's office, then said inventories shall be admissible as evidence of the description of said property. In the counties where the delinquent tax record for former years has not been furnished, as provided for in article 7685, the collector of taxes shall

also at the same time, make in triplicate a list of all lands and lots that have been previously sold to the state for taxes of former years, which have not been redeemed and on which the taxes are delinquent for the preceding year, and shall present the same to the commissioners' court for examination and correction of any error that may appear; and, when so examined and corrected by the commissioners' court, such lists, in triplicate, shall be approved by said court, and one copy thereof shall be filed with the county clerk, one retained and preserved by the collector, and one copy forwarded to the comptroller with his annual settlement reports. [Id. sec. 10.]

See *Stringer v. Franklin County* (Civ. App.) 123 S. W. 1168; *Mote v. Thompson*, 156 S. W. 1105.

**Former law.**—The provision as to the tax collection on March 31st of each year, making a list of delinquent taxes has no reference whatever to the time when taxes are delinquent. The state and county taxes on land for 1901 are delinquent in March, 1902, if not paid before that time. *Clark v. Elmendorf* (Civ. App.) 78 S. W. 539.

**Constitutionality.**—The fact that this act allows the judgment to include costs and penalties does not violate the fourteenth amendment to the constitution of the United States, securing to every citizen equality before the law. The act applies equally to all citizens. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**List of delinquent taxes.**—The list referred to in this article is not the one dealt with in Art. 7685. *Watkins v. State* (Civ. App.) 61 S. W. 533.

**Conditions precedent to collection of delinquent taxes.**—Proceedings can be had to enforce the collection of delinquent taxes even before the comptroller has prepared the delinquent tax record. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**Sale in gross.**—A sale in gross of different tracts of land for the payment of delinquent taxes and penalties is valid under article 8, section 15, state constitution. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**Costs, interest and penalties.**—Taxpayer failing to pay legal portion of taxes assessed held liable to the interest and penalties allowed by statute. *State v. Fulmore* (Civ. App.) 71 S. W. 418.

A national bank, tendering payment of taxes legally due from it before the time fixed for the accrual of penalty, held not liable for the penalty for nonpayment of taxes, in an action to recover an amount exceeding that which was legally due. *First Nat. Bank v. City of Lampasas*, 33 C. A. 530, 78 S. W. 42.

Under this article the right to fees for preparing delinquent tax lists, etc., prescribed by Art. 7691, does not depend on their having been called on by the commissioners' court to perform the services for which they claim compensation. *Houston Oil Co. of Texas v. State* (Civ. App.) 141 S. W. 805.

**Art. 7693. Law available to incorporated cities and towns.**—Any incorporated city or town or school district shall have the right to enforce the collection of delinquent taxes due it under the provisions of this chapter. [Id. sec. 11.]

**In general.**—This act was not intended to take away the express authority given to any city by special charter to bring an ordinary suit to recover its taxes. Its purpose was merely to authorize cities, towns and school districts to accept the benefits of this act should they see proper to proceed in the manner pointed out therein. And this law has only a future effect and is not intended to operate upon existing suits. *City of San Antonio v. Berry*, 92 T. 319, 48 S. W. 496.

**Art. 7694. Exemptions from this chapter.**—Real estate which may have been rendered for taxes and paid under erroneous description given in assessment rolls, or lands that may have been doubly assessed and taxes paid on one assessment, or lands which may have been assessed and taxes paid thereon in a county other than the one in which they are located, or lands which may have been sold to the state and upon which taxes have been paid and through error not credited in the assessment rolls, shall not be deemed subject to the provisions of this chapter. When called upon, the commissioner of the general land office shall furnish the county judge of any county compiling its own delinquent tax record, officially, with such information as may be necessary to enable him to determine the validity or locality of such surveys and grants as have not been shown by the printed abstracts of the land office. [Id. sec. 12.]

**Applicability in general.**—The provisions of this chapter do not apply where a person has assessed and paid taxes on his property, but under an erroneous description. *Hollywood v. Willhouser*, 28 C. A. 541, 68 S. W. 330, 331.

In view of Art. 7518, the three essential requirements were the name of the owner, if known, the description of the property, and its value, and hence, where an owner of city lots listed them for assessment as 15 acres of the J. survey, valued at \$3,000, and this assessment was not objected to either by the assessor or the board of equalization, and

the owner paid taxes levied on such assessment, a subsequent assessment of the property by lots and blocks to unknown owners constituted a double assessment, in violation of this article which the city had no right to make. *McMickle v. Rochelle* (Civ. App.) 125 S. W. 74.

**Art. 7695. Delinquent owners may redeem before sale.**—Any delinquent taxpayer whose lands have been returned delinquent or reported sold to the state for taxes due thereon, or any one having an interest therein, may redeem the same at any time before his lands are sold under the provisions of this chapter, by paying to the collector the taxes due thereon since January first, 1885, with interest at the rate of six per cent per annum and all costs and the penalty of ten per cent, as provided for in article 7692 of this chapter; provided, such penalty has accrued under the provisions and since the passage and taking effect of this chapter. [Id. sec. 13.]

**Art. 7696. May redeem in two years by paying double.**—Where lands are sold under the provisions of this chapter, the owner, or any one having an interest therein, shall have the right to redeem said land, or his interest therein, within two years from the date of said sale upon the payment of double the amount paid for the land. [Id. sec. 14.]

See Arts. 7641-7643, 7701.

**Statutory construction.**—A party whose property has been sold for taxes prior to 1895, in redeeming must conform to the requirements of the act of 1895, embodied in this chapter. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

Statutes providing for the redemption of land from sale for taxes should be liberally construed. *Jackson v. Maddox*, 53 C. A. 478, 117 S. W. 185.

**Right of redemption.**—A decree that the purchaser at tax sale shall be placed in possession within 30 days, and that defendant be debarred from asserting any claim in conflict with the tax lien foreclosed, does not deprive him of his equity of redemption. *Guerquin v. City of San Antonio*, 19 C. A. 98, 50 S. W. 140.

The purchaser at foreclosure of tax lien sale is not entitled to possession until expiration of two years from date of deed. *City of Marlin v. Green*, 34 C. A. 421, 78 S. W. 704, 79 S. W. 40.

The only right acquired by a purchaser at a foreclosure sale under a tax lien is subject to right of debtor to redeem within two years by paying double the amount of the bid, and this takes away a reason for the court's interfering that might otherwise be sufficient in a case where valuable property is bought at such sale for unconscionable price. Under the operation of this law the alleged inadequacy of price paid loses most of its force. *Rogers v. Moore*, 100 T. 220, 97 S. W. 636.

The refusal of a person holding under a judgment in proceedings to sell property for nonpayment of tax to allow part of the property to be redeemed held not a wrongful refusal of permission to redeem. *Blanton v. Nunley*, 55 C. A. 427, 119 S. W. 881.

Sale of land for taxes held not to affect the owner's title and possession until the right of redemption expires. *Turner v. Smith*, 56 C. A. 1, 119 S. W. 922.

**Time within which to redeem.**—Where land is sold for taxes under a decree in foreclosure, the former owner has two years to redeem. *Berry v. City of San Antonio* (Civ. App.) 46 S. W. 273. And it was error to direct that an order of sale for taxes should have the effect of a writ of possession. *League v. State* (Civ. App.) 56 S. W. 262.

A judgment for the sale of land for delinquent taxes should withhold the writ of possession until the expiration of the time for redemption. *Ryon v. Davis*, 32 C. A. 500, 75 S. W. 59. And the owner's title is not extinguished until the time for redemption has expired. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

**Possession during redemption period.**—The owner of land is entitled to possession during the two years allowed for redemption. *Masterson v. State*, 17 C. A. 91, 42 S. W. 1003.

**Persons entitled to redeem.**—The mere fact that a tender was made through an agency not known to purchaser to have an interest in the land can not affect the question. The real owner is given the right by statute to redeem and there is no law which requires him to exhibit his evidences of right at the time of redemption. *Logan's Heirs v. Logan*, 31 C. A. 295, 72 S. W. 418.

One joint owner has the right by paying the purchaser double the amount of his proportionate share to redeem his interest, but unless authorized by the other joint owners he has no right to redeem theirs. *Hill v. Harris*, 49 C. A. 365, 108 S. W. 489.

The heirs of one who held the possession of land by a tenant and who had a deed to the land, have such interest as entitles them to redeem the land sold for taxes. *Jackson v. Maddox*, 53 C. A. 478, 117 S. W. 185.

**Acts constituting redemption.**—Sale of land by other claimants to purchaser at tax sale held not a redemption, inuring to benefit of a claimant. *Kenson v. Gage*, 34 C. A. 547, 79 S. W. 605.

Certain transaction between owner of homestead and purchaser thereof at tax sale held tantamount to a redemption. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

**Amount necessary to redeem.**—One entitled to redeem from a tax sale is liable to the purchaser for interest on the amount due only from the date of the sale to the time he tenders such amount to the purchaser and offers to redeem. *Blair v. Guaranty Savings, Loan & Investment Co.*, 54 C. A. 443, 118 S. W. 608.

**Title acquired by redemption.**—Redemption from tax sale held not to give new title,

but simply to relieve land from the sale which has been made. *Bente v. Sullivan*, 52 C. A. 454, 115 S. W. 350.

Persons benefited by redemption.—One's redemption of land at a tax sale inures to the benefit of his equitable cotenants. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

**Art. 7697. May redeem from state, when and how.**—The owner or any one having an interest in lands or lots heretofore sold to the state, or any city or town, under decree of court in any suit or suits brought for the collection of the taxes thereon, or by a collector of taxes or otherwise, shall have the right within two years from the twelfth day of August, 1909, to redeem the same upon the payment of the amount of taxes for which sale was made, together with all costs, penalties and interest now required by law, and also the payment of all taxes, interest, penalties and costs on or against said lands or lots at the time of said redemption. And, where lands or lots shall hereafter be sold to the state, or to any city or town, for taxes under decree of court, in any suit or suits brought for collection of taxes thereon, or by a collector of taxes or otherwise, the owner having an interest in such lands or lots shall have the right to redeem the same within two years after such sale, upon payment of the amount of taxes for which sale was made, together with all costs, penalties and interest now required by law, and also the payment of all the taxes, interest, penalties, cost on or against said land or lots at the time of redemption. [Acts 1909, 2 S. S., p. 400.]

**Art. 7698. Proceedings against delinquents, unknown or non-resident.**—Wherever the owner or owners of any lands or lots returned delinquent or reported sold to the state, or that may hereafter be reported sold or returned delinquent for the taxes due thereon for any year or number of years, are non-residents of the state, or the name of the owner or owners of said land or lots be unknown, then, upon affidavit setting out that the owner or owners are non-residents, or that the owner or owners are unknown to the attorney for the state, and after inquiry can not be ascertained, said parties shall be cited and made parties defendant by notice in the name of the state and county, directed to all persons owning or having or claiming any interest in the following described land delinquent to the state of Texas and county of ———, for taxes, to-wit: (here set out description of the land as contained on the assessment roll and such further description obtainable in the petition), which said land is delinquent for taxes for the following amounts, \$——— for state taxes, and \$——— for county taxes, and you are hereby notified that suit has been brought by the state for the collection of said taxes, and you are commanded to appear and defend such suit at the ——— term of the district court of ——— county, and state of Texas, and show cause why judgment shall not be rendered condemning said land (or lot), and ordering sale and foreclosure thereof for said taxes and costs of suit, which notice shall be signed by the clerk and shall be published in some newspaper published in said county one time a week for three consecutive weeks. If there is no newspaper published in the county, then notice may be given by publication in a paper in an adjoining county. A maximum fee of two and one-half cents per line (seven words to count a line) for each insertion may be attached for publishing the citation as above provided for. If the publication of such citation can not be had for the compensation provided for in this article, then publication of the citation herein provided may be made by posting a copy at three different places in the county, one of which shall be at the court house door. It shall be lawful in all cases to set forth in the petition the name of all parties interested as far as ascertained, and make them parties, and also to join and make defendants all persons having or claiming any legal or equitable interest in the land described in the petition; and such suit, after such publication, shall be proceeded with as in other cases; and, whether any party or parties make defense or not on the trial of said case, the state and county shall be entitled to prove

the amount of taxes due, and shall have a decree for the sale of said land or lot as in those cases where defendant owners have been personally served and defend suit; and a sale of said land or lot shall be had and be as binding as where defendants were personally served with process. In all suits for taxes due, the defendant shall be entitled to credits he can show due him for any year or number of years for which he may be able to produce receipts; but the state shall have judgment and foreclosure of tax lien for any year or years sued for where the defendant can not offer receipt or other positive proof showing the payment of the claim for the taxes. [Acts 1897, p. 132, sec. 15.]

**In general.**—Prior to this law there was no provision of law for citing an unknown person in any case, except the unknown heirs of a known person. *Dunn v. Taylor*, 42 C. A. 241, 94 S. W. 350.

A suit to enforce a lien for delinquent taxes assessed against the property of an unknown owner held a proceeding in rem, not in a strictly judicial, but rather a step in administration proceedings, requiring the appearance of jurisdictional facts. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 74.

Facts held to show that certain lots in an addition belonging to an investment company could not be sold under the statute as belonging to unknown owners. *Harvey v. Provident Inv. Co.* (Civ. App.) 156 S. W. 1127.

**Constitutionality.**—The notice to nonresidents and unknown owners of lands sought to be subjected to taxation provided for by this article meets the requirement of "due process of law" or what is the same thing "the law of the land" required by the constitution. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 77, 78.

**Affidavit as prerequisite to citation by publication.**—To invoke process by publication in either of the statutory cases in which it is allowed, the party seeking it must make a certain affidavit, and unless this is done the service will not be legal. For instance in case of unknown heirs he must make oath that the names of the heirs are unknown. *Dunn v. Taylor*, 42 C. A. 241, 94 S. W. 350.

A citation by publication is not authorized unless the attorney for the state files an affidavit that the owners of the land are nonresidents of the state, or that the name of the owner is unknown and after inquiry cannot be ascertained, and of course a judgment without citation may be shown to be invalid if properly attacked. *Stoneman v. Bilby*, 43 C. A. 293, 96 S. W. 52.

An affidavit of publication of a notice of tax foreclosure proceedings held sufficient on collateral attack, notwithstanding the absence of the clerk's seal from the jurat, and the affidavit not void, but subject to amendment. *Young v. Jackson*, 50 C. A. 351, 110 S. W. 74.

Under this article the affidavit is a prerequisite to the filing of the suit and citation by publication is unauthorized except on the filing of the affidavit, and the judgment without it is subject to collateral attack. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**Requisites of petition, notice or citation.**—See, also, notes under Art. 1827, § 188.

A notice directed to the sheriff or any constable, instead of to all persons owning or claiming any interest in the land, etc., is fatally defective. A substantial compliance with the statute is essential to give jurisdiction. *Earnest v. Glaser*, 32 C. A. 378, 74 S. W. 606.

The statute gives the form of citation to be issued. The date of filing suit does not appear in the form, therefore the citation is sufficient without it. *Kenson v. Gage*, 34 C. A. 547, 79 S. W. 606.

The command to the sheriff to publish the notice to unknown owners preceding the notice and the command to him to make his return following the notice do not invalidate the citation by publication. *State v. Unknown Owner*, 47 C. A. 188, 103 S. W. 1116.

The notice by publication of suit against unknown owners to foreclose tax lien must so describe the land as to identify it and the unknown owners. Where the suit is for taxes on the Netherly survey and the citation as issued calls it the Wetherby survey and as published the Wetheraby, it is no notice at all to the unknown owners. *Harris v. Hill*, 54 C. A. 437, 117 S. W. 908.

A citation under this article need not recite the file number of the suit under Art. 1852, nor state the amount of the costs. *Unknown Owner v. State*, 55 C. A. 300, 118 S. W. 803.

**Validity and conclusiveness of judgment.**—See, also, notes under Art. 7689.

Where an order of publication in a tax suit summoned "George Eels and his unknown heirs," and there was a final judgment against "George Eels," and a dismissal as to the "unknown heirs of George Ellis," the suit stood dismissed as to the "heirs of George Eels." *Eels v. Blair* (Civ. App.) 60 S. W. 462.

A judgment rendered under due publication in a tax suit against the owner of land and his unknown heirs, in which the suit was dismissed as to the heirs and the land ordered sold, held valid. *Id.*

Sale under judgment of Galveston district court foreclosing tax lien held void for irregularity. *Cordray v. Neuhaus*, 25 C. A. 247, 61 S. W. 415.

In a suit for taxes against nonresidents, it is error to enter judgment for the gross sum due against several owners of different tracts without stating what amount of taxes was adjudged to be a lien on each separate tract. *Borden v. City of Houston*, 26 C. A. 29, 62 S. W. 426.

A judgment for taxes against the "unknown heirs" of a former owner is void as to the owner under grant from the deceased, and who had no notice of the suit. *Green v. Robertson*, 30 C. A. 236, 70 S. W. 345.

Where the owner of land is in occupation thereof, the state cannot deprive him of title by tax foreclosure suit against unknown owners. *Bingham v. Matthews*, 39 C. A. 41, 86 S. W. 781.

A citation and judgment in a proceeding to sell land of an unknown owner for taxes held void. *Bowden v. Patterson*, 51 C. A. 173, 111 S. W. 182.

A judgment in a suit to foreclose a tax lien held a judgment against all unknown owners made parties. *Sellers v. Simpson*, 53 C. A. 205, 115 S. W. 888.

But is not binding upon persons in possession, but not served with process. *Id.*

Where the judgment in a tax suit does not show that the court determined that due service had been made on the owners of the land, and the record shows a fatally defective notice, the judgment may be collaterally attacked. *Harris v. Hill*, 54 C. A. 437, 117 S. W. 907.

A person in possession claiming adversely to the owner whose title has been perfected by the ten-year statute who has no notice of a tax suit against the unknown owner is not affected by such suit or any judgment obtained therein. *Patton v. Minor* (Civ. App.) 117 S. W. 922.

Under this article the recital in a judgment of due notice to defendant, "an unknown person," was conclusive against a collateral attack, though it appeared that the citation was directed to an unknown person, and not to all persons owning or claiming any interest in the land. *Carr v. Miller* (Civ. App.) 123 S. W. 1158.

Failure to appoint an attorney to represent a defendant served by publication and to direct the case to stand continued did not render the judgment absolutely void. *Id.*

Under Const. art. 8, § 15, and Arts. 7528, 5683, where defendants, in adverse possession of certain land, had not been in possession for the 10 years required to confer title when the state instituted suit to foreclose its lien for unpaid taxes, so that they were not proper parties to such action, they were still bound by the judgment, though not served with notice, as provided by this article, and hence were not entitled to hold the land as against the purchaser from the state and those claiming under him. *Patton v. Minor*, 103 T. 176, 125 S. W. 6.

Owners of land holding under recorded deeds and decree of partition are not unknown owners, and they are not bound by a judgment for delinquent taxes rendered in a suit against unknown owners. *Nunley v. Blanton*, 103 T. 316, 126 S. W. 1110, affirming *Blanton v. Nunley*, 55 C. A. 427, 119 S. W. 881.

In a suit to quiet title, where plaintiff's deed was on record, and gave his residence as in a certain county of the state, a judgment for taxes against the "unknown owner" did not conclude plaintiff's title, since he was entitled to service of citation if within the jurisdiction of the court, and, not being an unknown owner, he was not a party to the proceedings. *Scales v. Wren*, 103 T. 304, 127 S. W. 164, affirming *Wren v. Scales*, 55 C. A. 62, 119 S. W. 879.

A judgment against unknown owners, foreclosing a tax lien, is not invalid because it is against "defendant," instead of "defendants." *Mangum v. Kenley* (Civ. App.) 145 S. W. 316.

Judgment against unknown owners, foreclosing a tax lien, is binding on the real owners. *Id.*

That the minutes of the term at which a judgment foreclosing a tax lien against the unknown owner of land was rendered had never been approved by the trial court, and that no attorney was appointed to represent such owner, as required by statute, were mere irregularities which could not be urged on collateral attack on the judgment and sale held pursuant thereto. *Jameson v. O'Neill* (Civ. App.) 145 S. W. 680.

Where the record owner of real estate rendered the same for taxes and paid the taxes thereon within the time limited by law, a judgment for delinquent taxes rendered in an action against unknown owners was void, because beyond the jurisdiction of the court. *Mote v. Thompson* (Civ. App.) 156 S. W. 1105.

**Title of purchaser.**—Sale under judgment in suit against unknown owners to enforce taxes held ineffectual against the owners who were in possession. *Peareson v. Branch* (Civ. App.) 87 S. W. 222.

Bona fide vendee of a purchaser of a tax sale held entitled to protection in his title. *Williams v. Young* (Civ. App.) 90 S. W. 940; *Speer v. Louisiana & T. Lumber Co.* (Civ. App.) 90 S. W. 943.

The fact that a deed at a delinquent tax sale only purported to convey the interest of an owner named and his unknown heirs held not to affect the claim of the purchaser under the unknown owners, made parties. *Ball v. Carroll*, 42 C. A. 323, 92 S. W. 1023.

A purchaser on execution of a vendee's interest in certain land held to have acquired only an equity, to obtain the legal title by payment of the balance of the purchase money. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

**Art. 7699. Similar proceedings by city or town.**—In any incorporated city or town, in which any lots or blocks of land situated within the corporate limits of said city or town have been returned delinquent or reported sold to said city or town for the taxes due thereon, the city council may prepare lists of delinquents in the same manner as is provided for in article 7685, and; when such lists shall be certified to as correct by the mayor of said city or town, the city council may direct the city attorney to file suit in the district court of the county in which said city or town is situated, for the recovery of the taxes due on said property, together with penalty, interest and costs of suit; which suits may be brought in the same manner as is provided in article 7687 of this chapter, for the bringing of suits by the county attorney. [*Id.* sec. 16.]

**Art. 7700. Lands to be platted and numbered.**—In counties in which the subdivisions of surveys are not regularly numbered, and in cities or towns in which the blocks or subdivisions are not numbered, or are so



irregularly numbered as to make it difficult or impossible for the assessor to list the same, the commissioners' court of such counties may have all the blocks and subdivisions of surveys platted and numbered so as to identify each lot or tract, and furnish the assessor with maps showing such numbering; and an assessment of any property by such numbering on said maps shall be sufficient description thereof for all purposes; and such maps, or a certified copy of same or any part thereof, shall be admissible as evidence in all courts; provided, that the cost of making said survey and plats shall be defrayed by the county in which said property is situated, and of which the said commissioners' court ordered the said surveys and plat made; provided, that the cost of any map of a town or city shall be paid by such town or city when ordered by the town or city. [Id. sec. 17.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Setting aside tax sale—Grounds.**—Misappropriation of the price by the officer is no ground for setting aside a sale for taxes. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

**Sale for taxes set aside for failure of sheriff to serve notice of the time and place of selling real estate.** *Bean v. City of Brownwood*, 91 T. 684, 45 S. W. 897, reversing *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

**Tax sale set aside for inadequacy of price and failure to give notice of sale.** *Edwards v. Harnberger* (Civ. App.) 55 S. W. 42.

**Inadequacy of price paid at a tax sale held insufficient to warrant an avoidance of the sale.** *Collins v. Ferguson*, 22 C. A. 552, 56 S. W. 225; *Crosby v. Bonnowsky*, 29 C. A. 455, 69 S. W. 212; *Ross v. Drouilhet*, 34 C. A. 327, 80 S. W. 241; *Blanton v. Nunley*, 55 C. A. 427, 119 S. W. 881.

— **Estoppel.**—See notes under Art. 3687, Rule 37.

— **Procedure.**—Proceeding by property owners for relief from void tax sale held properly brought in the form of a motion to set aside the judgment and sale. *Crosby v. Terry*, 41 C. A. 594, 91 S. W. 652.

— **Conditions precedent.**—A tax deed cannot be avoided unless the taxes are paid or tendered, though the collector made excessive charges for costs of sale. *Eustis v. City of Henrietta* (Civ. App.) 41 S. W. 720.

Where tax sale was void, owners on moving to set aside the same were only required to tender taxes and costs justly chargeable to them. *Crosby v. Terry*, 41 C. A. 594, 91 S. W. 652.

Party holding tax title based on void decree held not entitled to have amount paid by him refunded by owner of land. *Schaffer v. Davidson*, 44 C. A. 100, 97 S. W. 858.

Where a sale of land for taxes was fatally defective, but not fraudulent, it would only be set aside on the restoration to the purchasers of the full amount of their bid. *Moore v. Rogers*, 100 T. 361, 99 S. W. 1023.

— **Findings.**—Refusal to find that an owner of land sold for taxes would have designated a fractional portion for sale if he had been served with notice held proper in an action to set aside the sale. *Bean v. City of Brownwood* (Civ. App.) 43 S. W. 1036.

— **Rights and liabilities of parties.**—Where a tax sale is void, the owner is only liable for taxes due under the laws in force at the time the taxes became due. *Conklin v. City of El Paso* (Civ. App.) 44 S. W. 879.

Where defendant claimed title to land by sheriff's tax deed, and prayed that, if sale was void, he be decreed to have lien on land for taxes paid, his lien should not have been decreed for double the amount paid. *Murphy v. Williams* (Civ. App.) 56 S. W. 695.

Where plaintiff asserted title to land which defendant claimed by sheriff's deed under tax foreclosure, a set-off of rental value of land against taxes paid by defendant was not required, when defendant had received no rent and improvements by tenant exceeded rental value. *Id.*

On the setting aside of a tax sale for irregularity in the order of sale and advertisement, held, the purchaser was properly allowed the amount of his bid at the sale. *Rogers v. Moore* (Civ. App.) 94 S. W. 114.

Plaintiff held not entitled to recover from a tax collector the expense of having set aside judgments against her land for taxes; his neglect of duty not being the proximate cause of the suits. *Coleman v. Lytle*, 49 C. A. 42, 107 S. W. 562.

— **Conclusiveness of judgment.**—See notes under Art. 1994, § 25.

**Compensation for improvements by claimant under void tax title.**—See notes under Art. 7760.

**Reimbursement for taxes paid in trespass to try title.**—See notes at end of Title 128.

## CHAPTER SIXTEEN

### EVIDENCE OF TITLE TO REDEEM LAND

**Article 7701. Evidence of title to redeem land.**—In all cases where lands in this state have been or may be sold for taxes, and the owner of the land, at the time of such sale, shall desire to redeem the same, un-

der the provisions of the constitution of this state, or of laws enacted on that subject, it shall be sufficient to entitle such owner to redeem from the purchaser or purchasers thereof for him to have had a paper title to such land, or to have been in possession of such land in person or by tenant, at the time of the institution of the suit under which the sale was made, or when such sale was made; and the existence of such facts and conditions shall be sufficient prima facie evidence of ownership to entitle the party so claiming ownership to the right to redeem such land; and he shall not be required to deraign title from the sovereignty, nor shall any hiatus or defect in his chain of title defeat the offered redemption. Nothing herein contained shall be held to limit the right of one offering to redeem to prove ownership otherwise than herein provided, nor prevent any one having the superior title from redeeming such land within two years from the date of the tax sale by paying to the person who had previously redeemed such lands all amounts paid by him with legal interest. [Acts 1905, p. 118.]

## CHAPTER SEVENTEEN

### ASSESSMENT AND COLLECTION OF TAXES IN CERTAIN CASES

Art. 7702.	Property omitted from tax rolls, etc., list of.	Art. 7709.	Delinquent tax record to be published.
7703.	Property listed to be assessed, how.	7710.	Property listed by comptroller, when.
7704.	List to operate a lien on property.	7711.	List to be posted.
7705.	To be advertised.	7712.	Lands not rendered to be assessed, how.
7706.	Assessments reduced, when.	7713.	Duty of commissioners' court.
7707.	Commissioners' court may contract for collection.	7714.	Supplemental tax rolls to be prepared.
7708.	Bulk assessments validated, when.	7715.	Fees of assessor.

**Article 7702. Property omitted from tax rolls, etc., list of.**—Whenever the commissioners' court of any county in this state shall discover, through notice from the tax collector or otherwise that any real property has been omitted from the tax rolls for any year or years since 1884, or shall find that any previous assessments on any real property for the years mentioned are invalid, or have been declared invalid for any reason by any district court in a suit to enforce the collection of taxes on said properties, they may, at any meeting of the court, order a list of such properties to be made in triplicate and fix a compensation therefor; the said list to show a complete description of such properties, and for what years such properties were omitted from the tax rolls, or for what years the assessments are found to be invalid, and should be canceled and re-assessed, or have been declared invalid, and thereby canceled by any district court in a suit to enforce the collection of taxes; provided, that no re-assessment of any property shall be held against any innocent purchaser of the same, if the tax records of any county fail to show any assessment (for any year so re-assessed) by which said property can be identified and that the taxes are unpaid. The above exception, with the same limitation, shall also apply as to all past judgments of district courts canceling invalid assessments. [Acts 1905, p. 318, sec. 1.]

See *State v. Adams* (Civ. App.) 126 S. W. 674.

**Art. 7703. Property listed to be assessed, how.**—When said list has been made up in the manner prescribed in article 7701 [7702] the commissioners' court may, at any meeting, order a cancellation of such properties in said list that are shown to have been previously assessed, but which assessments are found to be invalid and have not been canceled by any former order of the commissioners' court, or by decree of any district court; and shall then refer such list of properties to be assessed

or re-assessed to the tax assessor, who shall proceed at once to make an assessment of all said properties, from the data given by said list (the certificate of the state comptroller as to assessments or re-assessments made by the tax assessor shall not be necessary as required under article 7675, Revised Statutes, but he shall furnish all blank forms needed, that uniformity may be had in all counties), and when completed shall submit the same to the commissioners' court, who shall pass upon the valuations fixed by him; and, when approved as to the values, shall cause the taxes to be computed and extended at the tax rate in effect for each separate year mentioned in said list; and, in addition thereto, shall cause to be added a penalty equal in amount to what would be six per cent interest to the date of making said list from the date such properties would have been delinquent had same been properly rendered by the owner thereof at the time and for the years stated in said list; provided, that the certificate of any tax collector of this state, given during his term of office, that all taxes have been paid to the date of such certificate on any certain piece of property, which is fully described in such certificate, or if the tax rolls of any county fail to show any assessments against such property sufficient to identify it, and that the same was unpaid at the dates such rolls may have been examined to ascertain the condition of any property as to taxes unpaid, this shall be a bar to any re-assessment of such property under this act for any years prior to the date of such certificate, or such examinations; provided, that the property referred to, when re-assessed, shall be held by an innocent purchaser, who has relied upon the correctness of such certificate, or the tax rolls heretofore referred to. [Id. sec. 2.]

**Art. 7704. List to operate a lien on property.**—The said list, when complete in all respects, as directed in the preceding articles, and filed with the tax collector, shall constitute a valid lien against all the properties mentioned in said list for the full amount of taxes, penalties, officers' costs, advertising and six per cent interest from the date of said list to the date of the payment of the full sum due on each separate piece of property. A copy of said list and all cancellation orders shall be furnished to the state comptroller, and a copy filed with the county clerk. [Id. sec. 3.]

**Art. 7705. To be advertised.**—The commissioners' court shall proceed to have such list of properties advertised in the manner provided in article 7687; after which, suit may be filed in the same manner as provided by law for the enforced collection of delinquent taxes. [Id. sec. 4.]

**Art. 7706. Assessments reduced, when.**—In all cases of delinquent taxes of unrendered and unknown property, where there appears to be an assessment of the same at a valuation excessive and unreasonable, the commissioners' court of any county shall be authorized to correct or reduce such values on the request of the tax collector with a full statement of the facts in each case; which statement and the action had thereon and the name of each commissioner voting for or against the reduction in valuation asked for shall be entered upon the minutes of the court; and a certified copy of the action had thereon shall be furnished to the comptroller of the state, and, when the values are so corrected or reduced, payment of taxes shall be accepted in accordance with such reduction, to which shall be added interest, penalty, advertising and costs, as provided by law. [Id. sec. 5.]

**Art. 7707. Commissioners' court may contract for collection.**—If the commissioners' court of any county in this state shall deem it expedient to contract with any person to enforce the collection of any delinquent state and county taxes, or to make up a list of properties referred to in this chapter, and to enforce the collection of taxes thereon for a per cent

of the taxes, penalty and interest actually collected and paid to the collector of taxes, the state comptroller shall be authorized to join in said contract and allow the same per cent for state taxes that is contracted to be paid by the commissioners' court for the collection of county taxes, which shall not exceed ten per cent, except in case of absolute necessity to employ an attorney to push the filing and prosecution of tax suits, and to pay for report of an abstract company as to the owner of property assessed as unknown or unrendered, and as to the holder of any liens against the same, in which case fifteen per cent additional may be allowed. It shall be the duty of the county attorneys of the several counties, or of the district attorney where there is no county attorney, to actively assist the person with whom the contract is made, by filing and pushing to a speedy conclusion all necessary suits for the collection of delinquent taxes under any contract; provided, that where any district or county attorney shall fail or refuse and in good faith to prosecute such suits, he shall not be entitled to any fees from such suits; provided, that, where any district or county attorney fails or refuses to bring these suits when requested to do so by the commissioners' court, or by the person having a contract herein provided for, then the contractor shall be authorized to employ some other attorney to file these suits in the name of the state, in the same manner provided by law now to enforce the collection of delinquent taxes. [Id. sec. 6.]

**Contracts for delinquent lists and taxes.**—The commissioners' court is authorized to make a contract with a party to collect the delinquent back taxes and pay him a commission for his services, and can order the tax collector to pay the commission earned under his contract, and it is the duty of the tax collector to obey the order. *Bailey v. Aransas County*, 46 C. A. 547, 102 S. W. 1159.

The county attorney cannot contract to prepare delinquent tax lists and collect delinquent taxes. *Stringer v. Franklin County* (Civ. App.) 123 S. W. 1168.

**Art. 7708. Bulk assessments validated, when.**—In all suits to enforce the collection of delinquent taxes, where the assessment of any property for any year is invalid by reason of the failure of the assessor to comply with the provisions of law for the description of any lot, block or tract of land, or to give a separate value on each lot, block or tract of land, known as "bulk assessments," or to enter upon the lists (similar to that used for the listing of rendered property, to be signed by the owner) all items of property assessed to unknown owners, all such assessments are hereby validated and given the same force and effect as if the descriptions, the separate valuations, and the listing were in all respects strictly in compliance with law; provided, as to description, that the descriptions given are sufficient to identify the property, as to separate values, that the valuations and the taxes shown upon the tax rolls (in what are called "bulk assessments") can be fairly prorated to each separate lot, block or tract of land; and, as to listing, that the valuation given on the tax rolls upon properties assessed as unknown are found to have been entered upon the assessor's block book as the original assessment, instead of listing as in rendered assessments, and then entering upon the tax rolls. [Id. sec. 7.]

See *State v. Adams* (Civ. App.) 126 S. W. 674.

**Validity.**—This article curing defective assessments, is valid. *Haynes v. State*, 44 C. A. 492, 99 S. W. 409.

**Art. 7709. Delinquent tax record to be published.**—The various counties of this state which have not heretofore made and published a delinquent tax record, under the provisions of chapter 103, acts of the regular session of the twenty-fifth legislature, are hereby authorized and it shall be their duty to make and publish the same to date hereof, and, when so done, it shall have the same force and effect as if made and published under that act; and any county which has heretofore made a delinquent tax record for any number of years is hereby authorized and empowered to re-compile the same to date hereof, and may compile each year thereafter under the provisions of said act. [Id. sec. 8.]

**Art. 7710. Property listed by comptroller, when.**—Whenever it shall appear to the comptroller of public accounts of the state, from an inspection of the tax rolls of any county of the state, or otherwise, that any lands in such county subject to taxation have not been assessed for taxation for any year since and including the year 1900, it shall be his duty and he is hereby required to make a list of such lands and send the same to the tax collector of such county by registered letter, properly addressed, accompanying such list with instructions to such tax assessor to assess such lands for taxes for the years for which they have not been assessed as shown by said list. [Acts 1905, p. 321, sec. 1.]

**Art. 7711. List to be posted.**—Upon receipt of such list, the tax assessor shall immediately post a copy of such notice and list at the court house door of his county, noting upon such copy the date of such posting; and the owners of the lands embraced in such list shall have the right, at any time within twenty days of such posting, to render the same to the tax assessor for the taxes for the years for which they have not been assessed for taxes, or for any of such years as shown by such notice, in the same manner as is provided for the rendition of other property for taxes under the provisions of the general laws for that purpose. [Id. sec. 2.]

**Art. 7712. Lands not rendered to be assessed, how.**—Should any of the said lands remain unrendered by the owners or owner thereof, under the provisions of article 7711, for any of the years for which the same have not been assessed according to said notice and lists, for twenty days after the date of the posting of such notice, it shall be the duty of the tax assessor, and he is hereby required, immediately upon the expiration of such time, to assess for taxes at their true value such lands so remaining unrendered and unassessed for each of the years since and including the year 1900, and including the year such lists are made up by the comptroller, listing the same in the name of unknown owners, and charging up to said lands the taxes, state and county, for which they are liable for each of such years, valuing such lands at their true and full value as provided in article 7530, Revised Civil Statutes. If any of said lands are lands purchased from the state as belonging to the school fund, the university, or any of the asylums of the state, and held under such contract of purchase upon which a part of the purchase money is still due, such lands being unpatented, no deduction shall be made in the value of said lands for, or on account of, such unpaid purchase money, but they shall be valued at their full and true value as though paid out and patented. [Id. sec. 3.]

**Art. 7713. Duty of commissioners' court.**—The tax assessor shall make up lists showing such assessments, and deliver the same to the county judge, who shall at once, unless a regular session is held within ten days thereafter, call a meeting of the commissioners' court in special session, as a board of equalization, for the purpose of passing upon said assessment lists in the manner provided in case of regular assessments, in so far as the provisions of the statute with regard thereto are applicable. It shall be the duty of the commissioners' court without delay to act upon said supplemental assessment lists, as to the value of the property embraced, and, when said values have been equalized as required by law, to approve the same, and to approve the rolls made up by the tax assessor in accordance therewith; provided, that the commissioners' court shall have no authority to alter said assessment lists, or in any way interfere with such assessments, except as to the values of property embraced therein, in equalizing the same as provided by law, and to strike therefrom any lands that have been already assessed for taxes at their true market value for the years for which they are assessed on said supplemental rolls and such taxes paid. [Id. sec. 4.]

**Art. 7714. Supplemental tax rolls to be prepared.**—After such supplemental assessment lists, as are herein provided for, have been passed upon by the board of equalization as herein provided, supplemental tax rolls shall be prepared by the tax assessor and approved by the commissioners' court as is required by law in case of the regular assessment for taxes; and thereafter the taxes due according to such supplemental rolls shall be collected as in case of other taxes, and, if not paid, such proceedings shall be had for their collection as in case of other taxes. [Id. sec. 5.]

**Art. 7715. Fees of assessor.**—For making the supplemental assessments provided herein, the tax assessor shall be entitled to the same fees to be paid in the same manner as is provided by law in case of regular assessments. This chapter is cumulative of all other laws upon the same subject. [Id. sec. 7.]

## CHAPTER EIGHTEEN

### OF MUNICIPAL TAXES TO PAY SUBSIDIES IN AID OF RAILROADS AND OTHER INTERNAL IMPROVEMENTS

Art.

7716. Such taxes, how applied.

7717. To be collected by city officers.

7718. Bond of the officers.

7719. Taxes paid in what.

Art.

7720. To be paid over every month.

7721. If insufficient, additional levy to be made.

**Article 7716. [5233] Such taxes, how applied.**—All taxes levied, assessed and collected for the purpose of paying the interest and principal of bonds heretofore issued by cities or towns to aid in the construction of railroads and other works of internal improvement, shall be applied solely to the objects for which they were levied, under the direction of the comptroller, as follows: First, to the payment of expenses of assessing and collecting the same; second, to the payment of the annual interest of such bonds, and not less than two per cent of the principal; and, if there be any excess on hand after making the above payments for the current year, it shall be used in the purchase and cancellation of said bonds. [Act Aug. 18, 1876, p. 174, sec. 1.]

**Art. 7717. [5234] To be collected by city officers.**—All such taxes shall be assessed and collected by the same officers whose duty it is to assess and collect the other municipal taxes, who shall receive the same rates of commission allowed for assessing and collecting the ad valorem tax of such city. The same remedies shall be used to enforce the assessment, collection and paying over such taxes as are or may hereafter be provided by law to enforce the assessment, collection and paying over of other municipal taxes. [Id. sec. 2.]

See notes under Art. 7718.

**Art. 7718. [5235] Bond of the officer.**—The officer whose duty it is to collect the aforesaid taxes shall give bond, with two or more sufficient sureties, to be approved by the mayor and board of aldermen of such city, in a sum fifty per cent greater than the estimated annual amount of said taxes; which bond shall be payable to the state, and shall be conditioned for the faithful assessing, collecting and paying over of said tax into the state treasury, as provided by law; and said assessor shall be amenable and subject to all laws enacted to secure the honest and faithful performance of the duties of collectors of taxes. [Id. sec. 3.]

**Liability on bond.**—A city has no right of action on the bond of its tax collector for a claim arising from collection of taxes, which by this article he is required to pay into the state treasury. *House v. City of Dallas*, 96 T. 594, 74 S. W. 902.

**Art. 7719. [5236] Taxes may be paid in what.**—It shall be lawful for the collector to receive in payment of the taxes herein specified current money or the matured coupons of the bonds for the payment of which such tax may have been levied. [Id. sec. 4.]

**Art. 7720. [5237] To be paid over every month.**—The collector of taxes levied under the provisions of this chapter shall pay over to the state treasurer, at the beginning of each and every month, all moneys or coupons he may have collected during the preceding month, deducting his legal commissions on the amount so paid, and shall make a report of his collections to the mayor and city council at its first regular meeting in each month. [Id. sec. 5.]

**Art. 7721. [5238] If insufficient, additional levy to be made.**—If it shall be ascertained, at any time, that the tax which has been levied for the payment of the city bonds issued under the provisions of law is insufficient to pay the annual interest and two per cent annually of the principal of such bonds, besides the expenses of assessing, collecting and paying over such tax, it shall be the duty of the comptroller to inform the mayor of said city of the fact; and it shall be the duty of the city council, and they shall, upon such information, levy such additional tax, and cause the same to be collected, as will be sufficient to make such payments; which levy shall be continued in force until the whole amount of principal and interest of said bonds shall have been fully paid. [Id. sec. 6.]

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## CHAPTER NINETEEN

### NEW COUNTIES

Art. 7722. When new counties are created.	Art. 7725. Compensation of collector.
7723. Transcripts of unpaid assessments.	7726. Compensation for transcribing rolls.
7724. To be verified.	

**Article 7722. [5239] When new counties are created, etc.**—Where any county now or hereafter created out of a part of any one or more organized counties, or when any unorganized county may be organized by the election and qualification of its officers, it shall be the duty of the person in charge of the assessor's roll in the county or counties from which such new county or any part of it, has been taken, or to which such unorganized county has been attached for judicial purposes, to allow such person as the commissioners' court of the newly organized county may appoint for that purpose access to the rolls for the purpose of making the transcripts hereinafter provided for. [Acts 1885, p. 107, sec. 1.]

**Special tax to pay judgments.**—See notes under Title 28, Chapter 1.

**Art. 7723. [5240] Transcripts of unpaid assessments.**—It shall be the duty of the person so appointed to make from such assessor's rolls two transcripts of the unpaid assessments, both on person and property, in that portion of the county included within the limits of the new county, or, as the case may be, in the limits of the former unorganized county. [Id. sec. 2.]

**Art. 7724. [5241] To be verified.**—The collector of the county from which such territory has been taken, or to which such unorganized county has been attached, shall examine and verify the transcripts herein provided for and attest their correctness over his official signature. For such service he shall receive twenty dollars from the county for which the transcript has been made, to be paid on the order of its commissioners' court. He shall also have the commissioners' court of his county to approve the transcript rolls, and shall deliver one of them to

the collector of the new county; the other he shall forward to the comptroller; and, when received by the comptroller, it shall authorize him to give the proper credit to the collector of the old county and to charge the same to the collector of the new county. [Id. sec. 3.]

**Art. 7725. [5242] Compensation of collector.**—The collector of such new county shall receive the same compensation, and shall have the same authority to collect and enforce the collection of the taxes found to be due by such transcripts as is enjoyed by the collectors of the other counties in this state. [Id. sec. 4.]

**Art. 7726. [5243] Compensation for transcribing rolls.**—The person selected by the commissioners' court of the new county to make such transcripts shall receive for his services such compensation as he may agree on with such commissioners' court. [Id. sec. 5.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Delegation of authority.**—The general rule of constitutional law that a sovereign power conferred upon one branch of the government cannot be delegated applies to taxation, but does not prevent delegating authority to municipal corporations provided such authority is subject to recall. *Stratton v. Commissioners' Court of Kinney County* (Civ. App.) 137 S. W. 1170.

**Construction of statutes in general.**—Revenue laws are to be construed fairly for the government and justly for the citizen, and so as to carry out the intention of the legislature gathered from the language used, read in connection with the general purpose of the law. *Eppstein v. State* (Civ. App.) 138 S. W. 1124.

**Tax on sale of harmful articles.**—In the absence of constitutional limitation, a legislature held empowered to prohibit or place a prohibitive tax on sale of harmful articles. *Ex parte Townsend*, 64 Cr. R. 350, 144 S. W. 628.

**Revocation or suspension of license.**—The revocation or suspension of a license to follow a lawful occupation is penal in effect, and the imposition of such penalty involves all the elements of a judicial proceeding. *Wichita Electric Co. v. Hinckley* (Civ. App.) 131 S. W. 1192.



## TITLE 127

## TIMBER

Art.  
7727. Log brands.  
7728. To be recorded.

Art.  
7729. Written report to be filed with county clerk, when.  
7730. Evidence of ownership, how proved.

**Article 7727. [5244] Log brands.**—Any person engaged in floating or rafting timber upon the waters of any river or creek of this state shall have a log brand with which to brand every log or stick that he may float or haul and put into the waters for sale or market, the same to be distinctly branded. [Acts 1879, p. 81, sec. 1.]

**Art. 7728. [5245] To be recorded.**—He shall have said brand recorded in every county in which he cuts any of said timber, and in the county where he proposes to sell or market said timber, by the county clerk, in a book to be kept by said clerk for that purpose, for which said clerk shall receive a fee the same as is by law allowed for recording stock brands. [Id. sec. 2.]

**Art. 7729. [5246] Written report to be filed with county clerk.**—Any persons who float any logs or timber in this state shall, on the first day of April, first day of July, first day of September, and on the first day of January of each year, or within fifteen days of said dates, make a written report under oath showing the number of logs cut or floated during the next preceding three months, the survey or surveys of land from which they were cut or carried, and the number cut from each, and a description of the brand placed thereon, and shall file the same with the county clerk of the county in which the timber was cut; and such clerk shall record the same in a book kept for that purpose, and index it, and receive therefor the sum of fifty cents from the party presenting the same; provided, that this law shall not apply to pickets, posts, rails or firewood. [Id. sec. 3.]

**Art. 7730. [5247] Evidence of ownership, how proved.**—A certificate under the hand of the county clerk, containing a description of a log brand and the name of the owner thereof, with a transfer on the back of it signed and acknowledged by such owner, or proved as other instruments for record, shall be prima facie evidence that the person to whom the transfer is made owns the logs described thereon. [Id. sec. 4.]

## DECISIONS RELATING TO SUBJECT IN GENERAL

**Sale of timber in general.**—A buyer of logs held not liable therefor under the contract of sale. *Southern Pine Lumber Co. v. Wm. Cameron & Co.*, 45 C. A. 350, 101 S. W. 488.

Under the facts, held that plaintiff could recover of defendants for standing timber which they bought of him and removed, though his title to the land failed. *Richburg v. Patten*, 46 C. A. 82, 101 S. W. 836.

A contract for sale of the timber on the vendors' lands in a certain part of the state held to sufficiently describe the property. *Hughes v. Adams*, 55 C. A. 197, 119 S. W. 134.

Purchaser of standing timber held to have relied on his own judgment, and not to be entitled to hold seller liable for misrepresentation. *Huber v. Hill* (Civ. App.) 130 S. W. 219.

In action on note for price of standing timber, court held not to have erred in refusing to find that there was no timber on the land when the contract was made. *Id.*

Contract for sale of standing timber, having sufficiently identified the land, held not invalidated by failure to attach map thereto. *Id.*

A contract of sale of timber held void for want of sufficient description of the land. *Adams v. Hughes* (Civ. App.) 140 S. W. 1163.

Where a contract of sale of standing timber failed because of the vendor's inability to make good title, the purchaser held entitled to recover only the purchase money paid. *Id.*

A contract of sale of timber held to make the obligations of the parties mutual and dependent promises. *Id.*

If plaintiff was the first to refuse to proceed under a contract with defendant for the cutting and delivery of logs, he could not sue defendant for breach of the contract. *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 T. 535, 142 S. W. 867.

The purchasers of standing timber having used only such means for removing it as was expressly authorized by the grant, without unnecessary injury to the land, are not liable for any injury to the land. *Davidson v. Bodan Lumber Co.* (Civ. App.) 143 S. W. 700.

An agreement that logs should be paid for according to scaling and classification by the buyer held binding upon the seller, in the absence of fraud or bad faith, though the agreement did not expressly state that such scaling should be conclusive. *Cudlipp v. C. R. Cummings Export Co.* (Civ. App.) 149 S. W. 444.

Evidence held to show that the purchaser of standing timber, who had done nothing for 11 years, had not cut the timber within a reasonable time, and that it had reverted. *Houston Oil Co. of Texas v. Boykin* (Civ. App.) 153 S. W. 1176.

An instrument executed by plaintiffs' grantor, after his conveyances reserving the timber and a vendor's lien, releasing the land from such lien, and quitclaiming and conveying to the grantee all right, title, and interest in the land conveyed by the previous deed, held to be only a release of the vendor's lien, and not a conveyance of the timber thereon. *Alf Bennett Lumber Co. of Texas v. Fall* (Civ. App.) 157 S. W. 209.

— **Limitation as to time.**—Where one purchases timber as personalty, if a time within which to remove it is fixed by his contract, he must remove it within that time, and if no time is fixed, he must remove it within a reasonable time, to be determined with reference to the circumstances of the case. *Beauchamp v. Williams* (Civ. App.) 115 S. W. 130.

If a purchaser of standing timber as personalty fails to remove it within a time fixed, or within a reasonable time if none is fixed, he forfeits his right to the timber not so removed. *Id.*

A reasonable time within which to remove timber purchased held not, as matter of law, to have expired before a certain date. *Id.*

When standing timber is sold as personalty and no time is fixed in the deed or bill of sale in which severance must be made, the law implies that a reasonable time was intended. *Montgomery County Development Co. v. Miller-Vidor Lumber Co.* (Civ. App.) 139 S. W. 1015.

A purchaser's failure to remove standing timber within the fixed time, or within a reasonable time, if none is fixed, forfeits his right to the timber not removed. *Houston Oil Co. of Texas v. Hamilton* (Civ. App.) 153 S. W. 1194.

Where a contract for the sale of timber provided that the grantee and his assigns should have a reasonable time within which to remove necessary houses, sheds, and other improvements erected on the land, he was entitled to a reasonable time, after the expiration of the last extension of lumbering rights under the contract, in which to remove the buildings and improvements. *Lancaster v. Roth* (Civ. App.) 155 S. W. 597.

Where growing timber is sold and a time limit fixed for its removal, the vendee loses all not removed within the time agreed on, whether the contract is regarded as a sale of the timber in specie or as a mere license to cut and remove. *Id.*

Under a contract for the sale and removal of standing timber to be cut, sold, and removed within a specified time, the grantee and his assigns, on the expiration of the final time as extended, did not forfeit to the grantor the logs and lumber remaining in the mill yard, but was entitled to remove the same. *Id.*

A grantee of standing timber held not excused for failure to remove the same within the contract period, as extended by the fact that weather conditions prevented the operation of his mill because of inability to obtain water. *Id.*

**Sale by owner of undivided interest.**—An owner of an undivided interest in a tract of land has no right to sell to another an undivided interest in the timber on the whole tract separate from his undivided interest. *Hunter v. Hodgson* (Civ. App.) 95 S. W. 637.

**Sale by mortgagor.**—If the right to cut and sell timber on mortgaged land is reserved to the mortgagor, the mortgagor can convey a good title to the timber and to any of its products. *American Nat. Bank of Paris v. First Nat. Bank*, 52 C. A. 519, 114 S. W. 176.

**Conveyance as conversion.**—If timber was a part of the realty when conveyed, its conveyance could not be a conversion thereof. *Berry v. Hindman* (Civ. App.) 129 S. W. 1181.

**Ownership by tenants in common.**—Tenants in common and each of them have the right to cut grass and marketable timber, but not to despoil the land. *Gillum v. Railway Co.*, 23 S. W. 716, 717, 4 C. A. 622.

Where one tenant in common without authority sells all the timber on the land, his co-tenant is entitled to recover from him and from purchasers with notice his share of the value of the timber taken. *Collier v. Wm. Cameron & Co.*, 55 C. A. 153, 117 S. W. 915.

A buyer of timber from an adult and infant owners held to become a tenant in common with those who owned the infant's interest, and, as such tenant, he could go on the land and appropriate at least a part of the timber. *Hatton v. Bodan Lumber Co.*, 57 C. A. 478, 123 S. W. 163.

**Deed of timber construed.**—A deed held one of standing trees as an interest in land without any limitation as to time of removal. *Lodwick Lumber Co. v. Taylor*, 100 T. 270, 98 S. W. 233, 123 Am. St. Rep. 803.

A deed of standing timber held to give right to cut it at any time. *Lodwick Lumber Co. v. Taylor* (Civ. App.) 99 S. W. 192.

A deed held a valid conveyance of timber without any limitation as to the time of removal. *Jones v. Lodwick Lumber Co.*, 44 C. A. 620, 99 S. W. 736.

A deed conveying all pine timber 12 inches in diameter at the stump, construed. *Havard v. Carter-Kelly Lumber Co.* (Civ. App.) 125 S. W. 928.

An instrument conveying timber construed, and held not to have passed any interest in the land, and to have provided for forfeiture of the timber on failure to remove it within a specified time. *Carter v. Clark & Boice Lumber Co.* (Civ. App.) 149 S. W. 278.

A deed providing that defendant "has bargained and sold \* \* \* all the mer-

chantable pine timber now standing" on certain land, "and agrees that L. \* \* \* shall have liberty to go upon the said land to cut the" same, is a conveyance of personality, and the timber must be removed within a reasonable time, or it will revert to the grantor. *Houston Oil Co. of Texas v. Boykin* (Civ. App.) 153 S. W. 1176.

Deed of the merchantable pine timber upon land held a sale of the timber as personal property, and in the absence of any specified time for removal, to give the purchaser a reasonable time therefor. *Houston Oil Co. of Texas v. Hamilton* (Civ. App.) 153 S. W. 1194.

A deed to standing timber construed, and held not to give a grantee an interest in the land, so as to entitle him to remove timber after the period designated in the deed. *North Texas Lumber Co. v. McWhorter* (Civ. App.) 156 S. W. 1152.

**Actions for taking timber.**—Where the taking of timber is intentional and wrongful, the owner may elect to fix the time of conversion, and proceed, according to the circumstances, to recover. *Ripy v. Less*, 55 C. A. 492, 118 S. W. 1084.

— **Plaintiff's possession.**—Executors held entitled to rely upon decedents' prior possession, to recover against a trespasser for cutting trees, where decedents were not in actual possession at the time of the trespass. *Beauchamp v. Williams* (Civ. App.) 115 S. W. 130.

— **Evidence.**—In trespass for cutting timber, a finding of gross negligence authorizing a judgment for the manufactured value of the timber cut held warranted. *Emporia Lumber Co. v. League* (Civ. App.) 105 S. W. 1167.

Evidence in an action for trespass held not to show that a time was agreed upon within which timber sold should be removed from the land. *Beauchamp v. Williams* (Civ. App.) 115 S. W. 130.

Evidence held to support a finding that defendants committed a timber trespass intentionally, and not through mistake in the land lines. *Ripy v. Less*, 55 C. A. 492, 118 S. W. 1084.

Evidence, in an action for taking timber, held to warrant a finding that the taking was willful as affecting plaintiff's right to recover the value of the timber in its manufactured state. *William M. Rice Institute v. Freeman* (Civ. App.) 145 S. W. 688.

— **Measure of damages.**—Where timber cut by a trespasser is made into railroad ties and sold to an innocent purchaser, the owner can recover the value of the timber in its improved condition. *Missouri, K. & T. Ry. Co. of Texas v. Starr*, 22 C. A. 353, 55 S. W. 393.

The measure of damages for the taking of timber by a trespasser is the value of the wood in its converted condition. *Brown v. Pope*, 27 C. A. 225, 65 S. W. 42.

The measure of damages for conversion, in case of cutting down of lumber under a mistaken belief of right, held to be the value of the trees and not of the manufactured lumber. *Texas & N. O. R. Co. v. Jones' Ex'rs*, 34 C. A. 94, 77 S. W. 955.

Where defendant's employes cut timber on plaintiff's land believing it to belong to defendant, defendant was liable only for the value of the timber at the time it was cut; but if such employes were negligent, or the trespass was intentional, defendant was liable for the value of the timber in its converted condition. *Messer v. Walton*, 42 C. A. 488, 92 S. W. 1037.

Where a trespasser removes timber from land and converts it into lumber, the landowner is entitled to recover the value of the lumber. *C. R. Cummings & Co. v. Masterson*, 42 C. A. 549, 93 S. W. 500.

The measure of damages in an action for injury to land caused by the destruction of trees, or in an action for the value of the trees destroyed, determined. *Galveston, H. & S. A. Ry. Co. v. Warnecke*, 43 C. A. 83, 95 S. W. 600.

Statement of the measure of recovery of the owner of standing timber, where another buys it of one without authority to sell and cuts it into ties. *Pettit v. Frothingham*, 48 C. A. 105, 106 S. W. 907.

Where timber is cut on the land of another the trespasser is liable for the full value of the property at the time and place of demand or of suit brought. *Ripy v. Less*, 55 C. A. 492, 118 S. W. 1084.

Defendant held not liable for the value of timber cut as enhanced by his own expenditures, where he acted in good faith in investigating the title, and believed that he owned the land. *Callen v. Collins*, 56 C. A. 620, 120 S. W. 546.

One recovering for a willful and wrongful taking of timber is entitled to recover its value in its manufactured state, e. g., where the timber is manufactured into staves. *William M. Rice Institute v. Freeman* (Civ. App.) 145 S. W. 688.

In order to warrant a recovery of the manufactured value of trees taken by one person from the land of another, the trespass must have been willful and without the belief in good faith that the taker was entitled to make the appropriation. *De Witz v. Saner-Whiteman Lumber Co.* (Civ. App.) 155 S. W. 980.

**Logging contracts.**—The refusal of a party to a logging contract to tell the other party whether he intended to finish out his contract held not a repudiation or breach of it, where he was at the same time, by acts as well as words, carrying out his obligations thereunder. *Hardeman-King Lumber Co. v. Hampton Bros.* (Civ. App.) 130 S. W. 647.

The refusal of an employer to pay his employes as required by two logging contracts was a breach of the contracts, and entitled the employes to cease performance and recover what was at the time due them. *Id.*

The refusal of an employer to carry out his obligations under two certain logging contracts, by refusing to pay what was due the employes under either, held a breach of both contracts, and that the employer's store account could not be set off against one of them alone. *Id.*

In an action for damages for breach of a contract to cut and deliver logs, evidence held to show that defendants intended to abandon the contract, but made no move to do so prior to plaintiff's breach. *Hardeman-King Lumber Co. v. Hampton Bros.*, 104 T. 585, 142 S. W. 867.

## TITLE 128

## TRESPASS TO TRY TITLE

Chap.  
1. Pleadings and Practice.

Chap.  
2. Claim for Improvements.

## CHAPTER ONE

## THE PLEADINGS AND PRACTICE

Art.		Art.	
7731.	Method of trying title to land, etc.	7744.	Abstract must be filed in twenty days.
7732.	Rules in other cases observed how far.	7745.	Abstracts shall state what.
7733.	The petition shall state what.	7746.	Amended abstract.
7734.	Indorsement on petition.	7747.	Surveyor appointed, etc.
7735.	Warrantor, etc., may be made a party.	7748.	Survey unnecessary when.
7736.	Landlord may become defendant.	7749.	Common source of title, proof of.
7737.	The possessor shall be defendant.	7750.	Judgment by default.
7738.	May join as defendants, whom.	7751.	Proof ex parte, when made.
7739.	May file plea of not guilty only.	7752.	When defendant claims part only.
7740.	What proof may be made under such plea.	7753.	Where plaintiff proves part.
7741.	Answer taken as admitting possession.	7754.	May recover a part, etc., when.
7742.	What is sufficient title, etc.	7755.	The judgment, etc.
7743.	Either party may demand abstract of title.	7756.	Damages, etc., when recovered.
		7757.	Considered with claim for improvements, when.
		7758.	Final judgment conclusive.
		7759.	Former laws shall govern, when.

**Article 7731. [5248] Method of trying titles to land, etc.**—All fictitious proceedings in the action of ejectment are abolished, and the method of trying titles to lands, tenements or other real property shall be by action of trespass to try title. [Act Feb. 5, 1840, sec. 1. P. D. 5292.]

**Nature and scope of remedy in general.**—An action involving title to land, whatever be its form, is, in effect, an action of trespass to try title to the land. *Grimes v. Hobson*, 46 T. 416; *Dangerfield v. Paschal*, 20 T. 537. And it is immaterial whether the cause of action or defense is legal or equitable. *Johnson v. Bryan*, 62 T. 623; *Neill v. Keese*, 5 T. 23, 51 Am. Dec. 746; *Miller v. Alexander*, 8 T. 36; *Easterling v. Blythe*, 7 T. 210, 56 Am. Dec. 45; *Martin v. Parker*, 26 T. 253; *Walker v. Howard*, 34 T. 478.

One in whose favor an action of "forcible entry and detainer" might be brought may, in lieu thereof, maintain an action for trespass to try title. *Thurber v. Conners*, 57 T. 96; *McDannell v. Cherry*, 64 T. 177.

This action, taking the place of the common-law action of ejectment, may be used where the object is to recover possession of land unlawfully withheld from the owner, and to which he has the right of immediate possession, whether the defendant claims under title or is a mere trespasser. *Hays v. T. & P. R. R. Co.*, 62 T. 397.

The action of trespass to try title embraces all character of litigation that affects the title to real estate. *Hardy v. Beaty*, 84 T. 562, 19 S. W. 778, 31 Am. St. Rep. 21; *Moody v. Holcomb*, 26 T. 719; *Titus v. Johnson*, 50 T. 237; *Rains v. Wheeler*, 76 T. 393, 13 S. W. 324; *Edrington v. Butler* (Civ. App.) 33 S. W. 143.

The owner of land in possession may maintain an action of trespass to try title to determine adverse and conflicting claims. *Edrington v. Butler* (Civ. App.) 33 S. W. 143. See *Moody v. Holcomb*, 26 T. 719; *Titus v. Johnson*, 50 T. 237; *Rains v. Wheeler*, 76 T. 393, 13 S. W. 324.

Where plaintiff claims title by settlement location, survey and return of field notes, his action is not merely for possession, but an action of trespass to try title. *Carnes v. Carnes*, 26 C. A. 610, 64 S. W. 878.

Trespass to try title held not in the nature of suit for specific performance, so as to be barred by limitations. *Turner v. Cochran*, 30 C. A. 549, 70 S. W. 1024.

The form of an action of trespass to try title is a special statutory proceeding. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

A suit to recover an undivided one-third interest in land, plaintiff admitting that defendant owned the remaining interest, was one of trespass to try title, though, in addition to seeking to recover the one-third interest, plaintiff asked for a partition of that interest when recovered. *McLean v. Moore* (Civ. App.) 145 S. W. 1074.

**Boundary disputes.**—A dispute as to boundaries may be determined in an action of trespass to try title, but only where facts are alleged sufficient to support that action. When, in addition to the confusion of boundaries, there is sufficient equity to give jurisdiction to a court of equity, the statutory action of trespass to try title may be used and the dispute as to boundary determined therein. *Nye v. Hawkins*, 65 T. 600.

Disputes as to boundaries may be determined in trespass to try title. *Weaver v. Vandervanter*, 84 T. 691, 19 S. W. 889; *Mahurin v. McClung* (Civ. App.) 34 S. W. 1046; *Rountree v. Haynes* (Civ. App.) 73 S. W. 435.

**Equities and rights of vendor and purchaser.**—The equities and rights of the vendor and vendee may be determined in this action. *Kauffman v. Brown*, 83 T. 41, 18 S. W. 425.

Where a grantor retained a vendor's lien for land conveyed to another heir in consideration of an annuity, and the grantee defaulted in a payment, the other heirs of the grantor may recover the land, unless the grantee tender the amount of the payment, less the amount due him by inheritance. *McRae v. Poor* (Civ. App.) 48 S. W. 47.

Trespass to try title may be maintained by vendor against vendee's grantee who assumed to pay lien notes, and who had acquired ownership of the notes as security. *Smith v. Cottingham*, 20 C. A. 303, 49 S. W. 145.

Where a vendor retains a lien in a trust deed and in the purchase-money notes, and the vendee dies before the price is paid on default made therein the vendor may recover the land by trespass to try title. *Curran v. Texas Land & Mortgage Co.*, 24 C. A. 499, 60 S. W. 466.

**Foreclosure.**—Plaintiff claiming under a deed which is in fact a mortgage cannot have a foreclosure in a suit in form of an action of trespass to try title. *Duty v. Graham*, 12 T. 427, 62 Am. Dec. 534; *Hannay v. Thompson*, 14 T. 144; *Parker v. Beaver*, 19 T. 410; *McKey v. Welch*, 22 T. 390; *Mann v. Falcon*, 25 T. 274; *Edrington v. Newland*, 57 T. 627; *Pratt v. Goodwin*, 61 T. 331.

One who receives a deed absolute on its face for money loaned, but who executes contemporaneously an instrument binding himself to reconvey on payment of purchase money, is but a mortgagee; not being entitled as such to the possession of the premises, his remedy is to foreclose, and this cannot be done in the form of an action of trespass to try title. *Edrington v. Newland*, 57 T. 627.

The action could not be maintained by grantee in a deed which was intended as a mortgage, the remedy being a suit to foreclose. *Wiggins v. Wiggins*, 16 C. A. 335, 40 S. W. 643.

A mortgagee held not entitled to bring trespass to try title. *Hume v. Le Compte* (Civ. App.) 142 S. W. 934.

**Redemption from Incumbrance.**—To entitle one to enforce redemption from incumbrance, he must sue for that purpose, alleging equities authorizing recovery, and the right cannot be enforced in trespass to try title. *Parks v. Worthington*, 39 C. A. 421, 87 S. W. 720.

**Recovery of school land leased by county.**—Trespass to try title cannot be maintained by a county to recover school land leased by it, unless the lease is void on its face; the remedy being in equity. *Midland County v. Slaughter* (Civ. App.) 130 S. W. 612.

**Removal of cloud on title.**—The levy of an attachment upon the land of a person who is not a party to the suit will not support an action to remove a cloud upon title. *Heath v. Bank* (Civ. App.) 32 S. W. 778; *Carlin v. Hudson*, 12 T. 202, 62 Am. Dec. 521; *Ferguson v. Herring*, 49 T. 130; *Purinton v. Davis*, 66 T. 456, 1 S. W. 343; *Spencer v. Rosenthal*, 58 T. 4; *Mann v. Wallis*, 75 T. 613, 12 S. W. 1123; *Kennard v. Mabry*, 78 T. 158, 14 S. W. 272.

**Railroad right of way.**—Where the statute provides a summary remedy by which lands can be condemned to the use of a railway company and damages assessed to the owner, such remedy does not interfere with the owner's right to an action of trespass to try title where the railway company occupies the land without resorting to the statutory method of condemning it. *Railroad Co. v. Ferris*, 26 T. 588; *Railroad Co. v. Pfeuffer*, 56 T. 66; *Railroad Co. v. Benitos*, 59 T. 326, citing *Hays v. T. & P. R. R. Co.*, 62 T. 397.

One who permits a railway company to enter upon his land and clear a right of way for its roadbed without objection, under verbal authority from him so to do, cannot afterwards repudiate the permission and maintain an action in trespass to try title to recover the strip so used for operating the road. *T. & St. L. R. R. Co. v. Jerrell*, 60 T. 267.

**Art. 7732. [5249] Rules in other cases observed how far.**—The trial shall be conducted according to the rules of pleading, practice and evidence in other cases in the district court, and conformably to the principles of trial by ejectment, except as herein otherwise expressly provided. [Id. sec. 2. P. D. 5293.]

**Art. 7733. [5250] The petition shall state what.**—The petition shall state:

1. The real names of the plaintiff and defendant and their residence, if known.

2. It shall describe the premises by metes and bounds, or with sufficient certainty to identify the same, so that from such description possession thereof may be delivered, and shall also state the county or counties in which the same are situated.

3. The interest which the plaintiff claims in the premises, whether it be a fee simple or other estate; and, if he claims an undivided interest, he shall state the same and the amount thereof.

4. That he was in possession of the premises or entitled to such possession.

5. That the defendant afterward unlawfully entered upon and dispossessed him of such premises, stating the date, and withholds from him the possession thereof.

6. If rents and profits or damages are claimed, such facts as show the plaintiff to be entitled thereto and the amount thereof.

7. It shall conclude with a prayer for the relief sought. [Id. sec. 1. P. D. 5292.]

**Petition.**—It is no misjoinder of causes of action to claim in the same suit judgment for the land and for damages committed on the premises, such as destroying timber, tearing down fences, etc. *Hillman v. Baumbach*, 21 T. 203.

A petition which alleges that plaintiff is the owner in fee simple of the land sued for and that the defendant is setting up a pretended title thereto is good on general exception. *Rains v. Wheeler*, 76 T. 390, 13 S. W. 324.

A plaintiff seeking to recover land on default in payment of purchase money must show an ability and willingness to make a valid title. *Kauffman v. Brown*, 83 T. 41, 18 S. W. 425.

A complaint which alleges that defendant claims a tax sale was void, and which asks judgment for the tax if it is so held, does not allege a void tax sale, nor admit that the tax was paid by the sale alleged. *Conklin v. City of El Paso (Civ. App.)* 44 S. W. 879.

Where partition is desired, the interest of the several parties should be stated in the petition. *Nehring v. McMurray (Civ. App.)* 45 S. W. 1032.

Sustaining an exception to an allegation in an amended petition in trespass to try title alleging a sale by plaintiff of the land in controversy after suit brought, and the prosecution of the suit in the name of plaintiff for grantee's benefit, held not prejudicial error. *Smith v. Olsen*, 92 T. 181, 46 S. W. 631.

A petition held good as a bill to cancel a void judgment. *Graham v. East Texas Land & Improvement Co. (Civ. App.)* 50 S. W. 579.

Allegations of complaint in trespass to try title held sufficient to show plaintiff's equitable title to land in controversy. *Bullock v. Sprowls (Civ. App.)* 54 S. W. 657.

Plaintiff, a corporation, may show identity with grantee named in deed in chain of title. *Houston & T. C. R. Co. v. Ennis-Calvert Compress Co.*, 23 C. A. 441, 56 S. W. 367.

A petition in trespass to try title held sufficient, as against a demurrer, to show that a transaction between a mortgagor and the purchaser at foreclosure was a loan, and that a resulting trust existed in favor of the mortgagor. *Hirshfeld v. Howard (Civ. App.)* 60 S. W. 806.

Art. 1875 confers the right of suit, but prescribes no form of pleading. This article prescribes a form of petition in trespass to try title, but does not inhibit the requisites prescribed by Art. 2174. *Cates v. Alston's Heirs (Civ. App.)* 61 S. W. 980.

Allegations that plaintiffs were executors of a will, and that they were lawfully seized and possessed of the lands, held to assert their right to recover in their individual capacity. *Hayden v. Kirby*, 31 C. A. 441, 72 S. W. 198.

Where a petition shows that plaintiffs seek to recover as foreign executors and also in their own right, their alleged right as executors should be stricken out on exceptions, but the suit should not be dismissed. *Id.*

Plaintiff held not precluded by his pleadings from attacking defendant's title as being through a sale by a substitute trustee without authority. *Bemis v. Williams*, 32 C. A. 393, 74 S. W. 332.

The allegations in a petition held sufficient. *Sanders v. Rawlings (Civ. App.)* 77 S. W. 41.

A petition in intervention in trespass to try title held good as against a demurrer. *Eddy v. Bosley*, 34 C. A. 116, 78 S. W. 565.

Where plaintiff, a tenant in common, sues to recover the entire tract, the petition cannot be construed as a repudiation or as an affirmation of what had been done by plaintiff's cotenants in selling specific portions of the track. *Zimpelman v. Power*, 38 C. A. 263, 85 S. W. 69.

Petition held not to authorize partition. *Keith v. Keith*, 39 C. A. 363, 87 S. W. 384.

A petition to recover possession of land held not open to the objection that plaintiff asserted inconsistent rights. *McCurry v. McCurry (Civ. App.)* 95 S. W. 35.

A paragraph of the supplemental petition averring coverture in replication to defendant's pleas of limitation was good against a general demurrer. *McAllen v. Alonzo*, 46 C. A. 449, 102 S. W. 475.

Where an action of trespass to try title went off on demurrer to the petition, and one of the instruments contained ambiguous language, when sought to be applied to the subject-matter, its construction must be arrived at in accordance with the intent of the original parties. *West v. Hermann*, 47 C. A. 131, 104 S. W. 428.

A plaintiff in trespass to try title who claims title and who shows that defendant's possession is under an executory contract of purchase held not required to allege certain facts. *Glenn v. Rhine*, 53 C. A. 291, 115 S. W. 91.

A petition held sufficient as against a general demurrer. *Williamson v. Williamson*, 53 C. A. 503, 116 S. W. 370; *Hammons v. Clwer (Civ. App.)* 127 S. W. 889.

Plaintiff need not specially plead an agreement by agents settling the disputed boundary line, and the ratification thereof, to avail himself thereof. *Cuneo v. Zilker (Civ. App.)* 125 S. W. 91.

Special allegations construed as allegations that, in consideration of paying a third person a certain sum, a defendant acquired possession of a section of land, and that this was sufficient to show a valuable consideration for his agreement that one-fourth should become plaintiff's property. *Hammons v. Clwer (Civ. App.)* 127 S. W. 889.

A petition held insufficient in not alleging the date of an agreement on which it was based, or a sufficient excuse for failure to allege the same. *Id.*

Petition held not to warrant a judgment for value of the land. *Broussard v. Mayumi (Civ. App.)* 144 S. W. 320.

Petition in trespass to try title, or, in the alternative, for damages from the taking of the property by condemnation, held not demurrable for failure to allege presentation of claim for damages to commissioners' court for approval. *Harbinson v. Cottle County* (Civ. App.) 147 S. W. 719.

Petition held sufficient to justify a judgment for the value of lots sold by defendant to third persons. *Home Inv. Co. v. Strange* (Civ. App.) 152 S. W. 510.

— **Description of premises.**—In boundary suits the petition should set out the land in dispute by metes and bounds. *Edwards v. Smith*, 71 T. 156, 9 S. W. 77; *Davis v. Smith*, 61 T. 18; *Porter v. Miller*, 76 T. 593, 13 S. W. 555, 14 S. W. 334.

The petition should describe the land sued for as in fact it is situated on the ground. *Roche v. Lovell*, 74 T. 191, 11 S. W. 1079; *Stephens v. Motl*, 81 T. 115, 16 S. W. 731; *Id.*, 82 T. 81, 18 S. W. 99; *Halley v. Fontaine* (Civ. App.) 33 S. W. 260.

In a suit to establish boundary lines, the petition should describe the boundaries by unambiguous calls. *Richardson v. Powell*, 83 T. 588, 19 S. W. 262.

Description of the land set forth in petition, and the evidence to support it held sufficient to identify the land claimed by defendant with that sued for. *Bateman v. Jackson* (Civ. App.) 45 S. W. 224.

Land being sufficiently described, held, misdescription in naming adjoining surveys would be rejected. *Bayne v. Denny*, 21 C. A. 435, 52 S. W. 983.

In trespass to try title, where the petition described the land as situated on "Corinth" street, and the citation as on "Coruth" street, the variance did not render the citation void. *Swain v. Mitchell*, 27 C. A. 62, 66 S. W. 61.

Petition in trespass to try title held to sufficiently identify the land. *Henry v. McNew*, 29 C. A. 288, 69 S. W. 213; *Echols v. Jacobs Mercantile Co.*, 38 C. A. 65, 34 S. W. 1082; *Louisiana & Texas Lumber Co. v. Kennedy* (Civ. App.) 142 S. W. 989; *Harbinson v. Cottle County*, 147 S. W. 719.

A petition to correct the description in a deed of trust held good. *Bracken v. Bounds* (Civ. App.) 70 S. W. 326.

Where, in trespass to try title, the description of the land given in the petition is so inaccurate and incomplete as not to identify the land, and it is impossible for the land in dispute to be contained in the description given, the petition is demurrable. *Thomas v. Tompkins*, 47 C. A. 592, 105 S. W. 1175.

Statement of the proper practice in boundary suits as to description of the lines and corners in pleadings. *Provident Nat. Bank v. Webb* (Civ. App.) 128 S. W. 426.

Plaintiff's deed held to sufficiently describe the land to render it certain that it comprehended the land sued for under the petition. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

A petition in trespass to try title held not bad on demurrer for describing several tracts. *Guilmartin v. Padgett* (Civ. App.) 138 S. W. 1143.

Where the description in the petition in trespass to try title correctly describes the land in controversy, other descriptions may be rejected. *Id.*

— **Interest or ownership.**—It is not necessary for the plaintiff, in an action of trespass to try title, to state the evidence of his title; but if the petition purports to do so, the substantial elements of the title must be stated. *Hughes v. Lane*, 6 T. 289. And where plaintiff claims title as resulting from a parol gift of the land in controversy, he should also allege the facts necessary to establish title, as valuable improvements, etc. *Montgomery v. Carlton*, 56 T. 361.

When a plaintiff in an action of this character pleads his title specially, and any link in the chain is dependent upon a fact resting in parol, such as heirship, etc., the fact should be alleged. But should the petition be in the statutory form, he will be permitted to adduce any competent parol evidence to establish his title, although the fact proposed to be established be not specially pleaded. *Edwards v. Barwise*, 69 T. 84, 6 S. W. 677.

A petition alleging ownership of land in plaintiffs, and an adverse claim by the defendants, is sufficient without alleging possession or right of possession in the plaintiffs. *Tevis v. Armstrong*, 71 T. 59, 9 S. W. 134.

In stating the requisites of the petition this article only requires the plaintiff to state the interest he claims in the premises—whether fee simple or other estate—and does not require him to plead his title. *Stevens v. Stoner* (Civ. App.) 54 S. W. 934.

— **Possession of plaintiff.**—The petition must state that plaintiff was in possession when the right of action accrued, or when ousted, or that he was entitled to such possession. *Stephens v. Motl*, 82 T. 81, 18 S. W. 99.

Plaintiff in trespass to try title held required only to state in his petition that he is seized and possessed of the property and entitled to the immediate possession of it without indicating how or when he acquired title. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

An allegation that one held land under a tax deed is equivalent to alleging that he was in possession. *Hammons v. Clwer* (Civ. App.) 127 S. W. 889.

Though plaintiff is not required to plead his title, yet if he does so and it is insufficient, a general demurrer should be sustained. *National Lumber & Creosoting Co. v. Maris* (Civ. App.) 151 S. W. 325.

The petition must state that plaintiff was in possession when the right of action accrued or that when ousted he was entitled to possession. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

— **Adverse possession or claim.**—Where the leading object of an action is to recover land, the additional allegation of the adverse claim being a cloud upon plaintiff's title will not change the character of the action from trespass to try title. *Shepard v. Cummings*, 44 T. 502.

An allegation of some adverse possession or claim is a necessary part of the petition in an action of trespass to try title. See opinion for allegations held insufficient to constitute the statutory action. *Nye v. Hawkins*, 65 T. 600.

A general objection to an averment of ouster held properly overruled. *Willoughby v. Long* (Civ. App.) 69 S. W. 646.

Under subdivision 5, an answer which alleges no ouster by plaintiff nor possession by him is insufficient as a cross-action. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

— **Damages.**—Under this subdivision a plaintiff cannot recover damages for injury to the land unless the facts showing such injury are alleged in the petition, and a petition claiming damages for the unlawful ejectment of plaintiff and withholding of the premises by defendant only authorizes such damages as directly resulted from the ejectment of plaintiff and the withholding of possession by defendant, and does not authorize a recovery of damages for the cutting and removal of timber on the land. *Kirby v. Hayden* (Civ. App.) 125 S. W. 993.

— **Prayer for relief.**—Plaintiff may so frame his petition as to secure a foreclosure of a lien, if on the trial what he believes to constitute title should in the judgment of the court be only a mortgage. A prayer asking the alternative relief without setting forth the facts which constitute it a mortgage is not sufficient. *Nye v. Gribble*, 70 T. 458, 8 S. W. 608.

— **Limitation.**—A plaintiff, relying on an exception to the running of the statute of limitations, must specially plead it. *Hughes v. Lane*, 25 T. 356.

Plaintiff who relies upon limitation for title need not specially plead it. *M., K. & T. Ry. Co. v. Wickham* (Civ. App.) 44 S. W. 1023.

The petition need not specifically plead title by limitation. *Benavides v. Molino* (Civ. App.) 60 S. W. 260.

— **Amendment.**—A plaintiff setting up a chain of title to the land sued for in his original petition may, by amendment, describe a tract of different location, and by other chain of title, and such amendment relieves the plaintiff from the allegations in his original petition as to his title, and he may support his title to the land described by any competent testimony. *Hunter v. Morse*, 49 T. 219. See Art. 7732.

If the facts set forth as the basis of recovery are the same in an original and in an amended petition, though the relief prayed for in the amendment may be different, the cause of action remains the same, and the defense of limitation, if not valid against the original petition, will not prevail against the amendment. If a new party plaintiff is made after the filing of the original petition, limitation runs as to such party up to the date of his making himself a party. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847.

A mistake in a description of the land claimed by the plaintiff cannot be corrected in this action. Such a correction can be made only in a suit for that purpose with the proper parties before the court. *White v. Kingsbury*, 77 T. 610, 14 S. W. 201.

A title acquired after commencement of a suit may be set up by amendment. *Bal-lard v. Carmichael*, 83 T. 355, 18 S. W. 734.

**Issues, proof and variance.**—See, also, notes under Art. 7740.

Though neither party is required to plead his title specially, yet if either one pleads, he will be confined to the evidence of the title as pleaded. *Rivers v. Foote*, 11 T. 662; *Turner v. Ferguson*, 39 T. 508; *Custard v. Musgrove*, 47 T. 219; *Cummins v. Denton*, 1 U. C. 181; *Railway Co. v. Whitaker*, 68 T. 630, 5 S. W. 448.

In an action for the recovery of land, partial discrepancies between the description of the land as given in the petition and as given in the title offered in evidence do not raise a question of variance between the allegations of the petition and the evidence offered in support of them, but a question of the identity of the land described in the petition and that described in the title. Therefore such discrepancies are not material, if it appear from the whole description in the title to be the same land described in the petition. *Smith v. Chatham*, 14 T. 322.

The defendant in an action of trespass to try title, having at the first trial relied upon one title, should not have been permitted, at a second trial granted him upon appeal, to set up a new and different title. The rights of the parties were fixed when the demise was laid. *Menifee v. Hamilton*, 32 T. 495.

Where plaintiffs in their pleadings do not set out the commencement or derivation of their title, it is error to exclude evidence of heirship, otherwise admissible, on the ground that there was no allegation of heirship in the pleadings. It would be different if plaintiffs had undertaken to specifically set out their title and had failed to aver heirship. *Bridges v. Cundiff*, 45 T. 440.

An alleged joint title in trespass to try title is not supported by titles in severalty to the individual plaintiff. *Teal v. Terrell*, 48 T. 491.

Plaintiff, who alleges a valid judgment against himself and execution sale of land and purchase thereof by defendant, is bound thereby, unless he shows that the sale was void or passed no title. *Hill v. Allison*, 51 T. 390.

Where defendant in trespass to try title claims title through a sheriff's deed under judgment and execution against plaintiff, plaintiff need not allege the common source of title to introduce evidence thereof. *Stegall v. Huff*, 54 T. 193; *Kerr v. Hill* (Civ. App.) 31 S. W. 1089; *Pearson v. Flanagan*, 52 T. 266.

A defendant in trespass to try title claimed, under a sheriff's sale, land described in the petition as lying and situated in the county of Dallas, state of Texas, known and designated as the northeast quarter of section 17, in township No. 3, south of the first base line, and range 1, east of the first meridian, located by virtue of Peters' colony certificate No. 275. He offered in evidence, in addition to the judgment and original execution, a writ of venditioni exponas and sheriff's return, to show levy and sale, in both of which the land was described as in the petition, except that section "7" appeared instead of section "17." The evidence was excluded. Held, it was error to treat the question thus presented as one of variance. *Freeman v. Brundage*, 57 T. 253.

Since the plaintiff is not required to set forth in his petition his chain of title, it is not necessary that he should state the fact that the written evidence of any link in the chain has been lost. Being himself a competent witness under the statute, he may testify to the loss of a missing deed without being required to first file the supplementary affidavit of its loss, required at common law. *Parks v. Caudle*, 58 T. 216.

When the boundary lines of the land sued for are not established so as to correspond with the description in the petition, the verdict should be for defendant. *Jones v. Andrews*, 62 T. 652.

The establishment of the boundary of plaintiff's land is necessary when he establishes his claim to any part of the land sued for, and is an issuable fact in such case, without the necessity of special pleading for that purpose. *Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81.



When the defendant disclaims title, but sets up title in himself to an adjoining tract of land, and, after asking for a survey to determine whether the two surveys conflict, prays that he may have judgment for costs if they do not, and for his improvements made in good faith if a conflict exists, evidence derailing plaintiff's title is unnecessary. *Mynders v. Ralston*, 68 T. 498, 4 S. W. 854; *King v. Haley*, 75 T. 163, 12 S. W. 1112; *Etter v. Dignowitty*, 77 T. 212, 13 S. W. 973.

It was insisted that the court erred in refusing to permit defendant to prove that there were other joint owners to the land beside the plaintiff. The petition alleged that plaintiff was the sole owner in fee of the land in question. Held, plaintiff had fully complied with the statute in setting forth his title; and the court did not err in refusing to permit the defendant to prove that there were other joint owners of the land beside the plaintiff, defendant not offering to connect himself with such title. *Gaither v. Hanrick*, 69 T. 92, 6 S. W. 619.

The plaintiff may introduce in evidence a deed forming a link in his chain of title, though it bears date subsequent to the alleged entry as charged in the petition, if executed before the institution of the suit. *Jenkins v. Adams*, 71 T. 1, 8 S. W. 603.

Under an allegation of ownership in fee plaintiff may show a contract of sale by which the vendor retained the legal title and the right to rescind until payment and under which plaintiff took possession and paid all installments. *Land Co. v. Wood*, 71 T. 460, 9 S. W. 340.

When the plaintiff sets out his title in his petition, he is confined in his evidence thereto. *Joyner v. Johnson*, 84 T. 465, 19 S. W. 522.

When the defendant pleads his title specially and asks affirmative relief, and plaintiff has matter in avoidance, the proof of it will not be admitted, and if admitted will not authorize a recovery by virtue thereof, in the absence of its being alleged in the plaintiff's pleadings. *Lapowski v. Smith*, 1 C. A. 391, 20 S. W. 957.

Pleading and proof held not at variance. *Kent v. Berryman*, 15 C. A. 487, 40 S. W. 33. Title by common source may be shown without pleading the nature thereof. *Webster v. McCarty*, 16 C. A. 160, 40 S. W. 823.

The fact that the title deeds of the defendant in trespass to try title do not accurately describe the land does not make out a variance in the description of the land sued for and the land recovered. *P. J. Willis & Bro. v. Smith*, 17 C. A. 543, 43 S. W. 325.

Where plaintiff claims as the only heir of her deceased mother, and pleads coverture to bar limitations, defendant can show that plaintiff is not the sole heir. *Hardy v. Brown* (Civ. App.) 46 S. W. 385.

Defendant, specially pleading title in himself, cannot defeat a recovery by proof of an outstanding title, not pleaded. *Hayes v. Gallaher*, 21 C. A. 88, 51 S. W. 230.

Where the land described in plaintiff's pleadings is not that embraced in her chain of title, it is proper to direct verdict for defendant. *Sayers v. Davis* (Civ. App.) 51 S. W. 520.

Under a petition in the general form of trespass to try title, plaintiff is not entitled to prove mistake, or any other fact entitling him to relief, unless specifically pleaded. *Matador Land & Cattle Co. v. State* (Civ. App.) 54 S. W. 256.

An allegation of fee-simple ownership is established by a trust deed; the legal title in a trust deed being in the trustee. *Matula v. Lane*, 22 C. A. 391, 55 S. W. 504.

Where plaintiffs pleaded title, alleging a trust, in that they furnished the money, they cannot recover, where defendant bought the land with his own money, though there be other evidence of a trust. *Perkins v. Davidson*, 23 C. A. 31, 56 S. W. 121.

Where plaintiff based his right on a tax sale of defendant's land, it was not necessary that he set forth defendant's title at the time of the sale. *Collins v. Ferguson*, 22 C. A. 552, 56 S. W. 225.

Where plaintiff's petition failed to allege that the land was a homestead, and defendant pleaded a verbal purchase, plaintiff was precluded from introducing evidence to show that the land was a homestead. *Fields v. Rye*, 24 C. A. 272, 59 S. W. 306.

Party claiming title by virtue of a sale under a foreclosure of a mortgage given by the grantee in a power of attorney giving authority to lease and sell such land cannot introduce such power in evidence to prove his title. *First Nat. Bank v. Hicks*, 24 C. A. 269, 59 S. W. 342.

There is no provision in this article that the facts establishing the title must be pleaded. If the petition is in statutory form plaintiff can adduce any competent parol evidence to establish title, though the fact to be established be not specially pleaded. *Benavides v. Molino* (Civ. App.) 60 S. W. 261.

The description of the land given in a petition in trespass to try title contained an additional description, but did not tend to vary the description stated in the instruments of title relied on. Held, that there was no variance. *Frazier v. Waco Bldg. Ass'n*, 25 C. A. 476, 61 S. W. 132.

A question as to the minority of plaintiff's remote grantor should not be made an issue when it can bring no advantage. *Gillum v. Fuqua* (Civ. App.) 61 S. W. 938.

In an action of trespass to try title, held, that there was no variance between the complaint and the proof. *Travis v. Hall*, 27 C. A. 95, 65 S. W. 1077.

Where a county, sued in trespass to try title, justifies its entry and claim by virtue of a condemnation proceeding, proof of service of notice therein is admissible without special pleadings. *Bowie County v. Powell* (Civ. App.) 66 S. W. 237.

A variance in trespass to try title held not to defeat the right of plaintiff to recover. *Anderson v. Anderson* (Civ. App.) 68 S. W. 297.

A lease if valid creates a possessory estate in the lessee and it is admissible under the general allegation of a fee simple title notwithstanding that subdivision 3 requires a plaintiff in trespass to try title to state in his petition the character of title claimed by him. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704.

Where plaintiff in trespass to try title alleged that the levy of the execution through sale under which he claimed was made on July 11th, but the sheriff's return showed that the levy was on July 8th, the variance was immaterial, and not calculated to mislead defendant. *Weinert v. Simang*, 29 C. A. 435, 68 S. W. 1011.

Where plaintiff claims under a deed executed by an agent, he may show ratification by the principal of the agent's act, without pleading such ratification. *Kirkpatrick v. Tarlton*, 29 C. A. 276, 69 S. W. 179.

Where plaintiff shows common source, there is no issue in the first instance as to the existence of title in the common grantor. *Gordon v. Hall*, 29 C. A. 230, 69 S. W. 219.

Discrepancy between deeds offered in evidence and description of land given in plea held not to create a variance. *Fischer v. Giddings* (Civ. App.) 74 S. W. 85.

A claim that defendants should have been confined to the issue of *res judicata* held untenable. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

The fact of defendant's occupancy of a certain "home section" held to have been put in issue. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

An admission, in a petition of intervention in trespass to try title, held to bring a certain issue into the case, and cure a failure of the answer to aver the facts. *Eddy v. Bosley*, 34 C. A. 116, 78 S. W. 565.

Defendant having specially pleaded, his title held confined to evidence thereof. *Tiemann v. Cobb*, 35 C. A. 289, 80 S. W. 250.

Certain evidence held admissible in support of cross-bill impleading another and alleging him to be the real party in interest. *Jinks v. Moppin* (Civ. App.) 80 S. W. 390.

In a suit by "W. M. Read" to establish a title to school land, an application for purchase by "Wm. Reed" held admissible. *Goethal v. Read*, 35 C. A. 461, 81 S. W. 592.

Where the petition attacked the sheriff's deed, under which defendant claimed, as void, plaintiff was not entitled to relief on a showing that the deed was merely voidable. *Temple v. Branch Saw Co.*, 39 C. A. 606, 83 S. W. 442.

In a formal suit in trespass to try title, the plaintiff may prove any character of title except that of limitation; no effort being made to plead his title specifically. *Arthur v. Ridge*, 40 C. A. 137, 89 S. W. 17.

Evidence held to require submission of the question whether plaintiff or defendants claimed as heirs of the real person for whose services the warrant was issued. *Kirby v. Boaz*, 41 C. A. 282, 91 S. W. 642.

In action of trespass to try title it was proper to show defendant's possession, claim of ownership, and ouster by writ of sequestration. *Latta v. Wiley* (Civ. App.) 92 S. W. 433.

An issue as to the consideration for a deed executed by the original owner to a party to the suit held immaterial. *Carlisle v. Gibbs*, 44 C. A. 189, 98 S. W. 192.

It is not necessary for plaintiff to prove the validity of her title, where it appears that defendant was in possession as plaintiff's tenant. *Berry v. Jagoe*, 45 C. A. 6, 100 S. W. 815.

Allegations of a supplemental petition held sufficiently broad to warrant the admission of certain evidence. *Id.*

Where plaintiff is not seeking the enforcement of any equity, he may introduce evidence to establish his title, although the fact proposed to be established was not specially pleaded. *Bumpass v. McLendon*, 45 C. A. 519, 101 S. W. 491.

The rule confining a party to a title specially pleaded is inapplicable to a title by limitation. *McAdams v. Hooks*, 47 C. A. 79, 104 S. W. 432; *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

The fact that defendant specially pleads his title only limits him to proof of the title pleaded, and does not relieve plaintiff from showing a title enabling him to recover. *Hutcheson v. Chandler*, 47 C. A. 124, 104 S. W. 434.

Certain evidence held admissible under special plea. *Allen v. Allen* (Civ. App.) 105 S. W. 53.

Defendants held not entitled under the pleadings to attack a deed by showing that it was fraudulent. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

Where, in a suit to recover an interest in land, plaintiff bases his right to recover on a deed which is attacked as a forgery, he cannot show that he had a right to the land by virtue of a resulting or express trust. *Robbins v. Hubbard* (Civ. App.) 108 S. W. 773.

Under general allegations as to title, any title may be proved. *Meade v. Logan* (Civ. App.) 110 S. W. 188; *Pierce v. Texas Rice Development Co.*, 52 C. A. 205, 114 S. W. 857.

An admission by defendant in compliance with district and county court rule No. 31 (67 S. W. xxiii) held an admission of every character of title which plaintiff may show he possessed. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

Where defendant pleads title specially, he cannot rely on any other title. *De Roach v. Clardy*, 52 C. A. 233, 113 S. W. 22.

Where plaintiffs claimed under deeds describing land as part of a survey remaining after a prior conveyance of 700 acres, it was proper to admit a deed from a former owner of the survey conveying 640 acres. *Uvalde County v. Oppenheimer*, 53 C. A. 137, 115 S. W. 904.

An inquiry in trespass to try title as to priority of liens under which the parties claim held immaterial. *J. M. West Lumber Co. v. Lyon* (Civ. App.) 116 S. W. 652.

Plaintiff held not bound by the date of the eviction pleaded, but entitled to prove that he was evicted on an earlier date. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Where plaintiff alleged that on or about January 1, 1905, he was lawfully seised and in peaceable possession of the land in fee, and that on that date defendants unlawfully entered on the premises and with force and arms ejected plaintiff therefrom and unlawfully withheld, and still withholds, from plaintiff the rightful possession, plaintiff was not confined to the dates of the possession and eviction pleaded, but was entitled to prove that the eviction occurred in 1901. *Id.*

Where plaintiff showed a superior right to defendants by prior possession, and defendants undertook to defeat plaintiff's *prima facie* title, or to substantiate their own title by proving a chain of title from the state, plaintiff was entitled to show that one of the links in defendants' chain was insufficient without defeating his own *prima facie* right. *Id.*

Though the controversy on the trial was, in the main, one merely as to the boundary lines between parts of a survey, owned, respectively, by plaintiff and defendant, the effect of defendant's plea of not guilty was to require plaintiff to prove that he had title to the land he sought to recover. *Dean v. Furrh* (Civ. App.) 124 S. W. 431.

Under an ordinary petition in trespass to try title, plaintiff's equities in the property in controversy, conveyed by him to defendant in trust for legitimate purposes, cannot be

proved, but the equities must be specially pleaded. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

Certain defendants held not entitled to recover any part of the land sued for not embraced in a deed, to which their claim was limited. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

A public easement in land which is the subject of litigation between individual parties is not involved in the suit, unless expressly brought into it by the parties. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

Plaintiff held entitled to show that one formerly in possession of the land was his tenant at will. *Crane v. Wood* (Civ. App.) 138 S. W. 444.

Under the ordinary pleadings in trespass to try title, neither party can introduce evidence of an equitable right. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

Where a plaintiff described the land and did not seek the recovery of any land west thereof, the fact that defendant inclosed and claimed land west of the described land was immaterial. *Cole v. Webb* (Civ. App.) 149 S. W. 245.

Where in a previous action between the same parties, involving the same land, defendants claimed under a deed from M., evidence that such deed was a forgery is admissible, even though defendants in the present action claimed under a lost deed from plaintiffs' ancestor. *Rice v. Taliaferro* (Civ. App.) 156 S. W. 242.

**Art. 7734. [5251] Indorsement on petition.**—The plaintiff shall indorse on his petition that the action is brought as well to try the title as for damages. [Id. sec. 2. P. D. 5293.]

**Effect of failure to indorse.**—The omission to indorse the petition cannot control the nature of a suit necessarily involving plaintiff's title. *Dangerfield v. Paschal*, 20 T. 536; *Bone v. Walters*, 14 T. 564; *Shannon v. Taylor*, 16 T. 413.

**Exception.**—Where a suit's character and object could have been mistaken, by which the defendants were about to be misled in their defenses, they should have excepted to the petition on that ground. *Dangerfield v. Paschal*, 20 T. 536; *Bone v. Walters*, 14 T. 564; *Shannon v. Taylor*, 16 T. 413.

An objection for want of an indorsement cannot be made by a general exception. *Day Co. v. State*, 68 T. 526, 4 S. W. 865.

**Art. 7735. [5252] Warrantor, etc., may be made a party.**—When a party is sued for lands, the real owner or warrantor may make himself, or may be made, a party defendant in the suit, and shall be entitled to make such defense as if he had been the original defendant in the action.

See *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**Intervention or bringing in of warrantor or others.**—While one who purchases during the pendency of a suit involving title to the land bought need not be made a party, but is bound by the decree against the person from whom he bought, there is no rule which will forbid making the purchaser from the defendant a party, at the will or with the consent of the plaintiff. *Jemison v. Halbert*, 47 T. 180.

When the title to real estate is directly involved in a suit pending, any one who has an interest in the property at the time of the commencement of the action has a right, on application made at the proper time and manner, to intervene. But when the title is not directly involved (as where the land has been levied on under attachment to satisfy a debt), then a third party in possession, in order to intervene, should allege such facts as would authorize a court of equity to grant him a writ of injunction. *Whitman v. Willis*, 51 T. 421; *Carlin v. Hudson*, 12 T. 202; *Ferguson v. Herring*, 49 T. 126.

Upon the institution of suit against the vendee of land with warranty, he may implead his warrantor, and in the same action, if the title should fall, he can recover on his warranty. *Crain v. Wright*, 60 T. 515; *Brown v. Hearon*, 66 T. 63, 17 S. W. 395; *Johns v. Hardin*, 81 T. 37, 16 S. W. 623; *Kirby v. Estell*, 75 T. 484, 12 S. W. 807; *Norton v. Collins*, 1 C. A. 272, 20 S. W. 1113.

A purchaser from defendant after suit may properly make himself a party defendant. *Land Co. v. Wood*, 71 T. 460, 9 S. W. 340.

Warrantors should not be brought in at such a time or in such a manner as unreasonably to delay the trial. *Kirby v. Estill*, 75 T. 484, 12 S. W. 807.

No judgment can be rendered against a warrantor who is not made a party to the suit. *Greening v. Keel*, 84 T. 326, 19 S. W. 435; *Simon v. Day*, 84 T. 520, 19 S. W. 691.

The defendant has the right to implead his warrantor in a suit pending in a county in which he does not reside. *McCreary v. Douglass*, 5 C. A. 494, 24 S. W. 367; *Johns v. Hardin*, 81 T. 37, 16 S. W. 623; *Kirby v. Estill*, 75 T. 484, 12 S. W. 807; *Meade v. Jones*, 13 C. A. 320, 35 S. W. 310.

A warrantor of defendant may be made a party to answer on his warranty. *Stark v. Homuth* (Civ. App.) 45 S. W. 761.

Answer impleading warrantors held sufficient to entitle defendant, of whom land was recovered by plaintiff, to recover his damages. *Sullivan v. Creamer* (Civ. App.) 50 S. W. 431.

Attempt of grantee of defendant in trespass to try title to become a party without leave of court held futile. *Riviere v. Wilkens*, 31 C. A. 454, 72 S. W. 608.

It was error to render judgment against plaintiff's vendor, who defaulted when cited on his warranty, on an amended petition not served on the vendor and claiming special damages not claimed in original. *Coreth v. McNatt*, 33 C. A. 473, 77 S. W. 33.

Under the statute authorizing defendants to implead their warrantor, it is improper to grant a severance as to a warrantor impleaded by defendants. *Cobb v. Robertson*, 99 T. 138, 86 S. W. 746, 122 Am. St. Rep. 609.

When warrantors are cited by defendants to appear and defend and judgment is in favor of all defendants and plaintiff appeals his appeal bond must be made payable to all the defendants. Appellate court will grant time in which to file new bond. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

Defendant in trespass to try title may file his cross-action against his warrantors independently of his answer at any time after he has been cited in the pending suit. *Houston Oil Co. of Texas v. Davis* (Civ. App.) 132 S. W. 808.

Defendant cannot delay the trial of the case beyond a reasonable time to enable him to bring in his warrantors by proper pleading and citation. *Id.*

A defendant is not entitled as a matter of right to wait until he is required to file his answer to the action before filing his cross-action, in pleading his warrantors as defendants for the cross-action can be set up in an independent pleading, and may be filed at any time after he is properly served with citation in the pending suit. *Id.*

The grantee under a warranty deed, on being sued for the land, can vouch the grantor into the suit and maintain against him a cross-action on the warranty. *McLean v. Moore* (Civ. App.) 145 S. W. 1074.

**Process.**—Where the defendant sets up his title and asks that his vendor be made a party to defend the title conveyed, the vendor must be served not only with a copy of the writ and of plaintiff's petition, but also with a copy of the defendant's answer and cross-bill, in which prayer is made to make such new defendant. *Crain v. Wright*, 60 T. 515.

Where defendant pleaded over against the executors of the estate of his grantor on the warranty of title, and they did not appear, judgment could not be rendered against them without service of citation requiring them to answer in the original suit. *Bomar v. Morris* (Civ. App.) 126 S. W. 663.

**Defenses by warrantor.**—A warrantor whose deed conveyed no title, when sued by the former owner with his vendee as codefendant may set up title acquired by limitation by such vendee since the sale. *Branch v. Baker*, 70 T. 190, 7 S. W. 808.

A vendor of land who gives a general warranty of title, when made a party defendant in a suit against his vendee, must defend that title. Defenses of limitation available to the vendee, or of the sufficiency of any part of the title which he warrants, must be urged by him. *Brown v. Hearon*, 66 T. 63, 17 S. W. 395.

A warrantor impleaded by the defendants may present the defense of limitations so as to protect his vendees, but when he relies upon their possession and not his own he should plead the statute in that form. *Land & Mortgage Co. v. Bridgeman*, 1 C. A. 383, 21 S. W. 141.

**Liability of warrantor.**—See, also, notes under Arts. 1108, 1112, 1113.

As to liability of warrantor on breach of covenant. See *Clark v. Mumford*, 62 T. 531; *Buchanan v. Kauffman*, 65 T. 235.

Where rents are recovered or set off against improvements, the warrantor is liable for interest for the time rents were recovered. *Boone v. Knox*, 80 T. 642, 16 S. W. 448, 26 Am. St. Rep. 767.

A warrantor may not only be required to defend the title, but the warrantee may also plead over against him and recover on the warranty in the same suit if the title fail. *Johns v. Harden*, 81 T. 37, 16 S. W. 623; *Kirby v. Estill*, 75 T. 485, 12 S. W. 807; *Crain v. Wright*, 60 T. 515.

In an action against parties in possession under warranty deeds executed to them by one affected with notice of a superior equity, the warrantor was made party by the defendants. It appeared that the defendants had paid but a part of the purchase money and had executed their negotiable notes for the remainder, and that their warrantor still held these notes. The defendants being innocent purchasers recovered the land, and the plaintiffs showing title against their vendor were entitled to recover of the defendants the unpaid purchase money. *Tate v. Kramer*, 1 C. A. 427, 23 S. W. 255.

As to the amount of recovery by a remote vendee on breach of warranty. *Hollingsworth v. Mexia*, 14 C. A. 363, 37 S. W. 455.

**Art. 7736. [5253] Landlord may become defendant.**—When such action shall be commenced against a tenant in possession, the landlord may enter himself as the defendant, or he may be made a party on motion of such tenant; and he shall be entitled to make the same defense as if the suit had been originally commenced against him. [*Id.* sec. 5. P. D. 5296.]

See *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**Operation and effect of judgment against tenant.**—See, also, note under Art. 7758.

In an action of trespass to try title wherein the defendant set up a previous judgment obtained against the tenant of the present plaintiff, and claimed that the same was conclusive against him, it was held that, notwithstanding this and the following article, where the landlord is not a party, and has no notice of the pendency of the suit, he is not bound. *Read v. Allen*, 56 T. 176.

A suit prosecuted to effect against the tenant breaks the continuity of the possession, and the judgment may be used to defeat limitation when asserted by the landlord. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

**Reopening case and setting aside judgment.**—See notes under Arts. 2019-2029.

**Art. 7737. [5254] The possessor shall be defendant.**—The defendant in the action shall be the person in possession, if the premises are occupied, or some person claiming title thereto in case they are unoccupied.

See notes under Art: 7736.

Cited, *Tevis v. Armstrong*, 71 T. 59, 9 S. W. 134; *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**Possession of defendant in general.**—The owner of land has such seizin by reason of his title, whether legal or equitable, as will support an action of trespass to try title; and he may elect to consider himself ousted, and bring suit against an adverse claimant of the land, even though such claimant has never been in actual possession. *Titus v.*

Johnson, 50 T. 224. As to the distinction in possession by the owner and a trespasser, see *Whitehead v. Foley*, 23 T. 290; *Cantagrel v. Von Lupin*, 53 T. 570; *Parker v. Bains*, 59 T. 15; *Evitts v. Roth*, 61 T. 85.

One who has recovered judgment in forcible entry and detainer brought by him cannot be regarded as a mere trespasser, in a subsequent action of trespass to try title brought against him by defendant in the forcible entry and detainer suit. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 88.

**Tenant holding over.**—See notes under Art. 7742.

**Occupation by army officer.**—Army officers occupying land without the consent of the owner and without authority of law stand under the same liability as would a private citizen. That such occupation was taken as military officers and under orders from their superiors would not affect such liability. *Stanley v. Schwalby*, 85 T. 348, 19 S. W. 264.

**Art. 7738. [5255] May join as defendants, whom.**—The plaintiff may join as a defendant with the person in possession, any other person who, as landlord, remainderman, reversioner or otherwise; may claim title to the premises, or any part thereof, adversely to the plaintiff.

**Purchaser from defendant.**—A defendant answered, denying that he was in possession, and after averring that he had sold and conveyed the land after the filing of the petition, but before service of citation on him, and without knowledge that he was sued, asked that his vendee be made a party defendant. Held: (1) The answer was properly disregarded by the court. (2) The refusal to make defendant's vendee a party, even if he might properly have been a party, was not an error of which the defendant could complain. *Stewart v. Kemp*, 54 T. 248.

**Possessor under wife's claim.**—A defendant in possession by virtue of his wife's claim to the property has no right to suspend proceedings in the cause until his wife can be made a codefendant. His possession by virtue of his wife's claim, may be defended without the necessity of making her a party. Her rights would not be concluded by the judgment, and the disadvantage which might result from her nonjoinder as a defendant would affect the plaintiff alone. *Thomas v. Quarles*, 64 T. 491.

**Severance as between defendants.**—When, in trespass to try title, the interest of the defendant is separate and distinct from that of codefendants in the land sued for, it is not error to allow a severance after a joint answer filed by all the defendants. *Snider v. Methvin*, 60 T. 487.

Where defendants claim separate tracts of land sued for they may sever in their defense. Nor is such right lost by their pleading jointly not guilty. Such right will be protected in favor of an actual settler residing upon the lands against a subsequent purchaser. *Land Co. v. Wood*, 71 T. 460, 9 S. W. 340.

A refusal to set aside an order of severance in the action of trespass to try title, granted by consent, not a ground for a new trial. *Grigsby v. May*, 84 T. 241, 19 S. W. 343.

**Art. 7739. [5256] May file plea of "not guilty" only.**—The defendant in such action may file only the plea of "not guilty," which shall state in substance that he is not guilty of the injury complained of in the petition filed by the plaintiff against him, except that if he claims an allowance for improvements he shall state the facts entitling him to the same as provided in the succeeding chapter. [Act Feb. 2, 1844. Id. sec. 5. P. D. 5307.]

**Plea or answer and subsequent pleadings.**—The plea of not guilty puts in issue not only the title of the plaintiff, but also the possession of the defendant, and imposes on the plaintiff the necessity of proving everything requisite to sustain his right of action. *Stroud v. Springfield*, 23 T. 649.

A defendant pleading specially facts admissible under the plea of not guilty cannot thereby prevent a discontinuance of the suit by a nonsuit by plaintiff. *Hoodless v. Winter*, 80 T. 638, 16 S. W. 427.

Defendant may plead the statute of frauds against a parol agreement set up to defeat his title. *Sanborn v. Murphy*, 86 T. 437, 25 S. W. 610.

Plea setting up homestead rights held not to state a defense, and therefore not to restrict defendants to proof of such title. *Wiggins v. Wiggins*, 16 C. A. 335, 40 S. W. 643.

Defendant can plead false representations by plaintiff, and ask judgment for damages therefor, and for cancellation of deed given plaintiff in exchange for the land sued for. *Herring v. Mason*, 17 C. A. 559, 43 S. W. 797.

It is a sufficient answer to a defense that the title to several of the small tracts had failed, to allege and prove that it was not the intention of either vendee or vendor to include in the deed the land to which the title had failed. *Elder v. First National Bank of Galveston*, 91 T. 423, 44 S. W. 62.

Where the petition does not show whether legal or equitable title will be relied on, a plea of stale demand is not demurrable. *McConnico v. Thompson*, 19 C. A. 539, 47 S. W. 537.

Permission to withdraw an answer, and dismissing as to defendants whose answer was so withdrawn, held erroneous, when such defendants were necessary parties. *Parker v. Nusbaumer*, 21 C. A. 180, 50 S. W. 646.

An answer alleging that plaintiff purchased the land on foreclosure, agreeing to loan defendant the amount bid, and that the deed from the trustee was a mortgage, held not subject to general demurrer. *Delaney v. Campbell* (Civ. App.) 97 S. W. 519.

Any equity acquired by defendant under a contract of purchase held a matter of defense which must be specially pleaded. *Glenn v. Rhine*, 53 C. A. 291, 115 S. W. 91.

Pleas of general denial, not guilty, statute of limitations, and want of consideration for the contract on which plaintiff's title is based, have the legal effect of admitting possession in plaintiff. *Wright v. Riley* (Civ. App.) 113 S. W. 1134.

Where the deed to adjoining land was pleaded, and a mistake therein alleged merely to identify the land in suit, defendant was not bound to allege that the mistake was mutual, how it occurred, or that it was not the result of negligence. *Snow v. Gallup*, 57 C. A. 572, 123 S. W. 222.

An answer held not defective, in that it alleged a mistake in the description of a deed from the common grantor of adjoining land to W. solely to identify the land in controversy. *Id.*

Where one defendant sued for the land answered by general denial and plea of not guilty, but did not disclaim plaintiffs were entitled to a verdict for the land as against him if they showed title in themselves. *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

An answer held not a cross-action for affirmative relief. *Crosby v. Di Palma* (Civ. App.) 141 S. W. 321.

In trespass to try title involving an award of school land, defendant's answer held sufficient as a plea to remove a cloud from his title. *Barnes v. Williams' Adm'r* (Civ. App.) 143 S. W. 978.

An answer held insufficient as a plea to quiet title on account of discrepancy in the description of the lands claimed. *Id.*

Where a petition in trespass to try title describes the land as section No. 48, in block C—3, located under certificate No. 838, issued to the East Line & Red River Railway Company, and section 54, in block C—3, located by virtue of certificate No. 5, granted to the Denison & Pacific Railway Company, a paragraph in the answer alleging defendant's claim to land described as "survey No. 48, in block C—3, D. & P. Ry. Co.," and "survey No. 54, block C—3, E. L. & R. R. Ry. Co.," is not fatally defective. *Barnes v. Patrick*, 105 T. 146, 146 S. W. 154.

**Waiver.**—A special pleading upon which a prayer for affirmative relief is based is not a waiver of the plea of not guilty. *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 622; *Hill v. Newman*, 67 T. 265, 3 S. W. 271; *Mexia v. Lewis*, 12 C. A. 102, 34 S. W. 158.

A defendant pleading special defenses in addition to the plea of "not guilty" will be held to the defenses so pleaded, the plea of "not guilty" in such case being considered as only requiring plaintiff to make out his case. It is not error to refuse permission to the defendant, after the trial has begun, to withdraw special defenses pleaded. Such action, if permitted, would change the effect of the plea of "not guilty." *Shields v. Hunt*, 45 T. 424.

Where a defendant files a special plea setting out his title, he is confined in his defense to that title, and the general denial or plea of "not guilty" is thereby waived. This rule is not applicable to a plea by the defendant of title under the statute of limitations. *Custard v. Musgrove*, 47 T. 217.

Where defendant pleads not guilty, and also files a disclaimer to the entire tract, the plea should be disregarded. *Herring v. Swain*, 84 T. 523, 19 S. W. 774.

A cross-action attacking plaintiff's title on the ground of fraud does not waive a plea of not guilty. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

Where evidence tended to show a parol partition of land sued for, it was not necessary that defendant plead such partition in order to authorize a submission thereof to the jury and warrant a finding thereof. *Long v. Long*, 30 C. A. 368, 70 S. W. 587.

Plea of not guilty in trespass to try title held waived by special pleas. *Garrison v. Richards* (Civ. App.) 107 S. W. 861.

Where defendant pleaded his title specially, he waived all defenses not pleaded. *Evants v. Erdman* (Civ. App.) 153 S. W. 929.

**Affirmative relief and cross-actions.**—The defendant may by his pleadings set up his own right and claim to the land and by appropriate allegations seek an affirmative recovery against the plaintiff. *Egery v. Power*, 5 T. 501; *Bradford v. Hamilton*, 7 T. 55; *Schmidt v. Talbert*, 74 T. 451, 12 S. W. 284; *De La Vega v. League*, 64 T. 205; *Short v. Hepburn*, 89 T. 622, 35 S. W. 1056.

The defendant may, by plea of reconvention, claim that the land be decreed to him, that the title of the plaintiff be annulled, and that he have judgment for the mesne profits. *Egery v. Power*, 5 T. 501.

When the answer of the defendant is in the nature of a cross-bill, praying that his title be quieted, if the decree be in his favor, it may adjudge title in him for the amount of land described in his answer, though it be for a larger number of acres than set out in plaintiff's petition. *Pearson v. Boyd*, 62 T. 541.

As to the right of a defendant, who had filed pleadings alleging facts sufficient to support a decree removing cloud from title, in the absence of the plaintiff and his attorneys, see *Browning v. Pumphrey*, 81 T. 163, 16 S. W. 870.

When the defendant is entitled to proceed to judgment upon his affirmative pleadings this right cannot be impaired by plaintiff's taking a nonsuit. *Giraud v. Ellis* (Civ. App.) 24 S. W. 967.

Where a defendant files a cross-bill asking for title and possession, he is not entitled to a judgment by default where the plaintiff fails to appear at the trial. *Clements v. Clements*, 13 C. A. 617, 46 S. W. 61.

Defendant is not entitled to recover land not described in plaintiff's petition, under a plea of reconvention. *Cissel v. Lewis*, 20 C. A. 415, 50 S. W. 425.

A cross-action setting up plaintiff's fraud in obtaining a deed to the land under an execution sale, and setting up facts in regard thereto which incidentally show defendant's title, held not a special plea of title. *Campbell v. Antis*, 21 C. A. 161, 51 S. W. 343.

Where defendant filed a cross bill on the appearance day of the ensuing term, it was proper, on failure of plaintiff to appear, to render judgment for defendant. *Harris v. Schlinke* (Civ. App.) 62 S. W. 72.

Where defendant by cross-bill sets up title in himself, the court cannot enter judgment on the cross-bill without service of it on plaintiff, in the absence of his appearance. *Harris v. Schlinke*, 95 T. 88, 65 S. W. 172.

Where plaintiff failed to appear, held error to render judgment in defendant's favor for the land, and not to dismiss. *Hill v. Friday* (Civ. App.) 70 S. W. 567.

Defendant held bound by his admission in his cross-action to establish the boundaries between himself and plaintiff, that plaintiff owned the land up to a certain bound-

ary, notwithstanding the fact that plaintiff failed to prove title to the land in controversy. *Gaffney v. Clark* (Civ. App.) 113 S. W. 606.

Defendant, after pleading not guilty as to a part of the land not claimed by plaintiff, could seek affirmative relief by having disputed boundaries between them established. *Id.*

A cross-action by defendant in trespass to try title against his codefendant held proper. *Haile v. Johnson* (Civ. App.) 133 S. W. 1088.

Answer in a suit to recover land held insufficient to authorize affirmative judgment for defendant on plaintiff's failure to appear. *Wood v. Montgomery* (Civ. App.) 136 S. W. 1150.

On cross-bill, defendant, who claimed under a warranty deed, on warranty stating that defendant paid a certain amount for the interest acquired, entitled to judgment with interest against the obligors on the warranty. *McLean v. Moore* (Civ. App.) 145 S. W. 1074.

Under the pleadings, defendant, claiming as joint owner and seeking equitable relief, held not required to offer by pleading to pay any part of the unpaid purchase money which was not yet due. *Weatherford v. Weatherford* (Civ. App.) 153 S. W. 353.

Where defendant's cross-bill did not claim an item for delinquent taxes against the cross-defendant, defendant's grantor, defendant was not entitled to recover such item. *Wood v. Warren* (Civ. App.) 157 S. W. 301.

**Pleading limitation.**—See notes under Art. 5706.

**Issues, proof and variance.**—See notes under Arts. 7733 and 7740.

**Art. 7740. [5257] What proof may be made under such plea.—** Under such plea of “not guilty,” the defendant may give in evidence any lawful defense to the action, except the defense of limitation, which shall be specially pleaded. [*Id.*]

**Defenses in general.**—A stranger in possession of real property cannot defend against a purchaser from a married woman on the ground that the title is still in the married woman for want of a compliance with the statute respecting the sale of property of married women. *Fisk v. Miller*, 13 T. 224.

Where defendant has no title, he cannot show in defense that plaintiff had not paid a valuable consideration for title. *Ann Berta Lodge v. Leverton*, 42 T. 13.

When the petition disclosed that the main object and purpose was to try title to the undivided half of a tract of land as to which there was a controversy, and of which plaintiff alleged that he had been wrongfully dispossessed by the defendant, held that, although there was a prayer for partition, the suit was an action of trespass to try title; and that under a plea of “not guilty” defendant could set up any matter of defense denying the title of plaintiff, or showing that defendant had acquired title to the land in controversy. *Watson v. Hewitt*, 45 T. 472.

Though a defendant is confined in his defense to the special matters as pleaded (*McDannell v. Horrell*, 1 U. C. 521), yet this does not relieve the plaintiff from the necessity of proving his title, or preclude the defendant from showing that the land sued for is not embraced in the description given in plaintiff's deeds (*Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81).

Where the grantor retained a vendor's lien, it is no defense to trespass to try title against the grantee, who has defaulted in a payment, that an action for the debt is barred by the statute of limitations. *McRae v. Poor* (Civ. App.) 48 S. W. 47.

Defendant cannot defeat plaintiff's right to possession of a house on the land which he was to have on payment of an indebtedness, which he had refused to pay, by asserting a claim of homestead. *Kay v. Hathaway*, 21 C. A. 466, 51 S. W. 663.

An execution sale of real estate, made without sufficient publication of notice, cannot be attacked in an action of trespass to try title. *Smith v. Olson* (Civ. App.) 56 S. W. 563.

Where no direct attack is made on a sheriff's deed held by defendant, the plaintiff cannot recover by showing mere inadequacy of consideration. *Id.*

Possession of land is alone insufficient to sustain a judgment as against a party showing a title from the state thereto. *Yarbrough v. De Martin*, 28 C. A. 276, 67 S. W. 177.

Question whether a certain title bond conveyed the legal or equitable title held immaterial. *Tenzler v. Tyrrell*, 32 C. A. 443, 75 S. W. 57.

Defendant's plea that he had been in possession “for more than 10 years next preceding the filing of suit” did not limit the time of possession to the 10 years next preceding the suit. *Campbell Real Estate Co. v. Wiley* (Civ. App.) 83 S. W. 251.

Plaintiff, being guilty of irregularities affecting defendant's rights held not entitled to maintain trespass to try title. *Cobb v. Gooch*, 40 C. A. 82, 88 S. W. 401.

An admission by defendant in the language of district and county court rule No. 31 (67 S. W. xxiii) held to operate as an admission of the fact that plaintiff was at the time of the trial a fee-simple owner of the property, rendering the defense of limitations unavailable. *Meade v. Logan* (Civ. App.) 110 S. W. 188.

Establishment of outstanding legal title in the estate of a decedent under which defendant claimed was a complete defense. *Millwee v. Phelps*, 53 C. A. 195, 115 S. W. 391.

Where defendant asks no affirmative relief, title acquired by defendant after suit brought is available to defeat plaintiff's claim of ownership. *Murphy v. Luttrell*, 56 C. A. 149, 120 S. W. 905.

The filing of a suit which was subsequently turned into a suit for specific performance held no defense to plaintiff's right to specific performance. *Durham v. Breathwit*, 57 C. A. 38, 121 S. W. 890.

A certain defense held not permissible. *Polk v. Seale* (Civ. App.) 144 S. W. 329.

Where defendant showed a good paper title to land included in the boundaries of a designated league, and the land in dispute was within such league, he was entitled to recover without reference to his plea of limitation. *Cole v. Webb* (Civ. App.) 149 S. W. 245.

**Title or right of possession of third person.**—A mortgagor, notwithstanding the terms of the conveyance, remains the real owner of the fee, and being entitled to the posses-

sion of land mortgaged, after as well as before breach of condition of defeasance, the mortgage cannot be pleaded as an outstanding title. *Byler v. Johnson*, 45 T. 509; *Burgess v. Millican*, 50 T. 401; *Duty v. Graham*, 12 T. 434, 62 Am. Dec. 534; *Mann v. Falcon*, 25 T. 275; *Morrow v. Morgan*, 48 T. 308; *Peters v. Clements*, 46 T. 115; *Wright v. Wooters*, 46 T. 380; *Sample v. Irwin*, 45 T. 567; *Moreland v. Barnhart*, 44 T. 283; *Williamson v. Wright*, 1 U. C. 711.

An outstanding equity cannot be pleaded in defense, unless the defendant is shown to be connected with it. *Johnson v. Timmons*, 50 T. 521; *Tapp v. Corey*, 64 T. 594.

When the plaintiff exhibits a title derived through mesne conveyance and a voidable judicial sale, the defendant cannot prevent a recovery by showing an outstanding equity with which he has no connection. A defendant who shows no title in himself cannot defeat a recovery by plaintiff who exhibits a title prima facie good, by showing fraud in the procurement of one of the mesne conveyances through which plaintiff claims, with which defendant has no connection, and in which he discloses no interest. *Capt v. Stubbs*, 68 T. 222, 4 S. W. 467.

A defendant who was a trespasser when suit is brought may acquire an outstanding title to or equity in the land, and set it up as a defense or as a basis for affirmative relief. *Ballard v. Carmichael*, 83 T. 355, 18 S. W. 734.

Where an outstanding title does not cover the entire tract, but leaves an undivided interest in plaintiff, he is entitled to recover the entire tract as against a trespasser showing no title. *Ford v. Ballard*, 1 C. A. 376, 21 S. W. 146.

An outstanding equity with which defendant does not connect himself will not avail as a defense against the legal title asserted by plaintiff. *Tariton v. Kirkpatrick*, 1 C. A. 107, 21 S. W. 405.

A sale of an interest in the land to plaintiff's attorney as a fee held not an outstanding title which can avail defendant. *Mealy v. Lipp*, 16 C. A. 163, 40 S. W. 324.

An outstanding life estate held no defense, where defendant does not connect himself with it. *Reed v. Coffey* (Civ. App.) 40 S. W. 1027.

Defendants cannot avail themselves of any benefit of a deed from one of plaintiffs, who are tenants in common, to a third person, without connecting themselves with such title. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

A defendant can defeat plaintiff's claim by proof of an outstanding legal title, without connecting himself with such title. *Pool v. Unknown Heirs of Foster* (Civ. App.) 49 S. W. 923.

Where defendant specially pleads his title he cannot prove a superior outstanding title in the absence of an allegation setting it up. *Hayes v. Gallaher*, 21 C. A. 88, 51 S. W. 280.

Bond conditioned to make a conveyance on demand held not a conveyance which can be pleaded by persons not connecting themselves therewith as an outstanding title. *Caudle v. Williams* (Civ. App.) 51 S. W. 560.

To show valid outstanding title to land sued for, superior to that of plaintiff, is a good defense. *La Pice v. Caddenhead*, 21 C. A. 363, 53 S. W. 66.

Plea of improvements in good faith does not deprive defendant of advantage of defense of outstanding title. *Buckner v. Vancleave*, 34 C. A. 312, 73 S. W. 541.

Plaintiff held entitled to recover on a showing that the state had parted with title and that he had been given a deed and had entered into possession. *Cook v. Spencer* (Civ. App.) 91 S. W. 813.

Plaintiff must recover on the strength of his own title and proof of a superior outstanding title in a third person is a good defense, though the defendant may not claim under such title. *Mann v. Hossack* (Civ. App.) 96 S. W. 767.

Where defendant relies on an outstanding title in a third person, in order to render the defense complete it is necessary for him to show that such title is a valid one. *Holland v. Ferris* (Civ. App.) 107 S. W. 102.

Defendant held not entitled to show application by and award to another. *Trimble v. Burroughs*, 52 C. A. 266, 113 S. W. 551.

An outstanding valid, legal, but not an equitable, title in a third person with which defendant is not connected, may be pleaded in bar of trespass to try title. *Id.*

Mere proof of a patent to a third person to the land in controversy did not show an outstanding title in such patentee sufficient to bar plaintiff's recovery based on possession. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

**Equitable defenses in general.**—If one who is sued for title to land has equities which entitle him to demand payment of a debt before surrendering possession, he should set them up in his answer. This case distinguished from that of a mortgagor who seeks to recover property of the mortgagee rightfully in possession under a deed absolute on its face. There the burden of showing payment of the debt is on the plaintiff, and he must do so as against the plea of not guilty. *Fuller v. O'Neal*, 69 T. 349, 6 S. W. 181, 5 Am. St. Rep. 59; *Groesbeeck v. Crow*, 85 T. 200, 20 S. W. 49.

Certain misrepresentations of plaintiff's grantor to defendant, a prior grantee, held an estoppel. *Mars v. Morris* (Civ. App.) 106 S. W. 430.

Heirs of an estate held not authorized to maintain trespass to try title, notwithstanding irregularities in an administrator's sale, in view of their subsequent dealings with the estate and failure to restore the purchase money. *Wilkin v. Geo. W. Owens & Bros.* (Civ. App.) 110 S. W. 552.

**Res judicata.**—Proof under plea of not guilty, see post.

The appellant brought this suit to try title to a parcel of land in the city of San Antonio; the appellee, defendant below, pleaded former adjudication of the title in a suit brought by the present appellee against the present appellant for the abatement of a nuisance on the same land. Held, that as it appeared from the record of the former suit that the title was therein adjudicated, the plea of res judicata was a good defense. *Lewis v. San Antonio*, 26 T. 316.

**Stale demand and laches.**—Equitable defenses in general, see ante.

Laches of the owner in instituting suit and in paying taxes will not defeat his action where there has not been actual adverse possession for a sufficient time to support a plea of limitation. *Williams v. Conger*, 49 T. 582; *Moss v. Berry*, 53 T. 632; *Murphy v. Welder*, 53 T. 235; *Mast v. Tibbles*, 60 T. 301; *Satterwhite v. Rosser*, 61 T. 166.



The doctrine of stale demand held to have no application. *Bremer v. Case*, 60 T. 151. The defendant in trespass to try title cannot interpose, by exception, the defense of stale demand against a legal title evidenced by a patent from the state pleaded by plaintiff, when the petition states no act of possession or claim by the defendant. *Mast v. Tibbles*, 60 T. 301.

Stale demand has no application where a plaintiff asserts his legal title, asking no equitable relief, and he can only be defeated by the general law of limitation applicable to purely legal demands. *Fletcher v. Ellison*, 1 U. C. 661.

The doctrine of stale demand can have no application as against one holding the legal title when invoked by one claiming an equitable right. *Harvey v. Cummings*, 68 T. 599, 5 S. W. 513; *League v. Henecke* (Civ. App.) 28 S. W. 220.

A mere failure to pay taxes, or laches, or delay of the owner in bringing suit for the recovery of the land to which he has a legal title, will not defeat his action, where there has not been actual adverse possession for a sufficient length of time to support the plea of limitation. *House v. Brent*, 69 T. 27, 7 S. W. 65; *Williams v. Conger*, 49 T. 602.

The doctrine of stale demand has no application to a legal title. It has no application to the claims of the true owner of land when set up by one claiming the land under a tax deed when no compliance with the steps prerequisite to its validity is shown. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 849; *New York & Texas Land Co. v. Hyland*, 28 S. W. 206, 8 C. A. 601.

As to plea of "stale demand," see *Bullock v. Smith*, 72 T. 545, 10 S. W. 687; *Hensel v. Kegans*, 79 T. 347, 15 S. W. 275; *Smith v. Perkins*, 81 T. 152, 16 S. W. 805, 26 Am. St. Rep. 794; *Montgomery v. Noyes*, 73 T. 203, 11 S. W. 138; *Browning v. Pumphrey*, 81 T. 163, 16 S. W. 870.

Where recovery of land is sought against strangers to the title, who are trespassers without color of title and show no connection with the legal title, and the time of possession, if any, does not appear, the defense of stale demand will not defeat a recovery. *Wright v. Dunn*, 73 T. 295, 11 S. W. 330; *Moss v. Berry*, 53 T. 632; *Murphy v. Welder*, 58 T. 236.

The objection that a claim is stale cannot be urged by a plaintiff against defendants claiming under a transfer of a headright certificate, who are in possession of the land and have been ever since the land was located. *Staley v. Hankla* (Civ. App.) 43 S. W. 20.

One having equitable title by an instrument entitled to record held not barred by limitations from setting it up as a defense. *Tompkins v. Brooks* (Civ. App.) 43 S. W. 70.

Delay of more than 30 years in bringing action to recover real estate held to bar claim as a stale demand. *Hasseldenz v. Dofflemyre* (Civ. App.) 45 S. W. 830.

Plea of stale demand cannot be maintained against one asserting legal title. *Batcheller v. Besancon*, 19 C. A. 137, 47 S. W. 296.

A stranger to a title under a headright certificate held not entitled to invoke the doctrine of stale demand against one claiming an equitable title under such certificate. *McCoy v. Pease*, 19 C. A. 657, 48 S. W. 208.

Delay in bringing an action to assert the legal title to land claimed by inheritance from an ancestor does not make it subject to the objection of being a stale demand. *Texas Tram & Lumber Co. v. Gwin* (Civ. App.) 52 S. W. 110.

Grantee of a bond for title prior to the issuance of a patent to his grantor held entitled to recover against his grantor's heirs, though such grantee was guilty of laches, in the absence of proof of possession by either party. *Neyland v. Ward*, 22 C. A. 369, 54 S. W. 604.

Where plaintiff shows a legal title sufficient to maintain the action, the doctrine of laches does not apply. *Tinsley v. Magnolia Park Co.* (Civ. App.) 59 S. W. 629.

Where both parties in trespass to try title rely on equitable titles, the plea of stale demand is not available as a defense. *Stipe v. Shirley*, 27 C. A. 97, 64 S. W. 1012.

Defense to an action of trespass to try title, that the power of sale under a trust deed, on which plaintiff's title depended, had ceased, the claim having become stale from lapse of time after default and before sale, cannot be first urged on appeal. *Thompson v. Cobb*, 95 T. 140, 65 S. W. 1090, 93 Am. St. Rep. 820.

Where defendant can assert equitable title without invoking affirmative relief, the doctrine of stale demand does not apply. *Whisler v. Cornelius*, 34 C. A. 511, 79 S. W. 360.

Action of trespass to try title, though regarded as one to enforce specific performance of a contract to convey land, held not shown to be on a stale demand. *Betzer v. Goff*, 35 C. A. 406, 80 S. W. 671.

Stale demand is no defense, whether plaintiff's title be legal or equitable, if it be a title, as distinguishable from a mere equitable right to acquire title. *Id.*

Where the title asserted by plaintiff is sufficient to sustain an action of trespass to try title, the defense of stale demand is not available, whether plaintiff's title is legal or equitable. *Lyster v. Leighton*, 36 C. A. 62, 81 S. W. 1033.

Laches of plaintiffs held not available to defendants holding under absolutely void conveyance. *Overby v. Johnston*, 42 C. A. 348, 94 S. W. 131.

A claim to the legal title to land held not defeated by the defense of stale demand. *Hunter v. Hodgson* (Civ. App.) 95 S. W. 637.

Where defendants rest upon their title and do not seek affirmative relief, pleas of the ten-year statute of limitation, laches, and stale demand, are not available. *Kirby v. Cartwright*, 48 C. A. 8, 106 S. W. 742.

Defendant holding land under a contract to convey held not guilty of laches. *Id.*

An heir of the vendee held not entitled to recover the land on the vendee's prior possession after an abandonment for more than 36 years. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 398.

Plaintiff having sued to correct a mistake in a deed, and to try title within two years after he acquired title to the property, held not chargeable with laches. *Isaacks v. Wright*, 50 C. A. 312, 110 S. W. 970.

It is not essential to a recovery of land by force of a prior possession that the action be brought within a reasonable time after eviction. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Unreasonable delay in bringing a suit to try title based on prior possession held no bar to the action, but relevant to the question of abandonment. *Id.*

Delay in bringing an action to try title to land based on plaintiff's prior possession operates merely as evidence that plaintiff had in fact abandoned his prior possession without animus revertendi, in cases where the possession was not continued when the adverse entry took place, in which the question of intent to return becomes important; unreasonable delay in itself not being a bar to the action. *Id.*

The doctrine of stale demand held inapplicable to defendant's allegation of a mistake in the conveyance of adjoining land to W. by the same grantor, pleaded to identify the land in controversy. *Snow v. Gallup*, 57 C. A. 572, 123 S. W. 222.

Facts which may be proved in an action at law without being specially pleaded cannot, when pleaded as a defense, convert it into an equitable one, which may be defeated by the doctrine of stale demand. *Id.*

An action held not barred by stale demand. *Hardy Oil Co. v. Burnham* (Civ. App.) 24 S. W. 221.

Defense of stale demand held not available in trespass to try title based on equitable title. *Lowry v. McDaniel* (Civ. App.) 124 S. W. 710.

A petition held not to show stale demand. *Hammons v. Clwer* (Civ. App.) 127 S. W. 189.

The defense of stale demand held available in trespass to try title based on an equitable claim of title. *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

A person's assertion of title to land as against a stranger to the legal title is not affected by the doctrine of stale demand. *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

If the title alleged is sufficient, only adverse possession by defendant under the statute of limitations relating to the recovery of land will bar the action; the defense of stale demand not being available. *Montgomery v. Trueheart* (Civ. App.) 146 S. W. 284.

Staleness of demand is no defense to trespass to try title. *Early v. Compton* (Civ. App.) 149 S. W. 694; *Sabine Valley Timber & Lumber Co. v. Cagle*, *Id.* 697.

One claiming land by virtue of a certificate, and its location and survey, through patents issued to the heirs of the original holder has, as against such heirs, the legal title, and the doctrine of stale demand has no application, even if the heirs have an equitable title. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

Proof under plea of not guilty or general issue.—Where the defendant pleads not guilty and gives in evidence facts which go to confess and avoid the plaintiff's right of action, the plaintiff has the right, by way of rebutting evidence, without any previous corresponding allegations, to prove any facts which answer the facts proved by the defendant. *Hunt v. Turner*, 9 T. 385, 60 Am. Dec. 167; *Rivers v. Foote*, 11 T. 662.

It is competent for the defendant to prove that the plaintiff's survey does not include the land claimed and in controversy, even though the defendant were a mere trespasser. *Dalby v. Booth*, 16 T. 563.

Where defendants were permitted, under the plea of not guilty, to offer evidence of title in themselves by purchase at sheriff's sale under a judgment against the plaintiff, it was competent for the plaintiff to rebut such evidence by proving that the judgment was obtained by fraud; and under such circumstances it was not incumbent on the plaintiff to plead any facts showing the nullity of such judgment, or of the title set up under it. *Rodriguez v. Lee*, 26 T. 32.

The defendants, under the plea of not guilty, had the right to set up a superior outstanding title, although they did not claim under it. *Paschal's Dig. art. 5307*, note 1153; *King v. Elson*, 30 T. 246; *Kauffman v. Shellworth*, 64 T. 179.

The plea of not guilty is an answer to the entire petition, and entitles the defendant to prove any defense, whether legal or equitable. The defendants in the present case proved representations of the plaintiff which are deemed to estop the latter from claiming the land in controversy as against the defendants. *Ragsdale v. Gohike*, 36 T. 286; *Johnson v. Byler*, 38 T. 606; *Wright v. Doherty*, 50 T. 34; *Groesbeck v. Crow*, 85 T. 200, 20 S. W. 49; *McKamey v. Thorp*, 61 T. 648.

In an action of trespass to try title in the ordinary form, with the plea of "not guilty," the equities of parties to the suit in the land in controversy, which was sold under a decree foreclosing the vendor's lien, and which equities grew out of the relation of the parties prior to such sale, will not be inquired into. The equities must be set out in the pleadings. *Rippetoe v. Dwyer*, 49 T. 498; *Ayres v. Duprey*, 27 T. 593, 86 Am. Dec. 657.

The defendant may, under the plea of "not guilty," set up any matter of defense except limitation, or that which involves affirmative equitable relief, both of which must be specially pleaded. *Williams v. Barnett*, 52 T. 130; *Dalby v. Booth*, 16 T. 563.

When the plea "not guilty" and a special plea (other than limitation) are filed, the plaintiff cannot rebut evidence admitted under the special plea in the absence of a pleading. In avoidance of evidence admissible under the general issue, he can submit testimony without such allegations. Defendants, after pleading "not guilty," pleaded specially that the sheriff's deed under which plaintiff claimed was void. On the trial the defendants showed a chain of title from the government to themselves. Held, that the plaintiff could show fraud in the acquisition of defendant's apparent title, and this though plaintiff had not set up the fraud in his pleadings; the defendants having pleaded nothing to render it necessary. *McSween v. Yett*, 60 T. 183. See *Rivers v. Foote*, 11 T. 662.

Under a plea of not guilty the defendant may prove an outstanding title in a third party, superior to that of plaintiff, to bar a recovery. *Adams v. House*, 61 T. 639.

Evidence entitling defendant to affirmative relief is not admissible under the plea of not guilty. *Fuller v. O'Neil*, 69 T. 349, 6 S. W. 181, 5 Am. St. Rep. 59; *Whitney v. Krapf*, 8 C. A. 307, 27 S. W. 843.

The defendant has the right, under the plea of not guilty, to prove such facts as may show that the plaintiff has no right to recover. *Wittbecker v. Walters*, 69 T. 470, 6 S. W. 788. And when the plaintiff claims the property as homestead, testimony of witnesses as to declarations of the plaintiff showing intention to abandon it as a homestead is admissible without any plea on the part of the defendant alleging abandonment. No other plea than that of "not guilty" is required to admit evidence which disputes and controverts the homestead claim. *Punderson v. Love*, 3 T. 60; *Blair v. Cisneros*, 10 T.

34; *Rivers v. Foote*, 11 T. 662; *Dalby v. Booth*, 16 T. 563; *Mann's Ex'x v. Falcon*, 25 T. 271; *Burcham v. Gann*, 1 U. C. 333.

When land is sold to be paid for at a future time, and a deed is executed to the vendee, who executes to the vendor a mortgage to secure payment of purchase money, the legal title remains with the vendor until the land is paid for. If before payment the vendor executes a deed of conveyance for the same land to a third party, and transfers to him the unpaid notes of the first purchaser, such party is subrogated to the rights of the vendor under the mortgage, and being in possession may, in a suit by the first purchaser in trespass to try title, show, under the plea of not guilty, that the original purchase money remains unpaid, and defeat a recovery either of the land or the possession. *Crafts v. Daugherty*, 69 T. 477, 6 S. W. 850.

The defense of estoppel can be made under the plea of not guilty. *Scarborough v. Alcorn*, 74 T. 358, 12 S. W. 72; *Eddie v. Tinnen*, 26 S. W. 732, 7 C. A. 371; *Parker v. Cockrell* (Civ. App.) 31 S. W. 221; *Mars v. Morris* (Civ. App.) 106 S. W. 430.

The defendant, under the plea of not guilty, may introduce evidence of title by estoppel. *Dooley v. Montgomery*, 72 T. 429, 10 S. W. 451, 2 L. R. A. 715; *Guest v. Guest*, 74 T. 664, 12 S. W. 331.

Under plea of not guilty defendant can interpose any legal or equitable defense. *Kauffman v. Brown*, 83 T. 41, 18 S. W. 425.

The heirship of parties allowed to make themselves plaintiffs as heirs of the decedent is put in issue by the plea of not guilty. *Musselman v. Strohl*, 83 T. 473, 18 S. W. 857.

An absolute deed may be shown to be a mortgage. *Herring v. White*, 25 S. W. 1016, 6 C. A. 249.

A legal or equitable title is admissible under plea of not guilty. *Compton v. Seley* (Civ. App.) 27 S. W. 1077; *McKamey v. Thorp*, 61 T. 648; *Scarborough v. Alcorn*, 74 T. 358, 12 S. W. 72; *Kauffman v. Brown*, 83 T. 47, 18 S. W. 425; *Mayers v. Manning*, 73 T. 46, 11 S. W. 136.

Matter of estoppel is admissible in evidence under the plea of not guilty, in the absence of special pleading, and need not be stated in the abstract. *Parker v. Cockrell* (Civ. App.) 31 S. W. 221.

Under a general denial, defendant can introduce a deed conveying title to him. *Robb v. Robb* (Civ. App.) 41 S. W. 92.

Where no affirmative relief is sought, any matter of defense except limitations may be proven under plea of not guilty. *Lumkins v. Coates* (Civ. App.) 42 S. W. 580.

Under a plea of not guilty it is not necessary to make proof of actual possession by the defendant. *Miller v. Knowles* (Civ. App.) 44 S. W. 927.

Under the plea of not guilty any defense can be made except that of limitation. *Taffinder v. Merrill*, 18 C. A. 661, 45 S. W. 477.

Under plea of not guilty, defendant may show any facts to defeat the plaintiff's recovery. *Hardy v. Brown* (Civ. App.) 46 S. W. 385.

Defendant, under a plea of not guilty, may show that a deed absolute in form, under which plaintiff claims, is a mortgage. *Hanrick v. Gurley* (Civ. App.) 48 S. W. 994.

Under the plea of not guilty parties can properly be allowed to prove circumstances tending to raise the presumption of a grant by the ancestor of the plaintiff. *Herndon v. Burnett*, 21 C. A. 25, 50 S. W. 581.

Where there is a special answer not pleading collusion between plaintiff and his grantor in the purchase of school lands, such issue cannot be proven under the plea of not guilty. *Abilene Live-Stock Co. v. Guinn* (Civ. App.) 51 S. W. 885.

Evidence of defendant's right to affirmative equitable relief is inadmissible under a plea of not guilty. *Matthews v. Moses*, 21 C. A. 494, 52 S. W. 113.

Under general issue, evidence explaining ambiguity in deed introduced by defendant held admissible. *Stuart v. Duffy*, 23 C. A. 221, 56 S. W. 142.

Defenses of failure of consideration for deed, fraud or mistake inducing its execution through ignorance that the deed conveyed title held admissible under plea of not guilty, without being specially pleaded. *Salazar v. Ybarra* (Civ. App.) 57 S. W. 303.

A plea of not guilty presents only the question of title and right of possession. *Central City Trust Co. v. Waco Bldg. Ass'n*, 95 T. 48, 64 S. W. 998.

Defendant by pleading not guilty, was not prevented, when failing in this plea, from falling back on his defense of title by limitation or conveyance. *Morrow v. Fleming*, 29 C. A. 547, 69 S. W. 244.

A donee of land subject to a deed of trust can urge that a sale thereunder by a substituted trustee was illegal, under plea of not guilty. *Bracken v. Bounds*, 96 T. 200, 71 S. W. 547.

Defendant, though a trespasser, may, under the plea of not guilty, show that a river forming plaintiff's boundary had, through avulsion, changed its channel. *Rodriguez v. Hernandez*, 35 C. A. 78, 79 S. W. 343.

Defendant, under a plea of not guilty, may prove an outstanding superior title in a third person. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

In trespass to try title, declarations to show heirship to the alleged donee of the land under whom defendants claimed held admissible under the general issue. *Kirby v. Boaz*, 41 C. A. 282, 91 S. W. 642.

In trespass to try title by a county to recover school lands, evidence admissible on the issue of abandonment or estoppel was admissible under the plea of not guilty. *Lamar County v. Talley* (Civ. App.) 94 S. W. 1069.

Defendant may show under a plea of not guilty that the title is outstanding in other parties, and a deed held admissible for that purpose. *Mars v. Morris* (Civ. App.) 106 S. W. 430.

Impleading warrantors, or asking for the quieting title in the defendant does not prevent him from proving any defense under the plea of not guilty, except limitations. *North v. Coughran*, 49 C. A. 101, 108 S. W. 166, 167.

Defendant under a plea of not guilty may offer in evidence a judgment as res judicata of plaintiff's rights as showing a superior title against plaintiff, and plaintiff would not be required to allege matters in avoidance before giving evidence to that effect. *Robbins v. Hubbard* (Civ. App.) 108 S. W. 773.

The plea of not guilty is sufficient to let in the defense of estoppel, although an abstract of title omitting all mention of defense of estoppel may have been filed by defendant in response to plaintiff's demand therefor. *Daugherty v. Templeton*, 50 C. A. 304, 110 S. W. 555.

Defendant may show any fact going to defeat plaintiff's right to recover without a special plea. *Wilkin v. Geo. W. Owens & Bros.*, 102 T. 197, 114 S. W. 104, 132 Am. St. Rep. 867.

A defense held an independent equitable defense not to be shown under plea of not guilty. *Isbell v. Southworth* (Civ. App.) 114 S. W. 689.

Under a plea of not guilty, defendant could prove, to identify the land in controversy, that a deed to adjoining land was defective in omitting the closing call. *Snow v. Galup*, 57 C. A. 572, 123 S. W. 222.

Defendant held not entitled to prove an equity in himself under the pleadings. *Smith v. Olivarri* (Civ. App.) 127 S. W. 235.

Where the location of a boundary is disputed, the defenses of estoppel and agreed boundary may be presented under the plea of not guilty. *Roberts v. Arlington Realty Co.* (Civ. App.) 128 S. W. 159.

Where the petition is in the statutory form and the answer a plea of not guilty, equitable relief cannot be obtained by either party, though equities arise from the evidence. *Roth v. Schroeter* (Civ. App.) 129 S. W. 203.

In trespass to try title for a tract claimed by plaintiff as heir of A., but devised to her by L, defendants claiming that she was estopped to claim as heir by having elected to take under the will, evidence to show that all the property devised to plaintiff in fact belonged to her father, and had been placed in A.'s name in trust for the father, so that L had no title thereto, was admissible as against the objection that it was an effort to prove a trust without pleading it. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

Under the plea of "not guilty," defendant may interpose the defense of alienage by an heir prohibited from inheriting. *Douthit v. Southern* (Civ. App.) 155 S. W. 315.

Where the land is claimed under a constable's sale which defendant alleges to have been fraudulent on account of a conspiracy between the plaintiff and H., the administrator of an estate, and who was holding the land at the time, it was proper to allow proof that H. was an administrator. *Moore v. Miller* (Civ. App.) 155 S. W. 573.

Under a plea of not guilty, evidence was admissible that the south boundary of the land claimed had been agreed on by the predecessors in title of the parties hereto as the correct boundary between the surveys. *Sanders v. Moore* (Civ. App.) 157 S. W. 441.

**Adverse possession and limitation of actions relating to land.**—See notes under Arts. 5672-5684.

**Pleading limitation.**—See notes under Art. 5706.

**Art. 7741. [5258] Answer taken as admitting possession.**—Such plea or any other answer to the merits shall be an admission by the defendant, for the purpose of that action, that he was in possession of the premises sued for, or that he claimed title thereto at the time of commencing the action, unless he states distinctly in his answer the extent of his possession or claim, in which case it shall be an admission to such extent only. [Act Feb. 5, 1840, sec. 6. P. D. 5297.]

**In general.**—An answer to the merits admits, for the purposes of the suit, that the defendant is in possession of the land described in the petition, but cannot be construed into an admission that the land is included within the calls of the grant under which the plaintiff claims. Hence the latter fact must be established by evidence before the plaintiff can recover. *Echols v. McKie*, 60 T. 41.

The object of this article is to relieve the plaintiff from proving a trespass when the defendant had answered to the merits, but it was not intended to relieve the plaintiff from the necessity of showing title in himself to the land he may seek to recover. *Cook v. Dennis*, 61 T. 246.

By a plea of not guilty defendants admit that they are in possession of the land referred to in the petition, and the effect of a judgment against them is to oust them from that possession. *Plummer v. Marshall* (Civ. App.) 126 S. W. 1162.

**Art. 7742. [5259] What is sufficient title, etc.**—All certificates for headright, land scrip, bounty warrant, or any other evidence of right to land recognized by the laws of this state which have been located and surveyed, shall be deemed and held as sufficient title to authorize the maintenance of the action of trespass to try title. [Act Feb. 5, 1841, sec. 23. P. D. 5303.]

**Title to support action.**—A right to the use of land entitles the user to an action against one attempting to appropriate it. *Lewis v. San Antonio*, 7 T. 288.

A mortgagor cannot recover possession as against the mortgagee without satisfying the mortgage. *Hannay v. Thompson*, 14 T. 142.

To entitle the plaintiff to recover, even against a naked possessor, he must show that he is the absolute owner of the land in controversy, not only as against the defendant, but as against all other persons. *Hooper v. Hall*, 35 T. 82; *Chinn v. Taylor*, 64 T. 385; *Maverick v. Flores*, 71 T. 110, 8 S. W. 636.

Plaintiff must recover, if at all, on the strength of his own title, and not on the weakness of that of defendant. *Hillman v. Meyer*, 35 T. 538; *Jones v. Lee* (Civ. App.) 41 S. W. 195; *Soape v. Doss*, 18 C. A. 649, 45 S. W. 387; *Willoughby v. Townsend* Id. 861; *Allen v. Worsham* (Civ. App.) 50 S. W. 157; *Renner v. Patterson*, 51 S. W. 867; *Smith v. Rothe*, 55 S. W. 754; *Trevy v. Lowrie*, 40 C. A. 321, 89 S. W. 981; *Jaggars v. Stringer*, 47 C. A. 571, 106 S. W. 151; *Brown v. Orange County*, 48 C. A. 470, 107 S. W. 607; *De Roach*

v. Clardy, 52 C. A. 233, 113 S. W. 22; Bailie v. Western Live Stock & Land Co., 55 C. A. 473, 119 S. W. 325; Murphy v. Luttrell, 56 C. A. 149, 120 S. W. 905; White v. McCullough, Id. 1093; Ward v. Nelson (Civ. App.) 131 S. W. 310; Lefevre v. Jackson, 135 S. W. 212; Griffin v. Ray, Id. 248; Skov v. Coffin, 137 S. W. 450; Staley v. King Bank & Mercantile Co., 144 S. W. 308.

When suit is brought to recover land allotted to plaintiff in partition, his right to recover against a defendant showing no title will not be defeated by showing the invalidity of the proceedings under which the partition was made. Truehart v. McMichael, 46 T. 222.

The fact that it appears from plaintiff's evidence that he holds in trust for another is immaterial. Fitch v. Bover, 51 T. 336.

The fact that the plaintiff represents herself in her petition as the sole surviving heir of the original grantee will not defeat a recovery against a trespasser or wrongdoer in a case where the evidence reveals the existence of other heirs not made parties. Pilcher v. Kirk, 55 T. 208.

A less estate in land than a fee simple may form the basis for the action of trespass to try title. Thurber & Co. v. Conners, 57 T. 96.

One having an interest in land for a term of years may maintain an action of trespass to try title against his tenant holding over, though the damages claimed may be less than \$500. Id.

An action may be maintained by the landlord against his tenant who holds over after the expiration of the term. And in such an action the plaintiff is entitled to recover upon the production of his lease as evidence of title. The defendant cannot deny plaintiff's title or set up a lease obtained from a third party. Juneman v. Franklin, 67 T. 411, 3 S. W. 562; Tyler v. Davis, 61 T. 674.

The plaintiff showing title under an heir to whom the land sued for was allotted in the partition, the exclusion of the partition deed would not defeat the right to recover against one showing no title. Ammons v. Dwyer, 78 T. 639, 15 S. W. 1049.

Where plaintiff's title rests on execution sale, the court has jurisdiction to determine its validity. Houghton v. Rice, 15 C. A. 561, 40 S. W. 1057.

Plaintiff's title is sufficiently shown where he proves that defendant went into possession as a tenant of his ancestor, and retained such possession. Hintze v. Krabbenschmidt (Civ. App.) 44 S. W. 38.

A plaintiff who has parted with his title before the suit was brought can not maintain an action of trespass to try title for the use of another. Smith v. Olsen (Civ. App.) 44 S. W. 874.

Where the only issue was the location of a division line, plaintiff was not required to prove a superior title to the entire tract claimed by him. Wardlow v. Harmon (Civ. App.) 45 S. W. 828.

During existence of life estate, remaindermen are not entitled to judgment for land or rents in trespass to try title. Adams v. Ramsey, 19 C. A. 294, 46 S. W. 265.

Where parties do not claim from a common source, plaintiff must show a perfect chain of title more remote than her ancestor. Hardy v. Brown (Civ. App.) 46 S. W. 385.

One claiming under a junior survey cannot maintain trespass against those claiming under an older conflicting survey, though they are mere trespassers. Lockwood v. Ogden (Civ. App.) 50 S. W. 1077.

A party claiming property under an execution sale, void because made after the return day thereof, cannot maintain trespass to try title thereto. Snodgrass v. Rutherford (Civ. App.) 54 S. W. 1054.

Held error to instruct that plaintiff could not recover unless the jury found that the title to the whole of the land was in her. Scales v. Marshall (Civ. App.) 60 S. W. 336.

A trustee holding the naked legal title may maintain trespass to try title, though entire beneficial ownership be in another. Aldridge v. Pardee, 24 C. A. 254, 60 S. W. 789.

Parties claiming title as against a judgment debtor under a sheriff's deed are not required to connect him with the sovereignty of the soil in order to recover judgment against him in an action of trespass to try title. Frazier v. Waco Bldg. Ass'n, 25 C. A. 476, 61 S. W. 132.

When plaintiffs show title to an undivided interest in the land, and defendant shows no title, plaintiffs are entitled to recover the entire tract. Wilcoxon v. Howard, 26 C. A. 281, 62 S. W. 802.

Where, in an action of trespass to try title to community property of plaintiff's parents, the defendant claimed through a valid execution sale against plaintiff's father, plaintiff's claim to the property by inheritance from her parents is ineffectual. Travis v. Hall, 27 C. A. 95, 65 S. W. 1077.

A claimant to land under an alleged executed parol agreement for sale or gift thereof held to have failed to establish her title. Newcomb v. Cox, 27 C. A. 583, 66 S. W. 338.

Interest of plaintiff held sufficient to support recovery, notwithstanding outstanding title to undivided interest. City of El Paso v. Ft. Dearborn Nat. Bank (Civ. App.) 71 S. W. 799.

The owner of a mere easement is not entitled to maintain ejectment or trespass to try title, as against the fee owner of land rightfully in possession. Cornick v. Arthur, 31 C. A. 579, 73 S. W. 410.

A city held to have acquired title to land dedicated for a public market, so as to be able to maintain trespass to try title. Heffron v. City of Galveston, 33 C. A. 52, 75 S. W. 370.

Plaintiff cannot recover land on evidence of an unlawful scheme by which her husband sought to acquire title through defendant. Pinkston v. West (Civ. App.) 85 S. W. 1014.

An action of trespass to try title to land may be maintained in his own name by one holding the land in trust for another. Lewis v. Brown, 39 C. A. 139, 87 S. W. 704.

Plaintiff, claiming under the sole heir of a former vendee, was not entitled to recover without discharging the vendor's lien to secure the purchase money, which had never been paid. Wall v. Club Land & Cattle Co. (Civ. App.) 88 S. W. 534.

Plaintiff can only recover on proving a title from the state or a superior title from a common source. Moore v. Kempner, 41 C. A. 86, 91 S. W. 336.

One claiming land under a purchaser at a sale on the foreclosure of the vendor's lien held not required to pay the purchase price in order to recover the land in trespass to try title. *Club Land & Cattle Co. v. Wall*, 99 T. 591, 91 S. W. 778, 122 Am. St. Rep. 666; *Id.* (Sup.) 92 S. W. 984.

The fact that the legal title to land was conveyed to a plaintiff for the purpose of bringing an action against trespassers held not to defeat a recovery. *Dean v. Jagoe*, 46 C. A. 389, 103 S. W. 195.

An owner of the fee of a street may maintain trespass to recover the title and possession against a trespasser. *Cocke v. Texas & N. O. R. Co.*, 46 C. A. 363, 103 S. W. 407.

Whether plaintiffs own all or only an undivided interest in the land, they are entitled to recover all of it as against trespassers. *Branch v. Deussen* (Civ. App.) 108 S. W. 164.

Plaintiff being the owner of an undivided interest in the land sued for, as against a defendant who is a trespasser without any title thereto, may recover the whole tract sued for, although he has not acquired the other interests. *Jett v. Hunter*, 51 C. A. 92, 111 S. W. 176.

Plaintiff must prove title in himself. *Uvalde County v. Oppenheimer*, 53 C. A. 137, 115 S. W. 904; *Campbell v. San Antonio Machine & Supply Co.* (Civ. App.) 133 S. W. 750; *Reese v. Cobb*, 105 T. 399, 150 S. W. 887; *Pence v. Same* (Civ. App.) 155 S. W. 608.

In trespass to try title as to a part of a lot, a judgment against defendant in favor of a city pleaded against defendant in estoppel did not vest title in plaintiffs or in any way affect them, and hence a finding that defendant agreed to such judgment would not support a judgment in plaintiffs' favor. *Connor v. Weik* (Civ. App.) 116 S. W. 650.

Where plaintiff's title is invalid, the question of limitations raised by defendant's pleading does not arise. *Pohle v. Robertson*, 54 C. A. 326, 116 S. W. 861.

An action to recover possession of land conveyed to the officers of a lodge and to their successors is properly brought by the present principal officers. *Rhodes v. Maret*, 102 T. 519, 119 S. W. 1139.

The purchaser at a foreclosure sale held entitled to recover in trespass to try title from one claiming under a subsequent judgment. *Taylor v. Davidson* (Civ. App.) 120 S. W. 1018.

The plaintiff to maintain the action must prove ownership. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

Plaintiff must show title from the sovereignty of the soil. *Williams v. Kuykendall* (Civ. App.) 136 S. W. 1153.

Plaintiff is not entitled to recover on a defective title merely because defendant fails to object in the trial court to the defect in the proof of title. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

Plaintiff held not entitled to recover. *Staley v. King Bank & Mercantile Co.* (Civ. App.) 144 S. W. 308.

A plaintiff who has fixed his judgment lien upon land, but has neither foreclosed the lien nor bought the property under execution sale, has no such title as will support trespass to try title to the land subject to his lien. *Elliott v. Williams* (Civ. App.) 150 S. W. 318.

Failure of the acknowledgment of a deed by a married woman to state that she did not wish to retract, will not defeat a suit by her remote grantee against a mere intruder, where she lived near the land, and for over 50 years neither she nor her heirs ever questioned the deed. *Spivy v. March*, 105 T. 473, 151 S. W. 1037, 45 L. R. A. (N. S.) 1109.

— Title acquired after commencement of suit.—Equitable title, see post.

The plaintiff cannot maintain a suit commenced without any color of title by evidence of a title subsequently acquired. *Bradford v. Hamilton*, 7 T. 55; *Simpson v. Mc-Lemore*, 8 T. 448; *Teal v. Terrell*, 48 T. 491.

Or if the plaintiff instituted his suit on an equitable title, and after the commencement of the suit acquired the legal title in conformity with his equitable right, there could be no valid objection to his introducing his legal title in evidence at the trial. *Ballard v. Perry*, 28 T. 348.

Plaintiff, pending the suit, may buy from heirs of a party whose undivided interest he had claimed through a defective administration sale, and such purchase would meet the plea of outstanding title to such interest if it could be made in such case. *Keyes v. Houston & Great Northern R. R. Co.*, 50 T. 169.

A plaintiff cannot recover upon a title acquired after commencement of the suit. *Ballard v. Carmichael*, 83 T. 355, 18 S. W. 734.

Plaintiff can set up title acquired pending suit by sale of defendant's interest. *Kerr v. Hill* (Civ. App.) 31 S. W. 1089.

Where plaintiff was the equitable owner of the land when the suit was brought, it was proper to admit in evidence a deed conveying to her the legal title, though executed after suit brought. *Vineyard v. Brundrett*, 17 C. A. 147, 42 S. W. 232.

Defendant who neglects to set up a title acquired after suit brought, cannot maintain a subsequent action between the same parties on such subsequent title. *McCray v. Freeman*, 17 C. A. 268, 43 S. W. 37.

Title to land acquired by plaintiff during a trial for its recovery held not available, where not set up by supplemental petition. *Matula v. Lane* (Civ. App.) 56 S. W. 112.

The right of plaintiff, having a superior title, to recover in trespass to try title, is not defeated by the fact that a deed in his chain of title was not acknowledged until after suit was brought. *Walker v. Downs* (Civ. App.) 61 S. W. 725.

A plaintiff held not entitled to sustain a recovery on a title acquired through limitations after the commencement of the action. *Erp v. Tillman*, 103 Tex. 574, 131 S. W. 1057.

— Adverse possession.—See notes under Arts. 5672-5684.

— Interest in public lands.—See notes under Title 79.

— Paper title.—A person who claims title by several conveyances of undivided interests in lands may dispossess a trespasser if one of the conveyances was effectual. *Maxson v. Jennings*, 19 C. A. 700, 48 S. W. 781.

The right of plaintiff, having a superior title, to recover, held not defeated by the fact that a deed in his chain of title referred to another deed to describe the property, and

gave an erroneous page of the record in which it was to be found. *Walker v. Downs* (Civ. App.) 61 S. W. 725.

Plaintiff cannot recover on a deed of defendant's homestead which was not signed by his wife. *Pinkston v. West* (Civ. App.) 85 S. W. 1014.

Plaintiff held entitled to recover all the land within his survey, unless he had lost any part thereof by limitations. *Earnest v. Lake*, 45 C. A. 463, 101 S. W. 479.

Plaintiff, on showing that he was the owner of a special act certificate on which the land was located, and under which title conveyed by the patent inured to his benefit, was entitled to recover, whether the title be legal or equitable. *Broussard v. Cruse* (Civ. App.) 154 S. W. 347.

— **Equitable title.**—Plaintiff may recover though having only an equitable title at commencement of action, the legal title being thereafter conveyed to her. *O'Connor v. Vineyard* (Civ. App.) 43 S. W. 55.

An equitable title will support an action for trespass to try title. *Bullock v. Sprowls* (Civ. App.) 54 S. W. 657; *Wade v. Boyd*, 24 C. A. 492, 60 S. W. 360; *Craig v. Harless*, 33 C. A. 257, 76 S. W. 594; *Bell County v. Felts* (Civ. App.) 120 S. W. 1065; *Low v. Gray*, 130 S. W. 270; *Warren v. Warren*, 145 S. W. 272; *Wolf v. Wilhelm*, 146 S. W. 216.

One who asserts equitable title to land cannot defeat the legal title without showing that the holder of the same was not a bona fide purchaser for value. *Fordtran v. Perry* (Civ. App.) 60 S. W. 1000.

A bond for title to land after the payment of the purchase price is an equitable title, which is sufficient on which to base trespass to try title against the grantor. *Wright v. Riley* (Civ. App.) 118 S. W. 1134.

Title acquired under a parol contract of sale held sufficient. *Lowry v. McDaniel* (Civ. App.) 124 S. W. 710.

A title held sufficient. *Blair v. Hennessy* (Civ. App.) 138 S. W. 1076.

Reversion of an equitable title in land after termination of a trust to sell and convey will support trespass to try title. *Montgomery v. Trueheart* (Civ. App.) 146 S. W. 284.

A plaintiff in trespass to try title may rely on a title under a bond for deed, making no mention of a consideration, and without proving any consideration for a conveyance, as against a defendant in possession, who does not show any title nor right to possession, but who is a mere trespasser. *Randell v. Robinson* (Civ. App.) 146 S. W. 717.

Plaintiff, in procuring a deed to himself from B. of land, which he afterwards, by mistake, he claims, conveyed to defendant C., having been the agent of defendant P., who furnished the consideration, so that he never had title, but held it in trust for defendant P., judgment in trespass to try title was properly against plaintiff; the superior title being shown in defendant P. *Yarbrough v. Clarkson* (Civ. App.) 155 S. W. 954.

— **Common source.**—See notes under Art. 7749.

— **Right of plaintiff to possession.**—Proof merely of prior possession by plaintiff is sufficient as against a mere trespasser. *Alexander v. Gilliam*, 39 T. 227; *Caplen v. Drew*, 54 T. 493; *Parker v. Railway Co.*, 71 T. 133, 8 S. W. 541; *Boyd v. Miller*, 22 C. A. 165, 54 S. W. 411; *Lockett v. Glenn* (Sup.) 65 S. W. 482; *Teagarden v. Patten*, 48 C. A. 571, 107 S. W. 909; *Frazer v. Seureau* (Civ. App.) 128 S. W. 649; *Stuart v. Harper*, 143 S. W. 712; *Chicago, R. I. & G. Ry. Co. v. Johnson*, 156 S. W. 253.

The doctrine that proof of possession of land is alone sufficient to entitle the occupant to maintain an action of trespass against a wrongdoer is founded on the fact that possession is prima facie evidence of title. But if the title be in another, the right of the possessor to recover is limited to the amount of damage to the possessory interest; if the damage be beyond this, and to the freehold, the possessor or tenant at sufferance cannot maintain an action for its recovery. *I. & G. N. Ry. Co. v. Ragsdale*, 67 T. 24, 2 S. W. 515.

Prior possession, as title against a trespasser, cannot avail one who is not shown to be in possession of the very land sued for. *Soape v. Doss*, 18 C. A. 649, 45 S. W. 387.

One in possession under defective title held to have such possession that he cannot be dispossessed by an intruder under mere color of title. *Watkins v. Smith*, 91 T. 539, 45 S. W. 560.

Actual possession held to raise a presumption of title, justifying plaintiff's recovery, though it has not continued long enough to give title by limitation. *Allen v. Boggess*, 94 T. 83, 58 S. W. 833.

Trespass to try title is an appropriate action for the recovery of the mere possession of lands. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704.

Where parties claimed from a common source, but both failed to connect themselves with the source, plaintiff, having had possession, held entitled to recover against defendant as a mere trespasser. *Estes v. Turner*, 30 C. A. 365, 70 S. W. 1007.

Prior possession will not support a judgment for plaintiff, where the title to the land in question is admittedly in the state. *Corrigan v. Fitzsimmons* (Civ. App.) 76 S. W. 68.

A widow and children of a deceased owner held entitled to recover land of which he died seised subject to a judgment in favor of a purchaser from the administrator of deceased for the value of improvements made thereon. *Fowler v. Agnew* (Civ. App.) 95 S. W. 36.

Where in an action to recover realty, based on a written lease to a bank, the owner of the premises being a party prays for possession for the use of the bank, he is entitled to recover, though the lease to the bank was void. *Lechenger v. Merchants' Nat. Bank* (Civ. App.) 96 S. W. 638.

Where defendant ousted plaintiffs under a writ of sequestration from inclosed land of which they were in possession and then dismissed the suit, plaintiffs were entitled to recover the land by virtue of such former possession, in the absence of proof of title in defendant. *McAdams v. Hooks*, 47 C. A. 79, 104 S. W. 432.

Prior possession to entitle plaintiff in trespass to try title to recover as against a trespasser must have existed at the time of entry. *Romine v. Littlejohn* (Civ. App.) 106 S. W. 439.

Where a city had title to land dedicated to it as a street, and had not lost it by limitation, in taking possession of the land it was not a trespasser against whom the actual possessor could recover by merely showing his possession. *City of San Antonio v. Rowley*, 48 C. A. 376, 106 S. W. 753.

Where plaintiffs against trespassers show title by prior possession, recovery by them will not be defeated because they have not been in actual possession for several years. *Teagarden v. Patten*, 48 C. A. 571, 107 S. W. 909.

In an action of trespass to try title, a finding that plaintiff and the persons under whom he claims fenced in the land in controversy with other lands and cultivated a portion through renters and repaired the fencing, and that plaintiff since his purchase of the land had repaired the fences, had a portion of the land cultivated, and was in possession of the land when defendants took possession thereof as complained of by plaintiff in his petition, though when defendants took possession a portion of the wires of the fence were broken by the high waters of a river forming its boundary, when such river last overflowed prior to the time, when defendants took possession, is sufficient to show prior possession good as against a mere trespasser. *Plummer v. Marshall* (Civ. App.) 126 S. W. 1162.

Prior possession by plaintiff as mortgagee held sufficient against a naked trespasser. *Frazier v. Seureau* (Civ. App.) 128 S. W. 649.

Proof of prior possession by plaintiff will not entitle him to recover where both parties are trespassers on the land. *March v. Spivy* (Civ. App.) 133 S. W. 529.

For a plaintiff to prevail he must establish his right to possession. *State v. Dayton Lumber Co.* (Sup.) 155 S. W. 1178.

— **Title of cotenant or joint tenant.**—The right of one tenant in common to recover the entire tract of land from one having no title is not affected by the Revised Statutes, but the same exists as recognized in *Croft v. Rains*, 10 T. 523, and *Watrous v. McGrew*, 16 T. 510. *Pilcher v. Kirk*, 60 T. 162; *Ney v. Mumme*, 66 T. 268, 17 S. W. 407.

On the death of one of several plaintiffs in an action of trespass to try title, the survivors, being joint tenants, can prosecute the suit against one having no title. *Watrous v. McGrew*, 16 T. 506; *May v. Slade*, 24 T. 205; *Presley v. Holmes*, 33 T. 476; *Alexander v. Gilliam*, 39 T. 227; *Truehart v. McMichael*, 46 T. 222; *Hutchins v. Bacon*, 46 T. 408; *Stovall v. Carmichael*, 52 T. 383; *Sowers v. Peterson*, 59 T. 216; *Pilcher v. Kirk*, 60 T. 162; *Hancock v. Tram Lumber Co.*, 65 T. 225; *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847; *Carley v. Parton*, 75 T. 98, 12 S. W. 950; *Musselman v. Strohl*, 83 T. 473, 18 S. W. 857.

It is well settled by adjudicated cases and by elementary authorities that one joint tenant or tenant in common can maintain trespass to try title or ejectment against a mere trespasser or wrongdoer. *Presley v. Holmes*, 33 T. 476; *Alexander v. Gilliam*, 39 T. 227; *Read v. Allen*, 56 T. 176; *Sowers v. Peterson*, 59 T. 217.

The plaintiff, on showing title either in severalty or in common with others not joined in the suit, can recover against a mere trespasser. *Guilford v. Love*, 49 T. 715.

If there were other joint owners, plaintiff would be entitled to recover their interest as against a stranger. *Pilcher v. Kirk*, 55 T. 208.

The right of a tenant in common to maintain an action for the recovery of the entire property against a wrongdoer is not affected by the statute which requires the plaintiff to state in his petition the interest which he claims in the property. *Telfener v. Dillard*, 70 T. 139, 7 S. W. 847.

When a defendant establishes title in an undivided interest, one tenant in common cannot recover for other tenants not parties. *Boone v. Knox*, 80 T. 642, 16 S. W. 448, 26 Am. St. Rep. 767.

Action by two tenants in common. Title of one was clear, that of the other disputed; defendant exhibited no title. Held, on appeal by defendant from a judgment of land in favor of both the plaintiffs, that inasmuch as one tenant in common could recover against a trespasser, it was immaterial whether both plaintiffs showed title or but one. *Flannagan v. Nasworthy*, 1 C. A. 470, 20 S. W. 839.

While one tenant in common can recover from a stranger the whole property, he can recover from his cotenant in possession only the interest he really owns; and the rule, it seems, applies even as to the interest of another cotenant defendant who had disclaimed. Before one tenant can make his cotenant liable to him for the use of the common property, he must show that he has been refused joint occupancy. *Bennett v. Land & Cattle Co.*, 1 C. A. 321, 21 S. W. 126.

One of several joint owners may recover the entire tract against a stranger to the title. *Hill v. Smith*, 25 S. W. 1079, 6 C. A. 312.

A tenant in common may recover an entire tract of land against a stranger to the title. *Marlin v. Kosmyroski* (Civ. App.) 27 S. W. 1042; *Minor v. Powers* (Civ. App.) 24 S. W. 710.

Plaintiff may recover as against a trespasser an undivided interest. *Webster v. McCarty*, 16 C. A. 160, 40 S. W. 823.

All the tenants in common need not join in an action to recover the land, as against one holding without title. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

An agreement between joint owners that either may sell to pay purchase money notes, and that the legal title, if either dies before notes are due, shall vest in the survivor to sell to pay notes, is not a mere power of attorney, but a contract conveying to the survivor all interest in the land to accomplish the purpose stated. *Carleton et al. v. Hausler et al.*, 20 C. A. 275, 49 S. W. 118.

Where nonresident stockholders in a foreign corporation, that has obtained no permit to do business in Texas, but has acquired lands in the state, seek to have a receiver appointed for the corporation on account of various misdeeds of the company, their request will be denied because they have a remedy under this article which allows a tenant in common to recover title or possession. They can bring sequestration suit under Art. 7094. *American Tribune New Colony v. Schuler*, 34 C. A. 560, 79 S. W. 375.

Plaintiffs as tenants in common held entitled to recover the entire land as against mere possessors without title. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Plaintiffs as tenants in common held entitled to recover against defendants having no title. *Hughes v. Wright & Vaughan* (Civ. App.) 97 S. W. 525.

One claiming land under a deed from a person having title to an undivided one-fourth interest therein may recover the entire tract from a person having no title to the land. *Hutcheson v. Chandler*, 47 C. A. 124, 104 S. W. 434.



Plaintiff held entitled to recover as against defendant who showed no interest therein; plaintiff being at least a joint owner with others. *Isbell v. Southworth* (Civ. App.) 114 S. W. 689.

— **Contract to purchase.**—The plaintiff alleged ownership in fee of the land sued for. On the trial plaintiff offered, to support his title, a contract of sale by which possession of the land was conceded, the purchase money payable in installments, the right to rescind reserved upon the failure to pay any of the installments, and reciting that the vendor retained the legal and equitable title in the land until it should be paid for. The vendee entered into possession and paid all the installments due upon the land. Held, that such title was sufficient to recover against one not showing a better title. *Land Co. v. Wood*, 71 T. 460, 9 S. W. 340.

A contract held only an executory agreement to convey land, giving plaintiff no present interest, and not sufficient to support an action of trespass to try title. *Prusiecke v. Ramzinski* (Civ. App.) 81 S. W. 771.

The title, whether legal or equitable, under a contract to convey land which contains an acknowledgment of the receipt of the purchase money, will support or defend against an action of trespass to try title. *Kirby v. Cartwright*, 48 C. A. 8, 106 S. W. 742.

Possession, construction of improvements, and cultivation of land under a parol contract to convey held sufficient to sustain trespass to try title or to defeat an action brought by the holder of the legal title or those holding under him. *Emporia Lumber Co. v. Tucker* (Civ. App.) 120 S. W. 1082.

Title acquired under a parol contract of sale, the price being paid, and the purchaser being placed in possession and making valuable improvements on the land, with the knowledge and consent of the vendor, is sufficient to sustain an action of trespass to try title. *Lowry v. McDaniel* (Civ. App.) 124 S. W. 710.

— **Presumptions burden of proof and admissibility of evidence.**—See notes under Art. 3687.

**Weight and sufficiency of evidence.**—If plaintiff in his petition seeks to avoid the effect of an execution sale to defendant by setting up homestead rights in the land, and that the defendant's purchase occurred while he was plaintiff's tenant and bound by the lease to deliver possession at the end of the term, evidence of such lease, tenancy and possession will not, of itself, authorize a recovery. *Hill v. Allison*, 51 T. 390.

A judgment for defendant in trespass to try title was held proper, in the absence of any evidence to show payment of purchase money by plaintiff, except such as appeared from the recitals of his chain of title. *Bremer v. Case*, 60 T. 151.

When the defendant asserts title to any part of the land claimed by plaintiff, or relies upon the plea of "not guilty," it is necessary for the plaintiff to show that his title extends to the land claimed in his pleadings; and, having done this, he is entitled to a judgment, unless superior title in the defendant in some way be shown. *McNamara v. Meunsch*, 66 T. 68, 17 S. W. 397.

Plaintiff is entitled to a verdict on a preponderance of evidence. *Moore v. Stone* (Civ. App.) 36 S. W. 909.

Evidence held to sustain a finding that plaintiff had failed to establish any trust. *Hendricks v. Huffmeyer*, 90 T. 577, 40 S. W. 1.

An answer filed in a suit in another state by the trustee of a company holding the title, admitting that one under whom plaintiff claimed was entitled to the land, held not to show title in plaintiff. *Story v. Jones*, 16 C. A. 60, 40 S. W. 417.

Evidence that defendant has more land than he is entitled to, without locating the excess or showing that it was taken from plaintiff, does not warrant recovery. *Rosson v. Miller*, 15 C. A. 603, 40 S. W. 861.

Description of land in decree for its conveyance held insufficient to divest title. *Forstall v. Bocoock* (Civ. App.) 41 S. W. 502.

Evidence held not to show fraud in that a grantee was given possession of a tract other than that purchased. *Niemann v. Silber* (Civ. App.) 41 S. W. 712.

Evidence held to show that a purchase of land by one person was made with the money of, and in behalf of, another person. *Richardson v. Richardson* (Civ. App.) 42 S. W. 248.

Evidence held to show that deed under which plaintiff claimed was genuine. *De la Garza v. Macmanus* (Civ. App.) 44 S. W. 704.

Evidence held to show a sufficient conveyance of legal title, as against defendant trespassers. *Rector v. Erath Cattle Co.*, 18 C. A. 412, 45 S. W. 427.

Evidence held insufficient to entitle defendant to recover on his cross-bill. *Clements v. Clements*, 18 C. A. 617, 46 S. W. 61.

The acceptance by defendant in ejectment of a lease from plaintiff, and the absence of any evidence of title in defendant, entitle plaintiff to recover. *Golden v. City of Galveston*, 20 C. A. 584, 50 S. W. 416.

Sufficiency of evidence to identify original patentee to land determined. *Graham v. Billings* (Civ. App.) 51 S. W. 645.

It is error to submit the question as to whether or not a deed was executed, where, to be availing, it would be necessary to determine whether it was executed either before or after another deed executed at a known time, where there is no evidence as to when the former was executed. *Texas Tram & Lumber Co. v. Gwin* (Civ. App.) 52 S. W. 110.

Descendants' claim of title, based on community interest of a grandmother, held not sustained. *Bludworth v. Poole*, 21 C. A. 551, 53 S. W. 717.

Evidence held insufficient to establish a claim of title based on a contract for services performed in locating land in question. *Herndon v. De Cordova* (Civ. App.) 54 S. W. 401.

One cannot recover by proving that he owns an undivided portion of the land, without establishing the portion. *Perkins v. Davidson*, 23 C. A. 31, 56 S. W. 121.

Plaintiff cannot recover when description in source of title cannot be identified with that in petition. *Greer v. Bringham*, 23 C. A. 582, 56 S. W. 947.

Plaintiff held entitled to judgment upon proof of title and admission of defendant of attempt to enter thereon under claim that same is a highway. *City of San Antonio v. Sullivan*, 23 C. A. 619, 57 S. W. 42.

Where defendant admits that the land in question was devised to him, and that decedent's will had been duly probated in another state, it is not error to proceed to judgment against the defendant alone. *Bonner v. Ogilvie*, 24 C. A. 237, 58 S. W. 1027.

Where an owner of land gave a deed of a part thereof, reserving 600 acres as previously agreed to be conveyed to W., in an action by an heir of the grantor to recover the reserved tract from one to whom another heir had conveyed it, held, that the identity of the land was sufficiently established. *Bartell v. Kelsey* (Civ. App.) 59 S. W. 631.

Evidence held to show that plaintiff had the fee-simple title to the land and right of possession to two-thirds thereof, while defendant had the other third during the life of another. *Scales v. Marshall* (Civ. App.) 60 S. W. 336.

Evidence held to show a sale of a certificate of headright under which plaintiffs claimed to plaintiffs' grantors. *Anderson v. Wynne* (Civ. App.) 62 S. W. 119.

Evidence of title held to justify verdict for plaintiff. *Cartmeil v. Gammage* (Civ. App.) 64 S. W. 315.

Facts held to show plaintiff entitled to the land in question. *Hamilton v. McAuley*, 27 C. A. 256, 65 S. W. 205.

The evidence of the title to real estate in the owners thereof held sufficient, in an action to recover the land under a mortgage thereon given by the person obtaining the patent to the land from the state as agent of the owner, to authorize a judgment in their favor. *Taylor v. Flynt*, 28 C. A. 219, 67 S. W. 347.

In trespass to try title by a trustee under a will, evidence held to show title in the trustee with the right of possession. *Eskridge v. Louisville Trust Co.*, 29 C. A. 571, 69 S. W. 987.

Evidence held to show certain facts on which plaintiff's title was based. *Yeary v. Crenshaw*, 30 C. A. 399, 70 S. W. 579.

Evidence held to justify a finding that the property constituted the homestead of defendant and her husband and was acquired under a parol partition. *Long v. Long*, 30 C. A. 368, 70 S. W. 587.

Evidence held to show that a purchaser from defendant after the suit was instituted purchased with actual notice of plaintiff's claim. *Turner v. Cochran*, 30 C. A. 549, 70 S. W. 1024.

Evidence held to sustain a finding that defendant's grantor, who claimed a prior settlement, had failed to continue his settlement as required by law. *Bates v. Bratton* (Civ. App.) 71 S. W. 38.

Evidence held to support a finding as to identity of the individual in whose right a headright certificate was issued. *Lynch v. Pittman*, 31 C. A. 553, 73 S. W. 862.

Defendant's evidence held not to have overcome plaintiff's prima facie case. *Binion v. Harris*, 32 C. A. 371, 74 S. W. 580.

Evidence held to show that the uncle of the ancestor of plaintiff's grantor was the owner of the land in question when he deeded it to a third person. *Henry v. Thomas* (Civ. App.) 74 S. W. 599.

Evidence held to make prima facie title in plaintiff. *Walker v. Marchbanks*, 32 C. A. 303, 74 S. W. 929.

Evidence held to show that plaintiff's ancestor had parted with his interest with notice of a previous conveyance of an interest by his co-tenants, and received his due proportion of the proceeds. *Bays v. Stone*, 33 C. A. 146, 76 S. W. 59.

Circumstantial evidence held to support a finding as to the contents of the report of commissioners to partition an estate. *Johnson v. Franklin* (Civ. App.) 76 S. W. 611.

In an action by the state against defendants claiming under a Spanish grant, evidence held to sustain finding of trial court that defendants were entitled to all the lands held by them under the grant. *State v. Texas Land & Cattle Co.*, 34 C. A. 460, 78 S. W. 957.

Facts held to authorize recovery. *Buster v. Warren*, 35 C. A. 644, 80 S. W. 1063.

Where both parties claim under applications to purchase from the state, facts held not to show conclusively that the state had no title at the time of plaintiff's purchase. *Jones v. Wright* (Civ. App.) 81 S. W. 569.

Plaintiff's abandonment of the land held not to require a verdict for defendant. *Id.*

Where a portion of plaintiff's chain of title was a power of attorney by a husband and wife to sell the land in question, that plaintiff failed to state that the power purported to be signed by the husband and wife held immaterial. *Barclay v. Waller*, 37 C. A. 242, 83 S. W. 721.

Evidence held to justify a finding that the name of a corporate grantee was a misnomer only, and intended for a corporation under whom plaintiff claimed title. *Cobb v. Bryan*, 37 C. A. 339, 83 S. W. 887.

A judgment for plaintiff held not affirmable on appeal, notwithstanding error, on the ground that the evidence showed plaintiff's prior possession sufficient to entitle her to recover against defendant, who failed to prove title. *Id.*

Evidence held to justify a presumption of grant of the land in controversy by the Spanish government to the former owner, under and from whom plaintiffs claimed and deraigned title. *Ortiz v. State* (Civ. App.) 86 S. W. 45.

Evidence held insufficient to show a gift of the land, in support of defendants' claim of title. *Tannery v. McMinn* (Civ. App.) 86 S. W. 640.

In trespass to try title, a charge that the burden of proof was on defendants to establish their case by clear and positive testimony held erroneous. *Matador Land & Cattle Co. v. Cooper*, 39 C. A. 99, 87 S. W. 235.

Evidence held not to raise an issue as to the location of a boundary line between two surveys. *Lewis v. Brown*, 39 C. A. 139, 87 S. W. 704.

Evidence held not to show estoppel in favor of purchaser against real owner. *Id.*

A charge to find for plaintiff if defendant failed to establish the allegations of his plea in reconvention, without requiring plaintiff to prove his right to possession, held properly refused. *Freeman v. Slay* (Civ. App.) 88 S. W. 404.

A finding as to the date plaintiff took possession of land sought to be recovered held erroneous. *Roos v. Basham*, 41 C. A. 551, 91 S. W. 656.

A plaintiff held not to have shown title to the land in controversy sufficient to warrant a judgment in his favor. *Ball v. Carroll*, 42 C. A. 323, 92 S. W. 1023.

A plaintiff held required to show that the land in controversy was not included in a deed to his grantor, as having been previously disposed of. *Id.*

Evidence held to require a finding that plaintiffs' ancestor, and not the ancestor of defendants, was the person to whom the land was patented. *Dorsey v. Olive Sternenberg & Co.*, 42 C. A. 568, 94 S. W. 413.

A party to prevail held required to show certain facts. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

Evidence held to show only a gift of the cultivated part of the tract. *Wallis v. Turner* (Civ. App.) 95 S. W. 61.

In trespass to try title, plaintiff held required to prove certain allegations of the petition in view of the answer. *Id.*

The prima facie inference that a prior possessor is the owner is rebutted by proof of a superior outstanding title in another. *Mann v. Hossack* (Civ. App.) 96 S. W. 767.

Evidence held to sustain the judgment as to title. *Henderson County v. Carpenter* (Civ. App.) 98 S. W. 413; *Burns v. Parker*, 137 S. W. 705.

That parties who have shown their right to inherit through paternal ancestor of last owner of land do not show that his maternal kindred are extinct held not to defeat their right to recovery. *Gorham v. Settegast*, 44 C. A. 254, 98 S. W. 665.

In trespass to try title, proof of title required of one claiming by collateral descent stated. *Id.*

Evidence held to support a finding of the jury locating the disputed boundary line in accordance with defendant's contention. *Brodhent v. Carper* (Civ. App.) 100 S. W. 183.

The finding of the jury on a special issue held not sustained by the evidence. *J. S. Brown Hardware Co. v. Catrett*, 45 C. A. 647, 101 S. W. 559.

Evidence held insufficient to show a gift inter vivos of the land to the plaintiff. *Combest v. Wall* (Civ. App.) 102 S. W. 147.

Evidence held sufficient to establish a parol partition of an estate. *Haines v. West* (Civ. App.) 102 S. W. 436.

Evidence held insufficient to show an unbroken chain of title in plaintiff. *State Nat. Bank of New Orleans v. Roberts* (Civ. App.) 103 S. W. 454.

Evidence held not sufficient to sustain a verdict for defendant on the issues presented. *Taliaferro v. Rice*, 47 C. A. 3, 103 S. W. 464.

Evidence held to warrant a finding that the land was located in a lot as designated on the plat of the survey. *Cochran v. Kapner* (Civ. App.) 103 S. W. 469.

Certain proof held not to prove that a survey as represented by the plat was not actually made by the surveyor on the ground. *Id.*

In ejectment plaintiff's possessory rights held limited by his inclosure. *McAdams v. Hooks*, 47 C. A. 79, 104 S. W. 432.

Evidence held insufficient to show title in plaintiff essential to a recovery. *Jaggers v. Stringer*, 47 C. A. 571, 106 S. W. 151.

In trespass to try title a defendant held entitled to recover under conditions stated. *Mars v. Morris* (Civ. App.) 106 S. W. 430.

Evidence held insufficient to establish plaintiff's right to recover by reason of prior possession. *Romine v. Littlejohn* (Civ. App.) 106 S. W. 439.

Evidence held sufficient to show that the person under whom plaintiffs claim was the person to whom a certain bounty warrant was issued by the republic of Texas. *Sanger v. McCan*, 48 C. A. 230, 106 S. W. 752.

A power of attorney reciting that G. was dead, and that B. was his heir, introduced as the basis of the introduction of a deed by the attorney in fact, held not to militate against a finding that the evidence did not show that B. ever had any title to the property. *Brown v. Orange County*, 48 C. A. 470, 107 S. W. 607.

Evidence held to sustain findings that a certain deed was signed and delivered to plaintiff's ancestor at a certain time, and that a quitclaim deed executed by the same grantor to defendant was made for the purpose of ratifying the former deed. *Jackson v. Tonahill*, 49 C. A. 169, 108 S. W. 178.

Evidence held to show that the grantee, under whom plaintiff claimed as heir, had voluntarily abandoned the land and agreed to rescind the sale by which he obtained possession of the land. *Evans v. Ashe*, 50 C. A. 54, 108 S. W. 1190.

Evidence held insufficient to sustain a finding that certain persons under whom defendant claimed title were tenants in common with plaintiffs of one-third of the land. *Morgan v. White*, 50 C. A. 318, 110 S. W. 491.

Evidence held to show that the certificates of the block claimed by plaintiffs were not filed with the district surveyor until after the filing of the certificates by defendant of the same block. *Smyth v. Saigling* (Civ. App.) 110 S. W. 550.

Evidence held to show that plaintiff's right to recover was based on the theory that he had purchased the premises from a third person who had acquired title from a former owner. *Daugherty v. Templeton*, 50 C. A. 304, 110 S. W. 553.

Where plaintiff introduced deeds to show chain of title, but there was nothing to show the relationship of certain grantors to the prior grantee, introduction of the same deeds by defendant held insufficient to overcome the hiatus. *San Antonio Machine & Supply Co. v. Campbell* (Civ. App.) 110 S. W. 770.

A judgment for plaintiff held authorized, though the sheriff's deed was not introduced in evidence. *Ayres v. Patton*, 51 C. A. 186, 111 S. W. 1079.

Evidence held to support a finding that defendants were in possession through their tenants when the land was levied upon under execution against their grantor. *Savage v. Cowan* (Civ. App.) 113 S. W. 319.

Evidence held to sustain a finding that certain notes were paid, and that a deed passed. *Millwee v. Phelps*, 53 C. A. 195, 115 S. W. 891.

Certain evidence introduced by plaintiff held to reduce his claim to an equitable one. *White v. McCullough*, 56 C. A. 383, 120 S. W. 1093.

Where plaintiff claimed certain land by prior possession, he was also entitled to show that one of the links in defendant's chain of title was insufficient without defeating his own prima facie right based on possession. *Saxton v. Corbett* (Civ. App.) 122 S. W. 75.

Evidence held insufficient to establish an estoppel on the part of plaintiffs. *Broocks v. Payne* (Civ. App.) 124 S. W. 463.

Evidence held insufficient to compel a finding by the trial court that a transfer of the land was made in accordance with a valid order of the probate court or under a valid deed. *Id.*

Evidence held insufficient to make it necessary for plaintiffs to restore to defendants the consideration paid for the land. *Id.*

Where complainant's claim rested on a constable's deed pursuant to a sale under execution on a judgment, production of the deed without the execution and judgment or excuse for complainant's inability to produce them held insufficient. *Kruegel v. Cobb* (Civ. App.) 124 S. W. 723.

If defendant stands on plaintiff's allegation of title to make out a case, a prima facie case is sufficient to entitle plaintiff to a judgment. *Finberg v. Gilbert* (Civ. App.) 124 S. W. 979.

Where plaintiff claimed through a deed describing the land conveyed as consisting of 177 acres of the C. survey, but the evidence showed that there were two C. surveys, one of 177 acres and one of a larger tract, held that it could not be said that plaintiff wholly failed to show that the land claimed was the 177-acre tract of the C. survey referred to in the deed. *Long v. Shelton* (Civ. App.) 126 S. W. 40.

Evidence held to sustain a finding that a witness moved from the land in the latter part of 1881. *Bond v. Garrison* (Civ. App.) 127 S. W. 839.

A plaintiff who shows title from the sovereignty to himself is prima facie entitled to recover. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

Evidence held not to sustain a finding that the land was worth \$520, when it was conveyed to defendant. *Rogers v. Blackshear* (Civ. App.) 128 S. W. 938.

Evidence held to sustain a finding that the patentee transferred the certificate to the person through whom defendants claimed. *Allen v. Clearman* (Civ. App.) 128 S. W. 1140.

A variance between the abstract number of the land as stated in a deed, and the correct abstract number in the comptroller's office to designate the land held immaterial. *Kirby v. Pitchfork Land & Cattle Co.* (Civ. App.) 129 S. W. 1151.

Facts held to make out a prima facie case for plaintiff. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

Plaintiff held to have a sufficient title, unless barred by the statute of limitations. *Wadsworth v. Vinyard* (Civ. App.) 131 S. W. 1171.

Proof of an outstanding title in a third person when a common grantor conveyed to defendant held not sufficient to defeat plaintiff's claim. *Caruthers v. Hadley* (Civ. App.) 134 S. W. 757.

A plaintiff held not to have connected himself with the title of the original grantee. *Griffin v. Ray* (Civ. App.) 135 S. W. 248.

Evidence held not to raise the issue of plaintiff's prior possession. *Id.*

Evidence held to warrant a finding of nonpayment of vendor's lien notes on the land. *Lippincott v. Taylor* (Civ. App.) 135 S. W. 1070.

To show title under a tax deed, one must put in evidence, not only the judgment and sheriff's deed, but also the order of sale. *Lumpkin v. Woods* (Civ. App.) 135 S. W. 1139.

A finding held not impeached by a certain fact. *Gladys City Oil, Gas & Mfg. Co. v. Right of Way Oil Co.* (Civ. App.) 137 S. W. 171.

In a suit by several to establish a cotenancy, failure of some of the plaintiffs to establish interests held not to affect the measure of recovery. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

Plaintiff held to show title under the sovereignty of the soil. *Edwards v. Smith* (Civ. App.) 137 S. W. 1161.

Evidence held to show plaintiff's title to only five-sevenths of the land. *Guilmartin v. Padgett* (Civ. App.) 138 S. W. 1143.

Evidence held to justify a finding that plaintiff had title. *Id.*

Evidence held to sustain a finding that title under which plaintiffs claim was extinguished by conveyance. *Surghenor v. Ducey* (Civ. App.) 139 S. W. 22.

Evidence held to sustain findings. *Surghenor v. Ayers* (Civ. App.) 139 S. W. 28.

The interest which one has in an estate held measured by the older and better title. *Southern Pine Lumber Co. v. Arnold* (Civ. App.) 139 S. W. 917.

Evidence, where plaintiff claimed under a trustee's sale under a trust deed executed by defendant, held to sustain a finding that the presumption that notice of sale was duly posted was not overcome. *Roe v. Davis* (Civ. App.) 142 S. W. 950.

Evidence held to support a finding as to the boundaries of land awarded in partition. *Morse's Heirs v. Williams* (Civ. App.) 142 S. W. 1186.

Evidence held to show that plaintiff's predecessors in interest recognized the defendant's title. *Addington v. Howard* (Civ. App.) 143 S. W. 268.

A plaintiff held not required to establish title in addition to a deed. *Ferrell v. Delano* (Civ. App.) 144 S. W. 1039.

The evidentiary value of circumstances essential to authorize a presumption that a missing conveyance in a chain of title was made held derived from their tendency to show an acquiescence in the title asserted by the claimant. *Baldwin v. McCullough* (Civ. App.) 146 S. W. 203.

Evidence held to sustain a judgment for defendant. *Childress v. Tate* (Civ. App.) 148 S. W. 843.

The possession of plaintiff and her transferees was prima facie evidence of title and sufficient to entitle them to recover against defendant, in the absence of evidence sufficient to defeat their right. *Adels v. Joseph* (Civ. App.) 148 S. W. 1154.

The evidence of title by third persons by limitation was insufficient to overcome the prima facie case made by the evidence of the possession of plaintiff and her transferees, in the absence of testimony to connect defendant with such limitation title. *Id.*

Evidence held to sustain a verdict for plaintiff on the facts. *Thompson & Tucker Lumber Co. v. Platt* (Civ. App.) 154 S. W. 268.

A plaintiff, claiming a title and possession of property, must remove every possibility of title in another, and not only show affirmatively his relationship to the person under whom he claims, but also that no other heirs exist to impede the descent, and, to do this, must negative the coming into existence of such other heirs. *Steddum v. Kirby Lumber Co.* (Civ. App.) 154 S. W. 273.

**Art. 7743. [5260] Either party may demand abstract of title.**—After answer filed, either party may, by notice in writing, duly served on the opposite party, or his attorney of record, not less than ten days before the trial of the cause, demand an abstract in writing of the claim or title to the premises in question upon which he relies.

**Abstract of title—Necessity of demand therefor.**—The plaintiff, unless an abstract is demanded, is not required to give the defendant notice of the source from which he claims title, and if he gives the defendant notice of the loss of a particular deed, or of the filing of a deed, or of a certified copy thereof, to be used in evidence, he is not thereby estopped from showing title in some other way. *Stanley v. Epperson*, 45 T. 645.

When a party desires to know, in advance of trial, the muniments of title relied on by the adverse party, he may call for an abstract of his title. A preliminary inquiry by the court into his sources of title, and an order requiring him to elect which of two sources of title he would rely on, was held error. *Hammond v. Connolly*, 63 T. 62.

— **Abstract as evidence of common source.**—Abstract of title admissible to show common source. *Wichita Land & Cattle Co. v. Ward*, 21 S. W. 128, 1 C. A. 307.

A plaintiff may show common source of title by introducing defendant's abstract of title filed in the suit. *Gonzales v. Batts*, 20 C. A. 421, 50 S. W. 403.

**Evidence under abstract.**—A defendant is not entitled to exclude from evidence, for want of due proof of its execution, a deed offered by plaintiff, where it is shown by abstract of title filed in that suit by the defendant, and offered in evidence by the plaintiff, that such deed is also a link in defendant's chain of title, and a common source of title of both parties. *Wichita Land & Cattle Co. v. Ward*, 1 C. A. 307, 21 S. W. 128.

Testimony of an abstractor, explanatory of his system, and of what was indicated by the want of an entry in certain columns, held not incompetent as at variance with the abstract. *Robbins v. Ginnochio* (Civ. App.) 45 S. W. 34.

The abstract of title filed by plaintiff in trespass to try title stated that he relied on "a copy of an execution," while the instrument read in evidence was a copy of an alias execution. Held, that there was no variance. *Frazier v. Waco Bldg. Ass'n*, 25 C. A. 476, 61 S. W. 132.

Where a deed was not embraced in the abstract of title filed in the case, but the record of the deed was not discovered until a short time before it was offered in evidence, its admission was proper. *Taffinder v. Merrill* (Civ. App.) 61 S. W. 936.

Under this and the following articles a plaintiff, who in attempting to comply with the demand for an abstract of title filed an abstract which stated that a deed in his chain of title had been recorded in the deed records in a designated county, in volume 5, while in fact it had been recorded in a book lettered "V," could not introduce the deed in evidence. *Coler v. Alexander* (Civ. App.) 128 S. W. 664.

This article only requires the abstract to show the party's own chain of title, and it need not contain evidence which only tends to destroy his adversary's title, so that defendant's abstract was not required to contain the proceedings by which the decree under which plaintiff's claim was set aside, in order to admit evidence of such proceedings. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

Under an abstract of chain of title filed by defendant in trespass to try title, pursuant to this article, stating that he claimed under the 3, 5, and 10 year limitations, he could testify that he and his father, under whom he claimed, rented the land by written lease. *Id.*

— **Evidence admissible without filing.**—Where plaintiff's suit is based wholly on a transaction between his decedent and defendant's deceased ancestors, evidenced by a deed and note, both of which are specially pleaded by plaintiff, they are admissible in evidence without an abstract of title having been filed. This article and Art. 4054 do not apply to such a case. *Bolden v. Hughes*, 48 C. A. 496, 107 S. W. 92, 93.

**Art. 7744. [5261] Abstract must be filed in twenty days, etc.**—Such abstract of title shall be filed with the papers of the cause within twenty days after the service of the notice, or within such further time as the court on good cause shown may grant; and, in default thereof, no evidence of the claim or title of such opposite party shall be given on trial.

**Filing defensive evidence.**—This statute gives the right to a litigant to have his opponent exhibit his title whether in writing or otherwise, but in no sense requires one to file his defensive evidence that only tends to rebut, destroy and annul his adversary's title, but upon which he does not rely to support his own title. *Wolf v. Wilhelm* (Civ. App.) 146 S. W. 216.

**Waiver of abstract.**—Plaintiff's right to the filing of an abstract held waived, where the case was called for trial before the expiration of 20 days from the notice, and no postponement was asked. *Crosby v. Ardoin* (Civ. App.) 145 S. W. 709.

**Postponement of trial.**—If the cause is called for trial before the expiration of twenty days, plaintiff may, on showing diligence in making demand, ask delay of the trial for the absence of the abstract. *Barth v. Green*, 78 T. 678, 15 S. W. 112.

**Art. 7745. [5262] Abstract shall state what.**—The abstract mentioned in the two preceding articles shall state:

1. The nature of each document or written instrument intended to be used as evidence, and its date; or,

2. If a contract or conveyance, its date, the parties thereto and the

date of the proof or acknowledgment, and before what officer the same was made; and,

3. Where recorded, stating the book and page of the record.

4. If not recorded in the county when the trial is had, copies of such instrument, with the names of the subscribing witnesses, shall be included.

If such unrecorded instrument be lost or destroyed, it shall be sufficient to state the nature of such instrument and its loss or destruction.

**Instruments included.**—A power of attorney under which a deed was executed must be included in an abstract of title. *Smith v. Powell*, 23 S. W. 1109, 5 C. A. 373.

A will not embraced in the abstract filed is not admissible in evidence. *Marlin v. Kosmyroski* (Civ. App.) 27 S. W. 1042.

This article was intended to be very comprehensive and include not only deeds to and contracts for the land vesting title in or securing a right to the party filing the abstract or those under whom he claims but also all other documents or written instruments intended to be used as evidence on the issue of title, and a lease falls within the latter class. *Hayes v. Groesbeck* (Civ. App.) 69 S. W. 237.

**Art. 7746. [5263] Amended abstract.**—The court may allow either party to file an amended abstract of titles, under the same rules which authorize the amendment of pleadings so far as they are applicable; but in all cases the documentary evidence of title shall, at the trial, be confined to the matters contained in the abstract of titles.

**Filing amended abstract.**—Amended abstracts of title can be filed under the same rules which authorize amendment of pleadings so far as applicable. *Stokes v. Riley*, 29 C. A. 373, 68 S. W. 704.

**Evidence admissible under abstract.**—Under this article plaintiff could not introduce in evidence a deed of trust not set out in his abstract of title, though he introduced a deed by the trustee, shown by the abstract, reciting that the deed was executed in pursuance of a power contained in the deed of trust. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

**Art. 7747. [5264] Surveyor appointed, etc.**—The presiding judge of the court may, either in term time or in vacation, at his own discretion, or on motion of either party to the action, appoint a surveyor, who shall survey the premises in controversy pursuant to the order of the court, and report his action under oath to such court; and, if said report be not rejected for good cause shown, the same shall be admitted as evidence on the trial. [Act Feb. 5, 1840, sec. 3. P. D. 5294.]

**In general.**—Boundaries of plaintiff's survey may be settled in one suit against the respective owners of adjoining tracts. *Muncy v. Mattfield* (Civ. App.) 40 S. W. 345.

The surveyor may adopt a previous survey if he knows it to be correct, but it is not the duty of the court to oblige him to adopt one shown to be incorrect. *Horton v. Face*, 9 T. 81.

To determine to whom a strip claimed belonged, held necessary to determine whether the boundary line between the surveys of the respective parties was located so as to include it within the survey owned by plaintiff or by defendant. *Provident Nat. Bank v. Webb* (Civ. App.) 128 S. W. 426.

Where there was no dispute as to the boundaries, and the land had been surveyed and marked, it was proper to refuse to order a survey. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

Where defendant pleads title in himself, and the land is sufficiently described in the petition, it is not error to refuse an order of survey on motion of defendant. *Id.*

**Form of report.**—The surveyor is not authorized to determine any question of fact or to report evidence. In making a survey by the field notes, he must report such natural and artificial objects as indicate the true location of the lines on the ground. *Schunior v. Russell*, 83 T. 83, 18 S. W. 484. See *Stanus v. Smith*, 8 C. A. 635, 30 S. W. 262; *Westbrook v. Guderian*, 3 C. A. 406, 22 S. W. 59; *Schaeffer v. Berry*, 62 T. 705.

**Admissibility and effect of report.**—The report of the surveyor appointed by the court to locate a tract the boundaries of which as given are inconsistent with each other is not conclusive, but may be contradicted by testimony at the trial. *Bass v. Mitchell*, 22 T. 285.

A line established on the ground will control a call for course and distance. *Woods v. Robinson*, 58 T. 655; *Oliver v. Mahoney*, 61 T. 610; *Ayers v. Harris*, 64 T. 296.

When there has been no actual survey a different rule prevails. *Booth v. Upshur*, 26 T. 64; *Boon v. Hunter*, 62 T. 582; *Jones v. Andrews*, 62 T. 652.

The report of a surveyor appointed by the court in a cause in which the boundary of a survey is in controversy is entitled to no greater weight than the testimony of a witness cognizant of the facts referred to in the report. *McAninch v. Freeman*, 69 T. 445, 4 S. W. 369; *Kerlicks v. Meyer*, 84 T. 158, 19 S. W. 379.

The report of a surveyor who has been appointed by the court during the progress of a suit is admissible in evidence only in suits instituted to try title to land. *Wheeler v. Boyd*, 69 T. 293, 6 S. W. 614; *Bellamy v. McCarthy*, 75 T. 293, 12 S. W. 349.

Under this article the report of a surveyor appointed to run a boundary is admissible in an action to establish the boundary. *Wardlow v. Harmon* (Civ. App.) 45 S. W. 828.

**Continuance and new trial for survey.**—Where no reasonable motion or request to have a surveyor appointed to locate the boundaries is made, a new trial will not be

granted in order that such survey might be made. *Pratt v. Slade* (Civ. App.) 126 S. W. 648.

Where it appeared that a survey had been made by both parties to determine the true location of the block of surveys containing the land in question, the court did not err in refusing a continuance on the day the cause was called for trial to enable an official surveyor to be appointed by the court to make the same survey. *Adams v. Burrell* (Civ. App.) 127 S. W. 581.

**Compensation of surveyor.**—This article makes no provision for compensation of the surveyor appointed by the court. It cannot be said that the court abused its discretion in allowing him \$20 per day for time engaged. *Harris County Irr. Co. v. Hornberger*, 42 C. A. 450, 94 S. W. 148.

That the surveyor's report and map were not admitted in evidence was no reason for refusing him compensation; the survey and map having been used by all parties on the trial. *Harris County Irr. Co. v. Hornberger*, 42 C. A. 450, 94 S. W. 145.

**Art. 7748. [5265] Survey unnecessary when.**—Where there is no dispute as to the lines or boundaries of the land in controversy, or where the defendant admits that he is in possession of the lands or tenements included in the plaintiff's claim or title, an order of survey shall be unnecessary. [Id. sec. 6. P. D. 5308.]

**Art. 7749. [5266] Common source of title, proof of.**—It shall not be necessary for the plaintiff to deraign title beyond a common source, and proof of a common source may be made by the plaintiff by certified copies of the deeds showing a chain of title to the defendant emanating from and under such common source; but before any such certified copies shall be read in evidence they shall be filed with the papers of the suit three days before the trial, and the adverse party served with notice of such filing as in other cases; provided, that such certified copies shall not be evidence of title in the defendant, unless offered in evidence by him; and the plaintiff shall not be precluded from making any legal objection to such certified copies, or the originals thereof, when introduced by the defendant. [Act Sept. 28, 1871, p. 3, sec. 1. P. D. 6829.]

See, also, notes under Art. 7740.

**Title from common source in general.**—A defendant cannot defeat the rule of common source by a declaration that he does not claim under it. *Burns v. Goff*, 79 T. 236, 14 S. W. 1009.

Where defendant seeks to hold land as within the boundaries of his deed, it enables plaintiff to deraign his title from the source from which the defendant's title has come. *Huth v. Heerman*, 24 S. W. 664, 5 C. A. 655.

A tax deed purporting to convey to defendant's predecessor the interest of the one under whom plaintiff claims does not show a claim of common source. *Hendricks v. Huffmeyer*, 90 T. 577, 40 S. W. 1.

Where a conveyance is made by persons having different titles, one holding under their grantee holds under two distinct titles. *Story v. Birdwell* (Civ. App.) 45 S. W. 847.

Instruction that original vendee was common source of title held error. *Haney v. Brown* (Civ. App.) 46 S. W. 55.

Where one holds under a conveyance from a grantor who had prior to making such conveyance conveyed to a third person whose interest had been sold to plaintiff under execution, they hold under a common source. *Parsons v. Hart*, 19 C. A. 300, 46 S. W. 856.

Deeds held sufficient conveyances as links in establishing a common source. *Smith v. Davis*, 18 C. A. 563, 47 S. W. 101.

Certain facts held to show common source of title. *Gordon v. Hall*, 29 C. A. 230, 69 S. W. 219.

Defendants could not be regarded as innocent purchasers of the land in controversy, where one deed forming a part of their claim of title was absolutely void. *Wren v. Howland*, 33 C. A. 87, 75 S. W. 894.

A deed prior in time from the common grantor held superior unless fraudulent as against the subsequent grantee. *Clark v. Bell*, 40 C. A. 39, 89 S. W. 38.

Both parties held to claim from a common source. *Lutcher v. Allen*, 43 C. A. 102, 95 S. W. 572.

Where adjoining owners have purchased from a common vendor, and each claims that his tract extends over that claimed by the other, the vendor is the common source of title. *Young v. Trahan*, 43 C. A. 611, 97 S. W. 147.

Defendants, claiming from a common source of title with plaintiffs by an invalid or insufficient conveyance, are merely trespassers. *Branch v. Deussen* (Civ. App.) 108 S. W. 164.

Where there is a dispute between purchasers from a common vendor regarding a boundary line, the vendor is the common source of title as to the parcel in controversy. *San Antonio Machine & Supply Co. v. Campbell* (Civ. App.) 110 S. W. 770.

Where a plaintiff fails to connect himself by a complete chain of title with the common source, he cannot recover. *Id.*

The doctrine of common source of title may be invoked where defendant is in possession of the land sued for. *Woodward v. Ross* (Civ. App.) 153 S. W. 158.

A grantor for himself, and as attorney in fact for third persons, conveyed real estate to a grantee, reserving a vendor's lien evidenced by notes. The grantor assigned the notes, none of which were ever paid, and quitclaimed his interest in the land to the assignee, who brought trespass to try title against a defendant, who claimed under a deed from the grantee. Held, that both parties claimed under a common source of title within this article; and defendant in possession, to defeat a recovery, must prove an outstanding title, and must prove that the grantor had no power of attorney to sell the interests of the third persons. *Id.*

**Agreement as to common source.**—An agreement between the litigants that they claimed under a common source is not an admission that each had a regular chain of title leading up to such common source; much less is it an admission that a deed offered in evidence is in the line of title. The effect of such an agreement is to relieve the plaintiffs from the necessity of tracing their title back to the government. *Tapp v. Corey*, 64 T. 594.

When defendant agreed that a certain party was the common source of title to the land in controversy, he was precluded from claiming any interest in the land not derived from that source. *Crabtree v. Whiteselle*, 65 T. 111.

**Deraigning title beyond common source.**—When the defendant claims title through a sheriff's deed under judgment and execution against the plaintiff, the plaintiff is not required to deraign title beyond himself, as a common source; nor is he required to allege the common source of title in order to introduce evidence of it. *Wilson v. Palmer*, 18 T. 592; *Pearson v. Flanagan*, 52 T. 266; *Stegall v. Huff*, 54 T. 192; *Kerr v. Hill* (Civ. App.) 31 S. W. 1089; *Johnson v. Foster*, 34 S. W. 821.

Where the evidence showed that both parties claimed title from a common source, the fact that the appellee filed an abstract of his title reaching back to the sovereignty of the soil, but failed to establish that title by proof, did not alter the rule entitling him to recover, if he showed the older title under the common source. *Sellman v. Hardin*, 58 T. 86.

The defendant relied on a title derived from the plaintiff. Held, it was immaterial whether or not the plaintiff established a complete chain of title down to himself from the original grantee. The parties claimed under a common source, and it was sufficient if the evidence did not show that the plaintiff had parted with his title by reason of any of the deeds through which defendant claimed. *Calder v. Ramsey*, 66 T. 218, 18 S. W. 502.

When the defendant claims under two paper titles, plaintiff cannot recover by showing simply a superior title from a common source in one of them only. *Starr v. Kennedy*, 5 C. A. 502, 27 S. W. 26; *Howard v. Masterson*, 77 T. 41, 13 S. W. 635.

Proof of title back of the common grantor need not be made. *Byne v. Wise* (Civ. App.) 31 S. W. 1069.

Where both parties in an action to recover real estate claim under a common source of title, it is not necessary for plaintiff to show title from the government. *Tinsley v. Magnolia Park Co.* (Civ. App.) 59 S. W. 629.

In trespass to try title, held unnecessary for plaintiff to show a regular chain of title from the state. *Young v. Trahan*, 43 C. A. 611, 97 S. W. 147.

Where plaintiffs' ancestor, through whom both parties claimed as a common source, had prior possession of the land, plaintiffs need not connect themselves with the sovereign of the soil. *Stephenville Oil Mill Co. v. McNeill*, 57 C. A. 252, 122 S. W. 911.

Under this article plaintiff can stand on the common source, and recover upon proving the superiority of his title from such source. *Long v. Shelton* (Civ. App.) 126 S. W. 40.

Notwithstanding defendant's plea of not guilty, plaintiff need not prove title from the sovereignty of the soil, where defendant's special plea alleges title emanating from plaintiff. *Organ v. Maxwell* (Civ. App.) 140 S. W. 255.

**Effect of common source or claim thereunder in general.**—A defendant having filed an abstract of his title, in which he claims under a common source with the plaintiff, will not be heard to attack the chain of title between the common source and the sovereignty. *Evans v. Foster*, 79 T. 48, 15 S. W. 170. See *Howard v. Masterson*, 77 T. 41, 13 S. W. 635.

Where plaintiffs prove common source and a superior title under it, they may recover, unless defendants show a superior title which they have acquired, or that title never vested in the common source. *Smith v. Davis*, 18 C. A. 563, 47 S. W. 101.

That defendant claimed title through the same person as plaintiffs would not bind him to such person as a common source, where he also claimed independent thereof. *Mayfield v. Robinson*, 22 C. A. 385, 55 S. W. 399.

Where parties claimed title under a common grantor, who derived title directly from the original grantee, it was error to exclude evidence of a prior deed showing that such grantee had no title when he conveyed to the common grantor. *Ferguson v. Ricketts*, 93 T. 565, 57 S. W. 19.

Where both parties claimed under a deed of an executor, held not necessary for plaintiff to show that he had authority to execute the deed. *Wade v. Boyd*, 24 C. A. 492, 60 S. W. 360.

Where both parties claimed under deed of an executor, defendant could not say that executor was without authority to execute the deed. *Id.*

Where plaintiff shows that his claim of title and that of defendant is from a common source, he will not be permitted to attack the title of such common source. *Skov v. Coffin* (Civ. App.) 137 S. W. 450.

**Showing outstanding or paramount title.**—When the evidence shows that both parties claim under a common source, the defendant is not estopped from proving the existence of a superior outstanding legal title with which he is not connected beyond the common source of title. *Rice v. Railway Co.*, 24 S. W. 1099, 6 C. A. 355.

Defendant claiming under a common source cannot show a superior outstanding title with which he is not connected. *Pfouts v. Thompson* (Civ. App.) 27 S. W. 904.

A defendant claiming land under a common source cannot show a superior outstanding title. *Easterwood v. Dunn*, 19 C. A. 320, 47 S. W. 285.

Prior judgment for defendant against outside parties held not sufficient to show title in him paramount to common source. *Gordon v. Hall*, 29 C. A. 230, 69 S. W. 219.



Mere possession held not to show title in defendant paramount to common source. *Id.*

Where defendant pleaded title under a common source inferior to that of plaintiff, plaintiff was entitled to recover, though a superior outstanding title was shown back of the common source. *Tiemann v. Cobb*, 35 C. A. 289, 80 S. W. 250.

Record of a lost deed and assignment of patent and payment of taxes held insufficient to establish an outstanding title in the grant by a person not claiming under him. *Schultz v. Tonty Lumber Co.*, 36 C. A. 448, 82 S. W. 353.

The fact that plaintiff shows that both he and defendant claim from the same grantor, and that plaintiff has the superior title from such source, held not to estop defendant from showing a claim through another source. *Gilmer v. Beauchamp*, 40 C. A. 125, 87 S. W. 907.

Common source of title does not preclude a party from proving title superior to such common source, whether it be an outstanding title or one accruing by virtue of the statute of limitations. *Stubblefield v. Hanson* (Civ. App.) 94 S. W. 406.

A party claiming as heir of a former owner held not prevented from asserting that his mother had an equitable title to one-half of the land in controversy. *Taylor v. Doom*, 43 C. A. 59, 95 S. W. 4.

Where both parties claim title under a common grantor, one party to defeat a recovery by the other must show that a person other than the common grantor held title, and that the common grantor was without title. *Cocke v. Texas & N. O. R. Co.*, 46 C. A. 363, 103 S. W. 407.

Where defendant relied upon a grant to another as an outstanding title, but it did not appear by whom the grant was made, or in what right it was made, the evidence was insufficient to show a valid outstanding title in third persons. *Holland v. Nance*, 102 T. 177, 114 S. W. 346; *Same v. Ferris*, *Id.*

Certain evidence held not to show that there was any outstanding title against the land in controversy. *Hoencke v. Lomax*, 55 C. A. 189, 118 S. W. 817.

If land in controversy is shown to be on part of the lot, as to which defendant obtained title from the common source by a continuous and unbroken chain, it shows conclusively that his title is superior to any that either he or plaintiff could have acquired under a grantee from the common source of the remaining part. *Roberts v. Blount* (Civ. App.) 120 S. W. 933.

When defendant has a superior right to land outside that which he may have under a common source, he is not precluded from showing it, but must show that the common source was without title. *Id.*

Where both parties claimed through a common grantor, proof of a conveyance to a third party before the conveyance of the common grantor would not prevent plaintiff from recovering. *Long v. Shelton* (Civ. App.) 126 S. W. 40.

Where the parties deraign title from a common source, evidence of title in some one anterior to the common source is not of itself sufficient to defeat the right of the claimant depending upon a regular chain of transfers from the common source. *Plummer v. Marshall* (Civ. App.) 126 S. W. 1162.

Where the parties claim under a common source, defendants cannot show an outstanding title with which they can show no connection. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

Defendant may defeat the action by proving an outstanding title in a third person was anterior to that of the common source, and which never vested in the common source. *Caruthers v. Hadley* (Civ. App.) 134 S. W. 757.

Defendant may show a superior title to that held by the common source, and to do so may attack the validity of a deed under which the common source claims. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

When the common source has been shown by the introduction of deeds or other muniments of title, the defendant cannot defeat the plaintiff's recovery by merely showing an outstanding title anterior to the common source, but must go further, and show that the common source had no title. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

**Proof of common source.**—See, also, notes under Art. 7743.

Where both parties claim title under a common source, and plaintiff shows title from such common source and that defendant is in possession, such evidence is sufficient, and it devolves upon the defendant to show either the nullity of plaintiff's deed or prove a superior title in himself. *Stephens v. Hix*, 38 T. 656.

This article seems to dispense with proof of inability of a plaintiff to produce original deeds or other papers to show that a defendant claims under a common source. But a party cannot offer in evidence a certified copy of the patent to show title in himself, over objections of the adverse party, without showing a compliance with the requirements of Art. 3700. *R. G. & E. P. R. R. Co. v. Milmo Nat. Bank*, 72 T. 467, 10 S. W. 563.

The provision as to the use of copies of deeds simply changed the common-law rule of evidence, so that such copies can be used without first accounting for absence of the originals, and does not change the rule as to the effect of the evidence when introduced. *Ogden v. Bosse*, 86 T. 336, 24 S. W. 798.

Proof of common source, how made. *Halley v. Fontaine* (Civ. App.) 33 S. W. 260; *Bradford v. Stoneroad* (Civ. App.) 33 S. W. 156; *Edrington v. Butler* (Civ. App.) 33 S. W. 143; *Greenwood v. Fontaine* (Civ. App.) 34 S. W. 826.

Evidence held to show common source. *Webster v. McCarty*, 16 C. A. 160, 40 S. W. 823.

Evidence considered, and held insufficient to entitle plaintiff to recover. *Sage v. Clopper*, 19 C. A. 502, 48 S. W. 36.

Evidence held to show that a small tract of land conveyed by a common grantor was included in a later grant of a larger tract by the same grantor. *Payton v. Caplen* (Civ. App.) 59 S. W. 624.

Certain facts held not to show common source. *Moore v. Kempner*, 41 C. A. 86, 91 S. W. 336.

Plaintiff, in making proof of common source of title, held to have the right to introduce his evidence for that purpose only. *Young v. Trahan*, 43 C. A. 611, 97 S. W. 147.

Evidence held to show that the parties claimed under a common source. *Wright v. Giles* (Civ. App.) 129 S. W. 1163.

That plaintiffs and defendant claim under the same deed is sufficient proof of common source. *Watson v. Harris* (Civ. App.) 130 S. W. 237.

This article establishes a rule of evidence and of burden of proof, and not one of pleading or estoppel, and proof by plaintiff that defendant has a deed or chain of title from the person under whom plaintiff claims establishes prima facie that defendant is claiming under a common source; but the defendant is not precluded from showing that he holds a superior title to that held by the prima facie common source, or that there is an outstanding superior title. *Word v. Houston Oil Co. of Texas* (Civ. App.) 144 S. W. 334.

Evidence held insufficient to show that the common source had title at the time he made the conveyance to plaintiff. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

— Presumptions, burden of proof and admissibility of evidence in general.—See notes under Art. 3687.

**Art. 7750. [5267] Judgment by default.**—If the defendant, who has been personally served with citation according to law, fails to appear and answer by himself or attorney within the time prescribed by law for other actions in the district court, the proper judgment by default may be entered against him and in favor of the plaintiff for the title to the premises, or the possession thereof, or for both, according to the petition, and for all costs, without any proof of title by the plaintiff.

See *Alamo Club v. State* (Civ. App.) 147 S. W. 639.

**Judgment against defendant.**—In a suit to cancel deeds and remove cloud from title where the defendant accepts service and enters appearance, but files no answer or other pleading, judgment by default may be entered and the defendant cannot assail plaintiff's title in the appellate court. *Wandelohr v. Greyson Co. Nat. Bank* (Civ. App.) 102 S. W. 747.

Plaintiff held entitled to judgment against defaulting defendants. *State v. Gallardo* (Civ. App.) 135 S. W. 664.

**Judgment against plaintiff.**—See notes under Art. 7739.

**Art. 7751. [5268] Proof ex parte, when made.**—If the defendant has been cited only by publication, and fails to appear and answer by himself, or by attorney of his own selection, or if any defendant, having answered, fails to appear by himself or attorney when the case is called for trial on its merits, the plaintiff shall make such proof as will entitle him prima facie to recover, whereupon the proper judgment shall be entered.

**Art. 7752. [5269] When defendant claims part only.**—Where the defendant claims part of the premises only, the answer shall be equivalent to a disclaimer of the balance.

**Disclaimer in general.**—See, also, notes under Art. 3687, Rule 37, § 24.

A disclaimer by the defendant as to part of the land sued for is not to the prejudice of the plaintiff, and the allowance of such disclaimer by the court, after the parties announced themselves ready for trial, is therefore not an error for which the judgment in favor of the defendant for the remainder of the land will be reversed. *Whitehead v. Foley*, 28 T. 1.

A disclaimer is an admission upon the record of the plaintiff's right and a denial of the assertion of title on the part of the defendant. *Wootters v. Hall*, 67 T. 513, 3 S. W. 725; *Herring v. Swain*, 34 T. 523, 19 S. W. 774.

When the defendant files only a disclaimer, evidence which under a proper plea establishing matter of defense would be admissible should be excluded. *Thurmond v. Brownson*, 69 T. 597, 6 S. W. 778.

After a defendant has withdrawn his answer and disclaimed, he has the right to be heard at the trial to object to plaintiff's introducing proof of title to land not claimed in the petition. *Etter v. Dignowitty*, 77 T. 212, 13 S. W. 973.

Where, in a suit against a defendant claiming title, and his tenant, the latter disclaims title, on judgment in favor of the former the plaintiff is not entitled to judgment against the tenant. *Smithwick v. Kelly*, 79 T. 564, 15 S. W. 486.

Where the defendant pleads not guilty and at the same time files a disclaimer as to the entire land sued for, it seems that the plea should be disregarded. *Herring v. Swain*, 84 T. 523, 19 S. W. 774.

Where the plaintiff sues the children of his deceased wife for their interest in the community property, a disclaimer by one of the defendants, in the absence of a special direction by him, inures to the benefit of his co-defendants and not to that of the plaintiff. *Robinson v. Moore*, 1 C. A. 93, 20 S. W. 994.

Rights of defendant, disclaiming as to part of the strip in controversy, to raise the question as to the effect of the purchase from the state under the "Scrap Act." *Cox v. Finks* (Civ. App.) 41 S. W. 95.

A disclaimer in a former action to all land except that claimed by metes and bounds held to estop the assertion of title to other adjoining land. *Scanlan v. Hitchler*, 19 C. A. 689, 48 S. W. 762.

Answer of defendants held a disclaimer, within this article, of a part of the land sued for. *Stipe v. Shirley*, 33 C. A. 223, 76 S. W. 307.

Certain heirs, having filed a disclaimer in a suit to set aside an exchange of property for failure of title, held not thereafter entitled to claim any rights therein. *Milby v. Hester*, 42 C. A. 514, 94 S. W. 178.

A judgment for plaintiff held proper on disclaimer by defendant. *Hildebrandt v. Hoffman* (Civ. App.) 113 S. W. 735.

In trespass to try title to land purchased at tax sale, defendant, disclaiming title, held liable for the value of a house removed from the land and the value of the use made of the house prior to the removal. *Cavins v. Trice*, 55 C. A. 533, 119 S. W. 896.

A disclaimer by a defendant, in a suit for land, held not to estop him, in a subsequent suit by a third party, from asserting the defense of limitations. *Webb v. Cole*, 56 C. A. 185, 120 S. W. 945.

By disclaiming, defendants held to waive the right to question plaintiff's title to a particular section. *Elwood, Arnett & Arnett v. Copeland* (Civ. App.) 129 S. W. 146.

Where one defendant sued for the land answered by general denial and plea of not guilty, but did not disclaim, plaintiffs were entitled to a verdict for the land as against him if they showed title in themselves. *Bender v. Brooks* (Civ. App.) 130 S. W. 653.

Where the plaintiff claimed damages, held that the defendant's disclaimer of title did not divest the court of jurisdiction to try the issue of damages. *Coombes v. Bradford* (Civ. App.) 132 S. W. 849.

Effect of mistaken disclaimers by defendants stated. *Turner v. Pope* (Civ. App.) 137 S. W. 420.

Where a party files a disclaimer, he is no longer a party to the suit, unless, in addition to land, it is sought to recover damages. *Williams v. Neill* (Civ. App.) 152 S. W. 693.

Disclaimer and agreement of defendants held sufficient to authorize a verdict for plaintiff as to timber cut from the land in controversy. *Kirby v. Conn* (Civ. App.) 156 S. W. 232.

**Judgment for part disclaimed.**—In case of a disclaimer, the judgment is for plaintiff for all the land sued for as to which defendant disclaims. *Snyder v. Compton* (Civ. App.) 29 S. W. 73.

Upon defendant's filing a disclaimer the court may render judgment for the land disclaimed. *Busk v. Manghum*, 14 C. A. 621, 37 S. W. 459.

Plaintiff held entitled to judgment for that portion of the land sued for included in defendant's disclaimer. *Pouns v. Zachery*, 46 C. A. 604, 103 S. W. 234.

**Costs on disclaimer.**—See notes under Art. 2035.

**Withdrawal of disclaimer.**—A disclaimer is not withdrawn by being omitted from a subsequent amended answer, for the consent of the court is essential to such withdrawal. *Scanlan v. Hitchler*, 19 C. A. 689, 48 S. W. 762.

**Art. 7753. [5270] When plaintiff proves part.**—Where the defendant claims the whole premises, and the plaintiff shows himself entitled to recover part, the plaintiff shall recover such part and costs.

**Recovery by plaintiff.**—One having sued for the whole of a tract of land may nevertheless recover an undivided interest. *Williams v. Davis*, 56 T. 250.

When against several defendants the evidence discloses that none of them were in possession of a part of the premises sued for, and, all having answered, failed to disclaim as to any part of the land, and the plaintiff exhibits a perfect title, the judgment should be against all the defendants for all the land to which he establishes his right, and for the costs of suit. *Koenigheim v. Miles*, 67 T. 113, 2 S. W. 81.

A plaintiff is entitled to recover an undivided interest in a tract of land of which he claims the whole. *Schmidt v. Talbert*, 74 T. 451, 12 S. W. 284; *Murrell v. Wright*, 78 T. 519, 15 S. W. 156.

Where the petition was in the usual form, and the answer pleaded not guilty, and plaintiff proved her fee-simple title and right of possession of two-thirds of the land, judgment of restitution to her was proper, without her showing right of possession to entire tract. *Scales v. Marshall* (Civ. App.) 60 S. W. 336.

Under this article a plaintiff, in an action for the whole of a specified tract, who shows himself entitled to an undivided interest, can recover it. *Holloway v. Hall* (Civ. App.) 136 S. W. 488.

Under this article and the following article, where plaintiffs claimed the whole tract, and defendants pleaded not guilty, on proof that the whole tract was held in common, and that defendants had a two-thirds interest in the tract, plaintiffs may recover the one-third interest proved by them and be put into possession with the defendants as tenants in common, and hence a judgment for defendants for all the land was erroneous. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

**Costs.**—Costs in general, see Title 37, Chapter 18.

When defendant does not disclaim, but contests plaintiff's right to any part of the land, the latter, on recovering judgment for a part, is entitled to costs. *Galveston Land & Imp. Co. v. Perkins* (Civ. App.) 26 S. W. 256.

When plaintiff shows himself entitled to recover part of the premises, he shall recover such part and costs. *Brown v. Humphrey*, 43 C. A. 23, 95 S. W. 25.

Under Art. 2048 and this article, a defendant held not entitled to costs. *Lumpkin v. Williams*, 56 C. A. 160, 119 S. W. 917.

**Art. 7754. [5271] May recover a part, etc., when.**—When there are two or more plaintiffs or defendants, any one or more of the plaintiffs may recover against one or more of the defendants the premises, or any part thereof, or any interest therein, or damages, according to the rights of the parties.

See *Coombes v. Bradford* (Civ. App.) 132 S. W. 849.

**Recovery of part.**—That an intervener may show title to an undivided interest in the land sued for does not affect the right of the plaintiff to recover, who shows title to the remaining interest, as against defendant, who is a mere trespasser. *Roosevelt v. Davis*, 49 T. 463.

In an action by tenants in common against another tenant in common who pleaded limitation and not guilty, on proof of title plaintiff was entitled to judgment for the interest sued for and for possession in common. *Railway Co. v. Frather*, 75 T. 53, 12 S. W. 969.

In an action against joint trespassers, a judgment against each of the defendants severally is not to the prejudice of the defendants, and therefore is not reversible error. *Lastovica v. Sulik* (Civ. App.) 33 S. W. 909.

When plaintiffs join claiming in a common right, and it is established that one only is entitled to recover, such one can recover according to his rights as shown by the evidence either in whole or in part or against one or all of the defendants. *Anderson v. Anderson*, 95 T. 367, 67 S. W. 405.

In a suit by several to establish a cotenancy in lands to which defendant acquired the legal title under a compromise in a suit in which he was employed by them under a contract for one-half of the recovery, failure of some of the plaintiffs to establish an interest did not affect the right of the successful plaintiffs to a joint one-half interest. *Henyan v. Trevino* (Civ. App.) 137 S. W. 458.

**Single or separate judgment.**—Where several defendants sever in their defense, presenting different defenses, there should be distinct judgments; and on appeal an appeal bond should be given for each judgment; otherwise the appeal will be dismissed. *Chambers v. Fisk*, 9 T. 261.

Where defendants sever, several judgments may be rendered, and a judgment in favor of one or more is not dependent upon the result of a motion for new trial made by the other defendants. *Boone v. Hulsey*, 71 T. 176, 9 S. W. 531. See *Hamilton v. Prescott*, 73 T. 565, 11 S. W. 548.

**Art. 7755. [5272] The judgment, etc.**—Upon the finding of the jury, or of the court where the case is tried by the court, in favor of the plaintiff for the whole or any part of the premises in controversy, the judgment shall be that the plaintiff recover of the defendant the title or possession, or both, as the case may be, of such premises, describing them, and where he recovers the possession, that he have his writ of possession.

See, also, notes under Art. 7752.

See *Coombes v. Bradford* (Civ. App.) 132 S. W. 849.

**Judgment in general.**—See, also, notes under Art. 1994.

Where issue is joined generally, and the plaintiff proves the better title to any part of the land claimed by him, he is entitled to judgment for that part. *Scott v. Rhea*, 5 T. 258.

The fact that there is verdict and judgment for only one of the plaintiffs below furnishes a ground for reversal. *Biencourt v. Parker*, 27 T. 558.

Where several tracts are sued for and are described in the petition by the date and name of the patentees and number of acres in each tract, a verdict for plaintiff, less two of the tracts, described by name of the grantee, is sufficiently certain to allow of a judgment thereon. *Wood v. Welder*, 42 T. 396.

A clause in a judgment removing cloud and quieting defendant's title to the premises sued for adds nothing to the force of the usual entry, that the plaintiff take nothing by his suit, etc. *French v. Olive*, 67 T. 400, 3 S. W. 568; *Railway Co. v. McGehee*, 49 T. 481.

Plaintiff claimed title to an undivided one-third of a survey; and for possession of the entire tract in the event the defendant failed to show title to two-thirds of it. The verdict was for plaintiff "for one-third of the property in dispute." The judgment entry was for the plaintiff for one-third of the entire tract. The verdict was rendered under a charge which instructed the jury to find "for plaintiff one-third of the land described in the petition." Held, that the entire property was in dispute, and there was no error in the judgment. *Edwards v. Barwise*, 69 T. 84, 6 S. W. 677. See *Wright v. Dunn*, 73 T. 293, 11 S. W. 330; *Carley v. Parton*, 75 T. 93, 12 S. W. 950; *Snow v. Starr*, 75 T. 411, 12 S. W. 673.

Where a plaintiff establishes title to an undivided interest in the land sued for, if the defendant is a naked trespasser the judgment should award possession to plaintiff. If defendant does not appear to be a trespasser, the judgment should admit plaintiff to possession to the extent of his interest. *Murrell v. Wright*, 78 T. 519, 15 S. W. 156.

A judgment for defendant should be that plaintiff take nothing and for costs against him. *Warren v. Frederichs*, 83 T. 380, 18 S. W. 750.

On a verdict for defendant, who had pleaded not guilty, for more land than was claimed by plaintiff, the judgment should be that plaintiff take nothing of defendant and that defendant recover costs. *Musselman v. Strohl*, 83 T. 473, 18 S. W. 857.

Where petition alleged that plaintiff owned an undivided half, and W. the other half, and L. successfully pleaded limitations as to west half, held, that plaintiff could recover from W. an undivided half interest in east half. *Harris v. Wilson* (Civ. App.) 40 S. W. 868.

Where defendants had not set out the particular tract which they claimed by adverse possession, the court cannot carve the same from a larger tract. *Simpson v. Johnson* (Civ. App.) 44 S. W. 1076.

Where defendants hold jointly, and judgment was rendered against plaintiff on pleas of not guilty and the statute of limitations, defendants in default are entitled to same judgment as answering defendants. *Greer v. Bringhurst*, 23 C. A. 532, 56 S. W. 947.

Where one sues for an undivided interest of 155 acres out of a survey of 640, his recovery cannot be given out of part of the tract owned by persons other than the owners of the remainder. *Chaney v. Saunders*, 24 C. A. 379, 59 S. W. 836.

Expenses of securing prior judgment against outside parties, which judgment is pleaded by defendant in trespass to try title, held not a lien on plaintiff's recovery. *Gordon v. Hall*, 29 C. A. 230, 69 S. W. 219.

Judgment in an action to recover an undivided interest in land held to entitle plaintiff only to an interest in an entire tract, and not to a share of a specific part of the tract claimed by one defendant in severalty. *Puckett v. McDaniel*, 96 T. 94, 70 S. W. 739.

Judgment decreeing that one-half of the recovery should inure to the benefit of plaintiff's attorneys held erroneous. *White v. Simonton*, 34 C. A. 464, 79 S. W. 621.

In trespass to try title to recover an entire tract of land, plaintiff may recover the whole or any part thereof, according to his proof of title. *Zimpelman v. Power*, 38 C. A. 263, 85 S. W. 69.

A defect in a judgment for defendants held not to arise from the fact that the pleas of limitation were joint while the pleas of improvements were several. *Elcan v. Childress*, 40 C. A. 193, 89 S. W. 84.

A judgment vesting title to all the land sued for in defendant held error. *McDonald v. Downs*, 45 C. A. 215, 99 S. W. 892.

Plaintiff held not entitled to recover anything on account of a judgment establishing his right to an easement in the land. *Pouns v. Zachery*, 46 C. A. 604, 103 S. W. 234.

Where defendant simply pleads not guilty, the appropriate judgment for defendant is that plaintiff take nothing by his suit but a further adjudication of title and right of possession would add nothing thereto. *McKee v. West*, 55 C. A. 460, 118 S. W. 1135.

The usual judgment that plaintiff take nothing by his suit construed. *Hackbarth v. Gordon* (Civ. App.) 120 S. W. 591; *McAllen v. Crafts*, 139 S. W. 41; *Drummond v. Lewis*, 157 S. W. 266.

Where the petition is in the statutory form and the answer a plea of not guilty, equitable relief cannot be obtained by either party. *Roth v. Schroeter* (Civ. App.) 129 S. W. 203.

A verdict and judgment held too indefinite. *Louisiana & Texas Lumber Co. v. Stewart* (Civ. App.) 130 S. W. 199.

One held authorized to sue in one action for two or more tracts of land. *Gullmartin v. Padgett* (Civ. App.) 138 S. W. 1143.

A plaintiff who recovered more land than his deed called for held not entitled to complain of the judgment. *Fewell v. Kinsella* (Civ. App.) 144 S. W. 1174.

In trespass to try title, brought by children of a former marriage against minor children for whose benefit a trust was declared by a divorce decree in land separately owned by the father, held that plaintiffs cannot complain of a judgment making their title subject to the conditions of such decree; it being subject to modification on their application, if circumstances make it proper. *Plummer v. Plummer* (Civ. App.) 154 S. W. 597.

Plaintiff held not entitled to acreage, title to which was not proven by defendants. *Zarate v. Villareal* (Civ. App.) 155 S. W. 328.

Description of land.—Description of premises in judgment held sufficient. *Adams v. Mauermann* (Civ. App.) 40 S. W. 22.

A judgment for land held not to sufficiently describe it. *Giddings v. Fischer*, 97 T. 184, 77 S. W. 209; *Downs v. Powell*, 54 C. A. 119, 116 S. W. 873.

A judgment assessing the value of the improvements made by defendants, but failing to describe the specific portion of the land in controversy claimed by each defendant, is insufficient. *Campbell v. McCaleb* (Civ. App.) 99 S. W. 129.

A judgment for defendant held to sufficiently describe the portion of the land to which he was entitled. *Pratt v. Slade* (Civ. App.) 126 S. W. 648.

Partition.—In trespass to try title and partition, judgment establishing title cannot be entered merely to perpetuate evidence until the right to partition accrues. *Brown v. Reed*, 20 C. A. 74, 48 S. W. 537.

Partition of the land in suit cannot be decreed when the owner of an undivided interest is not a party. *Carnes v. Swift* (Civ. App.) 56 S. W. 85.

Where it appeared that one of the defendants had a half interest in the property, and plaintiff was entitled to another half interest, an objection that, in the absence from the original pleadings of an allegation that the property was incapable of partition without sale, the court had no power to order its sale on partition, was without merit. *Abbott v. Foster* (Civ. App.) 62 S. W. 121.

Where partition was decreed between plaintiff and one of defendants, and a sale ordered, on a contest to the sale after the term at which the original decree was rendered the propriety of the original decree could not be considered. *Id.*

Partition cannot be had where all the interested parties are not parties to the action. *Keith v. Keith*, 39 C. A. 363, 87 S. W. 384.

On declaring a trust in land acquired by defendant as plaintiff's attorney under an agreement for an equal division, it was proper to decree partition where the interests of the parties were established and subject to admeasurement. *Henyan v. Trevino* (Civ. App.) 137 S. W. 459.

Fixing disputed line.—In a boundary suit the judgment should definitely fix and establish the location of the line in dispute with reference to some known object then in existence, concerning the identity and locality of which there is no dispute. *Reed v. Cavett*, 1 C. A. 154, 20 S. W. 837.

After a verdict in an action to determine a boundary line, the court cannot direct a survey and enter judgment based on the surveyor's report, but judgment must be based on the verdict alone. *Dillingham v. Smith*, 30 C. A. 525, 70 S. W. 791.

In a suit to determine a disputed boundary line, the fixing of the line of an adjoining survey not mentioned in the pleadings held not error. *Jacoby v. Norton* (Civ. App.) 90 S. W. 524.

Writ of possession.—It is error in a judgment for plaintiff to award a writ of possession against persons other than defendants, who have entered upon the premises recovered prior to the institution of the suit. *Jones v. Burget*, 33 T. 396.

The judgment for plaintiff need not award a writ of possession against sureties on the replevy bond. *Zimmerman v. Pearson* (Civ. App.) 51 S. W. 523.

Where defendant simply pleaded not guilty, an award to defendant of a writ of possession upon rendering judgment in his favor was improper, as going beyond what was involved in the pleadings. *McKee v. West*, 55 C. A. 460, 118 S. W. 1135.

**Art. 7756. [5273] Damages, etc., when recovered.**—Where it is alleged and proved that one of the parties is in possession of the premises, the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises, and, if special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue; but damages shall not be assessed under this article for use and occupation, or for injuries done over two years prior to the commencement of the suit. [Id. sec. 1.]

See *Coombes v. Bradford* (Civ. App.) 132 S. W. 849.

**Damages.**—The real owner of land cannot recover damages against one who, claiming the land as owner, sold it to another who committed a trespass upon the land, unless it appeared that he acted in concert with his vendee in the illegal act, or that the injury was the natural and proximate result of some act done by him. *McClanahan v. Stephens*, 67 T. 354, 3 S. W. 312.

Charge held not to exclude consideration of claims for destruction of planks and posts on the land. *Kent v. Berryman*, 15 C. A. 487, 40 S. W. 33.

Charge held not to exclude consideration of claim for damages for allowing "grass" to grow on land. *Id.*

Defendant can recover damages for false representations of plaintiff as to water supply on the land in suit deeded to him by plaintiff. *Herring v. Mason*, 17 C. A. 559, 43 S. W. 797.

Where defendant set up rights under a contract, and plaintiff claimed damages for breach of such contract, equity would award plaintiff such damages, on vesting title in defendant, although they were barred by limitations. *San Antonio & A. P. Ry. Co. v. Gurley* (Civ. App.) 44 S. W. 865.

Where defendant sets up rights under a contract for a sale of the land, plaintiff may recover damages for breach of the contract. *Id.*

A payment of such damages will be required as a condition precedent to the vesting of title in defendant. *Id.*

Failure to answer by denial only establishes right to recover, but leaves question of damages open. *Texas Land & Cattle Co. v. Nations* (Civ. App.) 63 S. W. 915.

In trespass to try title by a vendor, the court held to properly allow the purchaser credit on unpaid notes for the value of timber cut and rent while the vendor was wrongfully in possession. *Moore v. Brown*, 46 C. A. 523, 103 S. W. 242.

Where plaintiff in open court withdrew its claim for damages from cutting ties on the land, judgment on that issue was unnecessary. *Haynes v. Texas & N. O. R. Co.*, 51 C. A. 49, 111 S. W. 427.

Plaintiff, recovering part of the larger tract, and having it fairly set off by the court, must take it as it is, without right to damage for timber cut on the larger tract. *Louisiana & Texas Lumber Co. v. Kennedy* (Civ. App.) 142 S. W. 989.

Plaintiff was entitled, as a matter of law, to interest upon the value of the timber unlawfully cut by defendant from the time it was taken. *Callen v. Collins* (Civ. App.) 154 S. W. 673.

In trespass to try title against an individual claiming the land under deed from a patentee and a lumber company which had cut and removed timber therefrom with his consent and permission, such consent and permission made the individual defendant a joint trespasser with the lumber company, and liable to plaintiff for damages. *Kirby v. Conn* (Civ. App.) 156 S. W. 232.

— **Effect of disclaimer.**—See notes under Art. 7752.

**Use and occupation.**—If no answer be filed, the allegations of the petition are taken pro confesso by default, and nothing more is needed for the jury, under a writ of inquiry, to determine, from the evidence, the amount of the unliquidated damages for the mesne profits. There is no occasion, in such case, for the plaintiff to adduce any proof of his title. *Caldwell v. Fraim*, 32 T. 310.

One of several tenants in common recovering land held by a trespasser, or by one without license from any of the owners, can recover rents pro rata against such occupant. *Whitaker v. Allday*, 71 T. 623, 9 S. W. 483.

Where an action in the form of trespass to try title is in effect an equitable suit to rescind a sale of land for want of power in the plaintiff to make it, the plaintiff is not entitled to recover rents beyond the time when he manifested a purpose to rescind or the time when defendant took possession. *Cassin v. La Salle County*, 1 C. A. 127, 21 S. W. 122.

Before one tenant can make his cotenant liable to him for the use of the common property, he must show that he has been refused joint occupancy. *Bennett v. Land & Cattle Co.*, 1 C. A. 321, 21 S. W. 126.

A judgment for plaintiff entitles a recovery for the value of the use of the land from the time of filing the suit. *Ilig v. De la luz Garcia* (Civ. App.) 45 S. W. 857.

Damages for the use and occupation of the premises can be recovered only by showing the period during which defendant was in possession. *Parsons v. Hart*, 19 C. A. 300, 46 S. W. 856.

Value of use and occupation of land cannot be had, where no claim therefor is asserted in the pleadings. *Foster v. Eoff*, 19 C. A. 405, 47 S. W. 399.

Where defendant, in fencing land belonging to him, inclosed various tracts belonging to plaintiff, and used the entire inclosure for pasturage, defendant is liable for the reasonable rental value of plaintiff's land so used, though he never disputed plaintiff's title or right to possession. *Hastings v. O'Connor* (Civ. App.) 52 S. W. 567.

Defendant, in possession of land under a voidable deed from a county, purporting to convey the fee simple with covenants of warranty, held not liable for rent until the county repudiated the deed and demanded possession. *Club Land & Cattle Co. v. Dallas County*, 26 C. A. 449, 64 S. W. 372.

Verdict in regard to amount of rent will be stricken out on appeal, in absence of evidence when defendant took possession of premises. *Hart v. Meredith*, 27 C. A. 271, 65 S. W. 507.

Tenants in common can recover such part only of the rents as is proportionate to their interest. *Logan v. Robertson* (Civ. App.) 83 S. W. 395.

Plaintiff held entitled, on a finding in her favor, to recover reasonable value of rents and revenues arising from use of land in suit. *Field v. Field*, 39 C. A. 1, 87 S. W. 726.

The plaintiff having recovered judgment for title and possession, judgment also for value of rents during time defendant was in possession was properly rendered. *Bryson & Hartgrove v. Boyce* (Civ. App.) 92 S. W. 823.

Defendants unlawfully withholding from plaintiff the possession of the latter's land held liable for the sum which plaintiff's lessee had agreed to pay for the use of the land. *Burge v. Hinds*, 46 C. A. 134, 101 S. W. 855.

In trespass to try title by a vendor, the court held to properly allow the purchaser credit on unpaid notes for the value of timber cut and rent while the vendor was wrongfully in possession. *Moore v. Brown*, 46 C. A. 523, 103 S. W. 242.

Where defendant did not complain of a decree determining title to half the lot with improvements to be in plaintiff, in so far as it awarded title to half the property, he could not complain of that part awarding plaintiff one-half the rental value. *Sarro v. Bell* (Civ. App.) 126 S. W. 24.

A successful plaintiff was properly denied recovery for rents, where no formal demand for possession was made or refused. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

Under this article and Art. 7760, plaintiff, who established a title against defendant, who had been in possession and occupation for less than a year, and who set up a claim for improvements, was entitled to recover the rental value of the property from the beginning of defendant's possession to the date of the trial. *Smith v. Cook* (Civ. App.) 142 S. W. 26.

Where plaintiff sued out a writ of sequestration, and defendant replevied the property which it was found belonged to intervener, plaintiff was not entitled to recover rents on the replevy bond, either for himself or for intervener's benefit. *Deutschmann v. Ryan* (Civ. App.) 148 S. W. 1140.

**Art. 7757. [5274] Considered with claim for improvements, when.**—When the defendant or person in possession has claimed an allowance for improvements in accordance with the provisions of the succeeding chapter, the claim for use and occupation and damages mentioned in the preceding article shall be considered and acted on in connection with such claim by the defendant or person in possession.

**Art. 7758. [5275] Final judgment conclusive.**—Any final judgment rendered in any action for the recovery of real estate shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered, and upon all persons claiming from, through or under such party, by title arising after the commencement of such action.

**Res judicata.**—An action prosecuted to judgment against the tenant of a nonresident landlord does not conclude the question of title against such owner, even if he had knowledge of the pendency of the suit. Such action would stop the running of the statutes of limitation, or would be conclusive between the parties to the suit and those claiming under them by title made subsequent to the filing of the suit. *Stout v. Taul*, 71 T. 438, 9 S. W. 329.

A judgment in favor of defendant pleading not guilty is conclusive of title in his favor. *Hoodless v. Winter*, 80 T. 638, 16 S. W. 427.

Judgment in favor of one tenant in common for title does not affect the claims of the defendants made parties as among themselves. Such judgment without partition does not constitute the defendants joint tenants in the interest in the land not recovered. *Gray v. Kauffman*, 82 T. 65, 17 S. W. 513.

A judgment repeating the calls in the patent settles nothing. *Richardson v. Powell*, 83 T. 588, 19 S. W. 262.

The questions of boundary and title may be adjudicated in an action of trespass to try title, but an adjudication of the question of boundary will not bar an action to determine the title. *Freeman v. McAninch*, 24 S. W. 922, 6 C. A. 644.

A judgment for or against two or more joint parties ordinarily determines nothing as to their respective rights and liabilities as against each other in their own subsequent controversy. *Sandoval v. Rosser*, 26 S. W. 933, 935, 86 T. 682.

A final judgment must determine all the issues. *Reed v. Liston*, 8 C. A. 118, 27 S. W. 913.

A judgment held a bar, though it does not fix the boundary, which was the main question in dispute. *New York & T. Land Co. v. Votaw*, 16 C. A. 585, 42 S. W. 138; *Votaw v. New York & T. Land Co., Id.*

A defense of *res judicata* is not defeated by the fact that the judgment pleaded is based on a verdict induced by an erroneous charge. *Id.*

A conveyance pendente lite does not affect the result of the suit when the grantee is not made a party either by amendment or intervention. *Mealy v. Lipp*, 91 T. 182, 42 S. W. 544.

A judgment recovered on a disclaimer held to estop defendant from setting up a title acquired prior thereto in a subsequent similar action for the same land. *Easterwood v. Dunn*, 19 C. A. 320, 47 S. W. 285.

A party in whose favor title and possession of land have been adjudged held not precluded thereby from afterwards instituting another action in trespass to try title. *Zapeda v. Rahm*, 19 C. A. 648, 48 S. W. 212.

Prior judgment held conclusive of the title as between the parties at the time it was rendered. *Id.*

Where plaintiff files amended petition against defendants as to whom cause of action was severed after judgment in their favor, setting up after-acquired title, such judgment is not conclusive as to such question. *Parker v. Stephens* (Civ. App.) 48 S. W. 878.

A judgment determining title held not conclusive on an issue of boundaries. *Wood v. Cahill*, 21 C. A. 38, 50 S. W. 1071.

Plea in reconvention setting up record of federal court in an action between plaintiff and defendant's predecessor in title, and showing that plaintiff is claiming the same land to which it was adjudged it then had no title, is good. *New York & T. Land Co. v. Votaw* (Civ. App.) 52 S. W. 125.

There is no error in the conclusion of law that defendant acquired title to the land as against plaintiff by virtue of a judgment of the federal courts, where the issue as to title to the lands was raised in that case, and decided in favor of defendant's predecessor in title, and the land now in controversy is a part of the land then in issue. *Id.*

Though judgment against defendant is inoperative as to defendants not served, it is valid as between defendant served and plaintiffs, and precludes latter from recovering land. *Maury v. Keller* (Civ. App.) 53 S. W. 59.

Judgment as to location of boundary held a bar to a subsequent suit involving the same question, though the action was in the form of trespass to try title. *Birdseye v. Shaeffer* (Civ. App.) 57 S. W. 987.

Held, that a judgment in former action to try title to the same land determined the title. *Carnes v. Carnes*, 26 C. A. 610, 64 S. W. 877.

A contention that defendant was not estopped by the judgment in a former action on the ground that he was plaintiff's codefendant therein held without merit. *Id.*

When the title to the land itself is adjudicated, plaintiff is estopped by the judgment and whatever evidence of title was issued by the state to him or those claiming under him, under his homestead pre-emption claim, inures to benefit of him in whom title was vested in the suit. *Id.*

Judgment against tenants held not conclusive on landlord, who was not joined with them. *Hart v. Meredith*, 27 C. A. 271, 65 S. W. 507.

Continuance in possession of land adjudged to belong to another held not to affect the conclusiveness of the judgment, as far as title to the date of its rendition is concerned. *Weisman v. Thomson* (Civ. App.) 78 S. W. 728.

Judgment of foreclosure of tax lien was obtained against Snowball, and land sold by sheriff at execution sale to Moore. Snowball sued to recover the property, and in addition to usual allegations in trespass to try title, alleged that the judgment obtained in the tax suit was void because no citation had been served on defendant; also that the judgment and sale were void because they directed that the property be sold in bulk for whole amount of taxes, although part of the taxes were due on homestead, and it could not be sold for taxes due on other property, and also that tax judgment and proceedings thereunder were a cloud on plaintiff's title. Defendant pleaded general denial, not guilty, and by way of reconvention claimed title and prayed judgment for the property. Judgment for property was rendered in favor of defendant. Plaintiff brought second suit to set aside sheriff's sale on account of irregularities which conduced to sacrifice the property for grossly inadequate price, the petition expressly affirming the title both legal and equitable to be in Moore, but seeking as a matter of affirmative equitable relief to regain title on account of the equity mentioned as would be done by reconveyance in equity. Defendant among other pleas, pleaded *res adjudicata*. Majority of supreme court hold that the plea of *res judicata* cannot be sustained. In a very lengthy opinion Judge Brown dissents. *Moore v. Snowball*, 98 T. 16, 81 S. W. 7, 66 L. R. A. 745, 107 Am. St. Rep. 596.

A judgment in a former action of trespass to try title held a judgment of dismissal only, which was not a bar to a subsequent action for the same cause. *Logan v. Stephens County* (Civ. App.) 81 S. W. 109.

The fact that the land was the community homestead of the defendants and their wives was no defense, judgment against the husbands bound the wives' interest in the community property, though they were not parties to the suit. *Brown v. Humphrey*, 43 C. A. 23, 95 S. W. 23.

A judgment against a husband held conclusive on the wife, where the fact that the property was occupied as their community homestead was no defense. *Breath v. Flowers*, 43 C. A. 516, 95 S. W. 26.

A compromise judgment by which a third person was to convey defendants' title to lands to plaintiffs held to estop defendants from a subsequent assertion of title. *Townsend v. Scurlock*, 44 C. A. 141, 99 S. W. 123.

A judgment in favor of the owner of the fee, and against a trespasser in possession, held not to affect the right of the municipality to the use of the property as a street. *Cocke v. Texas & N. O. R. Co.*, 46 C. A. 363, 103 S. W. 407.

This article restricts the conclusive effect of a judgment to the parties in legal effect before the court; and the judgment against a defendant is not conclusive on his prior grantee not made a party to the suit, and not taking part therein. *Elliott v. Morris*, 49 C. A. 527, 121 S. W. 209.

Under this article held, that a judgment in an action against a tenant in possession is not conclusive against the landlord as to the title. *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

A general judgment for defendant held *res judicata* in a subsequent action between the parties or their privies involving the same land, though the pleadings did not fix the boundary. *Provident Nat. Bank v. Webb* (Civ. App.) 128 S. W. 426.

The rule that, where the petition is in the statutory form and the answer a plea of not guilty, equitable relief cannot be obtained, does not apply where the right of recovery is based on an equitable title. *Roth v. Schroeter* (Civ. App.) 129 S. W. 203.

Counsel for a county agreed that the case involving one tract of land should be continued to await the decision in a suit involving another tract, and the county was defeated in the last-mentioned suit and thereafter the other suit was dismissed in con-



formity with another agreement. Held, that the judgment determining the rights of the parties to the last-named tract was not conclusive on the right of the county to the first tract. *Talley v. Lamar County*, 104 T. 295, 137 S. W. 1125.

A judgment for plaintiff held not res judicata of a subsequent action against plaintiff by the former defendant as a creditor to plaintiff's husband, attacking his deed to plaintiff as in fraud of creditors. *Lane v. Kuehn* (Civ. App.) 141 S. W. 363.

Plaintiff held not entitled to offer testimony attacking an adjudication in a former suit to which he was a party. *Cain v. Hopkins* (Civ. App.) 141 S. W. 834.

A judgment against plaintiff, in trespass to try title to recover property sold under a deed of trust unappealed from, held res judicata of plaintiff's right to maintain a subsequent action to redeem or to recover damages. *McClellan v. Pye* (Civ. App.) 142 S. W. 99.

A judgment held to merely deny a recovery to plaintiff, without vesting any title in defendant. *Sauvage v. Wauhob* (Civ. App.) 143 S. W. 259.

The judgment that plaintiffs take nothing, and that defendant recover of and from them the land in controversy, and that a certain road is the boundary between the parties, is a final one, though the parties agreed that the only question involved was as to the dividing line between their properties, thus eliminating, and depriving the court of power to determine, all but one issue. *Cramer v. Barfield* (Civ. App.) 157 S. W. 256.

**Art. 7759. [5276] Former laws shall govern, when.**—Nothing under this title shall be so construed as to alter, impair or take away the rights of parties, as arising under the laws in force before the introduction of the common law, but the same shall be decided by the principles of the law, or laws, under which the same accrued, or by which the same were regulated or in any manner affected. [Id. sec. 6. P. D. 5297.]

**Old law governing.**—Except as to the course of practice or procedure, the provisions of the old law are to govern in such a suit. The parties may, in its prosecution or defense, plead and prove the same matters that they could have urged had the cause been tried under the former law. *Steed v. Petty*, 65 T. 490.

## CHAPTER TWO

### CLAIM FOR IMPROVEMENTS

Art.	Art.
7760. Suggestion of improvements in good faith.	7765. On failure of plaintiff, defendant may pay, etc., and keep premises.
7761. Issue as to.	7766. Defendant failing to pay, etc., within six months, writ to issue.
7762. Rents and profits to be offset against.	7767. Judgment.
7763. Judgment for excess, etc.	7768. Duty of clerk receiving payment, etc.
7764. Writ of possession not to issue for a year, unless, etc.	

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of chapter.]

**Article 7760. [5277] Suggestion of improvements in good faith.**—The defendant in any action of trespass to try title may allege in his pleadings that he and those under whom he claims have had adverse possession in good faith of the premises in controversy for at least one year next before the commencement of such suit, and that he and those under whom he claims have made permanent and valuable improvements on the lands sued for during the time they have had such possession, stating the improvements and their value respectively, and stating also the grounds of such claim. [Act Feb. 5, 1840, P. D. 5300.]

**Rights of parties as to improvements in general.**—The statute which secures to possessors of real property in good faith reimbursement from the true owner for permanent and valuable improvements made on the property by the former is consistent with equity and the civil law, and not inconsistent with the constitution. *Saunders v. Wilson*, 19 T. 194; *Scott v. Mather*, 14 T. 235.

In suits for the rescission of sales of land the parties should set up their respective equities, for rents and profits on the one hand, and for the value of improvements, interest of purchase money, if paid, etc., on the other. Where the purchase money has been paid, and no fraud or injustice has been committed by either party, and the vendor is unable to make the title, the rule is to restore the land to the vendor without profits, and the purchase money to the vendee without interest. But if in such case the vendee had made valuable improvements, there should be an allowance for the value of such improvements. Where a rescission is sought, the right to the value of improvements and the measure of its allowance depend upon principles of equity, and not on the provisions of the statute regulating the action of trespass to try titles; and in such cases the purchaser should be allowed payment for all substantial improvements and repairs. *Patrick v. Roach*, 21 T. 251.

Under this article a plaintiff who recovers judgment against a defendant in possession in good faith, who has made valuable improvements, is afforded a remedy reasonable in itself, under which he may obtain the possession after doing equity. Equity requires that he shall first pay the excess of value of the improvements over the rents, and the law in requiring this does not delay the plaintiff in his remedy; but the courts will not by construction extend the operation of the statutes in favor of a possessor in good faith beyond this. *Van Valkenburgh v. Ruby*, 68 T. 139, 3 S. W. 746.

The right of a vendee to recover for improvements in an action by the vendor to rescind an executory contract for its sale is determined by equitable rules. *Patrick v. Roach*, 21 T. 256; *Eberling v. Deutscher Verein*, 72 T. 339, 12 S. W. 205.

It is error to make payment of one-half the value of improvements a condition precedent to plaintiff's right to partition. *Spicer v. Henderson* (Civ. App.) 43 S. W. 27.

Defendant having acquired the interest of plaintiff's tenant in common held entitled to his improvements so far as they can be allotted without injury to plaintiff. *Mahon v. Barnett* (Civ. App.) 45 S. W. 24.

Where no charge was requested as to a separate finding as to improvements on each of two tracts in one inclosure, it was not error not to direct separate findings. *Cahill v. Benson*, 19 C. A. 30, 46 S. W. 838.

A charge that one should not be allowed for improvements to land never in his possession is properly refused where he never made any such improvements. *Id.*

One has an equitable right independent to that of the statute to recover the value of improvements placed on another's land in good faith. *Wood v. Cahill*, 21 C. A. 38, 50 S. W. 1071.

The court held to have jurisdiction to adjust an indebtedness between the parties, growing out of a house built on the land, although the amount was not within its jurisdiction. *Kay v. Hathaway*, 21 C. A. 466, 51 S. W. 663.

A contention that a holding contrary to the theory of a gift to defendant would operate as a fraud, because of improvements made, held untenable. *Meurin v. Kopplin* (Civ. App.) 100 S. W. 934.

Neither the owner of land nor his purchaser held liable to one who made improvements thereon. *Overton v. Meggs* (Civ. App.) 105 S. W. 208.

Defendant cannot recover for two buildings as improvements in good faith, when the evidence only shows the aggregate value of four buildings. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

The purchaser of a lot held not entitled to claim compensation as for improvements made thereon in good faith. *Werkheiser v. Foard* (Civ. App.) 108 S. W. 933.

One held entitled to allowance for improvements in good faith without deduction for timber taken from the land and put in the improvements. *Fain v. Nelms* (Civ. App.) 113 S. W. 1002.

Statutory provisions concerning compensation for improvements held not to apply to contest between city and county involving jail building. *City of Victoria v. Victoria County*, 103 T. 477, 129 S. W. 593.

It may be proper not to allow a party the value of certain improvements. *Sutherland v. Kirkland* (Civ. App.) 134 S. W. 851.

**Possession and good faith as grounds for compensation.**—A mistake of boundary, where the defendant has failed to employ the legal means (a survey by the proper surveyor) to ascertain the boundaries of his land, cannot constitute the foundation for a possession in good faith, under the statute. *Sartain v. Hamilton*, 12 T. 219, 62 Am. Dec. 524.

A purchase at administrator's sale, where it proves to be invalid, may constitute the basis for a claim for valuable improvements made in good faith. *Burdett v. Silsbee*, 15 T. 604.

If the true owner stands by and suffers improvements to be made on his land, without notice of his title, he must pay for the improvements. *Saunders v. Wilson*, 19 T. 202.

A claim for improvements made in good faith will not be sustained by proof of mistake as to the boundary lines of the land claimed, unless carelessness be excluded. *Nesbitt v. Walters*, 38 T. 576; *Gatlin v. Organ*, 57 T. 11.

That a defendant purchased land, knowing that his vendor held it under a deed from a married woman, defectively acknowledged, is not inconsistent with his good faith in such purchase; and in such case it was error to exclude evidence of value of improvements from the jury. *Hill v. Spear*, 48 T. 583. See *Berry v. Donley*, 26 T. 737.

Good faith alone, regardless of the character of title under which a party claims, does not entitle him to recover the value of his improvements. If there are no grounds for his questioning the fact that he has neither a title nor the semblance of an apparent title, the law will conclusively presume that his claim is not based on good faith. *Miller v. Brownson*, 50 T. 583; *House v. Stone*, 64 T. 678; *Johnson v. Schumacher*, 72 T. 334, 12 S. W. 207.

A defendant who makes improvements on the premises after suit brought has no right to claim that he acted in good faith. This is so, though he may have sequestered and replevied the premises; and no tenant of his having notice of the suit has any greater rights than himself. *Henderson v. Ownby*, 56 T. 647, 42 Am. Rep. 691.

The claim of a defendant in possession under a void judicial sale, for the value of necessary and beneficial repairs made by him on improved real estate, and which have enhanced the value of the property, is based upon a higher equity than if the improvements were merely ornamental or new. See statement and opinion for a case in which such a claim was allowed. *French v. Grenet*, 57 T. 273.

A purchaser at a sale, made under a decree of court which had no jurisdiction, may still, under some circumstances, be a purchaser in good faith, and as such entitled under the statute to compensation for improvements made on land purchased before eviction. *Id.*

It would seem that when the defect in a title exists in the power under which it is executed, and is such as the true owner could waive by parol or by acts done in pais, any act or conduct of his which would lead the purchaser to believe that the defect was waived, or that the true owner had acquiesced in his possession and improvement of the property, would constitute the purchaser a possessor in good faith. *Cole v. Bammel*, 62 T. 109.

See opinion for evidence held sufficient to sustain the presumption of law that there

was a lack of good faith on the part of a claimant for the value of improvements. *House v. Stone*, 64 T. 678.

It is a question of fact to be determined whether the claimant did in good faith believe his own to be the true and superior title. The application of the maxim that "every man is held to know the law" is not as to this class of cases recognized, but expressly disclaimed by our courts. *House v. Stone*, 64 T. 678. See *French v. Grenet*, 57 T. 273; *Sartain v. Hamilton*, 12 T. 220, 62 Am. Dec. 524; *Hill v. Spear*, 48 T. 583; *Dorn v. Dunham*, 24 T. 380; *Hutchins v. Bacon*, 46 T. 409; *Thompson v. Comstock*, 59 T. 318; *Sellman v. Lee*, 55 T. 319.

Tax titles when in every respect complete may constitute perfect assurance of title; they may constitute the basis of good title under the statute of limitations; and under certain circumstances they are to be deemed colorable titles. Though invalid, a tax title is not necessarily without meritorious consideration, if the owner had reasonable grounds for believing that his title was good. *House v. Stone*, 64 T. 678.

The existence of good faith is established by evidence tending to show that the improvements were made by one believing himself to be the owner of the land, with grounds for such belief as would ordinarily be satisfactory to one unlearned in the law, but of ordinary intelligence, after proper inquiry. *Van Valkenburg v. Ruby*, 68 T. 139, 3 S. W. 746; *Holstein v. Adams*, 72 T. 485, 10 S. W. 560; *Louder v. Schluter*, 78 T. 103, 14 S. W. 205, 207.

To constitute one a possessor in good faith he must not only believe that he is the true owner and have reasonable grounds for that belief, but he must be ignorant that his title is contested by one having or claiming a better right, unless he has strong grounds to believe that the adverse claim is destitute of legal foundation. *Farrish v. Jackson*, 69 T. 614, 7 S. W. 486; *Pilcher v. Kirk*, 60 T. 162; *Sartain v. Hamilton*, 12 T. 219, 62 Am. Dec. 524; *Houston v. Sneed*, 15 T. 307; *Dorn v. Dunham*, 24 T. 366; *Hutchins v. Bacon*, 46 T. 408; *House v. Stone*, 64 T. 678; *Gaither v. Hanrick*, 69 T. 92, 6 S. W. 619.

Where both parties, plaintiff and defendant, claim the land in controversy from the same grantor, and the junior claimant holds the title, the senior claim being invalid, the junior and better title has all the rights of the common source, and the claimant under the imperfect title cannot tack his possession to the common grantor so as to make out a claim for improvements as a good-faith possessor for twelve months. *Whittaker v. All-day*, 71 T. 623, 9 S. W. 483.

An imperfect deed may be a sufficient basis for the claim for valuable improvements made by a good-faith possessor under such deed. *Coker v. Roberts*, 71 T. 598, 9 S. W. 665.

One cannot be an innocent purchaser under a void sale; e. g., under a probate sale of property over which the court had no jurisdiction. *Henderson v. Lindley*, 75 T. 185, 12 S. W. 979.

Possession under void deeds held not to entitle the defeated party to payment for improvements. *Crumbley v. Busse*, 11 C. A. 319, 32 S. W. 438; *Simpson v. Johnson* (Civ. App.) 44 S. W. 1076.

Where defendants used ordinary care, and believed there were no adverse claims, held they were entitled to remuneration for improvements. *McCown v. Terrell* (Civ. App.) 40 S. W. 54.

Where defendant is in possession under a contract of sale, and is insolvent and unable to fulfill it, he cannot recover for improvements made. *First Nat. Bank v. Jackson* (Civ. App.) 40 S. W. 833.

Evidence held insufficient to show a purchase in good faith entitling defendant to the value of improvements. *Settegast v. O'Donnell*, 16 C. A. 56, 41 S. W. 84.

Evidence held insufficient to sustain defendant's plea of improvements in good faith. *Gilley v. Williams* (Civ. App.) 43 S. W. 1094.

Defendants cannot recover for improvements, where they entered under a contract providing that they might occupy the land in consideration of any improvements they might place upon it. *Hintze v. Krabbenschmidt* (Civ. App.) 44 S. W. 38.

Improvements on the land of another not made in good faith, or while in possession, cannot be allowed. *Ferguson v. Cochran* (Civ. App.) 45 S. W. 30.

Deeds void for want of description will not sustain claim for improvements in good faith. *Simpson v. Johnson*, 92 T. 159, 46 S. W. 628.

On an issue of good faith in making improvements, a charge that the law does not protect one taking his chances on defeating an adverse claim, and that one is bound to use diligence in investigating his title, held properly refused. *Cahill v. Benson*, 19 C. A. 30, 46 S. W. 888.

Facts held sufficient to take the question of good faith in making improvements to the jury. *Id.*

Where defendant shows improvements made in good faith, he is entitled to judgment for their value. *Boyd v. Miller*, 22 C. A. 165, 54 S. W. 411.

In trespass to try title between vendor and purchaser, involving a dispute as to land conveyed, where the latter had erected improvements against vendor's protest, held, that the decision in the latter's favor as to the title was conclusive against the purchaser's plea of good faith in making the improvements. *Bell v. Wright*, 94 T. 407, 60 S. W. 873.

Where defendant admits on the trial that a portion of the improvements were made after he was told by one of the plaintiffs that they owned the land, a finding that the improvements were not made in good faith is justified. *Wilcoxon v. Howard*, 26 C. A. 281, 62 S. W. 802.

This statute does not restrict recovery to one who claims title by purchase but it protects an heir who takes and holds possession after inquiry as to title in good faith believing the property to be his. *Rowan v. Rainey*, 25 C. A. 593, 63 S. W. 1032.

Where one who purchases land in good faith, believing he acquires good title, is ejected therefrom, he is entitled to compensation for improvements made thereon. *Stevenson v. Roberts*, 25 C. A. 577, 64 S. W. 230.

Defendant held entitled to a personal judgment against plaintiff for the value of improvements. *Morris v. Wells*, 27 C. A. 363, 66 S. W. 248.

Valuable improvements, made on land, after death of the owner, in reliance on a promise made by the owner that at her death the land was to belong to the party making

the improvement, held insufficient to perfect title in claimant. *Newcomb v. Cox*, 27 C. A. 533, 66 S. W. 333.

Invalid power of attorney of married woman to sell her separate real property, and deed from the attorney in fact, held admissible as basis for claim for improvements made in good faith by the grantees. *Nolan v. Moore* (Civ. App.) 70 S. W. 785.

Defendant held to have had notice that he had no title, and therefore not entitled to allowance as for improvements in good faith. *Texas & N. O. R. Co. of 1874 v. Barber*, 31 C. A. 84, 71 S. W. 393.

One who acquires land with the hope that he may perfect title by the statute of limitations does not act in such good faith as to entitle him to reimbursement for improvements made by him. *Staley v. Stone*, 41 C. A. 299, 92 S. W. 1017.

The trustee in a resulting trust arising from the fact that he employed the funds of another to take title in his own name is not entitled to the value of improvements. *Pearce v. Dyess*, 45 C. A. 406, 101 S. W. 549.

Railroad company, acquiring railroad property held by a married woman and issuing stock to her for her interest, but never receiving a legal transfer, held not entitled to recover for improvements. *Texas Southern Ry. Co. v. Harle* (Civ. App.) 101 S. W. 878.

To recover for improvements one must have been in adverse possession of the land on which are the improvements for at least one year before suit and the improvements must have been made in good faith. *Overton v. Meggs* (Civ. App.) 105 S. W. 210.

The mere fact that a deed is invalid for want of proper acknowledgment does not preclude the vendee from being a possessor in good faith. *Veeder v. Gilmer*, 47 C. A. 464, 105 S. W. 331.

To constitute possession in good faith one must not only believe that he is the true owner and have grounds for that belief, but he must be ignorant that his title is contested (where such is the case) by one claiming a better right, unless he has strong grounds for believing that the adverse claim is destitute of legal foundation, and he must allege facts which justify his belief in the validity of the title under which he claims. *Kaack v. Stanton*, 51 C. A. 495, 112 S. W. 704.

A receipt given a purchaser of land held a sufficient writing to warrant him in believing he had secured the land bargained for as regards the right to allowance for improvements. *Fain v. Nelms* (Civ. App.) 113 S. W. 1002.

One making improvements on adjoining land under mistake of a surveyor held entitled to allowance for improvements. *Id.*

Defendant held a purchaser in good faith, as regards the right to allowance for improvements. *Id.*

Improvements made on land by a life tenant are presumed to be a gratuity to the remainderman, precluding the tenant from recovering therefor on partition of interests. *Burns v. Parker* (Civ. App.) 137 S. W. 705.

Under Act Aug. 30, 1856 (Laws 1856, c. 158), providing that no limitations shall run in favor of one settling on lands granted for purposes of education, and Const. art. 7, § 6, as amended in 1883, providing that no adverse possession shall be available against the title to county school lands, and this article and Art. 7764, the court in trespass to try title by a county for school lands may not on granting judgment for the county provide for the payment to defendant for improvements made in good faith, because, to establish a claim for improvements, the questions of adverse possession and of limitations are involved. *Talley v. Lamar County*, 104 T. 295, 137 S. W. 1125.

Where remaindermen represented to a wife that her husband owned the land, when in fact he owned only a life estate, and thereby induced her to make permanent investments thereon, she has a cause of action against the remaindermen for the funds invested. *Holder v. Melugin* (Civ. App.) 146 S. W. 958.

If the possessor of land believed in good faith that he had good title, he may recover the value of permanent and valuable improvements made thereon in good faith, even though he had no title. *West Lumber Co. v. Chessher* (Civ. App.) 146 S. W. 976.

The purchasers of land need not have used due diligence to ascertain whether their vendor had a reasonably valid title or color of title, in order to recover for permanent improvements made thereon in good faith, in trespass to try title against them. *Id.*

Evidence held not to show that defendant, defeated in the action, placed improvements on the land in good faith, and he was not entitled to recover for improvements. *Carlock v. Willard* (Civ. App.) 149 S. W. 363.

Where a grantee obtained a conveyance by fraud, and entered into possession and made improvements while wrongfully in possession, he could not recover the value of the improvements on the setting aside of the deed. *Chambers v. Wyatt* (Civ. App.) 151 S. W. 864.

Where an agent believed he had authority to sell real estate, contracted to sell to a purchaser who believed that the agent had authority, and the purchaser was placed in possession and the owner ratified the transaction, the purchaser was a bona fide purchaser within the law governing the recovery for improvements. *Fain v. Nelms* (Civ. App.) 156 S. W. 281.

— **Claim or possession under void tax title.**—If a tax title shows upon its face that it is void, it cannot be the foundation for a claim for the value of improvements made in good faith. *Hatchett v. Conner*, 30 T. 104; *House v. Stone*, 64 T. 677.

A claim through a defective tax sale may be the basis of a claim for good faith possession and improvements. *Louder v. Schluter*, 78 T. 103, 14 S. W. 205, 207; *French v. Grenet*, 57 T. 273, and *Wofford v. McKinna*, 23 T. 36, 76 Am. Dec. 53, approved, and *Robson v. Osborn*, 13 T. 298, questioned. *House v. Stone*, 64 T. 677; *Stewart v. Kemp*, 54 T. 248.

It cannot be held as a matter of law that improvements made by a purchaser were not made in good faith because he held under a void tax title. *Netzorg v. Geren*, 26 C. A. 119, 62 S. W. 789.

As against one claiming under a tax deed not void on its face, the latter is entitled to have the issue of his right to compensation for improvements determined under his plea of good faith. *Lamberida v. Barnum* (Civ. App.) 90 S. W. 698.

**Proceedings for recovery of compensation.**—Where a defendant in an action to try title fails to suggest valuable improvements in his pleadings, he cannot be permitted to prove them on the trial. *Rogers v. Bracken*, 15 T. 564.

To enable defendant to recover compensation for improvements made in good faith, it is necessary that he should aver that he entered under claim of title. *Powell v. Davis*, 19 T. 382; *Ragsdale v. Gohlke*, 36 T. 286.

A claim for compensation for improvements on the ground of good faith must allege facts which would justify the belief in the validity of the title under which it is claimed. *Miller v. Brownson*, 50 T. 596; *House v. Stone*, 64 T. 633; *Parrish v. Jackson*, 69 T. 614, 7 S. W. 486; *Greenwood v. McLeary* (Civ. App.) 25 S. W. 708; *Freeman v. Preston* (Civ. App.) 29 S. W. 495; *Johnson v. Schumacher*, 72 T. 334, 12 S. W. 207.

A party claiming the value of improvements must set up, as he would any other fact, his claim, and set forth specifically the ground upon which that claim is based. A general informal suggestion to the court, that he has made permanent and valuable improvements, and was a possessor in good faith, which was sufficient under a former statute, will not comply with the law. *Thompson v. Comstock*, 59 T. 318.

The verdict of the jury should conform to the requirements of this article. *Roche v. Lovell*, 74 T. 191, 11 S. W. 1079.

A defendant claiming compensation for improvements must show that he has improved the particular tract of land in controversy, and how much the value of the land has been enhanced by his improvements. *Herndon v. Reed*, 82 T. 647, 18 S. W. 665.

An answer alleging adverse possession without stating the grounds therefor is not sufficient on exception. *Riggs v. Nafe* (Civ. App.) 30 S. W. 706.

It seems that defendants having a distinct and separate claim to a portion of the land and improvements should plead separately. *Benson v. Cahill* (Civ. App.) 37 S. W. 1088.

Error in submitting to the jury the right to recover for improvements of one who had parted with his interest was harmless, where he recovered nothing. *Cahill v. Benson*, 19 C. A. 30, 46 S. W. 888.

In an action to recover an entire tract, there being no prayer for improvements, and the recovery being only of an undivided interest, held, that there can be no adjudication as to improvements without regard to good faith. *Kesterson v. Bailey*, 35 C. A. 235, 80 S. W. 97.

Under the statute, a general allegation of good faith of a defendant is insufficient, but he must set forth specifically the grounds of his good faith claim. *Campbell v. McCaleb* (Civ. App.) 99 S. W. 129.

Pleadings held to authorize allowance for improvements made by one of the tenants. *Mateer v. Jones* (Civ. App.) 102 S. W. 734.

A plea suggesting improvements in good faith held sufficient, as against the objection that it was not alleged that defendant had ever examined the title or knew what it was. *Haney v. Gartin*, 51 C. A. 577, 113 S. W. 166.

If defendant was equitably entitled to an allowance for improvements and the rents growing out of the same, he should have made claim therefor in his pleading, and cannot have the allowance where he failed to do so. *Sarro v. Bell* (Civ. App.) 126 S. W. 24.

To entitle a bona fide purchaser to recover the value of improvements placed on the land under the belief that he had good title, the evidence must show the value of such improvements. *Durham v. Luce* (Civ. App.) 140 S. W. 850.

Where defendant specifically alleged the various improvements for which they sought to recover and the value of each, the amount recovered for improvements is limited to the aggregate of the special items alleged, and they cannot recover more under a general allegation as to the amount of improvements. *West Lumber Co. v. Chessher* (Civ. App.) 146 S. W. 976.

Defendants held not entitled to reimbursement for moneys expended by them where they had not set up a claim thereto in their answers. *Home Inv. Co. v. Strange* (Civ. App.) 152 S. W. 510.

In trespass to try title begun April 7, 1904, a finding that the possession of defendant claiming compensation for improvements began about January 1, 1903, was sufficiently definite to fix the time within the statute. *Fain v. Nelms* (Civ. App.) 156 S. W. 281.

— **Burden of proof and admissibility of evidence.**—See notes under Art. 3687, Rule 5, § 31, and Rule 12, § 170.

— **Effect of plea as to defense of outstanding title.**—See notes under Art. 7740.

**Art. 7761. [5278] Issue as to.**—Where the defendant has filed his claim for an allowance for improvements in accordance with the preceding article, if the court or jury find that he is not the rightful owner of the premises sued for, but that he and those under whom he claims have made permanent and valuable improvements thereon, being possessors thereof in good faith, the court or jury shall at the same time estimate from the testimony—

1. The value at the time of trial of such improvements as were so made before the filing of the suit not exceeding the amount to which the value of the premises is actually increased thereby.

2. The value of the use and occupation of the premises during the time the defendant was in possession thereof (exclusive of the improvements thereon made by himself or those under whom he claims), and also, if authorized by the pleadings, the damages for waste or other injury to the premises committed by him, not computing such annual value for a longer time than two years before suit, nor damages for waste or injury done before said two years.

3. The value of the premises recovered without the improvements made as aforesaid. [Id.]

See *Adoue & Lobit v. Town of La Porte* (Civ. App.) 124 S. W. 134.

**Constitutionality of statute.**—The provision of law providing for compensation for improvements made in good faith does not impair the obligation of contracts and is constitutional. *Cahill v. Benson*, 19 C. A. 30, 46 S. W. 888.

**Application of statute.**—The statute is applicable only to such improvements as, when made, constitute a part of the realty, and has no application when the improvements are personal property. *Harkey v. Cain*, 69 T. 146, 6 S. W. 637.

A claim for the value of improvements in good faith will open the question of the rental value of the premises recovered. *Ammons v. Dwyer*, 78 T. 639, 15 S. W. 1049.

In an action, in the form of trespass to try title, which is in effect an equitable suit to rescind a sale of land for want of power in plaintiff to make it, the principles of equity, and not the provisions of the statute regulating the action of trespass to try title, should control as to the value of improvements made by defendant under the contract and the measure of its allowance to him. *Cassin v. La Salle County*, 1 C. A. 127, 21 S. W. 122.

The provisions of this article furnish the rule for adjusting the equities between persons having a joint interest in land. *Robert v. Ezell*, 11 C. A. 176, 32 S. W. 362.

Disallowance of plaintiff's claim for rents pursuant to this article held proper. *Morris v. Wells*, 27 C. A. 363, 66 S. W. 248.

A parol gift of homestead is void. Pay for improvements cannot be enforced where premises are recovered on ground that they were homestead and were not conveyed in accordance with the statute. *Id.*

**Evidence.**—Where the court rendered judgment in favor of plaintiff for the land, and gave defendant judgment for \$1,633 for improvements, and there was evidence that improvements to the value of \$1,733.05 were placed on the land, it was some evidence at least that the value of the land was actually enhanced to the amount of the judgment as required by this article. *Haney v. Gartin*, 51 C. A. 577, 113 S. W. 169.

See Art. 7762.

**Verdict.**—When the verdict rendered in a cause in which there is a claim for improvements, made in good faith, is not responsive to the issues required to be passed on in this article, the judgment must be reversed. *Collins v. Kay*, 69 T. 365, 6 S. W. 313.

A general verdict for the plaintiff, when there is a claim for improvements, is in effect a finding against the claim. *Broxson v. McDougal*, 70 T. 64, 7 S. W. 591.

**Art. 7762. [5279] Rents and profits to be offset against.**—If the sum estimated for the improvements exceeds the damages estimated against the defendant and the value of the use and occupation as aforesaid, there shall then be estimated against him, if authorized by the testimony, the value of the use and occupation and the damages for injury done by him or those under whom he claims, for any time before the said two years, so far as may be necessary to balance the claim for improvements, but no further; and he shall not be liable for the excess, if any, beyond the value of the improvements.

See, also, authorities cited under Art. 7761.

See *Adoue & Lobit v. Town of La Porte* (Civ. App.) 124 S. W. 134.

**Set-off against value of use and occupation and damages.**—Purchaser occupying land under unauthorized contract of agent held entitled to payment for improvements made, less the rent of the land. *Van Zandt v. Brantley*, 16 C. A. 420, 42 S. W. 617.

Where the rental value is due to improvements made by defendant, he should not be required, on decree for partition, to account for the same. *Spicer v. Henderson* (Civ. App.) 43 S. W. 27.

Where improvements were not made in good faith, plaintiff should be allowed rental value of land as improved. *Gilley v. Williams* (Civ. App.) 43 S. W. 1094.

Improvements being claimed, value of use and occupation should be estimated without reference thereto. *Mahon v. Barnett* (Civ. App.) 45 S. W. 24.

Rent cannot be offset as against improvements made in good faith if the lands have no rental value apart from the improvements. *Cahill v. Benson*, 19 C. A. 30, 46 S. W. 888.

If a person intervenes in attachment, although he may be entitled to the land that has been levied on, yet he cannot recover the rental value for period claimed which is more than two years. *Caldwell v. Bryan's Ex'r*, 20 C. A. 168, 49 S. W. 240.

A person possessing land in good faith and making valuable improvements thereon, though not having a valid title thereto, held liable for the rental value of the property, exclusive of the improvements made by him, from the time of possession to the ouster, deducted from the value of the improvements. *Black v. Garner* (Civ. App.) 63 S. W. 918.

From the evidence, held, that it would be inferred that the jury, which returned a verdict merely for plaintiff for the land, set off the rents and damages against the improvements. *O'Mahoney v. Flanagan*, 34 C. A. 244, 78 S. W. 245.

The value of the use and occupancy of the premises and the damage done thereto were properly offset against the improvements made. *Ingram v. Winters*, 46 C. A. 392, 102 S. W. 432.

Where the claim for improvements is greater than that for the use and occupation during the period of time indicated in this article and Art. 7761, subd. 2, value of the use and occupation for a longer period may be considered for the purpose of balancing the claim for improvements. *Reeder v. Eidson*, 56 C. A. 269, 120 S. W. 951.

Plaintiffs held entitled to pay what may be found due on a debt secured by a deed of trust to defendant and charge defendant with the rent while in possession and credit him with the value of permanent improvements. *Openshaw v. Dean* (Civ. App.) 125 S. W. 989.

Where defendant in good faith, believing he had title to certain oil land, produced

\$29,563.85 worth of oil therefrom by an expenditure of \$11,000, he was entitled to reimbursement for his expenditures out of the proceeds of the oil produced. *Gilmore v. O'Neil* (Civ. App.) 139 S. W. 1162.

**Art. 7763. [5280] Judgment for excess, etc.**—If it shall appear from the finding of the court or jury, under the two preceding articles, that the estimated value of the use and occupation and damages exceed the estimated value of the improvements, judgment shall be entered for the plaintiff for the excess and costs in addition to a judgment for the premises; but, should the estimated value of the improvements exceed the estimated value of the use and occupation and damages, judgment shall be entered for the defendant for the excess.

**Art. 7764. [5281] Writ of possession not to issue, unless, etc.**—In any action of trespass to try title, when the lands or tenements have been adjudged to the plaintiff, and the estimated value of the improvements in excess of the value of the use and occupation and damages has been adjudged to the defendant, no writ of possession shall be issued for the term of one year after the date of the judgment, unless the plaintiff shall pay to the clerk of the court for the defendant the amount of such judgment in favor of the defendant, with the interest thereon. [Act Feb. 5, 1840, sec. 9. P. D. 5301.]

See, also, notes under Art. 7760.

See *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**Payment of excess.**—Under Art. 7760 a plaintiff who recovers judgment against a defendant in possession in good faith who has made valuable improvements is afforded a remedy reasonable in itself under which he may obtain the possession after doing equity. Equity requires that he shall first pay the excess of value of the improvements over the rents, and the law in requiring this does not delay the plaintiff in his remedy, but the courts will not by construction extend the operation of the statutes in favor of a possessor in good faith beyond this. *Van Valkenburgh v. Ruby*, 68 T. 139, 3 S. W. 746.

**Damages.**—When the verdict is in favor of the plaintiff no damages can be awarded for wrongfully suing out the writ of sequestration, even in favor of a defendant in possession who is found to have made improvements on the property in good faith. *Van Valkenburgh v. Ruby*, 68 T. 139, 3 S. W. 746.

**Enforcement of judgment.**—Under this and the three following articles, held that a judgment in favor of defendants for improvements cannot be enforced by the issuance of execution, but can only be enforced in the statutory manner, whether the suit be brought under the statute or by equitable proceedings to recover the value of the improvements. *West Lumber Co. v. Chessher* (Civ. App.) 146 S. W. 977.

**Art. 7765. [5282] On failure of plaintiff, defendant may pay, etc., and keep premises.**—If the plaintiff shall neglect for the term of one year to pay over the amount of said judgment in favor of the defendant, with the interest thereon, as directed in the preceding article, and the defendant shall, within six months after the expiration of said year, pay to the clerk of the court for the plaintiff the value of the lands or tenements without regard to the improvements, as estimated by the court or jury, then the plaintiff shall be forever barred of his writ of possession, and from ever having or maintaining any action whatever against the defendant, his heirs or assigns, for the lands or tenements recovered by such suit.

See notes under Art. 7764.

See *Lamar County v. Talley* (Civ. App.) 127 S. W. 272.

**Art. 7766. [5283] Defendant failing to pay, etc., within six months, writ may issue, etc.**—If the defendant, or his legal representatives, shall not, within six months aforesaid, pay over to the clerk for the plaintiff the estimated value of the lands or tenements, as directed in the preceding article, then the plaintiff may sue out his writ of possession as in ordinary cases.

See notes under Art. 7764.

**Art. 7767. [5284] Judgment.**—The judgment or decree of the court shall recite the estimated value of the premises without the improvements, and shall also include the conditions, stipulations and directions contained in the three preceding articles, so far as they may be applicable to the case before the court.

See notes under Art. 7764.

**Art. 7768. [5285] Duty of clerk on receiving payment, etc.—** Whenever payment shall be made to the clerk of the court by the plaintiff or defendant, as provided in the preceding articles, it shall be the duty of such clerk to enter a memorandum of such payment, with the date thereof, on the page of the record on which the judgment was entered; and he shall, on demand, pay over the money to the party entitled, taking his receipt therefor, dated and signed on the page of the record aforesaid.

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Conditions precedent to action or recovery in general.**—Where plaintiff claimed as heir of one who had executed deed of trust, and neither the trustee, mortgagee, nor those claiming under void sales by the trustee were in possession, payment of the mortgage held not a condition to recovery. *Harris v. Wilson* (Civ. App.) 40 S. W. 868.

Where defendant is a lien holder in possession, plaintiff can not dispossess him without discharging the lien. *Carleton et al. v. Hausler et al.*, 20 C. A. 275, 49 S. W. 118.

Where a trust deed does not authorize the mortgagee to take possession of the property, but he takes possession without the consent of the mortgagor, the possession is wrongful, and the mortgagor or his successors in interest may recover the possession without a prior payment of the mortgage debt. *Galloway v. Kerr* (Civ. App.) 63 S. W. 180.

Plaintiffs will not be permitted to recover without making restitution of the consideration of a void conveyance under which defendants claim, which consideration was applied on a debt for which the property was liable and inured to their benefit. *Parks v. Knox* (Civ. App.) 130 S. W. 203.

**Reimbursement of taxes paid.**—A voluntary payment of taxes by a defendant, against whom the plaintiff obtains judgment for the land, can constitute no basis for a claim for reimbursement against the true owner. *Capt v. Stubbs*, 68 T. 222, 4 S. W. 467; *Broxson v. McDougal*, 70 T. 64, 7 S. W. 591; *McCormick v. Edwards*, 69 T. 106, 6 S. W. 32; *Robson v. Osborn*, 13 T. 298; *Pitts v. Booth*, 15 T. 453.

A void tax sale involves no equity that would subrogate the purchaser to rights of the state for taxes paid and entitle him to reimbursement from the true owner when sued by him to recover land. *McCormick v. Edwards*, 69 T. 106, 6 S. W. 32.

To entitle defendant to recover taxes paid, he must show that plaintiff had failed to pay the taxes assessed on the property. *Settegast v. O'Donnell*, 16 C. A. 56, 41 S. W. 84.

Defendant in possession, to whom title has accrued by limitation, need not remit taxes paid by plaintiff, claiming under an invalid title. *Hardy v. Brown* (Civ. App.) 46 S. W. 385.

One purchasing several tracts of land at a void tax sale cannot have a lien on one of them, without showing what part of the taxes were chargeable against it. *Faris v. Simpson*, 30 C. A. 103, 69 S. W. 1029.

**Contract to dismiss action.**—Where plaintiff contracted to dismiss, he is not entitled to prosecute and recover, unless defendant violated or abandoned contract. *Hunt v. Siemers*, 22 C. A. 94, 53 S. W. 387.



## TITLE 129

## TRIAL OF RIGHT OF PROPERTY

Art.	Art.
7769. Claimant must make affidavit.	7784. Proceedings, how conducted.
7770. And give bond.	7785. Burden of proof on plaintiff, when.
7771. Bond, condition of.	7786. Burden of proof on defendant, when.
7772. Property to be delivered to claimant.	7787. Damages.
7773. Return of oath and bond.	7788. Where value of property exceeds judgment.
7774. Form of bond.	7789. Copy of writ evidence, when.
7775. Form immaterial.	7790. Judgment upon failure to establish title.
7776. Return of oath, bond and copy of writ when levy made in county other than that where writ issued.	7791. Execution shall issue.
7777. Return of original writ.	7792. Execution not to issue within ten days.
7778. Jurisdiction.	7793. Return of property by claimant within ten days.
7779. Cause, how docketed.	7794. Claim operates as release of damages.
7780. Issue to be made, etc.	7795. Levy may be made on other property.
7781. Requisites of issue.	
7782. Judgment by default against defendant, when.	
7783. Judgment of non-suit against plaintiff when.	

[In addition to the notes under the particular articles, see also notes on the subject in general, at end of title.]

**Article 7769. [5286] Claimant must make affidavit.**—Whenever any sheriff or other lawful officer shall levy a writ of execution, sequestration, attachment or other like writ upon any personal property, and such property, or any part thereof, shall be claimed by any person who is not a party to such writ, such person or his agent or attorney may make oath in writing, before any officer authorized to administer oaths, that such claim is made in good faith, and present such oath in writing to the officer who made such levy. [Act March 18, 1846, p. 140, sec. 1. P. D. 5310.]

For mode of levying upon the interest of a partner in partnership property see Art. 3743, ante.

**Cited,** Slayden-Kirksey Woolen Mill v. Robinson (Civ. App.) 143 S. W. 294 (dissenting opinion); Jackson v. Downs, 149 S. W. 286; Barker v. Johnson, 154 S. W. 609.

**Application of statute.**—Statute for trial of right of property cannot be complied with, where writ provides for seizure of specific property, and delivery has been had before tender to officer of claimant's affidavit and bond. Lackey v. Campbell (Civ. App.) 54 S. W. 46.

**Persons entitled to remedy.**—One having a lien upon personal property without the right of possession is not entitled to this remedy. Garrity v. Thompson, 64 T. 598; Wilber v. Kray, 73 T. 533, 11 S. W. 540; Saunders v. Ireland (Civ. App.) 27 S. W. 880. See Willis v. Thompson, 85 T. 301, 20 S. W. 155.

A party to the writ under which property is seized is not entitled to this remedy. Pitts v. Burgess, 2 App. C. C. § 700.

One having title or the right of possession may maintain this proceeding. White v. Jacobs, 66 T. 462, 1 S. W. 344.

In a proceeding for the trial of the right of property a contract lien may be enforced. Howard v. Parks, 1 C. A. 603, 21 S. W. 269.

Where a levy of an execution is made without taking actual possession under Arts. 3740-3743, the claimant is entitled to a trial. Marsh v. Thomason, 25 S. W. 43, 6 C. A. 379.

One who buys property after it has been levied upon cannot maintain the statutory action of trial of right of property. Casentini v. Ullman, 21 C. A. 582, 54 S. W. 420.

A landlord, under his lien, has such possessory rights in the crop of his tenant as to entitle him to prevent a removal thereof by the tenant's creditor under execution, and to maintain an action for the trial of the right of property to compel its return. Groesbeck v. Evans, 40 C. A. 216, 83 S. W. 430, 88 S. W. 889.

A landlord by virtue of his lien has no such possessory rights in the tenant's crop as entitles him to prevent its removal from the premises or to maintain an action to try the right of property. Evans v. Groesbeck, 42 C. A. 43, 93 S. W. 1005.

To entitle a third person to claim property levied on under execution, held he need not be in possession. Steiner v. Anderson (Civ. App.) 130 S. W. 261.

A party who has a judgment for debt and for a foreclosure sale of mortgaged chattels may levy on the property in the possession of the judgment debtor's transferee, who is entitled to retain possession of the property by complying with the provisions of this article. Yandell v. Appling (Civ. App.) 140 S. W. 518.

A claimant in a trial of the right to property levied on is entitled to prevail, when his rightful possession was disturbed, or when he was entitled to possession, and has been deprived thereof by the levy. Jones v. Lawrence (Civ. App.) 151 S. W. 584.

— **Mortgagees and pledgees.**—A mortgagee out of possession cannot, under the statute for the trial of the right of property, assert a claim to mortgaged property. *Wright v. Henderson*, 12 T. 43; *Gillian v. Henderson*, 12 T. 47; *Joost v. Scott*, 19 T. 473; *Belt v. Raguet*, 27 T. 471; *Garrity v. Thompson*, 64 T. 597; *Parker v. Benner*, 1 App. C. C. § 64; *Robinson v. Veal*, 1 App. C. C. § 311; *Gammage v. Silliman*, 2 App. C. C. § 14; *Wilber v. Kray*, 73 T. 533, 11 S. W. 540. Nor can he by injunction restrain sale under execution. *George v. Dyer*, 1 App. C. C. § 782.

One who holds property in pledge cannot avail himself of the statutory remedy provided for the trial of the right of property, if the levy be made on notice as the statute directs, and the pledgee's possession be not disturbed. If possession be taken under the attachment, the statutory remedy to try right to property may be resorted to. *Osborn v. Koenigheim*, 57 T. 91; *Durham v. Flannagan*, 2 App. C. C. § 24.

A mortgagee of personal property, the possession of which remained with the mortgagor, cannot claim the property in this proceeding. *Gammage v. Silliman*, 2 App. C. C. § 14; *Durham v. Flannagan*, 2 App. C. C. § 24, citing *Wright v. Henderson*, 12 T. 43; *Gillian v. Henderson*, 12 T. 47; *Wootton v. Wheeler*, 22 T. 338; *Belt v. Raguet*, 27 T. 471; *George v. Dyer*, 1 App. C. C. § 781; *Brown v. Young*, 1 App. C. C. § 1242; *Aiken v. Kennedy*, 1 App. C. C. § 1322.

A pledgee is entitled to the trial of the right of property, if the officer making the levy takes the possession of the property to the exclusion of the pledgee. *National Bank of Cleburne v. Citizens' Nat. Bank*, 41 C. A. 535, 93 S. W. 209.

**Persons who may intervene.**—Sureties on the bond may intervene and defend when a claimant abandons his claim. *Boehm v. Calsch* (Sup.) 3 S. W. 293.

One who is a stranger to the process by which property is seized cannot question the regularity of the writ, judgment or proceeding on which it is based. *Roos v. Lewyn*, 23 S. W. 450, 24 S. W. 538; 5 C. A. 593; *Slade v. Le Page*, 27 S. W. 952, 8 C. A. 403.

A claimant of the property attached may intervene without being impleaded by the garnishee. *Turner v. Wade* (Civ. App.) 48 S. W. 542.

Holder of check drawn by debtor on garnishee, which had been accepted by garnishee, held entitled to intervene in garnishment proceeding. *Ragsdale v. Groos* (Civ. App.) 51 S. W. 256.

Where a creditor, by virtue of a garnishment, assets a lien on funds not subject thereto, other creditors who have acquired rights in such fund may raise the defense. *Medley v. American Radiator Co.*, 27 C. A. 334, 66 S. W. 86.

A claimant of a fund garnished in proceedings before a justice of the peace held authorized to intervene on appeal to the county court. *Davis v. West Texas Bank & Trust Co.* (Civ. App.) 116 S. W. 393.

A claimant of a fund in the possession of a bank held not entitled to intervene in garnishment against the bank; his rights not being prejudiced. *Nelson v. Winters State Bank* (Civ. App.) 138 S. W. 1082.

In an action for a debt, where plaintiff also sought to establish a laborer's lien against property attached, claimant to such property held entitled to intervene and contest the laborer's lien, notwithstanding the filing of claimant's oath and bond under the statute to determine the issues arising on the attachment lien. *Jackson v. Downs* (Civ. App.) 149 S. W. 288.

**Priority of liens.**—The question of priority of liens will not be determined in a proceeding for the trial of the right of property. *Raysor v. Reid*, 55 T. 266; *Groesbeck v. Evans* (Civ. App.) 83 S. W. 430.

One not in possession of the property, or entitled to the same at the date of the levy, cannot resort to the statutory method of the trial of the right of property for the purpose of having determined the priority of liens upon such property. *Willis v. Thompson*, 35 T. 301, 20 S. W. 155; *Wilber v. Kray*, 73 T. 533, 11 S. W. 540; *Wright v. Henderson*, 12 T. 43; *Erwin v. Blanks*, 60 T. 583; *Garrity v. Thompson*, 64 T. 597.

Plaintiff in garnishment held to have had a superior right to be paid from the proceeds of certain property, as against the holder of an unrecorded mortgage. *Thatcher v. Jeffries* (Civ. App.) 91 S. W. 1091.

The holder of an assignment of the amount due on a contract with a school board held to have priority over garnishment by other creditors of the assignor. *Buchanan v. A. B. Spencer Lumber Co.* (Civ. App.) 134 S. W. 292.

**Property affected.**—The action applies to personal property only. *Jones v. Bull* (Civ. App.) 36 S. W. 501.

This remedy does not apply to fixtures. *Jones v. Bull*, 90 T. 187, 37 S. W. 1054.

**Other remedies.**—When a claimant of personal property levied on resorts to this remedy he thereby waives his privilege of suit at common law. *Vickery v. Ward*, 2 T. 214; *Lera v. Freiberg* (Civ. App.) 22 S. W. 236. But he is not compelled to adopt the statutory remedy. *Moore v. Gammel*, 13 T. 120. He might not be allowed to intervene in an attachment suit without complying with the statute by filing oath and bond. *Carter v. Carter*, 36 T. 693; *Irvin v. Ellis*, 76 T. 164, 13 S. W. 22. And he cannot enjoin a sale under execution because of his legal remedy. *Ferguson v. Herring*, 49 T. 129; *Lang v. Dougherty*, 74 T. 226, 12 S. W. 29.

A party whose property has been wrongfully seized under a writ against another person is not entitled to the statutory remedy; he may avail himself of his common-law remedies by suit for the recovery of the property or for damages. *Moore v. Gammel*, 13 T. 121; *Schley v. Hale*, 1 App. C. C. § 931; *Lang v. Dougherty*, 74 T. 226, 12 S. W. 29; *Heinze v. Marx*, 4 C. A. 599, 23 S. W. 704. Or a case may be made in which, as in the present one, injunction will lie. *Hardy v. Broaddus*, 35 T. 668.

The claimant of property levied on under execution cannot invoke relief by injunction to prevent its sale, unless some good reason be alleged in the petition why he did not resort to his legal remedy by affidavit and claim bond to try the right of property. *Ferguson v. Herring*, 49 T. 126.

When the right to personal property levied upon is involved in a suit, it is, as a general rule, the proper practice to require a claimant to resort to the statutory remedy for trial of the right of property. *Whitman v. Willis*, 51 T. 421.

A joint owner of property cannot as a claimant prevent the sale of the interest of his

co-owner in the property. If his rights require protection he must resort to other remedies. *Schley v. Hale*, 1 App. C. C. § 932.

A party whose property may be seized under attachment is not required to seek relief under this statute, but may sue for taking and conversion. *Lang v. Dougherty*, 74 T. 226, 12 S. W. 29.

The court having the custody of property may grant and hear an injunction in aid of its jurisdiction. *National Bank of Jefferson v. Goolsby*, 12 C. A. 362, 35 S. W. 713.

In an action on notes wherein an attachment was issued and levied on certain property, a third party, claiming to be the owner of some of the property under a sale and to have a chattel mortgage on part of the balance, was not entitled to intervene; his remedy being to file a claimant's affidavit and bond under this statute. *Dorroh v. Bailey* (Civ. App.) 125 S. W. 620.

Where a stock of goods levied on as that of a husband in fact belongs to the wife, equity will restrain the enforcement of the judgment, as by a proceeding at law to try the right of property the damages against the sheriff, both as to the goods seized and the remainder, would be released, the goods would have to be returned to the custody of the officer until the determination of the right thereto and would be subject to such other writs as might have been levied before the trial, and the wife would be deprived of the right to have the goods replaced and sold with the stock, so that the remedy at law would not be plain and adequate. *Slayden-Kirksey Woolen Mill v. Robinson* (Civ. App.) 143 S. W. 294.

**Levy.**—The statute contemplates the actual seizure of the subject of the levy. If the levy is upon an undivided interest of one joint owner who has exclusive possession, the officer must take possession of the whole. *Hamburg v. Wood*, 66 T. 168, 18 S. W. 623.

**Affidavit or pleading by claimant.**—An affidavit signed by partnership name is insufficient. *Flint v. McCarty*, 1 App. C. C. § 1018.

It is not necessary for the claimant in his affidavit to state the nature of his claim to the property or the particulars of his title. This may be done under the direction of the court in making up the issues for trial, and such issues in a justice's court may be amended on appeal to the county court. *Durham v. Flannagan*, 2 App. C. C. § 23.

A claimant cannot attack the judgment by showing a defect in the affidavit. *Slade v. Le Page*, 27 S. W. 952, 8 C. A. 403.

An affidavit indorsed on the bond and referring to the statements made in it is sufficient. *Merchant v. Scott* (Civ. App.) 28 S. W. 717.

A pleading filed by a claimant to property attached as that of claimant's tenant held to be sufficient on demurrer. *Groesbeck v. Evans* (Civ. App.) 83 S. W. 430.

— **Amendment.**—A claimant may amend as in any other action, and claim such damages as he may have sustained from the illegal seizure of his property. The right to amend is confined to no particular class of actions. *Cleveland v. Tufts*, 69 T. 580, 7 S. W. 72.

A claimant who files an affidavit and bond to try the right of property which has been attached may thereafter amend his pleading, and ask damages for the seizure. *Breedon Bros. v. Pennington* (Civ. App.) 104 S. W. 908.

Any right of claimant to amend his affidavit held not absolute, but in the court's sound discretion. *Texas Banking & Investment Co. v. T. S. Reed Grocery Co.* (Civ. App.) 137 S. W. 162.

**Right to have all claimants brought in.**—Several claimants of property in controversy should be joined in the proceeding. *Blankenship v. Thurman*, 68 T. 671, 5 S. W. 836.

In garnishment proceedings, the garnishee is entitled to have all claimants to the garnished fund brought before the court and required to interplead, to preclude the possibility of his being compelled to make double payment, so that where the vendors of land, a part of the purchase price of which was garnished in the hands of the vendee, and others who claimed parts of the fund were not parties to the proceeding, a judgment against the garnishee was of no effect. *Looney v. Pope* (Civ. App.) 148 S. W. 1170.

**Waiver of claimant's rights.**—Claimant of the garnished fund did not waive his rights therein by taking a mortgage from the debtor to secure probable loss of the fund and enforcing it before the garnishment suit was determined. *Smith v. Merchants' & Planters' Nat. Bank* (Civ. App.) 40 S. W. 1038.

**Art. 7770. [5287] Bond.**—He shall also execute and deliver to the officer who made such levy his bond, with two or more good and sufficient sureties, to be approved by such officer, payable to the plaintiff in such writ, for an amount equal to double the value of the property so claimed to be assessed by such officer; provided, however, that, when more than one writ has been levied, said bond may be made payable to all the plaintiffs in the several writs levied. Said bond shall inure to the benefit of all the plaintiffs in the several writs according to their respective priorities in time of levy. Upon the approval of such bond and delivery of the property to the claimant, the same shall be deemed in custodia legis, and shall not be taken out of his possession by any other like writ or writs; but said writs may be levied on the same by giving notice to the claimant; and in such cases the claimant's bond shall also inure to the benefit of the several plaintiffs in such writs according to their respective priorities. [Acts 1887, p. 104.]

**In general.**—A claimant of property which had been levied on as the property of another cannot assert his title to the property by intervention without bond. He must proceed according to the statute. *Carter v. Carter*, 36 T. 693.

Where property is seized under several writs, a claim bond for the trial of the right

to property is properly made payable to the plaintiffs in all the writs levied, and but one bond is necessary or proper. *Harness Co. v. Schoelkopf*, 71 T. 418, 9 S. W. 336.

An officer who has surrendered personal property to a claimant cannot return the bond to the maker and receive the property. *Durst v. Padgitt*, 24 S. W. 666, 5 C. A. 304.

Where real property is seized under a writ, a bond given under this article is a nullity. *Bull v. Jones*, 29 S. W. 804, 9 C. A. 346.

Property, after the bond is given and is in the hands of claimant, is in custodia legis, in the sense that his possession thereof is protected from levies from any source except subsequent writs against the original defendant. *U. S. Carriage Co. v. Bay City Buggy Works*, 12 C. A. 52, 33 S. W. 381. See *Friberg v. Elliott*, 64 T. 367; *Bailey v. Mears*, 1 App. C. C. § 84; *Le Gierse v. Pierce*, 2 App. C. C. § 89; *Brown Mfg. Co. v. Watson*, 3 App. C. C. § 330.

The filing of a claimant's bond gives the court jurisdiction over the person of a surety on such bond. *Johnson v. Blum*, 17 C. A. 260, 42 S. W. 791.

Only one bond need be given by the claimant though one writ issues from the district and another from the county court. *Philips et al. v. Davis* (Civ. App.) 49 S. W. 144.

**Defects and objections.**—A sheriff having levied a writ of attachment on certain goods, they were claimed by R., who executed a replevy or forthcoming bond, which was accepted by the sheriff under the impression that it was a bond for the trial of the right of property to said goods and was by him returned into court; afterwards, on discovering the mistake, R. executed to the sheriff a bond for the trial of the right of property and made affidavit claiming the goods. Held, that the proceeding for the trial of the right of property could be maintained. *Reeves v. Wallace*, 3 App. C. C. § 178.

A bond insufficient as a statutory claim bond may be good as a common-law bond. An officer levying an execution when sued by plaintiff in execution may make the principal and sureties in the claim bond parties. *Denson v. Horn*, 4 App. C. C. § 227, 16 S. W. 182.

A claim bond was signed by two sureties, one of whom was a beneficiary in the trust. In motion for new trial, objection was first made to the sufficiency of the bond on ground of the incompetency of one of the sureties. Held, that the objection came too late. *Willis v. Thompson*, 85 T. 301, 20 S. W. 155.

If the sureties on the claimant's bond authorized or understood that the blanks in the bond were thereafter to be properly filled up with the names of the plaintiffs in the attachment, etc., there can be no serious question of its legality. *Jacobs v. Shannon*, 1 C. A. 395, 21 S. W. 386.

The signature of a partnership or firm name as surety on a claimant's bond is valid, though the names of the individual members be not signed. *Id.*

A claimant's bond with but one surety is not valid as a statutory bond, but will be sustained as a common-law obligation. As such bond will not authorize a summary judgment under the statute against the one surety, the plaintiff in the attachment may proceed against the sheriff for taking an imperfect statutory bond without having first sued the parties to the claimant's bond on the common-law liability created thereby. *Id.*

It is a fatal defect in a bond of a claimant of property levied on that it is not, as required by this article, approved by the officer who levied the writ, and has the property in his possession. *Texas Banking & Investment Co. v. T. S. Reed Grocery Co.* (Civ. App.) 137 S. W. 162.

A bond by a claimant in a contest under the statutory remedy of trial of right of property to determine ownership thereof, conditioned that claimant will return the property to plaintiff or his successors if he fails to establish his claim, does not comply with the statute providing that the bond shall be conditioned for return to the officer making the levy or his successor in office. *Crowley v. Finch* (Civ. App.) 153 S. W. 648.

**Motion to quash.**—After a bond given for a trial of the right of property has served its purpose in securing to the claimant a trial of that right, and after judgment against him upon that issue, and a failure on his part to surrender the property within the time prescribed by law, it is not competent for him to move the quashal of his own bond, thereby to escape the consequences of his failure to surrender the property. *Wheeler v. Wooten*, 27 T. 257.

**Liability of officer for insufficient bond.**—Though a sheriff may have taken an insufficient claimant's bond, whereby property attached by plaintiffs is lost to them, yet he is not liable for such loss if plaintiffs then had an attachment lien on other property of their debtor, and through their own negligence failed to realize their debt therefrom. *Jacobs v. Shannon*, 1 C. A. 395, 21 S. W. 386.

The measure of damages against the officer is the actual injury sustained by the plaintiff by reason of neglect or failure. *Id.*

**Amendment.**—Any right of claimant of property levied on to amend his bond at the trial held not absolute, but in the court's sound discretion; so that refusal thereof, where motion to quash was filed four months before, was not error. *Texas Banking & Investment Co. v. T. S. Reed Grocery Co.* (Civ. App.) 137 S. W. 162.

**Art. 7771. [5288] Condition of bond.**—The bond shall be conditioned that the party making such claim, in case he fails to establish his right to such property, shall return the same to the officer making the levy, or his successor, in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase and fruits thereof from the date of said bond, or, in case he fails so to return said property and pay for the use of the same, he shall pay the plaintiff the value of said property, with legal interest thereon from the date of the bond, and shall also pay all damages and costs that may be awarded against him.

**In general.**—A bond by a claimant in a contest under the statutory remedy for trial of right of property to determine the ownership thereof, conditioned on the claimant re-

turning the property to plaintiff or his successors in case he fails to establish his claim, does not comply with the statute. *Crowley v. Finch* (Civ. App.) 153 S. W. 648.

**Return of property.**—The property must be returned in as good condition as it was in when the claimant received it. This does not mean reasonable wear and tear, incidental to careful use excepted. The condition in the bond is absolute. *Parlin & Orendorff v. Coffey*, 25 C. A. 218, 61 S. W. 513.

**Art. 7772. [5289] Property to be delivered to claimant.**—It shall be the duty of the officer receiving such oath and bond to deliver the property so claimed to the person so claiming it. [Id.]

**Art. 7773. [5290] Return of oath and bond.**—Whenever any person shall claim property and shall make the oath and give the bond, as provided for in this chapter, if the writ under which said levy was made was issued by any justice of the peace or court of the county where such levy was made, the sheriff or other officer receiving such oath and bond shall indorse on the writ that such claim has been made and oath and bond given, stating by whom, and shall also indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond and oath to the proper justice or court having jurisdiction to try such claim, as hereinafter provided. [Id. sec. 2. F. D. 5311.]

**In general.**—In the absence of an indorsement on the bond, the statements in the affidavit and the bond that the amount was within the jurisdiction of the court is sufficient. *Leman v. Borden*, 83 T. 620, 19 S. W. 160.

**Art. 7774. [5291] Form of bond.**—The form of such bond shall be substantially as follows:

“Whereas, by virtue of a writ of \_\_\_\_\_ [here describe the writ] issued out of the \_\_\_\_\_ court (or by \_\_\_\_\_, justice of the peace for precinct No. \_\_\_\_\_, \_\_\_\_\_ county) in favor of \_\_\_\_\_ [here insert name of plaintiff] versus \_\_\_\_\_ [here insert name of defendant], and tested on the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19\_\_\_\_, \_\_\_\_\_ [here insert name and title of officer seizing], has seized and taken the following described personal property, viz.: \_\_\_\_\_ [here describe the property], the value of which property has been assessed by said officer at \_\_\_\_\_ dollars. And, whereas, \_\_\_\_\_ [here insert name of claimant] has claimed said property and presented to said officer his oath in writing that such claim is made in good faith; now therefore we \_\_\_\_\_ [here insert name of claimant], as principal, and \_\_\_\_\_ and \_\_\_\_\_ as sureties, acknowledge ourselves bound to pay to the said \_\_\_\_\_ [insert name of plaintiff] the sum of \_\_\_\_\_ dollars, being double the value of said property, conditioned that the said \_\_\_\_\_ [here insert name of claimant], in case he fails to establish his right to said property, will return the same to the said \_\_\_\_\_ [insert the name of the officer] or his successor in as good condition as he received it, and shall also pay the reasonable value of the use, hire, increase or fruits of the same from the date of this bond and costs, or in case he fails to return said property and pay for the use, hire, increase or fruits thereof, that he will pay the plaintiff the value of the same with legal interest thereon from date, and shall also pay all damages and costs that may be awarded against him.

“Witness our hands this the \_\_\_\_\_ day of \_\_\_\_\_, A. D. 19 \_\_\_\_.

“\_\_\_\_\_”  
“\_\_\_\_\_”

“Approved: \_\_\_\_\_ sheriff (or constable) of \_\_\_\_\_ county.”

**Obligees.**—When the property has been seized under several writs, a claim bond may be made payable to the plaintiffs in all the writs. *Peters Saddlery & Harness Co. v. Schoelkopf*, 71 T. 418, 9 S. W. 336.

**Conditions of bond.**—The bond must cover costs. *Ft. Worth Pub. Co. v. Hitson*, 80 T. 216, 14 S. W. 843, 16 S. W. 551.

**Filling blanks.**—With the assent of the sureties, blanks in a bond may be filled after its execution. *Jacobs v. Shannon*, 1 C. A. 395, 21 S. W. 386.

**Art. 7775. [5292] Form immaterial.**—Any other form of bond which shall be a substantial compliance with the requirements of article 5291 [7774] shall be a sufficient bond.

**Art. 7776. [5293] Return of oath, bond and copy of writ when levy made in county other than that where writ issued.**—Whenever any person shall claim property and shall make the oath and give the bond as provided for herein, if the writ under which such levy was made was issued by any justice of the peace or court of another county than that in which such levy was made, then the officer receiving such oath and bond shall indorse on such bond the value of the property as assessed by himself, and shall forthwith return such bond and oath, with a copy of the writ, to the justice or court of the county in which such levy was made having jurisdiction according to the value of the property as assessed by said officer.

*In general.*—That the officer makes the indorsement on the bond instead of the execution is immaterial after the parties have appeared in the proper court and joined issue. *Carney v. Marsalis*, 77 T. 62, 13 S. W. 636.

When a copy of the writ is found among the papers of the case, with a return upon it signed by the sheriff officially, it will be presumed that the sheriff performed his duty and returned a true copy of the original writ. *Betterton v. Echols*, 85 T. 212, 20 S. W. 63.

It is the duty of the claimant to see that sheriff files the affidavit and bond in the proper court. *Chappell v. Ferrell* (Civ. App.) 54 S. W. 1072.

*Effect of failure to state value.*—Where the officer fails to state the value of the property, the court can hear evidence of the value and is not bound by the assessed value of the property. *Cullers v. Gray* (Civ. App.) 57 S. W. 305.

**Art. 7777. [5294] Return of original writ.**—The sheriff or other officer taking such bond shall also indorse on the original writ that such claim has been made and oath and bond given, stating by whom, the names of the sureties and to what justice or court the bond has been returned; and he shall forthwith return such original writ to the justice or court from which it is issued.

**Art. 7778. [5295] Jurisdiction.**—Cases arising under this chapter shall be tried as follows:

1. Where the assessed value of the property does not exceed two hundred dollars, the writ shall be returned to a justice of the peace, as before provided.

2. Where the value assessed is more than two hundred dollars and does not exceed five hundred dollars, the writ shall be returned to the proper county court.

3. When the assessed value is more than five hundred dollars, the writ shall be returned to the proper district court. [Const., art. 5, secs. 8, 16, 19.]

*Determination of value.*—The assessment of value placed on property by the officer who seizes it under attachment should determine the jurisdiction on the trial of the right of property, and not its value as subsequently ascertained on trial. *Cleveland v. Tufts*, 69 T. 580, 7 S. W. 72; *Harris v. Hood*, 1 App. C. C. § 573; *Carney v. Marsalis*, 77 T. 62, 13 S. W. 636.

In an action for trial of right to property, held, that the court was not bound to determine its jurisdiction by the value of the property in controversy as shown by the officer's return on the claim bond. *Cullers v. Gray* (Civ. App.) 57 S. W. 305.

*Justice of the peace.*—A justice of the peace has no jurisdiction of a case of the trial of the right of property when the amount in controversy exceeds in value \$200. *Marx v. Carlisle*, 1 App. C. C. § 93, citing *Chrisman v. Graham*, 51 T. 454.

*County court.*—So much of this article as attempts to confer jurisdiction on the county court when the property is of the value of \$500 is void. Arts. 1705 and 1766 are held to conform to the constitutional provisions. *Erwin v. Blanks*, 60 T. 583; *Cleveland v. Tufts*, 69 T. 580, 7 S. W. 72; *Carney v. Marsalis*, 77 T. 62, 13 S. W. 636; *Wetzel v. Simon*, 87 T. 403, 28 S. W. 274, 942; *Betterton v. Echols*, 85 T. 212, 20 S. W. 63; *Heidenheimer v. Marx*, 1 App. C. C. § 172; *Nave v. Frieberg*, 1 App. C. C. § 173.

But this rule holds only when the property is seized under a writ of execution, sequestration or attachment. Where a distress warrant is levied, and the property is valued at \$500, the county court has jurisdiction. *St. Louis Type Foundry v. Taylor*, 6 C. A. 732, 26 S. W. 226.

*District court.*—Property levied on under an execution from the district court was claimed by a third party, under the statute, by affidavit and claim bond. The officer making the levy appraised the property at \$400. Held, that the district court did not have the jurisdiction to try the issue raised by the claim. *Chrisman v. Grayham*, 49 T. 491.

**Art. 7779. [5296] Cause, how docketed.**—Whenever any oath and bond for the trial of the right of property shall be returned, as provided for in this chapter, it shall be the duty of the clerk of the court, or of such justice of the peace, to docket the same in the name of the plain-

tiff in the writ as the plaintiff, and the claimant of the property as defendant. [Act March 18, 1848, p. 140, sec. 3. P. D. 5312.]

See *Cobb v. Campbell*, 14 C. A. 433, 38 S. W. 246.

**Proceedings by judgment owner.**—The assignee of a judgment should be permitted to have a case for trial of right to property docketed in the name of the plaintiff in the writ and be allowed to proceed in the name of the plaintiff for his own use. *Owens v. Clark*, 78 T. 547, 15 S. W. 101.

**Art. 7780. [5297] Issue to be made up, etc.**—At the first term of the court thereafter, if both parties appear, the court or justice shall direct an issue to be made up in writing between the parties and tried as in other cases. [Id.]

**In general.**—On the trial of the right of property upon the issue of ownership, the greatest latitude of proof must necessarily be admitted. *Heidenheimer v. Bledsoe*, 1 App. C. C. § 319, citing *Linn v. Wright*, 18 T. 317, 70 Am. Dec. 232.

**Pleadings held sufficient to present issues.** See *Emerson v. Bank* (Civ. App.) 25 S. W. 433.

**In tendering issues the claimant is not limited to matters stated in the affidavit.** *Wetzell v. Simon*, 28 S. W. 274, 942, 87 T. 403. The nature of the claim must be stated. *Choate v. McIlhenny*, 71 T. 119, 9 S. W. 83.

**Particular issues.**—If there are questions as to priority of liens, and the security afforded by a prior lien is in danger of being destroyed by proceedings under a levy, the remedy is an appeal by an original suit invoking the equitable powers of the court. The question of priority of liens will not be determined in a proceeding for the trial of the right of property. *Raysor v. Reid*, 55 T. 266.

**In order to entitle the plaintiff to impeach the title of the claimant as fraudulent, he must show by competent evidence that he was a creditor of the person from whom he derived title.** *Freiburg v. Foreman*, 1 App. C. C. § 473, citing *Pierson v. Tom*, 10 T. 145.

Where a lien is reserved in notes given for the purchase of personal property, on which notes a judgment not foreclosing the lien is recovered, and in that suit an attachment is issued and levied on the property covered by the lien, such contract lien may, in the statutory action for the trial of the right of property, be foreclosed and enforced against a claimant holding the property under transfer from the judgment debtor, and this without making the judgment debtor a party thereto. *Howard v. Parks*, 1 C. A. 603, 21 S. W. 269 (Justice Head dissenting).

Where plaintiff is insolvent, defendant can set off a debt due to him from plaintiff, against plaintiff's claim on the bond. *Fleming v. Stansell*, 13 C. A. 558, 36 S. W. 504.

The refusal to submit an issue whether claimant acquired title to the property in controversy by a sale prior to the levy held error. *Cullers v. Gray* (Civ. App.) 57 S. W. 305.

Where the judgment in a trial of the right of property was set aside, and the case reopened, the issue of the value of the property was necessarily involved, without any special averment on that point in claimant's petition, and was properly submitted to the jury. *Ryan v. Teague*, 50 C. A. 153, 110 S. W. 117.

A plaintiff in a trial of right of property under issues made under this article, involving property levied on under a judgment for plaintiff and claimed by a third person, has, under Art. 7785, the burden of proving title in the judgment debtor. *Marrett v. Herrington* (Civ. App.) 145 S. W. 254.

**Validity of levy.**—An execution cannot be attacked by the claimant in this proceeding for irregularities. *Seligson v. Staples*, 1 App. C. C. § 1070, citing *Sydnor v. Roberts*, 13 T. 598, 65 Am. Dec. 84; *Earle v. Thomas*, 14 T. 591; *Portis v. Parker*, 22 T. 699. There must be collusion and fraud. *Saunders v. Ireland* (Civ. App.) 27 S. W. 880.

When the property was levied on in the possession of the claimant, he may show that the process under which the levy was made was void, or was such as did not authorize a disturbance of his possession; and where the process is void it may be attacked after issue joined, at any stage of the trial. *Tillman v. McDonough*, 2 App. C. C. § 54, citing *Latham v. Selkirk*, 11 T. 314; *Webb v. Mallard*, 27 T. 80.

The object of the statute is to provide a trial of the right of property, and the validity of the writ under which it was seized cannot be questioned except by special plea. *Ft. Worth Pub. Co. v. Hitson*, 80 T. 216, 14 S. W. 843, 16 S. W. 551; *Yarborough v. Weaver* (Civ. App.) 22 S. W. 771.

A claimant of property taken under attachment may question regularity of attachment where the matter is specially pleaded. *Scott v. De Witt*, 42 C. A. 69, 93 S. W. 215.

In an action to try the right to certain property levied on, the validity of the execution could not be attacked except by special plea setting out the grounds of invalidity relied on. *Courtney Shoe Co. v. Polley* (Civ. App.) 95 S. W. 7.

**Amendment.**—The issues may be amended pending the trial when no surprise or injury to the adverse party results. *Ft. Worth Pub. Co. v. Hitson*, 80 T. 216, 14 S. W. 843, 16 S. W. 551.

**Default of claimant.**—Until issues are tendered, the claimant cannot be considered in default. *Field v. Fowler*, 62 T. 68; *Harry v. City Bank*, 10 C. A. 51, 30 S. W. 92. See *McKinnon v. Reliance L. Co.*, 63 T. 30.

**Answer containing denial and demurrer.**—In action of trial of right of property, answer containing general denial and general demurrer held sufficient on general demurrer thereto. *Scott v. De Witt*, 42 C. A. 69, 93 S. W. 215.

**Art. 7781. [5298] Requisites of issue.**—Said issue shall consist of a brief statement of the authority and right by which the plaintiff seeks to subject the property levied on to his execution, and of the nature of the claim of the defendant thereto.

See *Cobb v. Campbell*, 14 C. A. 433, 38 S. W. 246.

**Sufficiency of tender of issue.**—In a suit for the trial of the right of property subject to attachment, if the attaching creditor sets up the fact that the property levied on was

the property of his attached debtor, who was insolvent, and who had no other property subject to levy, and that he had fraudulently transferred the same to claimants, this is a sufficient tender of issue. *McKinnon v. Reliance L. Co.*, 63 T. 30.

A claimant in presenting issues under the statute must state the nature of his claim to the property, and his evidence is restricted thereby. *Choate v. McIlhenny Co.*, 71 T. 119, 9 S. W. 83.

If the property is claimed by estoppel it must be pleaded, and the facts constituting the estoppel must be stated. *Scarborough v. Alcorn*, 74 T. 353, 12 S. W. 72.

**Issue as to seizure.**—No question having been made in the pleading or otherwise as to the regularity of the writs of attachment under which the seizure was made, it was not necessary to submit to the jury the existence of the writ, or debt supporting it. *Gilmour v. Heinze*, 85 T. 76, 19 S. W. 1075.

**Art. 7782. [5299] Judgment by default against defendant, when.**—If the plaintiff appears and the defendant fails to appear or neglects or refuses to join issue under the direction of the court or justice, within the time prescribed for pleading, the plaintiff shall have judgment by default, as in other cases. [Id.]

**In general.**—An appearance in person or by attorney prevents a judgment by default until the defendant refuses to join issue under direction of the court. *Field v. Fowler*, 62 T. 65. See *Martin v. Harnett*, 86 T. 517, 25 S. W. 1115; *Id.* (Civ. App.) 24 S. W. 963.

No provision is made in the statute for citation or notice of the proceeding to either party. An affidavit and bond dated October 20, 1882, was returned, filed and docketed April 17, 1883, and on May 23, 1883, judgment by default was rendered against the claimant and the sureties upon the claim bond. Held, that the judgment was properly rendered. *Betterton v. Buck*, 2 App. C. C. § 200.

**Art. 7783. [5300] Judgment of non-suit against plaintiff, when.**—If the plaintiff does not appear at the said first term, the case shall be continued to the next term, when, if he appears, the like proceedings may be had as at the said first term; but, if he does not then appear on or before the appearance day of said term, he shall be non-suited. [Id.]

See *Cobb v. Campbell*, 14 C. A. 433, 38 S. W. 246.

**Death of claimant.**—Where claimant dies after execution is levied and issue joined, the fact that his attorney withdraws from the case does not authorize judgment by default against sureties on his bond, since claimant's appearance and issues remained a part of the record, and satisfied the requirements of the law. *Muenster v. Tremont Nat. Bank*, 92 T. 422, 49 S. W. 362.

**Judgment on demurrer.**—When a claimant files bond and affidavit, alleging ownership of goods seized under execution by the judgment creditor, and a demurrer to the sufficiency of the claim and affidavit is sustained, the judgment on the demurrer, when there is no offer to cure alleged defects, is conclusive. Such a judgment is *res judicata*, and may be pleaded as such in a subsequent suit between the parties or their privies. *Dixon v. Zadek*, 59 T. 530.

**Art. 7784. [5301] Proceedings, how conducted.**—The proceedings and practice on the trial shall be as nearly as practicable the same as in other cases before such court or justice.

**Persons who may intervene.**—See notes under Art. 7769.

**Art. 7785. [5302] Burden of proof on plaintiff, when.**—In all cases arising under this title, if the property was taken from the possession of the claimant, the burden of proof shall be on the plaintiff. [Id.]

**In general.**—When the property is found in the possession of the claimant the burden of proof is upon the plaintiff to show better right. *Cooper v. Bumpass*, 1 App. C. C. § 499; *Hamburg v. Wood*, 66 T. 168, 18 S. W. 623.

When possession, actual or constructive, is material, evidence relating thereto is admissible. *Panhandle Nat. Bank v. Foster*, 74 T. 514, 12 S. W. 223.

Where there is a controversy as to the possession of the property, actual or constructive, the court should hear the evidence and determine upon whom the burden of proof rests. *Panhandle Nat. Bank v. Foster*, 74 T. 514, 12 S. W. 223. In a proper case the question may be submitted to the jury. *Brown v. Lessing*, 70 T. 544, 7 S. W. 783.

On trial of right of property, lien holder must show both lien and possession. *Buckner v. Lancaster* (Civ. App.) 40 S. W. 631.

Where in an action for loss of horses owned by plaintiff and another jointly, defendants waived plaintiff's failure to join his joint owner as a party, the burden was on them to show *prima facie* the interest of such joint owner to prevent plaintiff's recovery. *Waggoner v. Snody*, 36 C. A. 514, 82 S. W. 355.

**Attached property.**—In a suit for the trial of right of property between an attaching creditor and a claimant to whom the property was transferred, the burden of proof is on the attaching creditor. *Lewy v. Fischl*, 65 T. 311.

When the return of the sheriff does not disclose in whose possession the property was found when a writ of attachment was levied, the burden of proving that the goods were in the possession of the defendant in attachment is upon the plaintiff. *Boaz v. Schneider*, 69 T. 128, 6 S. W. 402.

In a proceeding to test the right to property taken under attachment, etc., the claimants have the burden of showing that it is subject to their writ. *Jackson v. Downs* (Civ. App.) 149 S. W. 286.



**Property taken under execution.**—In trials of the right of property the plaintiff in execution has the burden of proof and the affirmative of the issue when the property levied on was taken from the possession of the claimant; but the claimant has the burden and the affirmative when the property was taken from any other possession than his own. It is sometimes difficult to determine in whose possession the property was when taken in execution; and in such cases the court trying the cause is to direct which party shall assume the burden of proof and have the affirmative of the issue. *Miller v. Sturm*, 36 T. 291; *King v. Sapp*, 66 T. 519, 2 S. W. 573.

A plaintiff in a trial of right of property under issues made under Art. 7780, involving property levied on under a judgment for plaintiff and claimed by a third person, has, under this article, the burden of proving title in the judgment debtor. *Marrett v. Herrington* (Civ. App.) 145 S. W. 254.

**Fraudulent transfer.**—The burden of proof rests upon the party alleging a fraudulent transfer of the property in question. *Producers' Marble Co. v. Bergen* (Civ. App.) 31 S. W. 89.

In an action by a minor son, residing with his father, to recover the value of cattle seized on execution against the father and converted, held error to charge that the burden of proof was on defendants to show that the father was the real and beneficial owner of the cattle, and that they were kept in plaintiff's name to conceal them from creditors of the father. *Love v. Hudson*, 24 C. A. 377, 59 S. W. 1127.

In an action to try the right to certain property levied on under an execution, the burden was on plaintiff to prove that transfers from the execution debtor to claimant were fraudulent as alleged. *Courtney Shoe Co. v. Polley* (Civ. App.) 95 S. W. 7.

**Right to open and close.**—The claimant of personal property in his possession is entitled to the opening and conclusion, although the execution creditor has assumed the burden of proof. *Marsh v. Thomason*, 25 S. W. 43, 6 C. A. 379.

In action to try right of property taken under execution, burden is on plaintiff to prove title. *Pinkard v. Willis*, 24 C. A. 69, 57 S. W. 891.

**Art. 7786. [5303] Burden of proof on defendant, when.**—If it was taken from the possession of the defendant in such writ, or any other person than the claimant, the burden of proof shall be on the claimant. [Id.]

See notes under Art. 7785.

**Art. 7787. [5304] Damages.**—In all trials of the right of property under the provisions of this title, if the claimant shall fail to establish his right to the property, the court or justice trying the same shall give judgment against all the obligors in the claimant's bond for ten per cent damages on the value of the property. [P. D. 5314.]

**Constitutionality.**—This article does not conflict with the constitution, state or national. *Muenster v. Tremont Natl. Bank* (Civ. App.) 46 S. W. 277.

**Amount.**—On failure of the claimants to establish their claim, the judgment should be rendered so as to fix the lien of the attachment under which the property was seized, and to subject the property to sale to satisfy the demand of the plaintiffs in the suit out of which the attachment issued. On failure to return the property for that purpose, the law fixes the remedy against the obligors on the claim bond. *Maymore v. Baldwin*, 1 App. C. C. § 722, citing *Mardis v. Johnson*, 43 T. 225. See *Harris v. Schuttler* (Civ. App.) 24 S. W. 989.

When the verdict is for the judgment creditor, judgment should be rendered against the claimant and his sureties for the value of the property, with legal interest thereon from the date of the bond and ten per cent. damages for the amount claimed in the writ when that amount is less than the value of the property. *Wilber v. Kray*, 73 T. 533, 11 S. W. 540; *Floege v. Wiedner*, 77 T. 311, 14 S. W. 132; *Wetzell v. Simon* (Civ. App.) 25 S. W. 792.

When the debt is reduced by payment, the damages should be assessed on the amount unpaid. *Dupree v. Woodruff* (Sup.) 19 S. W. 469.

Where judgment for claimant is set aside, plaintiff in execution held entitled to judgment for value of the goods, and legal interest thereon from date of bond together with damages. *P. J. Willis & Bro. v. Pinkard*, 21 C. A. 423, 52 S. W. 626.

**Art. 7788. [5305] Where value of property exceeds judgment.**—When such value is greater than the amount claimed under the writ, by virtue of which such property was levied upon, the damages shall be on the amount claimed under said writ. [Id.]

**Basis for assessing damages.**—The value of the property at the date of the claim bond should be ascertained in order to furnish a basis for the computation of damages. *Neill v. Billingsley*, 49 T. 161.

When the value assessed by the officer is not put in issue, it may properly be adopted as a rule in rendering judgment. *Aiken v. Kennedy*, 1 App. C. C. § 1321, citing *Wright v. Henderson*, 12 T. 45; *Ratcliff v. Hicks*, 23 T. 174. And see *Gillian v. Henderson*, 12 T. 48.

**Art. 7789. [5306] Copy of writ evidence, when.**—In all trials of the right of property, under the provisions of this title, in any county other than that in which the writ issued under which the levy was made, the copy of the writ herein required to be returned by the officer

making the levy shall be received in evidence in like manner as the original could be. [P. D. 5315.]

Copy not under seal.—A copy of a writ of execution, by virtue of which the levy was made by the sheriff as required by the statute, is admissible in evidence, although no seal or copy of a seal appears therein. *Kuykendall v. Marx*, 1 App. C. C. § 669.

**Art. 7790. [5307] Judgment upon failure to establish title, etc.—**In all cases where any claimant of property, under the provisions of this title, shall fail to establish his right thereto, judgment shall be rendered against him and his sureties for the value of the property, with legal interest thereon from the date of such bond. Such judgment shall be rendered in favor of the plaintiff in the writ, or of the several plaintiffs, if more than one, and shall fix the amount of each plaintiff's claim. [Acts 1887, p. 104.]

**Constitutionality.**—This article does not conflict with constitution, state or national. *Muenster v. Tremont Natl. Bank* (Civ. App.) 46 S. W. 277.

**Right to judgment.**—When a demurrer to the sufficiency of the claim and affidavit is sustained, and the claim to the property "dismissed," the judgment creditor is entitled to a judgment against the sureties on the claimant's bond, and against the claimant for the value of the property, with legal interest thereon from the date of the bond. A dismissal of the claim cannot deprive him of that right; the proper practice is to ascertain the value of the property, and render a judgment for that amount. *Dixon v. Zadek*, 59 T. 530; *Floege v. Wiedner*, 77 T. 311, 14 S. W. 132.

When claimant makes default, judgment should be rendered for the amount shown to be due. *Martin v. Harnett*, 86 T. 517, 25 S. W. 1115; *Id* (Civ. App.) 24 S. W. 963.

Where claimant dies after issue joined and before trial, he has not "failed" in the meaning of this article to establish his claim, so as to render judgment against the sureties on his bond alone. The heirs or legal representatives of the claimant should be made parties. *Muenster v. Tremont Nat. Bank*, 92 T. 422, 49 S. W. 362.

Where a claimant under the statute relating to trial of right of property abandons his claim, he thereby fails to establish his right to the property, and judgment may be recovered on his bond. *St. Louis Type Foundry v. Taylor*, 27 C. A. 349, 65 S. W. 677.

Where claimants assert a joint ownership in the property and fail to establish their claim as made, judgment can be rendered on their claimant's bond. *Davis v. Jones*, 32 C. A. 424, 75 S. W. 64.

**Effect of claimant's death or discharge in bankruptcy.**—Nunc pro tunc judgment against claimant to property levied on, after his death, held voidable only, and hence conclusive on bondsmen on his claimant's bond in subsequent action against them. *Ramsey v. Zapp* (Civ. App.) 57 S. W. 82.

Formal judgment on claimant's bond may be entered against principal, who has received discharge in bankruptcy, for purpose of holding sureties. *Pinkard v. Willis*, 24 C. A. 69, 57 S. W. 891.

Sureties on claimant's bond for goods taken on execution are liable, notwithstanding discharge in bankruptcy of principal. *Id*.

**Judgment on cross-bill.**—In proceedings under the statute relating to trial of right of property, judgment against the claimant and sureties on his bond, on his failure to establish his claim, may be recovered on a cross-bill filed in the action in which the bond is given, without citation to such claimant or notice to the sureties. *St. Louis Type Foundry v. Taylor*, 27 C. A. 349, 65 S. W. 677.

**Proceedings for judgment.**—It is not necessary to cite the sureties on a deceased claimant's bond before proceeding to judgment against them. *Muenster v. Tremont Natl. Bank* (Civ. App.) 46 S. W. 277.

**Form of judgment.**—The judgment is properly rendered against the obligors unconditionally. The provision for the return of the property in no way controls the form of the judgment to be entered, but simply grants to the defendants in the judgment a means of satisfying the same otherwise than by paying the amount of the judgment in money. *Wrought Iron Range Co. v. Brooker*, 2 App. C. C. 231.

The judgment should establish the rights and privileges of the parties, and should fix the value of the use of the property in controversy. *Ft. Worth Pub. Co. v. Hitson*, 80 T. 216, 14 S. W. 843, 16 S. W. 551; *Martin v. Hartnett* (Civ. App.) 24 S. W. 963, construing amendment of 1887.

A judgment for the value of the property alone without providing that its return satisfies the judgment, is not erroneous, as the right to return exists independent of the judgment. *Muenster v. Tremont Natl. Bank* (Civ. App.) 46 S. W. 277.

Where judgment is rendered against the claimant who had obtained the property from the sheriff, the judgment should have also fixed the value of the use of the property, to enable the claimant, if he wished, to return the property in satisfaction of the judgment, to know what amount he was required to pay for the use of same up to the date of the judgment. *Teague v. Ryan*, 43 C. A. 565, 96 S. W. 936.

**Amount of judgment.**—The claimant should not be taxed with costs of proceedings held to be erroneous. *Bailey v. James*, 64 T. 546.

Where the property in controversy consists of several articles separately valued, a judgment against the claimant and his sureties upon his claim bond, for the aggregate value of the claim bond, is proper. *Betterton v. Buck*, 2 App. C. C. § 201; *Chapman v. Allen*, 15 T. 278; *Wright v. Henderson*, 12 T. 43.

On judgment against claimant, judgment is rendered on the bond for the value of the property, together with interest, damages and costs. *Wrought Iron Range Co. v. Brooker*, 2 App. C. C. § 225.

A judgment entered in the terms of the statute cannot be enforced for more than the debt, interest and ten per cent. damages. *Wills Point Bank v. Bates*, 76 T. 329, 13 S. W. 309.

**Conclusiveness of judgment.**—A judgment against the claimant is conclusive, and he cannot inquire into the debt upon which judgment is rendered. *Livingstone v. Wright*, 68 T. 706, 5 S. W. 407.

**Satisfaction of judgment.**—When the judgment is for a larger amount than the plaintiff is entitled to, it is satisfied in full by payment of such amount as is actually due. *Wrought Iron Range Co. v. Brooker*, 2 App. C. C. § 230, citing *York v. Le Gierse*, 1 App. C. C. § 1330.

**Art. 7791. [5308] Execution shall issue.**—In case such judgment should not be satisfied by a return of the property as provided in article 5310 [7793] then execution shall issue thereon in the name of the plaintiff for the amount of his claim, or of all the plaintiffs for the sum of their several claims, provided the amount of such judgment exceed such claim or sum; and in such cases the excess of such judgment shall inure to the benefit of any person who shall show superior right or title to the property claimed as against the claimant; but, if such judgment be for a less amount than the sum of the several plaintiffs' claims, then the respective rights and priorities of the several plaintiffs shall be fixed and adjusted in the judgment. [Id.]

**Art. 7792. [5309] Execution not to issue within ten days.**—On such judgment, no execution shall issue for ten days.

**Execution pending writ of error.**—The judgment creditor not being in condition, pending the writ of error, to have execution against the principal, he could not at that time have it issued against the surety. *Wren v. Peel*, 64 T. 374.

**Art. 7793. [5310] Return of property by claimant within ten days.**—If, within ten days from the rendition of said judgment, the claimant shall return such property in as good condition as he received it, and pay for the use of the same, together with the damages and costs, such delivery and payment shall operate as a satisfaction of such judgment.

**In general.**—The property must be returned within ten days, and in as good condition as when it was received, and claimant must also within said time pay for the use of the same, and pay the damages and costs, otherwise the officer is not bound to receive the property if tendered. *Bullard v. White*, 2 App. C. C. § 287.

If the claim is not sustained, no matter for what reason, the bondsmen are bound to return the property or pay its value. When the property is not returned within the time prescribed by statute, the remedy is against the principal and sureties on the claim bond. *Garrity v. Thompson*, 67 T. 1, 2 S. W. 750; *Wallace v. Terry*, 4 App. C. C. § 58, 15 S. W. 35.

After adverse judgment in trial of right of property, judgment creditor's consent is not essential to a return of the property by claimant to sheriff. *Willis v. Chowning*, 90 T. 617, 40 S. W. 395, 59 Am. St. Rep. 842.

When judgment creditor cannot object because property was returned by surety on bond after adverse judgment, without consent of claimant. *Id.*

It is the privilege of the claimant to return the property, and the consent of plaintiff is not necessary. *Id.*

A charge concerning the condition of property at the time a claimant in a trial of right of property offered to return it in discharge of the judgment against him held not to impose a greater liability than the law allowed. *Parlin & Orendorff Co. v. Coffey*, 25 C. A. 213, 61 S. W. 512.

A claimant who seeks to discharge a judgment against him on a trial of right of property by returning the property as required by his bond must return it in as good condition as he received it. *Id.*

**Return of part.**—A return of the property in satisfaction of the judgment against the claimant must be made within ten days from the rendition of the judgment, and such property must be in as good condition as when it was released to the claimant. A claimant is not authorized to return a part of the property. In order to operate as a satisfaction of the judgment, there must be a return of the whole of it. *Betterton v. Buck*, 2 App. C. C. § 202.

Under this article claimants of property attached cannot discharge a judgment against themselves by an offer to return only a part of the property, and pay for the part which they had sold. *Cox v. Janes* (Civ. App.) 141 S. W. 326.

**Sufficiency of return.**—The property levied on consisted of a sorghum mill and evaporator, which were so heavy as to require wagons to remove them. Held, that a tender, by the claimant, of the property back to the officer, which was not at that time visible to the parties, but ten or fifteen miles removed from where the tender to return it was made, did not constitute such a return of the property as is contemplated by the statute. For facts on which the opinion is based, see statement of case. *Edwards v. Connolly*, 61 T. 30.

**Direction by a surety of the claimant to sheriff to repossess himself of cattle running at large is a delivery to him.** As also to retake goods in a store easily accessible to him. *Willis v. Chowning*, 18 C. A. 625, 46 S. W. 45.

**Release of sureties.**—The sureties on the bond cannot be released by the return of the property to the sheriff before the case is tried, as the sheriff has no authority to receive the property delivered to the claimant before trial of the issue. *Durst v. Padgitt*, 24 S. W. 666, 5 C. A. 304.

**Art. 7794. [5311] Claim operates a release of damages.**—A claim made to property, under the provisions of this chapter, shall operate as a release of all damages by the claimant against the officer who levied upon said property. [P. D. 5317.]

**Construction of article.**—A claim made to property under the provisions of this statute operates as a release of damages for making the levy, but this is in derogation of the common law and will not be extended to claims otherwise made. *Terry v. Webb* (Civ. App.) 96 S. W. 71.

**Persons released.**—The release of the officer, he being a joint wrongdoer, operates as a release also of the other wrongdoers. *Rose v. Riddle*, 3 App. C. C. § 301.

The above article does not apply to parties who order an officer to make a levy. *City National Bank of Gatesville v. Colgin*, 21 C. A. 487, 51 S. W. 856.

**Objections waived.**—By giving claimants bond and proceeding under the statute to test his right to the property the claimant waived the manner of the levy. *Davis v. Jones*, 32 C. A. 424, 75 S. W. 64.

**Art. 7795. [5312] Levy may be made on other property.**—Proceedings for the trial of the right of property, under the provisions of this title, shall in no case prevent the plaintiff in the writ from having a levy made upon any other property of the defendant. [P. D. 5318.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Weight and sufficiency of evidence.**—As against a claimant of property seized under distress, the judgment of the landlord against the tenant held conclusive as to the amount of the tenant's debt. *Sanger v. Magee*, 29 C. A. 397, 69 S. W. 234.

Evidence held not to show that judgment debtor had no interest in certain property which was subject to execution. *Davis v. Jones*, 32 C. A. 424, 75 S. W. 63.

Evidence of value of property in proceeding by a claimant of property levied on under execution held sufficient to sustain the finding. *Ryan v. Teague*, 50 C. A. 153, 110 S. W. 117.

**General verdict.**—A general verdict for either party is sufficient. *Wilber v. Kray*, 73 T. 533, 11 S. W. 540.

**Appeal.**—The surety on a claim bond against whom a judgment is rendered is a competent surety on the appeal bond of the principal who alone appeals from the judgment. *Peoples v. Rodgers*, 11 C. A. 447, 32 S. W. 798, citing *Trammell v. Trammell*, 15 T. 291; *Sampson v. Solinsky*, 75 T. 663, 13 S. W. 67.

The amount of the claims of plaintiff creditors must appear from the record in the action of trial of right of property. *Casentini v. Ullman*, 21 C. A. 582, 54 S. W. 420.

## TITLE 130

## TRUSTS—CONSPIRACIES AGAINST TRADE

Chap.

1. Definitions, Forfeitures and Other Provisions.

Chap.

2. Evidence in Trust Cases.

## CHAPTER ONE

## DEFINITIONS, FORFEITURES AND OTHER PROVISIONS

Art.	Art.
7796. "Trusts" defined.	doing business and may be enjoined.
7797. "Monopoly" defined.	7804. Quo warranto proceedings.
7798. Conspiracies against trade, what constitutes.	7805. Successor to defaulting foreign corporation prohibited from doing business.
7799. Acts and things mentioned declared illegal.	7806. Penalties; venue of suits; fees of attorney general, etc.
7800. Charters forfeited.	7807. All agreements in violation void.
7801. Attorney general to institute quo warranto proceedings.	7808. Actions under this chapter have precedence.
7802. Successors to defaulting corporation prohibited from doing business.	7809. Recovery against one does not bar recovery against others.
7803. Foreign corporations prohibited from	

**Article 7796. "Trusts" defined.**—A "trust" is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons, or either two or more of them for either, any or all of the following purposes:

1. To create, or which may tend to create, or carry out restrictions in trade or commerce or aids to commerce or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.

2. To fix, maintain, increase or reduce the price of merchandise, produce or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities, or the business of insurance, or to prevent or lessen competition in aids to commerce, or in the preparation of any product for market or transportation.

4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, or to make any contract of insurance at a price below a common standard or figure, or by which they shall agree in any manner to keep the price of such article or commodity or charge for transportation or insurance, or the cost of the preparation of any product for market or transportation, at a fixed or graded figure, or by which they shall in any manner affect or maintain the price of any commodity or article or the cost of transportation or insurance, or the cost of the preparation of any product for market or transportation between them or themselves and others, to preclude a free and unrestricted competition among themselves or others in the sale or transportation of any such article or commodity,

or business of transportation or insurance, or the preparation of any product for market or transportation, or by which they shall agree to pool, combine or unite any interest they may have in connection with the sale or purchase of any article or commodity, or charge for transportation or insurance or charge for the preparation of any product for market or transportation, whereby its price or such charge might be in any manner affected.

6. To regulate, fix or limit the output of any article or commodity which may be manufactured, mined, produced or sold, or the amount of insurance which may be undertaken, or the amount of work that may be done in the preparation of any product for market or transportation.

7. To abstain from engaging in or continuing business, or from the purchase or sale of merchandise, produce or commodities partially or entirely within the state of Texas, or any portion thereof. [Acts 1903, p. 119, sec. 1.]

See *Texas Cent. R. Co. v. Hannay-Frerichs & Co.*, 104 T. 603, 142 S. W. 1163.

**Validity in general.**—The anti-trust acts of May 25, 1899 (Acts 1899, p. 246, c. 146) and March 31, 1903 (Acts 1903, p. 119, c. 94), held not indefinite and uncertain, but valid. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 918.

**Constitutionality.**—It seems that the statute is not violative of the fourteenth amendment. *Texas Brewing Co. v. Anderson* (Civ. App.) 40 S. W. 737.

The law prohibiting combinations in restraint of trade is not obnoxious to the fourteenth amendment to the United States constitution. *Waters-Pierce Oil Co. v. State*, 19 C. A. 1, 44 S. W. 936.

This article is not violative of state or national constitution. *Texas Brewing Co. v. Durrum* (Civ. App.) 46 S. W. 830.

The act of 1899 (Acts 1899, p. 246, c. 146) was not rendered unconstitutional by the act of May 27, 1899, to protect workmen in the right of organization, etc. This latter act engrafts no exception upon the anti-trust act of 1899 (Acts 1899, p. 262, c. 153). *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 926.

**Law in force.**—The sections of this and the act of 1899 (Acts 1899, p. 246, c. 146) providing penalties are penal, but cases prosecuted under them for the penalties are not criminal but civil and articles 228, 229, Code Cr. Proc., relating to limitation, do not apply in a civil action to recover the penalties. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 926.

The proviso in this act as to repeal preserved whatever rights the state had under the act of 1899 (Acts 1899, p. 246, c. 146), including the rights to enforce the penalties prescribed by that act. *Id.*

The repealing clause of this law repeals that part of the law of 1899 (Acts 1899, p. 246, c. 146) wherein the attorneys for the state are allowed as fees one-fourth of the penalties collected. *State v. Brady*, 102 T. 408, 118 S. W. 128-131, reversing (Civ. App.) 114 S. W. 896.

**Retroactive operation.**—This act has no retroactive effect so as to affect contracts previously entered into and executed. *Crump v. Ligon*, 37 C. A. 172, 84 S. W. 251.

Where a combination in restraint of trade is formed before the anti-trust law is passed, it can be restrained after the law is enacted and those guilty of carrying out the contract punished. *State v. M., K. & T. Ry. Co.*, 99 T. 516, 91 S. W. 215, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

**Combinations prohibited.**—Persons may, without malice toward any one, and for the lawful purpose of protecting each other from dishonest or insolvent customers, and otherwise actually assisting each other in the conduct of their business, agree that each, upon the request of the other, would refuse to deal with any person. *Delz v. Winfree*, 80 T. 400, 16 S. W. 111, 26 Am. St. Rep. 755; *Delz v. Winfree*, 25 S. W. 50, 6 C. A. 11.

There must be a "combination"—a union or association of capital, skill or acts. *Gates v. Hooper*, 90 T. 563, 39 S. W. 1079. See *Queen Ins. Co. v. State*, 86 T. 264, 24 S. W. 397, 22 L. R. A. 483; *Coal Co. v. Lawson*, 89 T. 394, 32 S. W. 871, 34 S. W. 919; *Welch v. Windmill Co.*, 89 T. 653, 36 S. W. 71; *Brewing Co. v. Templeman*, 90 T. 277, 38 S. W. 27; *Fuqua v. Brewing Co.*, 90 T. 298, 38 S. W. 29, 750, 35 L. R. A. 241.

Equity will not compel an accounting between partners for profits growing out of an illegal contract to restrict trade, etc. *Wiggins v. Bisso*, 92 T. 219, 47 S. W. 637, 71 Am. St. Rep. 837.

If the combination was made and its object was to restrain trade and create a monopoly, the statute denounces it no matter if the immediate result is to lower prices. The object of the law is to guard the commerce and trade of the state. The getting of a city ordinance enacted by a city council extending the lives of corporations for a long period is a circumstance which may be shown to prove a conspiracy against trade. Although a party may not be alleged to be in the conspiracy, yet when the facts establish a conspiracy and show that he was a party to it, his acts and declarations made to further the common design can be shown. *San Antonio Gas Co. v. State*, 22 C. A. 118, 54 S. W. 289.

Where an agreement in violation of the anti-trust law has been made, and one party thereto pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement and of entering into it, so that the parties thereto are liable as aiders and abettors and are responsible for the acts of each and all within this article. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

**Contract not to engage in business.**—A promise by a merchant to the purchaser of his stock to retire from business in the town for one year does not constitute a trust. *Gates v. Hooper*, 90 T. 563, 39 S. W. 1079.

An agreement not to engage in a particular business for two years is not in violation of the trust law, or against trade. *Erwin v. Hayden* (Civ. App.) 43 S. W. 610.

An agreement that if defendant ceased to teach music in plaintiff's school that he would not teach in a certain town is a binding contract and is not in violation of the foregoing article. *Patterson v. Crabb* (Civ. App.) 51 S. W. 870.

A contract of seller, on the sale of merchandise and goods to refrain from such business for twenty years within the county in which the sale is made, is not invalid as an unreasonable restraint of trade. *Tobler v. Austin*, 22 C. A. 99, 53 S. W. 706.

An agreement by a doctor not to practice his profession within ten miles of a certain town for ten years is not void, as against public policy, at common law, and is not in conflict with the law to prevent a combination in restraint of trade. *Wolff v. Hirschfeld*, 57 S. W. 572, 23 C. A. 670.

An agreement by an owner, on sale of his business and good will, not to re-enter such business within a specified time at a certain place, is not void as in restraint of trade. *Comer v. Burton-Lingo Co.* (Civ. App.) 58 S. W. 969.

This law does not apply when one sells his business and good will to a single person or firm on condition that the purchaser will not engage in the same kind of business for a limited time at a specified place. It prohibits any combination having for its purpose the doing of either of the things specified, without regard to the intention of the parties or of the immediate effect of the combination on trade and commerce. *Id.*

A promise by a partner to his copartner, purchasing the business of the firm, not to engage in such business in that town so long as the copartner remains in the business in the town, is not void as in restraint of trade, at common law. *Crump v. Ligon*, 34 S. W. 250, 37 C. A. 172.

An agreement by the seller of a cotton gin and gristmill not to re-engage in that business so long as the purchasers operated it was not in violation of this article. *Malakoff Gin Co. v. Riddlesperger* (Civ. App.) 133 S. W. 519.

**Interstate commerce.**—Where manufacturers in another state sell to dealers in Texas on an order from the latter, and the goods are delivered in Texas on a contract on the part of the sellers not to sell similar goods to any one in a named county for a specified time except the purchasers of the bill it is an interstate transaction and the Texas anti-trust laws do not apply. *Eclipse Paint & Mfg. Co. v. New Process Roofing & Supply Co.*, 55 C. A. 553, 120 S. W. 533.

Where goods sold and contemplated to be sold under a contract in restraint of trade were to be shipped from a sister state to Texas and there mingled with other goods of the buyer in Texas to become a part of the buyer's stock and to be there sold at retail, and the contract was made with the knowledge and purpose and intent of all the parties thereto that that should be done, the parties were liable for a violation of this article, as against the objection that the transaction was interstate commerce. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

A petition, in an action by the state against a foreign corporation for a violation of the anti-trust act of 1903 (Acts 1903, c. 94), which alleged that the foreign corporation was a manufacturer of farming implements and vehicles; that it contracted with a dealer in the state in such articles to give him the exclusive sale of its goods, the latter agreeing not to buy or sell any other makes of like goods; that the foreign corporation had traveling salesmen soliciting business throughout the state; that the contract was signed by one of the salesmen; and that the foreign corporation was a wholesale dealer in farming implements and vehicles—was sufficient as against a general demurrer to show that it was the purpose of the foreign corporation to sell goods under the contract at the residence of the dealer in Texas, and that it was its purpose that the contract should be carried into effect in Texas, so that the transaction was not interstate commerce, but was subject to the state anti-trust laws. *Id.*

**Contracts with carriers.**—A contract of railroad company to ship 66 per cent. of output of salt of a company at as low rate as any other company held not void as against public policy. *Texas & P. Ry. Co. v. Texas Short Line Ry. Co.*, 35 C. A. 387, 80 S. W. 567.

A railroad company has the right to give one person the privilege of soliciting on its trains the transfer business of the passengers on such trains, and to exclude another from engaging in the same business on its trains. By so doing it does not violate the anti-trust law. *Lewis v. W. M. W. & N. W. Ry. Co.*, 36 C. A. 48, 81 S. W. 112, 113.

A contract between a railway company and a sleeping car company, whereby the former grants the latter the exclusive right to furnish sleeping cars to be used on the railway company, and on all lines controlled by it, and all roads which it might subsequently acquire or operate, is not in restraint of trade and does not violate the anti-trust law. *Ft. Worth & D. C. Ry. Co. v. State*, 99 T. 34, 87 S. W. 341, 70 L. R. A. 950.

Article 6616 authorizes express companies to pursue their business on all the railways controlled by state legislation with equal and reasonable facilities and accommodations and upon equal and reasonable rates, and any combination of the kind denounced by the anti-trust statute, the carrying out of which would limit or narrow such scope, is necessarily one to create or carry out a restriction in the free pursuit of the business. Hence an agreement by a railroad company to give one express company "exclusive privileges" and bound itself not to contract with other express companies to do an express business on its road violates this article. *State v. M., K. & T. Ry. Co.*, 99 T. 516, 91 S. W. 215, 5 L. R. A. (N. S.) 783, 13 Ann. Cas. 1072.

An agreement between carriers and associations and citizens of a city binding the carriers to sell excursion tickets at a special low rate for certain occasions held not to contravene the state or federal anti-trust laws. *Lytle v. Galveston, H. & S. A. Ry. Co.*, 100 T. 292, 99 S. W. 396, 10 L. R. A. (N. S.) 437.

**Contracts for sale of goods.**—Under this article a petition, which alleges that a manufacturer of farm implements and vehicles entered into a contract with a dealer therein whereby the manufacturer agreed to give the dealer the exclusive sale of its product, and whereby the dealer agreed not to buy or sell any other makes of like goods, and that the manufacturer and dealer carried the contract into execution to the injury of the people, charges a violation. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

An agreement whereby plaintiff was to give defendant the sole and exclusive right to sell certain automobiles and supplies in a fixed territory for a given length of time is not in violation of this article defining a trust as a combination of capital, skill, or acts by two or more persons for specified purposes; there being no combination in this case. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

**Exclusive franchise.**—A city held not to have express or implied power to grant to a waterworks company an exclusive franchise to furnish water to the city for thirty years. *Ennis Waterworks v. City of Ennis* (Civ. App.) 136 S. W. 513.

**Ordinance regulating billboards.**—The anti-trust laws have no application to the questions raised in a proceeding to test the constitutionality of an ordinance regulating the size, location, and construction of billboards. *Ex parte Savage* (Cr. App.) 141 S. W. 244.

**Reservation in dedicatory deed as to use of streets.**—A reservation in dedicatory deeds of the right in the grantors to the exclusive use of the streets and alleys so dedicated for the maintenance of street railroads, lighting, sewers, gas, telephones, etc., held contrary to public policy, as tending to create a monopoly. *Jones v. Carter*, 45 C. A. 450, 101 S. W. 514.

**Art. 7797. "Monopoly" defined.**—A monopoly is a combination or consolidation of two or more corporations when effected in either of the following methods:

1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in the first article of this chapter.

2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. [*Id.* sec. 2.]

**What are monopolies.**—A monopoly is not only an exclusive right granted by the state to a few of something which was before of common right, but embraces a combination, regardless of form, the tendency of which is to prevent competition and control prices to the detriment of the public. *Jones v. Carter*, 45 C. A. 450, 101 S. W. 514.

Municipal ordinance regulating the size, location, and construction of billboards held not in conflict with Const. art. 1, § 26, prohibiting monopolies. *Ex parte Savage* (Cr. App.) 141 S. W. 244.

Where neither party to a contract giving an exclusive selling agency in specified territory was a corporation, and there being no evidence of a combination or consolidation, the agreement was not in violation of this article. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

**Art. 7798. Conspiracies against trade, what constitutes.**—Either or any of the following acts shall constitute a conspiracy in restraint of trade:

1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity.

2. Where any two or more persons, firms, corporations or association of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons. [*Id.* sec. 3.]

**Conspiracy defined.**—A "conspiracy," within this article, is a combination between two or more persons to do an unlawful act or to do a lawful thing in an unlawful manner. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

**Constitutionality.**—Acts March 30, 1889, and April 30, 1895, prohibiting combinations in restraint of trade, held not a violation of Const. U. S. Amend. 14. *Waters-Pierce Oil Co. v. State*, 19 C. A. 1, 44 S. W. 936.

**Restraint of trade.**—Trade as used in the statute is synonymous with traffic—the buying and selling of articles of commerce. The term does not include an occupation or employment. *Queen Ins. Co. v. State*, 86 T. 250, 24 S. W. 397, 22 L. R. A. 483.

Any combination in restraint of trade is unlawful. The prohibition applies to every article of usual and general consumption and of daily use among the people, and this is a matter of common knowledge. *Anheuser-Busch Brewing Ass'n v. Houck* (Civ. App.) 27 S. W. 692; *Id.*, 87 T. 647, 30 S. W. 869.

A combination which operates to create and carry out restrictions in trade and to prevent competition is within the statute. *Coal Co. v. Lawson*, 89 T. 394, 32 S. W. 871, 34



S. W. 919; *Brewing Co. v. Templeman*, 90 T. 277, 38 S. W. 27; *Fuqua v. Pabst Brewing Co.*, 90 T. 298, 38 S. W. 29, 750, 35 L. R. A. 241.

A contract between A. and B., by which A. agrees not to sell any beer other than that furnished by or with the consent of B. and B. agrees to sell to no other person at two towns at which A. carries on his business, is prohibited by this statute. *Texas Brewing Co. v. Anderson* (Civ. App.) 40 S. W. 737.

A covenant by a grantor not to allow the sale of intoxicating liquors in the same block, held not void as in restraint of trade. *Anderson v. Rowland*, 18 C. A. 460, 44 S. W. 911.

An agreement to sell only a certain product made by the buyer in consideration that the seller would sell to no other person in a certain town is in restraint of trade and prohibited. *Texas Brewing Co. v. Durrum* (Civ. App.) 46 S. W. 880.

A contract by which a patentee grants to a licensee the exclusive right to build, weave, and construct wire fences in specified territory, and which binds the licensee to purchase the wire, pickets, and fence machines from the patentee, does not violate the statute against trusts. *Clark v. Cyclone Woven Wire Fence Co.*, 22 C. A. 41, 54 S. W. 392.

A contract between a foreign corporation, and a citizen of Texas, which gives the latter the exclusive right to sell goods of the former in Texas and that provides that the purchaser will not buy from anyone, except said corporation, such goods, and that the said goods shall not be used or sold or otherwise disposed of by the purchaser outside of a certain territory is contrary to law and void. *Pasteur v. Vaccine Co. v. Burkey*, 22 C. A. 232, 54 S. W. 804.

Under statute avoiding contracts against trade, a broker may not recover for services in securing an agreement between competitors to maintain prices. *Street v. Houston Ice & Brewing Co.* (Civ. App.) 55 S. W. 516.

An agreement not to sell beer to anyone else than the person to whom the sale was made within a certain designated territory, contributory to his place of business does not violate the anti-trust law. *Vandeweghe v. Am. Brewing Co.* (Civ. App.) 61 S. W. 527.

An agreement of a manufacturer with a dealer not to sell vehicles to any other person within a certain territory violates the anti-trust law and is void. *Troy Buggy Works Co. v. Fife & Miller* (Civ. App.) 74 S. W. 956.

Where the contract was that the retailer would handle the goods of wholesaler exclusively except so far as he might purchase cheaper or inferior class of tin goods and that the wholesaler would not sell to anyone else in retailer's city, so that the latter should have exclusive control of retail business in the city in certain lines, it violated this law and was therefore void. *Simmons & Co. v. Terry* (Civ. App.) 79 S. W. 1103.

A contract of sale and purchase entered into by two parties wherein the seller agrees not to sell the same kind of goods in three specified cities until the purchaser had disposed of the goods bought from the seller is not in violation of the anti-trust law (Acts 1899, p. 246, c. 146), and the notes given by the purchaser for the goods are not uncollectible under that act. *Norton v. W. H. Thomas & Co.*, 99 T. 578, 91 S. W. 780; *Id.* (Civ. App.) 93 S. W. 712.

An agreement by a photographer to furnish a grocer trading tickets each entitling the holder to a photo art calendar when presented countersigned by the grocer, and not to sell any other local grocer such tickets does not violate this law. *Forrest Photographic Co. v. Hutchinson Grocery Co.* (Civ. App.) 108 S. W. 768.

A contract wherein it is agreed that a purchaser shall have the exclusive right to sell a certain article in a certain described territory is illegal and void. *Gust Feist Co. v. Albertype Co.* (Civ. App.) 109 S. W. 1140.

A contract whereby the owner of a plantation gives another the exclusive right to sell merchandise on his premises does not violate this law because the right to sell upon the premises of another is not given by law, but by consent of the owner. *Redland Fruit Co. v. Sargent*, 51 C. A. 619, 113 S. W. 330.

A manufacturer in another state sold souvenir albums to firm in Galveston and agreed not to sell to any one else in Galveston for the period of one year. This contract did not violate this law. *Albertype Co. v. Gust Feist Co.*, 102 T. 219, 114 S. W. 792.

A contract between the owner of goods and another, whereby such other person was to deal with the goods for one year and then turn them back to the owner, held not void as against public policy. *Holder v. Shelby* (Civ. App.) 118 S. W. 590.

A lease of saloon property binding the lessor not to lease other property in the same street to others for the same business is not invalid under this article. *Wheatley v. Kol-lauer* (Civ. App.) 133 S. W. 903.

Under this article, restrictions in trade are prohibited without regard to their immediate effect on trade. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

Under this article a contract between plaintiff and defendant grain dealers, whereby plaintiff agreed not to buy grain from the growers thereof or from curbstone brokers or other persons not regularly engaged in the grain business was void as contravening the statute. *Star Mill & E. Co. v. Ft. Worth Grain & E. Co.* (Civ. App.) 146 S. W. 604.

Where neither party to the contract was engaged in buying or selling automobiles or any other article of merchandise, a contract whereby plaintiff gave defendant the exclusive right to sell certain machines and supplies in a designated locality for a given length of time is not in violation of this article. *Nickels v. Prewitt Auto Co.* (Civ. App.) 149 S. W. 1094.

Acts of defendant, a dealer in eggs, in writing to the express company which employed plaintiff, and whose rules forbade him to engage in such business on his own account, resulting in stopping plaintiff's personal activity in such business, and reducing his profits and in his final discharge, without malice or interference with his customers, held proper competition, and not actionable as an interference with plaintiff's business. *Swift & Co. v. Allen* (Civ. App.) 151 S. W. 645.

A contract giving plaintiff the exclusive right to bottle "Jersey-Creme," a drink, in a certain part of the country, by which the plaintiff agreed to use defendant's copyrighted labels and bottles and to buy the syrup for making such drink from the defendant, was a "conspiracy in restraint of trade" within this article; the bottles and labels being only

incidentals, and "Jersey-Creme" being a "commodity" or "article of merchandise," and since it indirectly conferred upon appellee the exclusive right to purchase and resell the syrup. *Jersey-Creme Co. v. McDaniel Bros. Bottling Co.* (Civ. App.) 152 S. W. 1187.

**Art. 7799. Acts and things mentioned declared illegal.**—Any and all trusts, monopolies and conspiracies in restraint of trade, as herein defined, are prohibited and declared to be illegal. [Id. sec. 4.]

**Art. 7800. Charters forfeited.**—Any corporation holding a charter under the laws of the state of Texas which shall violate any of the provisions of this chapter shall thereby forfeit its charter and franchise, and its corporate existence shall cease and determine. [Id. sec. 5.]

**Validity.**—That anti-trust statutes have no application to interstate commerce held not to affect the power of the court to apply them to domestic commerce, so as to forfeit permit of foreign corporation for violation thereof. *Waters-Pierce Oil Co. v. State*, 19 C. A. 1, 44 S. W. 936.

The (anti-trust) law tested by the decision of the United States (in the Connolly Case) is valid to the extent that it authorizes the state to revoke the license of a foreign corporation or to forfeit the charter of a domestic corporation for acts done which are forbidden by the anti-trust law. *State v. Shippers' Compress & Warehouse Co.*, 95 T. 603, 69 S. W. 61.

**Art. 7801. Attorney general to institute quo warranto proceedings.**—For a violation of any of the provisions of this chapter, or any anti-trust laws of this state, by any corporation, it shall be the duty of the attorney general, upon his motion and without leave or order of any judge or court, to institute suit or quo warranto proceedings in Travis county, or at the county seat of any county in the state which the attorney general may select, for the forfeiture of its charter rights and franchises, and the dissolution of its corporate existence; and for such purposes, venue is hereby given to each district court in the state of Texas. [Id. sec. 6. Amended Acts 1909, p. 281.]

**Art. 7802. Successors to defaulting corporations prohibited from doing business.**—When a corporation organized under the laws of this state shall have been convicted of a violation of any of the provisions of this chapter, and its charter and franchise has been forfeited, as provided in article 7800, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. [Acts 1903, p. 119, sec. 7.]

**Art. 7803. Foreign corporations prohibited from doing business.**—Every foreign corporation violating any of the provisions of this chapter is hereby denied the right and is prohibited from doing any business within this state; and it shall be the duty of the attorney general to enforce this provision by injunction or other proceedings in the district court of Travis county, in the name of the state of Texas. [Id. sec. 8.]

**In general.**—The courts of Texas have the power of interpretation of the statutes of Texas. What they say the statutes of that state mean, we must accept them to mean, whether it is declared by limiting the objects of their general language or by separating their provisions into valid and invalid parts. *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 20 Sup. Ct. 518, 44 L. Ed. 657.

A corporation is the creature of the law and none of its powers are original. They are precisely what the incorporating act has made them and can only be exerted in the manner in which that act authorizes. In other words, the state prescribed the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations. Id.

The charter of a corporation confers its powers and the means of executing them, and such powers and means can only be exercised in other states by the permission of the latter. Id.

Having no absolute right of recognition in other states, but depending for such recognition and enforcement of its contract upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion. Id.

A corporation does not have the rights of its personal members and can not invoke that provision of section 2, article 4, of the constitution of the United States which gives to the citizens of each state the privileges and immunities of citizens of the several states. The statute of 1889 therefore was a condition upon the plaintiff in error (the *Waters-Pierce Oil Company*), within the power of the state to impose, and whatever its limita-

tions were upon the power of contracting, whatever its discriminations were, they became conditions of the permit and were accepted with it. The statute was not repealed by the statute of 1895. The only substantial addition made by the latter was to exclude from its provisions organizations of laborers for the purpose of maintaining a standard of wages. *Id.*

The act of 1895 is either constitutional or unconstitutional. If it is constitutional the plaintiff in error (the Waters-Pierce Oil Company) has no right to complain of it. If unconstitutional it does not affect the act of 1889, and that imposes valid conditions upon the plaintiff in error, and their violation subjected its permit to do business in the state to forfeiture. *Id.*

Foreign corporation held no less responsible for infraction of anti-trust law by its agent because in so doing the agent's acts involved a criminal responsibility. *Waters-Pierce Oil Co. v. State*, 19 C. A. 1, 44 S. W. 936.

So much of the anti-trust statutes of 1889 and 1899 as authorize the cancellation and forfeiture of a charter or of permit to do business within the state is constitutional and valid. *National Cotton Oil Co. v. State* (Civ. App.) 72 S. W. 615.

**Art. 7804. Quo warranto proceedings.**—The provisions of title 114, to prescribe the remedy and regulate the proceedings by quo warranto, etc., shall, except in so far as they conflict herewith, govern and control the proceedings when instituted to forfeit any charter under this title. [Id. sec. 9.]

**Art. 7805. Successor to defaulting foreign corporation prohibited from doing business.**—When any foreign corporation has been convicted of a violation of any of the provisions of this chapter, and its right to do business in this state has been forfeited, as provided in article 7803 of this chapter, no other corporation to which the defaulting corporation may have transferred its properties and business, or which has assumed the payment of its obligations, shall be permitted to incorporate or do business in Texas. [Id. sec. 10.]

**Art. 7806. Penalties; venue; fees of attorney general.**—Each and every firm, person, corporation or association of persons, who shall in any manner violate the provisions of this chapter, shall, for each and every day that such violation shall be committed or continued, forfeit and pay a sum of not less than fifty nor more than fifteen hundred dollars, which may be recovered in the name of the state of Texas in the district court of any county in the state of Texas, and venue is hereby given to such district courts; provided, that when any such suit shall have been filed in any county and jurisdiction thereof acquired, it shall not be transferred to any other county, except upon change of venue allowed by the court; and it shall be the duty of the attorney general, or the district or county attorney under the direction of the attorney general, to prosecute for the recovery of the same; and the fees of the district or county attorney for representing the state in all anti-trust proceedings, or for the collection of penalties for the violation of the anti-trust laws of this state, shall be ten per cent of the amount collected up to and including the sum of fifty thousand dollars, and five per cent on all sums in excess of the first fifty thousand dollars, to be retained by him when collected; and all such fees which he may collect shall be over and above the fees allowed under the general fee bill; provided, that the provisions of this chapter as to the fees allowed the prosecuting attorney shall not apply to any case in which judgment has heretofore been rendered in any court, nor to any moneys to be hereafter collected upon any such judgment heretofore rendered in any court, whether such judgment or judgments are pending upon appeal or otherwise; and provided, further, that the district or county attorney who joins in the institution or prosecution of any suit for the recovery of penalties for a violation of any of the anti-trust laws of this state, who shall, previous to the collection of such penalties, cease to hold office, he shall be entitled to an equal division with his successor of the fee collected in said cause; and in case of the employment of special counsel by any such district or county attorney, the contract so made shall be binding upon such prosecuting officer making such contract and thereafter retiring from office; provided, further, that in case any suit is compromised before any final

judgment in the trial court is had, then the fees herein provided for shall be reduced one-half. [Id. sec. 11. Amended Acts 1909, p. 281.]

**Repeal of law.**—The anti-trust law of 1903 (Gen. Laws, p. 119, c. 94) does not repeal the provision of the anti-trust act of 1899 (Acts 1899, p. 246, c. 146), giving the county attorney a fee of 25 per cent. of penalties recovered for violations of the latter law before this law took effect. *State v. Brady* (Civ. App.) 114 S. W. 896, reversed 102 T. 408, 118 S. W. 128.

**Ground of action.**—Where an action is brought to recover a penalty allowed by the anti-trust statutes of Texas, held, that no right of the state to the penalties could be based on the ground that the contract created a monopoly at common law or was in violation of the anti-trust statutes of the United States. *Ft. Worth & D. C. Ry. Co. v. State* (Civ. App.) 88 S. W. 370.

In an action by the state for the penalty prescribed by this article, the fact that the petition annexes, as an exhibit, the contract relied on, which contains blanks which could not be filled by parol evidence in a suit between the parties thereto will not render the petition bad; the making of the contract, and not the contract itself, being the foundation of the suit, so that, the contract being merely evidence, it is immaterial that it only supports the petition in part. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

**Inquiry as to offense.**—While the language of this statute is imperative, it necessarily implies that before the officer acts he must look into the facts and find not only that there is ground to believe that an offense has been committed but that enough evidence to a successful prosecution can be procured. *Lewright v. Bell*, 94 T. 556, 63 S. W. 623.

**Verdict.**—The verdict (\$1,623,900) is not so large, being under the maximum permitted by law, as to render it manifest that the jury were actuated by prejudice or other improper motives. *Waters-Pierce Oil Co. v. State*, 48 C. A. 162, 106 S. W. 926.

**Art. 7807. All agreements in violation of, void.**—Any contract or agreement in violation of the provisions of this chapter shall be absolutely void and not enforceable either in law or equity. [Acts 1903, p. 119, sec. 12.]

**Validity of contracts.**—Contract of insurance held valid, though insured is a member of a trust. *Springfield Fire & Marine Ins. Co. v. Cannon* (Civ. App.) 46 S. W. 375.

Indebtedness for hydrant rentals, under contract with the assignee of the vendee of the city's waterworks, held not void because the franchise granted to the vendee created a monopoly. *City of Tyler v. L. L. Jester & Co.* (Civ. App.) 74 S. W. 359.

**Right of action for breach of contract.**—Contract by which defendant was to sell no other goods than those of plaintiff held in restraint of trade, so that plaintiff could not recover for goods furnished. *S. S. White Dental Mfg. Co. v. Hertzberg* (Civ. App.) 51 S. W. 355.

Defendant cannot recover on claim in reconvention for damages for breach of a contract which is violative of statute against monopolies. *Pasteur Vaccine Co. v. Burkey*, 22 C. A. 232, 54 S. W. 304.

A contract by the president and teller of a bank to recover control of sufficient stock to secure the election of a satisfactory board of directors and their own re-election as officers, and to share the expense, is illegal, and expenses incurred thereunder by one cannot be recovered of the other. *Withers v. Edmonds*, 26 C. A. 189, 62 S. W. 795.

In view of this article the buyer could not maintain an action for damages for breach of a contract to sell grain which included provisions in restraint of trade contrary to the act. *Star Mill & E. Co. v. Ft. Worth Grain & E. Co.* (Civ. App.) 146 S. W. 604.

**Judgment.**—In an action on a note by a licensee, given in payment of property purchased under the license, where the licensee seeks a rescission on the ground of fraud and tenders property received under the license contract, he cannot complain of a judgment which requires him to return the property so tendered, even though contract is in violation of statute against trusts. *Clark v. Cyclone Woven-Wire Fence Co.*, 22 C. A. 41, 54 S. W. 392.

**Art. 7808. Actions under this chapter to have precedence.**—All actions authorized and brought under this chapter shall have precedence, on motion of the prosecuting attorney or the attorney general, of all other business, civil and criminal, except criminal cases where the defendants are in jail. [Id. sec. 16.]

**Art. 7809. Recovery against one does not bar recovery against others.**—Recovery against any person or persons for any violation of the provisions of this chapter shall not bar recovery against any other person or persons for the same offense. [Acts 1907, p. 456, sec. 20.]

## CHAPTER TWO

## EVIDENCE IN TRUST CASES

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| <p>Art.<br/>7810. Evidence preliminary to prosecutions, how secured.</p> <p>7811. Witnesses examined; books and papers produced, etc.; defendants produce witnesses, books, etc.</p> <p>7812. Evidence, how taken.</p> <p>7813. Judgment by default on failure to produce papers, documents, etc.</p> <p>7814. Notice to attorneys, failure to produce evidence; judgment by default, when.</p> | <p>Art.<br/>7815. Special commission to take testimony, when; powers of and compensation.</p> <p>7816. Ten days' notice to require witnesses to appear.</p> <p>7817. Witnesses testifying not subject to prosecution.</p> <p>7818. Provisions of this chapter cumulative.</p> |
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[See notes on the subject in general, at end of chapter.]

**Article 7810. Evidence preliminary to prosecutions, how secured.**—Upon the application of the attorney general, or of any of his assistants, or of any district or county attorney, acting under the direction of the attorney general, made to any county judge, or any justice of the peace, in this state, stating that he has reason to believe that a witness, who is to be found in the county in which such county judge or justice of the peace is an officer, knows of a violation of any of the provisions of the preceding chapter, it shall be the duty of the county judge, or of the justice of the peace, as the case may be, before whom such application is made, to have summoned and to have examined such witness in relation to violations of any of the provisions of said chapter, said witness to be summoned as provided for in criminal cases. The said witness shall be duly sworn; and the county judge, or justice of the peace, as the case may be, shall cause the statements of the witness to be reduced to writing and signed and sworn to before him, such sworn statement shall be delivered to the attorney general, his assistants, or the district or county attorney, upon whose application the witness was summoned. Should the witness summoned as aforesaid fail to appear, or to make statements of the facts within his knowledge, under oath, or to sign the same after it has been reduced to writing, he shall be guilty of contempt of court, and may be fined not exceeding one hundred dollars, and may be attached and imprisoned in the county jail until he shall make a full statement of all the facts within his knowledge with reference to the matter inquired about. Any person who shall testify before any county judge, or justice of the peace, as provided for in this article, or who shall testify as a witness for the state in the course of any statutory proceeding to secure testimony for the enforcement of the provisions of the preceding chapter, or in the course of any judicial proceeding to enforce the provisions of said chapter shall not be subject to indictment or prosecution for any transaction, matter or thing concerning which he shall so give evidence, documentary or otherwise. [Acts 1907, p. 221, sec. 15.]

**Witnesses.**—The provision in this section relating to the securing of testimony does not apply to an examination before a grand jury, or district court. It is confined to examinations before a justice of the peace. *Ex parte Andrews*, 51 Cr. R. 79, 100 S. W. 378. (This decision was rendered before the amendment was made.)

**Art. 7811. Witnesses examined; books and papers produced.**—Whenever any suit shall be instituted, or is pending in any court of competent jurisdiction in this state by the attorney general, or by any district or county attorney acting under his direction, against any corporation or corporations, individual or individuals, or association of individuals, or joint stock associations, or copartnerships under any law of this state, against trusts, monopolies or conspiracies in restraint of trade, or under any laws of this state regulating or controlling corporations, domestic or foreign, the attorney general, district or county at-

torney, as the case may be, may, in addition to the means now provided by law, examine and procure the testimony or evidence of witnesses and have books, papers and documents produced as evidence, in the manner herein provided. [Acts 1907, p. 16, sec. 1.]

**Art. 7812. Evidence, how taken.**—Whenever any action is commenced or is pending, as contemplated in the preceding article of this chapter, by the attorney general, or by any district or county attorney acting under his direction, and said officer representing the state, either upon the trial of the case, or in preparation for the trial thereof, desires to take the testimony of any officer, director, agent or employé of any foreign or domestic corporation or joint stock association proceeded against, or in case of any co-partnership, any member thereof, or in case of any individual or individuals, either of them, and the person or persons whose testimony is desired, resides either within or without the state of Texas, the said officer shall file in said court where the action is brought, either in term time or in vacation, or with any special commissioner, who may be appointed by the court to take testimony, as provided for in this act, a statement in writing setting forth the name or names and residence of the person or persons whose testimony he desires to take, and in a general way shall designate any books, papers or documents he desires produced, and the time when and place where, either within or without this state, he desires such person to appear and testify, or to produce books, papers and documents, if any are desired; and thereupon the judge of said court, or the commissioner, as the case may be, before whom said testimony is being or shall be taken, shall immediately issue a notice in writing, directed to the attorney or attorneys of record in said cause, or the agent, officer, or employé of any corporation or joint stock association, or directed to the attorney or attorneys of record of any co-partnership, individual or individuals, or to any member of such co-partnership, or to any individual or individuals, who are defendant or defendants in said action, notifying said attorney or attorneys of record, or officer, agent or employé, aforesaid, or member or members of any co-partnership, or individual, as herein provided, that the testimony of the person or persons named in said notice is desired, and requiring said attorney or attorneys of record, or such officer, agent or employé aforesaid, or member of such co-partnership, or any individual to whom said notice is delivered, or upon whom the same is served, to notify and have said witness or witnesses, whose testimony or evidence it is desired to take, at the place named in said notice, at the time fixed therein, before the court or special commissioner named, then and there to testify, and then and there to have and produce such books, papers and documents as are called for, and for any of the purposes herein provided; provided, that, if the taking of such evidence be not concluded on the day and date specified in said notice, the court or the commissioner, as the case may be, may continue the taking of same from day to day, or adjourn from day to day, at the same place, until the taking of such evidence has been concluded. [Id. sec. 2.]

**Art. 7813. Judgment by default on failure to produce books, papers, etc.**—Whenever any officer, director, agent or employé of any foreign or domestic corporation, or joint stock association, authorized to do business in this state, or any member of any co-partnership, or any individual, against whom suit has been filed, or is pending, as provided for in this chapter, or the attorney or attorneys of record of any such corporation, joint stock association, co-partnership, or individual, shall be notified in accordance with the provisions of this chapter that any of the books, papers or documents belonging to such corporation, joint stock association, co-partnership, or individual, are wanted before the court, or special commissioner, as provided in this chapter, it shall be

the duty of such defendant corporation, joint stock association, co-partnership, or individual, as the case may be, to produce and present, or cause to be produced and presented, as required in said notice, all such books, papers and documents belonging to any such defendant, or under such defendant's control, as may be specified in said notice, in court or before said special commissioner, at the time and place so specified; and, in the event of the failure or refusal of any such corporation, joint stock association, co-partnership or individual, to comply with any of the provisions of this article, it shall be the duty of the court, upon the motion of the officer representing the state, to strike out all the pleadings, answers, motions, reply or demurrer theretofore or thereafter filed in such case by such defendant corporation, joint stock association, co-partnership, or individual, as the case may be and render judgment by default against any such defendant. [Id. sec. 3.]

**Art. 7814. Notice to attorneys on failure to produce documents; judgment by default, when.**—Whenever any attorney or attorneys of record, or any agent, officer, or employé of any corporation or joint stock association, proceeded against as herein provided, shall be notified that any officer, director, agent or employé of any such corporation or joint stock association is wanted before said court or any special commissioner, as provided herein, to give his testimony or to produce any such books, papers or documents of said corporation or joint stock association, as the case may be, or if any attorney or attorneys of record of any co-partnership or individual shall be notified that any member or members of said co-partnership or any individual, who are defendants in any such action, are desired as witnesses, or to produce books, papers or documents before any court, or before any special commissioner appointed to take testimony in said proceeding, as herein provided, it shall be the duty of such attorney or attorneys of record, or any such officer, director, agent or employé to immediately notify any such person of the time and place where he shall attend and give his testimony, or produce any such books, papers or documents, if any are desired; and, if the person or persons whose testimony is desired as herein provided, shall fail to appear, or appearing shall refuse to testify, or shall fail to produce whatever books, papers or documents he or they may be ordered to produce, as before provided, then it shall be the duty of the court, upon motion of the attorney general, district or county attorney, as the case may be, on proof of such refusal, failure or dereliction, to strike out the answer, motion, reply, demurrer or other pleading theretofore or thereafter filed in such action, by said delinquent defendant, who has himself, or being a corporation or joint stock association, whose officer, agent, director or employé, as herein provided, has refused or failed to attend and testify, or to produce all books, papers or documents demanded, which were in the custody or subject to the control of such witness or witnesses, or corporation or joint stock association; and said court shall, in the event of any such refusal or failure, proceed to render judgment by default against any such defendant; provided, however, that if any such defendant shall file a sworn denial in writing, in said court, setting forth that such failure or refusal did not arise by reason of any fault or procurement of defendant, the court shall hear evidence upon that issue; and if the defendant shows to the satisfaction of the court that any witness who failed to attend did not do so at the instance or procurement of said defendant, or that the books, papers or documents demanded were not in its possession or control and could not be produced, and that such defendant had complied with all the provisions of this chapter, within such defendant's power to perform, then in that event the answer, motion, reply, demurrer, or other pleadings shall not be stricken out or judgment by default taken because of the failure of the witness to attend, who could not be so procured, or be-

cause of the failure to produce the books, papers or documents not in the possession or under the control of such defendant; but the court shall have the power to enter such further orders in respect to the matter in controversy as it may deem necessary for the proper administration of justice; provided, further, that, in any proceeding had before a special commissioner as herein provided, the certificate of the special commissioner showing the failure or refusal of any such witness or witnesses to appear and testify, or to produce any books, papers or documents desired, shall be sufficient prima facie evidence of such failure, refusal or dereliction on the part of any such defendant, when same is filed in court. Any witness attending any proceeding herein provided for in compliance with any notice or subpoena issued by authority of this act shall receive as compensation one dollar per day for each day of his attendance, and four cents per mile traveled, computed upon the shortest practicable route; any claim for fees and mileage shall be filed with the court, or special commissioner, and sworn to by said witness, and shall be taxed up as costs, and collected as other costs in civil cases. [Id. sec. 4.]

**Art. 7815. Special commission to take testimony; powers of; compensation.**—The court, or presiding judge thereof, in which any proceeding as herein provided is pending, in term time or in vacation, upon application therefor made by the attorney general, or district or county attorney acting under his direction, shall appoint some well qualified disinterested person as special commissioner to take testimony in any such case, at any point either within or without the state, as designated in such application, or where requested by either party to said cause of action, upon the issues joined in said cause. Such special commissioner shall have full power and authority to issue notices provided for in article 7812 of this chapter, and to issue subpoenas for witnesses, compelling the attendance of such witnesses, the production of books, papers or documents, to issue attachments, to punish for contempt to the same extent as provided by law for said court, to administer oaths to witnesses, to have all witnesses examined orally, which testimony shall be reduced to writing and may be taken down by a competent stenographer and transcribed, and shall be signed and sworn to by said witness. The person appointed as special commissioner in any case shall qualify by taking oath prescribed by the constitution of this state for officers, and shall, with all convenient speed, certify and return the testimony taken by him to the court appointing him; and said commissioner shall note all objections to testimony, and shall not exclude any testimony; and all questions as to the materiality or admissibility of same shall be reserved for the court trying the case; and such testimony so taken may be read in evidence upon the trial of the suit in which same was taken, subject to any legal objections which might be made to same. The compensation of such commissioner shall be his actual expenses in traveling and such fees as are allowed a notary public in taking depositions, to be taxed up as costs and collected in the same manner as now provided by law for district clerks in civil cases. [Id. sec. 5.]

**Art. 7816. Ten days' notice to require witnesses to appear.**—When any notice is issued and served, as provided for in this chapter, ten full days exclusive of the day of service shall elapse before any witness so requested shall be compelled to appear and testify, or produce any books, papers or documents called for; and, if the taking of testimony shall not be concluded on the date named in said notice, the witness or witnesses shall remain in attendance from day to day until same is completed or said witness is finally discharged by the court, or commissioner, as the case may be; service of said notice and the return thereon may be made by any sheriff or constable of this state, or by any dis-



interested person competent to make oath of the fact, and shall be made by said person executing the same by delivering to the person or persons, attorney or attorneys to be served, a true copy of such notice, and return of such service shall be indorsed on or attached to the original notice; it shall state when the same was served and the manner of service, and upon whom served, and shall be signed; and, if served by any person other than an officer, shall be sworn to by the party making the service before some officer authorized by law to take affidavits; and such affidavit shall be certified under the hand and official seal of such officer. [Id. sec. 6.]

**Art. 7817. Witnesses testifying not subject to prosecution.**—Any witness for the state, who shall testify or produce any books, papers or documents in any proceeding or examination under the provisions of this chapter, shall not be subject to indictment or prosecution for any transaction, matter or thing, concerning which he truthfully testifies or produces evidence, documentary or otherwise. [Id. sec. 7.]

**Art. 7818. Provisions of this chapter cumulative.**—The provisions of this chapter shall be cumulative of all laws of this state, and shall not be construed as repealing any other law relating to the taking of testimony or evidence; but shall be construed as providing an additional means of securing evidence for the enforcement of the laws, as herein provided. [Id. sec. 8.]

#### DECISIONS RELATING TO SUBJECT IN GENERAL

**Evidence of violation of the law.**—Evidence in action for violation of antitrust law held sufficient to connect corporation therewith. *Waters-Pierce Oil Co. v. State*, 19 C. A. 1, 44 S. W. 936.

The charter of a compress company, incorporated for constructing, purchasing, and maintaining cotton compresses in various counties of the state, held not subject to forfeiture, under the evidence, on the ground that its incorporation was procured for creating a monopoly in compressing cotton. *State v. Shippers' Compress & Warehouse Co.* (Civ. App.) 67 S. W. 1049.

The purchase of six cotton compresses by a cotton compress company on one day held not to show that the object of incorporation was to do a lawful act to effect an unlawful purpose,—the restraint of trade. *State v. Shippers' Compress & Warehouse Co.*, 95 T. 603, 69 S. W. 58.

Where an agreement in violation of the anti-trust law of 1903 (Acts 1903, c. 94) has been made, and one party pursues the course of conduct agreed on, the law presumes that the acts done by him were the result of the agreement, so that the parties thereto are liable. *State v. Racine Sattley Co.* (Civ. App.) 134 S. W. 400.

Evidence in an action by one grain dealer against another for breach of a contract to sell and deliver oats to plaintiff held to show that the contract bound plaintiff not to buy grain from the growers or other persons not regularly engaged in the grain business. *Star Mill & Elevator Co. v. Ft. Worth Grain & Elevator Co.* (Civ. App.) 146 S. W. 604.

## TITLE 131

## WAREHOUSES AND WAREHOUSEMEN

Art. 7819.	Who and what are public warehouses and warehousemen.	Art. 7821d.	Change of non-negotiable for negotiable receipt; how made.
7820.	Certificate and bond of public warehousemen.	7822.	No receipt without actual storage of goods.
7821.	Form, functions and record of warehouse receipts; duplicates, when issued.	7823.	Must deliver property immediately on production of receipt.
7821a.	Control by commissioner of insurance and banking; powers and duties.	7824.	Limitations of liability in receipts prohibited.
7821b.	Commissioner to provide uniform warehouse receipt for cotton; contents.	7825.	Force and effect of warehouse receipts; negotiable, etc.
7821c.	Liens to be stated in receipt; not in non-negotiable receipt; stamp.	7826.	Liability for damages.
		7827.	Limiting the operation of this law.

[In addition to the notes under the particular articles, see also notes of decisions relating to topic in general, at end of title.]

**Article 7819. Who and what are public warehousemen and warehouses.**—All persons, firms, companies or corporations who shall receive cotton, tobacco, wheat, rye, oats, rice, oil, or any kind of produce, wares, merchandise, or any description or personal property in store for hire, under the provisions of this Act, shall be deemed and taken to be public warehousemen; and all warehouses which shall be owned or controlled, conducted and managed in accordance with the provisions of this Act, shall be deemed and taken to be public warehouses, provided that a public warehouse for the storage of cotton may, within the meaning of this Act, include a lot or parcel of land inclosed with a lawful fence, the gates or entrances to which shall be kept securely locked at night. [Acts 1901, p. 251, sec. 1. Acts 1913, S. S., p. 93, sec. 2, amending Art. 7819, Rev. St. 1911.]

**Art. 7820. Certificate and bond of public warehousemen.**—The owner, proprietor, lessee or manager of any public warehouse, whether an individual, firm or corporation, before transacting any business in such public warehouse shall procure from the county clerk of the county in which the warehouse or warehouses are situated, a certificate that he is transacting business as a public warehouseman under the laws of the state of Texas, which certificate shall be issued by said clerk upon a written application, setting forth the location and name of such warehouse or warehouses, and the name of each person, individual, or a member of the firm, interested as owner or principal in the management of the same, or, if the warehouse is owned or managed by a corporation, the names of the president, secretary and treasurer of such corporation shall be stated, which application shall be received and filed by such clerk and preserved in his office, and the said certificate shall give authority to carry on and conduct the business of a public warehouse within the meaning of this Act, and shall be revokable only by the district court of the county in which the warehouse or warehouses are situated, upon a proceeding before the court, on complaint by written petition of any person, setting forth the particular violation of the law, and upon process, procedure and proof, as in other civil cases. The person receiving a certificate, as herein provided for, shall file with the county clerk granting same, a bond payable to the state of Texas, with good and sufficient surety, to be approved by said clerk, in the penal sum of five thousand dollars, conditioned for the faithful performance of his duty as a public warehouseman,—which said bond shall be filed and

preserved in the office of such clerk. [Acts 1901, p. 251, sec. 2. Acts 1913, S. S., p. 93, sec. 3, amending Art. 7820, Rev. St. 1911.]

**Art. 7821. Form and record of warehouse receipts; duplicates, when issued.**—On application of the owner or depositor of the property stored in a public warehouse, the warehouseman shall issue, over his own signature, or that of his duly authorized agent, a public warehouse receipt therefor, to the order of the person entitled thereto; which receipt shall purport to be issued by a public warehouse, shall bear date of the day of its issue, and shall state upon its face the name of the warehouse and its location, the description, quantity, number and marks of the property stored, where such receipt is for cotton it shall state the class and weight, and the date on which it was originally received in warehouse, and that it is deliverable upon the return of the receipt, properly indorsed by the person to whose order it was issued, and on payment of all charges for storage, and insurance, which charges shall be stated on the face of the receipt. All such receipts shall be numbered consecutively, in the order of their issue; and when such receipt is for cotton, the receipt shall state whether the cotton therein described is exposed to the weather or is under shelter; and a correct record of such receipts shall be kept in a well-bound book, which shall be, at all reasonable hours, open to examination by any interested person; and no two receipts bearing the same number shall be issued from the same warehouse during the same year, nor shall any duplicate receipts be issued, except in the case of a lost or destroyed receipt, in which case the new receipt shall bear the same date and number as the original, and shall be plainly marked on its face, "duplicate" and provided, that no such duplicate receipt shall be issued by the public warehouseman until adequate security acceptable to the warehouseman be deposited with or to the order of said warehouseman, to protect the party or parties who may finally hold the original receipt in good faith and for a valuable consideration. [Acts 1901, p. 251, sec. 3. Acts 1913, S. S., p. 93, sec. 4, amending Art. 7821, Rev. St. 1911.]

**Art. 7821a. Control by commissioner of insurance and banking; powers and duties.**—The supervision of public warehouses shall be under the control of the commissioner of insurance and banking, whose duty it shall be to prescribe all forms of receipts, certificates, and records of whatsoever description necessary in the conduct of the business of public warehouses; and in providing forms for handling those products which are of general commercial character, the said commissioner shall prescribe forms answering to all usual requirements of negotiable receipts of certificates. The commissioner of insurance and banking is hereby empowered and directed to make not less than one examination each year of all such public warehouses, the necessary expense of such examination or examinations to be paid by the warehouse. [Acts 1913, S. S., p. 93, sec. 5.]

**Art. 7821b. Commissioner to provide uniform warehouse receipt for cotton; contents.**—The commissioner of insurance and banking shall provide a uniform public warehouse receipt for cotton which shall be used by all public warehouses coming under the provisions of this Act, which said receipt shall conform in all respects to the provisions herein set out. In addition to the other provisions such receipt shall have a blank form on the back thereof, to be filled in and signed by the owner of the cotton showing whether or not such cotton is free from encumbrance or liens of any kind. [Id. sec. 6.]

**Art. 7821c. Liens to be stated in receipt; not in non-negotiable receipt; stamp.**—If there is any encumbrance or liens of any kind on said cotton at the time of its storage the nature and amount of same shall be clearly set out and it is hereby made the duty of the public warehouse-

man or his authorized agent issuing the receipt, to have said blank filled in and signed by the owner of the cotton before issuing a negotiable receipt against same; provided, however, such statement need not be made if a non-negotiable receipt is desired, but in such cases the public warehouseman issuing said receipt shall write or stamp across the face thereof the words "not negotiable." [Id. sec. 7.]

**Art. 7821d. Change of non-negotiable for negotiable receipt; how made.**—If a person holding a non-negotiable receipt for cotton as is herein provided for, shall desire to obtain a negotiable receipt in lieu thereof, he shall return said non-negotiable receipt to the public warehouse issuing same and thereupon shall comply in every respect with the provisions of this chapter relating to negotiable receipts, and upon compliance therewith a negotiable receipt shall be issued to him in lieu of said non-negotiable receipt, and said non-negotiable receipt thereupon shall be cancelled, and the word "cancelled" plainly marked in ink across the face thereof. [Id. sec. 8.]

**Note.**—Section 9 makes it a felony to insert a false statement as to liens.

**Art. 7822. No receipts without actual storage of goods.**—No public warehouse receipt shall be issued except upon the actual previous delivery of the goods in the public warehouse or on the premises, and under the control of the public warehouseman by whom it purports to be issued; and the name of the warehouse shall invariably be specified in such receipt. Acts 1901, p. 251, sec. 4. Acts 1913, S. S., p. 93, sec. 10, amending Art. 7822, Rev. St. 1911.]

**Art. 7823. Must deliver property immediately upon production of receipt.**—On the presentation and return to the warehouseman of any public warehouse receipt issued by him and properly indorsed, and the tender of all proper warehouse charges upon the property represented by it, such property shall be delivered immediately to the holder of such receipt; but no public warehouseman who shall issue a receipt for goods shall, under any circumstances or upon any order or guarantee whatsoever, deliver the property for which receipts have been issued, until the said receipt shall have been surrendered and cancelled, except in case of lost receipts, as provided for in section 4 [Art. 7821]; and, in default of the strict compliance with the provisions of this article, he shall be held liable to the legal holder of the receipt for the full value of the property therein described, as it appeared on the day of the default, and shall, furthermore, be liable to the special penalty herein provided. Upon delivery of the goods from the warehouse, upon any receipt, such receipt shall be plainly marked in ink across its face with the words "cancelled," with the name of the person cancelling the same, and shall thereafter be void, and shall not again be put in circulation. [Acts 1901, p. 251, sec. 5. Acts 1913, S. S., p. 93, sec. 11, amending Art. 7823, Rev. St. 1911.]

**Care of property stored.**—Compress company held bound to use ordinary care in storage of cotton delivered. *Loeb Compress Co. v. I. G. Bromberg & Co.* (Civ. App.) 140 S. W. 475.

**Duty as to delivery in general.**—The duty of a warehouseman to return the bailed goods stated, as well as his liability for not doing so. *Rex v. James* (Civ. App.) 131 S. W. 248.

**Control of property after transfer of receipt.**—A transfer of a bonded warehouse receipt for whisky places it beyond the transferrer's control, without giving notice to the warehousemen. *Friedman v. Peters*, 18 C. A. 11, 44 S. W. 572.

**Delivery to person not the holder of receipt.**—Where a compress company shipped cotton on the order of R., who was not the holder of the warehouse receipts, and was compelled to purchase other cotton for delivery to the holder of the receipts, R. was liable to it for the cotton so purchased. *National Bank of Denison v. Roundtree* (Civ. App.) 115 S. W. 639.

One receiving goods and issuing a receipt therefor held a bailee for any person to whom the receipt is transferred, and cannot justify a nondelivery to an assignee by proof of a delivery to the depositor without notice of the assignment. *Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 129 S. W. 1160.

A warehouseman held guilty of gross negligence in delivering the bailed goods to another. *Rex v. James* (Civ. App.) 131 S. W. 248.

**Art. 7824. Limitations of liability in receipts prohibited.**—No public warehouseman shall insert in the public warehouse receipt issued by him any language limiting or modifying his liabilities or responsibilities as imposed by the laws of this state, excepting, “not accountable for leakage or depreciation,” or words of like import and meaning. [Acts 1901, p. 251, sec. 6. Acts 1913, S. S., p. 93, sec. 12, amending Art. 7824, Rev. St. 1911.]

**Art. 7825. Force and effect of warehouse receipts; negotiable, etc.**—The receipt issued against property stored in public warehouses, as herein provided for shall be negotiable and transferable by endorsement in blank or by special endorsement, and delivery in the same manner and to the same extent as bills of exchange and promissory notes now are, without other formality; and the transferee or holder of such public warehouse receipt shall be considered and held as the actual and exclusive owner, to all intents and purposes, of the property therein described, subject only to the lien and privilege of the public warehouseman for storage and other warehouse charges; provided, however, that all such public warehouse receipts as shall have the words “not negotiable” plainly written or stamped on the face thereof, shall be exempt from the provisions of this article; and provided, further, that no public warehouseman shall issue warehouse receipts against his own property in his own warehouse; but, upon sale of such property in good faith may issue to the purchaser his public warehouse receipt in form and manner as herein provided, which issue and delivery of the receipt shall be deemed to complete the sale, and shall constitute the purchaser full owner, as aforesaid, of the property therein described. Nothing in this last clause shall be construed to exempt the issuer of said receipt for his own goods in his own public warehouse, from complying with and being subject in all respects, to all other articles of this chapter. [Acts 1901, p. 251, sec. 7. Acts 1913, S. S., p. 93, sec. 13, amending Art. 7825, Rev. St. 1911.]

**Negotiability.**—A cotton compress ticket held not negotiable. *Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank* (Civ. App.) 129 S. W. 1160; *Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank*, 105 T. 44, 143 S. W. 1142, 144 S. W. 1130.

**Rights of assignee of non-negotiable receipt.**—At common law the assignee of a non-negotiable warehouse receipt for cotton could not recover against the warehouseman because in the absence of notice of the assignment the assignee never became bailor to the warehouseman. *Stamford Compress Co. v. Farmers' & Merchants' Nat. Bank*, 105 T. 44, 143 S. W. 1142, 144 S. W. 1130.

An assignee of a non-negotiable warehouse receipt cannot recover against the issuing warehouseman for conversion of the stored goods, in the absence of notice to the warehouseman of the assignment. *Stephenville Compress Co. v. First Nat. Bank of Stephenville* (Civ. App.) 148 S. W. 335.

**Rights of assignee for security.**—A bank which held warehouse receipts for certain cotton as security held not to have lost the right to possession of the cotton by acceptance of a note on sale of the cotton. *National Bank of Cleburne v. Citizens' Nat. Bank*, 41 C. A. 535, 93 S. W. 209.

Receipts issued for cotton by a compress company to a railroad company and exchanged by the latter for bills of lading held by the bank for security gave the bank a right to possession of the cotton. *Id.*

A bank, which holds warehouse receipts to secure loans to the bailor, held not estopped to sue the warehouseman for delivery of the goods to the bailor, though the bank received money from the bailor, not knowing it was the proceeds from the goods. *Stephenville Compress Co. v. First Nat. Bank of Stephenville* (Civ. App.) 148 S. W. 335.

An assignee of warehouse receipts to secure loans to the bailor, in suing the warehouseman for conversion by delivering the goods to the bailor, was not bound to show the exact amount of the loans; they exceeding the amount of the judgment asked for. *Id.*

**Art. 7826. Liability for damages.**—Any, every and all persons, aggrieved by the violations aforesaid, shall have the right to maintain an action against the person or persons, corporation or corporations, so violating any of the provisions of this law, for the recovery of damages which he or they may have sustained by reason of such violation aforesaid, before any court of competent jurisdiction, whether such person or persons so violating shall have been convicted of criminal offense under

this law or not. [Acts 1901, p. 251, sec. 8. Acts 1913, S. S., p. 93, sec. 15, amending Art. 7826, Rev. St. 1911.]

**Duty to procure insurance.**—A contract to procure insurance on rice left to be milled and sold held to be implied by a charge for insurance. *Broussard v. South Texas Rice Co.* (Civ. App.) 120 S. W. 587.

In an action to recover for loss sustained by the failure to fully insure rice left with defendant to be milled and sold, evidence held to show that defendants, by their acts and dealings with plaintiff, had bound themselves to fully insure the rice. *Id.*

In an action for loss, sustained by the failure to fully insure rice, left with defendant to be milled and sold, in which plaintiff relies on an implied contract and trade customs to so insure, it is no defense that defendant secretly had never complied with the custom. *Id.*

In an action to recover for loss sustained by the failure to fully insure rice left with defendant to be milled and sold, evidence held sufficient to show that it was a custom of millers to collect so much on a sack of rice, and that the amount so collected was to pay for the full insurance of the rice. *Id.*

**Liability incidental to insurance contracts.**—Warehouseman, taking out insurance policy broad enough to cover property of another party stored with him, and under no obligation to insure such property, will not be charged with having money in trust for such other party, where a loss occurred which the insurance company settled, the amount received only covering the warehouseman's loss. *Pittman v. Harris*, 24 C. A. 503, 59 S. W. 1121.

Where a policy of insurance executed to a warehouseman covers property stored with him, which is destroyed by fire, the owner thereof must show that he elected to adopt the warehouseman's acts in procuring such insurance, and so notified him, before he can claim any benefit under such policy. *Id.*

A warehouseman, who had insured its property and that of a bailor for enough to cover the goods destroyed, held liable to him, having settled for less. *Southern Cold Storage & Produce Co. v. A. F. Dechman & Co.* (Civ. App.) 73 S. W. 545.

Insurance by a warehouseman held to inure to the benefit of a bailor. *Id.*

**Damages for negligence of warehouseman.**—Where the owner of corn stored in an elevator is unable, by reason of it being damaged through the negligence of the elevator company, to remove it at the end of the time for which it is stored and is required to pay storage for the additional time, he may recover back this excess storage as a part of his damage. *Arbuckle Bros. v. Everybody's Gin & Mill Co.* (Civ. App.) 148 S. W. 1136.

**Evidence in actions against warehouseman.**—Assignees of cotton warehouse receipts held not entitled to recover against the warehouseman for failure to deliver cotton, in the absence of other evidence than the assignment. *Sanger v. Travis County Farmers' Alliance*, 37 C. A. 321, 84 S. W. 856.

A party furnishing money with which to buy cotton and taking compress company's receipts as collateral held entitled to recover for conversion against compress company and the party to whom it delivered the number of bales belonging to plaintiff, although its receipt did not describe the particular cotton covered, nor did the evidence show the particular bales covered by the receipt. *First Nat. Bank v. Mineola State Bank* (Civ. App.) 155 S. W. 603.

**Art. 7827. Limiting operation of this law.**—Nothing in this law shall be construed to apply to private warehouses or to the issue of receipts by their owners or managers under existing laws, or to prohibit public warehousemen from issuing such receipts as are now issued by private warehousemen under existing laws; provided, that such private warehouse receipts issued by public warehousemen shall never be written on a form or blank indicating that it is issued from a public warehouse, but shall, on the contrary, bear on its face, in large characters, the words, "not a public warehouse receipt." [Acts 1901, p. 251, sec. 9. Acts 1913, S. S., p. 93, sec. 16, amending Art. 7827, Rev. St. 1911.]

#### DECISIONS RELATING TO TOPIC IN GENERAL

**Custom of smelting company as binding on ore shipper.**—An ore shipper held not bound by a custom of a smelting company whereby the company might appropriate to its own use ore shipped to it, as to the disposal whereof the shipper failed to give directions within fifteen days after its receipt by the company. *Consolidated Kansas City Smelting & Refining Co. v. Gonzales*, 50 C. A. 79, 109 S. W. 946.

**Delivery to cotton ginner as bailment.**—An arrangement by which a cotton ginner ginned cotton for a specified price, payable in money, and returned seed to his customers from a common mass at the rate of 64 pounds of seed for each 100 pounds of seed cotton ginned, was a bailment and not a sale. *First State Bank v. Barnett*, 48 C. A. 82, 106 S. W. 182.

## TITLE 132

## WEIGHERS—PUBLIC

[For fees, see Fees of Office.]

Art.		Art.	
7828.	Appointment and term of office.	7833.	Factor or commission merchant not to employ, etc.
7829.	Oath and bond.	7834.	Owner may weigh, etc.
7830.	Duties.	7835.	Weighers liable for damages, when.
7831.	Deputies.		
7832.	Shall keep accurate scales.		

**Article 7828. [4308] Appointment and term of office.**—The governor is authorized and required to appoint five persons as public weighers in every city which receives annually one hundred thousand bales of cotton on sale or for shipment. In all of the counties in this state in which there are no city or cities in which the governor is authorized to appoint public weighers, the commissioners' court of said county, when presented with a petition signed by a majority of the qualified voters of any justice precinct in their county, praying for the appointment or election of public weighers for said precinct, shall appoint, or order to be elected at the next general election, one or more suitable persons for public weighers for said justice precinct, the number of weighers for any one precinct to be determined by said court; and, should they appoint a public weigher for said justice precinct, he shall hold his office until the next general election, when there shall be elected for said justice precinct his successor, a public weigher, in the manner and form governing the election of other precinct officers; provided, the majority of the qualified voters shall be determined by a comparison with the whole number of votes cast at the last general election in such justice precinct for the office of governor; and it is further provided, that no person shall be elected or appointed a public weigher, unless he shall be a qualified elector in the city or justice precinct for which he is appointed or elected. All public weighers appointed by the governor or elected for justice precinct shall hold their office for the term of two years and until their successors are appointed or elected, as the case may be, and qualified, subject to removal for misconduct or incompetency in office; provided, no person shall be appointed or elected public weigher, or deputy public weigher, who is interested in the purchase or sale of cotton, wool, sugar or grain to be weighed, either as principal, agent, factor, commission merchant or employé; provided, further, that the commissioners' court may unite two or more justice precincts for the purpose of electing public weighers; provided, further, that, when the people of any county or subdivision thereof that has an elective weigher, may wish to abolish said office of public weigher, the commissioners' court of said county shall, upon petition to abolish said office signed by qualified voters at least one-third in number of the whole vote cast for governor at the last preceding election in the county or weigher's precinct, as the case may be, order an election to decide whether such office of public weigher of the county, or subdivision named in the petition, shall be abolished or not. Said election shall be held in the same manner as other elections; and, if a majority of the votes of the county, or subdivision of the county ordering said election, shall be cast in favor of abolishing any office of public weigher, the commissioners' court shall declare such office to be abolished within thirty days after the election; and another election for this purpose shall not be held for two years; and no election shall be held for this purpose until two years after said office of public weigher has been created. [Acts 1883, p. 83. Amended Acts 1899, p. 264.]

**Private weighing.**—See notes under Art. 7834.

**Petition in suit against unauthorized weigher.**—A petition in an action by a public weigher for statutory penalties and punitive damages on account of defendant weigh-

ing cotton for others held to state no cause of action. *Gray v. Eleazer*, 43 C. A. 417, 94 S. W. 911.

Under this article, which supplanted Sayles' Ann. Civ. St. 1897, art. 4308, and in view of Pen. Code 1911, art. 996, providing that no one except the regularly appointed weigher or his deputy shall weigh any cotton, wools, sugar, or hides required to be weighed, sold, or offered for sale in any city having a public weigher, the petition of a public weigher seeking to enjoin an unauthorized weigher need not allege that the weighing was not done at the request of the owner in order to entitle him to a preliminary injunction, the criminal statutes showing that it was the policy of the law to protect the public weigher, and the fees of his office and the last pronouncement of the legislature having omitted that qualification. *Perry v. Carlisle* (Civ. App.) 151 S. W. 1155.

Fees of public weighers.—See Art. 3879.

**Art. 7829. [4309] Oath and bond.**—Every person appointed or elected public weigher shall take the oath of office prescribed by the constitution for other officers, and shall execute a bond with good and sufficient sureties in the sum of five thousand dollars, to be approved by the commissioners' court of his county, and payable to the county judge, or his successors in office, conditioned upon the faithful and impartial performance of the duties of the office; provided, the bond for the public weigher for a justice precinct shall be two thousand five hundred dollars where not over five thousand bales of cotton are received for sale or shipment; provided, further, that the commissioners' court shall be authorized to accept as surety on such bond any surety company or corporation having a permit in this state to execute indemnity bonds. [Acts 1903, p. 216.]

See *Hedgepeth v. Hamilton Warehouse Co.* (Civ. App.) 128 S. W. 709.

**Art. 7830. [4310] Duties.**—When a person is appointed or elected public weigher, and shall have qualified as provided in article 7829, he shall enter upon the duties of his office and weigh, without unnecessary delay, all cotton, wool, sugar, hay, pecans, or grain, required to be weighed by him. He shall prepare a convenient place or places of easy access to the public in which to perform his duties. He shall mark upon the bales of cotton, hogshead or barrels of sugar, and bales of wool, or on tags attached thereto, the weights thereof in figures, and shall deliver to the owner, or his agent, of all cotton, wool, hay, sugar, pecans, or grain a certificate or a statement at the option of the owner in writing with ink or an indelible pencil, setting forth the weights of such cotton, wool, sugar, hay, pecans, or grain weighed by him, over his official signature. And where a certificate is issued it shall be negotiable by delivery and indorsement of the owner; and it shall be the duty of the public weigher issuing such certificate, if the produce for which the same was given is left with him on storage, to keep the produce for which the same was issued in his possession, and not remove or permit to be removed such produce until such certificate is returned and delivered to him; and he shall immediately stamp or mark in writing with ink such certificate, "canceled," and shall make a corresponding memorandum upon his book; provided, that, where the holder of such certificate desires to ship or receive from the possession of the public weigher a portion of the produce for which such certificate was given, he may deliver to the public weigher the certificate; whereupon it shall be the duty of the public weigher to deliver such portion of the produce, and, in lieu of the original certificate, he shall give the holder a new certificate for the balance remaining in his possession, and shall cause the original certificate to be canceled, and make the memorandum above provided for. He shall keep in a well-bound book a record of each bale of cotton, sack of wool, or barrel or hogshead of sugar, hay, grain, or pecans weighed by him, numbering the same, giving the gin's marks of cotton bales and number, with the name of the seller and purchaser thereof; which book shall be open at all reasonable hours for the inspection of the public; and he shall, upon application therefor by any one, issue certified copies of such certificate, for which he may charge the sum of ten cents, including certificate thereon. The provisions of this article shall also apply to private weighers



who are engaged in weighing for the public, as well as to public weighers. [Id.]

**Art. 7831. [4311] Deputies.**—The public weighers who shall have been appointed or elected under the provisions of this title, after they have taken the oath of office, and their bonds shall have been approved and recorded in the same manner as the bonds of county officers, shall have power and authority to appoint as many deputies as may be necessary to enable them to expeditiously weigh all cotton, wool, sugar, hay and grain offered to be weighed in the cities and justice precincts for which they are elected or appointed; provided, that no public weigher shall appoint deputies for any place or places not situated in the city or justice precinct for which he is elected or appointed. The public weigher for any justice precinct shall, on request of twenty bona fide citizens of any town, railroad station or other place in his precinct, who are engaged in the buying or selling of cotton, wool, sugar, hay, or grain, appoint a deputy for such town, railroad station, or other place. The deputies of public weighers shall take the oath required of their principals; and their principals may require of them a bond with good and sufficient sureties, in the sum of fifteen hundred dollars, to be approved by said principals, and conditioned for the faithful performance of their duties; and the said principals shall have the right to recover, in any court having jurisdiction, satisfaction on said bonds for any damages sustained by reason of said deputy or deputies failing to properly perform the duties of their office. [Acts 1899, p. 264.]

**Art. 7832. [4312] Shall keep accurate scales.**—All public weighers appointed or elected under the provisions of this chapter shall keep accurate and well adjusted scales and balances and give accurate weights, and shall have the same tested and certified to as provided by law. Such public weighers shall be held responsible for their official acts and the official acts of their deputies, and shall be liable at suit for all damages that may have accrued to any person or persons by reason of their failure to perform their official duties, or the violation of any of the provisions of this chapter; and their bonds shall not be void upon the first recovery, but may be sued on from time to time, in the name of the person or persons injured until the whole thereof is recovered. [Id.]

**Art. 7833. [4314] Factor or commission merchant not to employ.**—It shall not be lawful for any factor, commission merchant, or other person or persons, to employ any other than a public weigher, or his deputies, to weigh cotton, wool, sugar, hay, or grain, or other produce, sold or offered for sale in any city or justice precinct having a public weigher duly qualified; and any person or persons violating the provisions of this article shall be liable at the suit of the public weigher of such city or justice precinct to damages in any sum not less than five dollars for each bale of cotton, bale or sack of wool, ton of hay, or ton of grain, so unlawfully weighed, to be recovered in any court having jurisdiction thereof. [Id.]

**"Any factor, commission merchant or other person" construed.**—This statute does not prohibit a person engaged in storing cotton for customers, but who does not transact business as a factor or commission merchant, from weighing same for his customers. The expression, "any factor, commission merchant or other person or persons," means persons engaged in similar occupations or employment as factors and commission merchants. *Galt v. Holder*, 32 C. A. 564, 75 S. W. 569, 570.

This article does not apply to maintaining a public warehouse and purchasing and selling produce without authority to sell for his principal and without selling in behalf of the owner, for he is a mere "warehouseman," and not a "factor," who is an agent employed to sell goods consigned on delivery to him by or for his principal for a compensation commonly called a commission (citing *Words and Phrases*, vol. 3, p. 2640, and vol. 3, p. 7392). *Hedgepeth v. Hamilton Warehouse Co.* (Civ. App.) 128 S. W. 709; *Id.*, 104 T. 496, 140 S. W. 1084.

**"Other person or persons" construed.**—The law is not intended to prevent ginners and warehousemen from weighing cotton for their customers or farmers offering produce for sale from having it weighed by the purchasers or by any person who may be willing to weigh it, and the words "other person or persons" mean other of the same class as fac-

tors and commission merchants. *Whitfield v. Terrell Compress Co.*, 26 C. A. 235, 62 S. W. 118, 119.

**Persons against whom penalty directed.**—The law denounces the penalty against those who employ others than a public weigher to weigh cotton and other named produce sold or offered for sale, and is not directed against the person who weighs the produce. *Whitfield v. Terrell Compress Co.*, 26 C. A. 235, 62 S. W. 118.

**Art. 7834. [4316] Owner may weigh, etc.**—Nothing in this chapter shall prevent any person, firm or corporation from weighing his own cotton, wool, sugar, hay, grain, or pecans in person; provided, that in places where there are no public weighers appointed or elected any person who shall weigh cotton, wool, sugar, grain, hay, or pecans for compensation shall be required before weighing such produce to enter into a bond with at least two good and sufficient sureties, in the sum of twenty-five hundred dollars, approved and payable as in the case of public weighers referred to in this chapter, and conditioned that he will faithfully perform the duties of his office and turn over all property weighed by him on demand of the owner; provided, that this article shall not apply to merchant flouring mills. [Acts 1905, p. 117.]

**Constitutionality.**—The act is constitutional. *Davidson v. Sadler*, 23 C. A. 600, 57 S. W. 55.

**Private weighing.**—This law applies to all persons who buy and sell articles specified in the statute and does away with the right of private persons to weigh the articles mentioned in the statute for pay in places where there is a public weigher, except by the owner in person. *Davidson v. Sadler*, 23 C. A. 600, 57 S. W. 55.

Under the statute providing for public weights, held that, except in the specified cases, one may prosecute the business of private weigher. *Davis v. McInnis*, 35 C. A. 594, 81 S. W. 75.

The statutes creating the office of official weigher do not prohibit private persons from weighing produce, but only forbid factors, commission merchants, etc., from weighing the cotton of others consigned to them for sale; nor is such private weighing forbidden by this article. *Paschal v. Inman* (Civ. App.) 151 S. W. 569.

The business of private weighing is a legitimate vocation and falls within those ordinary occupations which a citizen is privileged to follow as an inalienable right, subject only to the valid exercise of the police power. *Paschal v. Inman* (Sup.) 157 S. W. 1158.

**Owner may procure any one to weigh.**—The owner of produce being present and acting for himself may procure any one to weigh his produce. *Martin v. Johnston*, 11 C. A. 628, 33 S. W. 306; *Ex parte Hunter*, 34 Cr. R. 114, 29 S. W. 482.

A private weigher can weigh cotton for the owner under an oral request from him. *Smith v. Wilson*, 18 C. A. 24, 44 S. W. 556.

**Fees of public weighers.**—See Art. 3879.

**Art. 7835. [4316a] Weigher liable for damages, when.**—Any weigher who qualifies under the preceding article, and shall violate any of the provisions or fail to comply with any of such provisions, shall be liable at the suit of any person injured upon his bond for damages that may have accrued to such person by such violation or failure. [Id.]

## TITLE 133

## WEIGHTS AND MEASURES

[See Mill Products, Title 92.]

Art.		Art.	
7836.	Legal standard weights and measures.	7841.	Counties to pay for same.
7837.	Weights of grain, etc.	7842.	License to make and vend.
7838.	Governor to procure standards.	7843.	Testing and stamping.
7839.	And furnish to counties.	7844.	False weights and measures.
7840.	Commissioner of agriculture, etc., may sell, etc.	7845.	Private informer may recover, when.
		7846.	Forfeitures merely cumulative.

**Article 7836. [5322] Legal standard.**—The standard of weights and measures adopted and used by the government of the United States is hereby declared the only legal standard of weights and measures in this state. [Act May 7, 1846, p. 180, sec. 4. P. D. 5352.]

**Art. 7837. [5323] Weights of corn, etc.**—The following shall be the legal number of pounds per bushel: Wheat, sixty pounds; corn, shelled, fifty-six pounds; corn in the ear, shucked, seventy pounds, unshucked, in the ear, seventy-two pounds; oats, thirty-two pounds; barley, forty-eight pounds; rye, fifty-six pounds, buckwheat, forty-two pounds; white beans, sixty pounds; Irish potatoes, sixty pounds; sweet potatoes, fifty-five pounds; onions, fifty-seven pounds; turnips, fifty-five pounds; dried apples, twenty-eight pounds; dried peaches, twenty-eight pounds; bran, twenty pounds; Hungarian grass seed, forty-eight pounds; hemp seed, forty-four pounds; flax seed, fifty-six pounds; stone coal, eighty pounds; charcoal, twenty-two pounds; salt, fifty pounds; clover seed, sixty pounds; timothy seed, forty-five pounds; cotton seed, thirty-two pounds; millet seed, fifty pounds; peaches, fifty pounds; tomatoes, fifty-five pounds; apples, forty-five pounds. [Acts 1883, p. 73. Amended Acts 1901, p. 271.]

**Art. 7838. [5324] Governor to procure standards.**—The governor shall procure, if necessary, at the expense of the state, a set of weights and measures in conformity with the standard used by the government of the United States, and cause the same to be deposited with the treasurer of the state, by him to be safely kept. [Act Feb. 13, 1858, p. 200, sec. 1. P. D. 5353.]

**Art. 7839. [5325] And furnish copies to counties.**—The governor is authorized to cause correct copies of such weights and measures to be made under such appropriate seal as he may adopt, and to deliver, or cause to be delivered, after the inspection and approval of some competent person by him appointed for that purpose, a full set of such weights and measures to the county judges of the several counties, on their application, and at the cost and expense of their respective counties. [Id. sec. 2. P. D. 5354.]

**Art. 7840. [5326] Commissioner of agriculture may sell.**—The commissioner of agriculture is authorized to sell sets, or parts of sets, of standard weights and measures heretofore manufactured in accordance with the preceding article of the Revised Statutes, at the cost of manufacturing. [Acts 1889, p. 32.]

**Art. 7841. [5327] Counties to pay for same.**—When such copies have been made, it shall be the duty of the several commissioners' courts to appropriate a sufficient amount of money to enable the county judges of the respective counties to pay for and procure a full set thereof for the use of their counties, and said county judges shall take charge of and keep the same. [Id. sec. 4. P. D. 5356.]

**Art. 7842. [5328] License to make and vend.**—The commissioners' courts of the several counties are authorized and directed to grant a license to such suitable person or persons as they may think proper to make and vend weights and measures agreeing with the standard furnished by the governor, under such rules and regulations as they may think proper to prescribe; provided, however, that no such weights and measures shall be sold or distributed, unless the same have been first examined and approved by the commissioners' court, or some competent person under their direction and approval. [Act May 7, 1846, p. 180, sec. 3. P. D. 5351.]

**Art. 7843. [5329] Testing and stamping.**—Any person desirous of having his weights and measures tested may have the same done by applying to the county judge, who, if he finds them correct, shall seal them with a seal to be provided by the commissioners' court for that purpose, on which shall be the capital letter "T," and also the letter with which the name of the county begins. [Act Feb. 13, 1858, p. 200, sec. 5. P. D. 5357.]

**Art. 7844. [5330] False weights and measures.**—Any person who shall sell by any weight, balance or measure that does not correspond to and agree with such copies, or who shall keep the same for the purpose of buying or selling thereby, shall forfeit and pay the sum of ten dollars for every month he may continue to keep the same, one-half of which shall go to the county in which such offense shall have been committed, and the other to the county judge, and it shall be his duty to sue for the penalty incurred by the commission of every such offense before some court of competent jurisdiction. [Id. sec. 7. P. D. 5359.]

**Art. 7845. [5331] Private informer may recover, when.**—If the county judge shall fail to sue for any such penalty within three months after the same shall have been incurred, any other person may sue therefor and recover one-half thereof for his own use and the other half for the use of the county. [Id. sec. 8. P. D. 5360.]

**Requisites of Judgment.**—In a qui tam action the judgment should be in favor of the informer, for the uses expressed in the statute, and not in favor of the state. *Doss v. State*, 6 Tex. 433.

**Art. 7846. [5332] Forfeitures merely cumulative.**—Nothing in the two preceding articles contained shall be construed to affect any provision of the Penal Code relating to the use of false weights and measures, nor shall a recovery of any forfeiture by civil action relieve an offender from criminal prosecution, or an action for damages resulting therefrom.

## TITLE 134

## WELLS—OIL, GAS AND WATER

<p><b>Art.</b> 7847. Wells, how cased. 7848. Abandoned wells to be filled, consequences of failure. 7849. Gas to be confined until utilized. 7850. Limitations as to use of gas for illuminating purposes. 7851. Penalties and disposition of fines. 7852. Duty of persons where salt water appears in wells.</p>	<p><b>Art.</b> 7853. District court, jurisdiction and supervision; may appoint superintendents, make regulations, etc. 7854. Suits and penalties, how brought. 7854a. Wells to be plugged or shut in, etc. 7854b. Petition to restrain waste of gas; duty of district judge.</p>
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[See notes of decisions relating to title in general, at end of title.]

**Article 7847. Wells, how cased.**—The owner or operator of any well being constructed for the production of petroleum oil, natural gas, or mineral water, shall, before drilling into the oil or gas bearing rock, incase such well with good and sufficient wrought iron or steel casing, in such manner as shall exclude all surface or fresh water from the lower part of such well from penetrating the oil or gas bearing rock. Should any well be drilled through the first into a lower oil or gas bearing rock, the same shall be cased in such manner as will exclude all fresh water above the last oil or gas bearing rock penetrated. [Acts 1899, p. 68.]

**Art. 7848. Abandoned wells to be filled.**—The owner or operator of any well constructed for either or any of the purposes named in the preceding article, when about to abandon or cease operating the same, and before drawing the casing therefrom, shall securely fill such well with rock, sediment or with mortar, composed of two parts sand and one part cement or other suitable material to the depth of two hundred feet above the top of the first oil or gas bearing rock, and also in such manner as shall prevent the gas and oil from escaping therefrom. If the owner or operator of any such well shall fail to or shall inefficiently comply with the provisions of this article, then the owner of the land upon which the well is situated shall forthwith comply therewith. If all the persons hereinbefore named shall fail to or inefficiently fill such well in the manner hereinbefore described, then it shall be lawful for any person, after written demand therefor to any of said persons, to enter the premises where such well is situated, take possession thereof and fully comply with the provisions of this article. The reasonable cost and expense thereof shall forthwith be paid by the owner or operator of the well, and on his default by the owner of the land. The amount of such reasonable cost and expense shall forthwith be a lien upon the fixtures and machinery and leasehold interest of the owner and operator of said well, as upon the title and interest of the land owner in the land upon which said well is situated, and may be recovered and enforced against said owner or operator, in the order named, in any court of competent jurisdiction. [Id. sec. 2.]

**Art. 7849. Gas to be confined until utilized; penalty.**—Any person, co-partnership, or corporation in possession, either as owner, lessee, agent or manager, of any well producing natural gas, in order to prevent the said gas from wasting by escape, shall, within ten days after penetrating the gas bearing rock in any well hereafter drilled, shut in and confine the gas in said well until and during such time as the gas therein shall be utilized for light or fuel or power; provided, that this shall not apply to any well that is operated for oil. Any person violating the provisions of this article shall be liable to a penalty of not less than \$300.00

for each offense, to be recovered, with the costs of suit, in a civil action in the name of the state of Texas, in any court of competent jurisdiction in the county in which the act shall be committed or omitted, and each day such violation continues shall be considered a separate offense. Such suit may be brought at the instance of any resident of the state of Texas, without security or liability of cost. The amount of said penalty, when collected, shall be paid one-half into the school fund of the county in which said suit is brought, and one-half to said person at whose instance said suit shall be brought. [Acts 1899, p. 68, sec. 3. Acts 1913, p. 212, sec. 1, amending Art. 7849, Rev. St. 1911.]

**Art. 7850. Limitations on use of gas for illuminating purposes.**—It shall be unlawful for any person, co-partnership or corporation to use natural gas for illuminating purposes by what are known as flambeau lights; but nothing herein shall prohibit the use of "Jumbo" burners, or any other burners consuming no more gas than such "Jumbo" burners, but the person, co-partnership, or corporation, consuming such gas and using such burners in the open air, shall inclose the same in glass globes or lamps; and any one using such gas in the open air, or in or around derricks, shall turn off said gas not later than eight o'clock in the morning of each day such lights are burning or used, and shall not turn on or relight the same between the hours of eight o'clock a. m. and five o'clock p. m. [Acts 1899, p. 68, sec. 4.]

**Art. 7851. Penalties; disposition of fines.**—Any person, co-partnership, or corporation violating any of the provisions of this chapter shall be liable to a penalty of one hundred dollars, to be recovered with the cost of suit in a civil action, in the name of the state of Texas, in any court of competent jurisdiction in the county in which the act shall be committed or omitted. Such suit may be brought at the instance of any resident of the state of Texas, without security or liability of cost. The amount of said penalty when collected shall be paid, one-half into the school fund of the county in which said suit is brought, and one-half to said person at whose instance said suit shall be brought. [Id. sec. 5.]

**Art. 7852. Duties of persons where salt water appears in wells.**—If any person or persons in this state, in boring any well or wells for oil, gas or mineral waters, shall pierce any cap-rock or other geological formation in such manner as to cause a flow of salt water or fresh water injurious to any oil well or wells already bored, or to any oil or gas deposits, and which shall or may probably result in the injury of such oil or gas field, or to such gas or oil wells already bored, such person or persons shall, if the flow of water can not be cased off, immediately abandon all work upon such well and plug and fill up the same in such manner and with such materials as will stop the flow of said water; and it shall be unlawful for any well owner, or person boring any such well, to remove the casing from the well drilled until the flow of water shall be stopped, either by casing off or plugging such well. The provisions of this article shall only apply where such cap-rock or other formation is pierced at a depth below the horizon at which oil or gas has already been discovered. If any well shall be abandoned from any cause, the same shall be securely plugged and sealed. [Acts 1905, p. 228, sec. 7.]

**Art. 7853. District courts; jurisdiction and supervision; may appoint superintendent, make regulations, etc.**—The district courts of each county in this state, and the judges thereof in vacation, shall have jurisdiction to enforce the provisions of this chapter; and they are hereby authorized and empowered, either in term time or in vacation, upon the application of any person or persons interested either as land owners, lessees of land or as well owners, in any oil or gas field in this state, in its discretion, to appoint some suitable person or persons as super-

intendent of such oil or gas field, and to require of such person a bond, the amount thereof to be fixed by the court, conditioned that such superintendent shall obey and carry out the rules, regulations, orders and decrees which may be from time to time prescribed and entered by said court for the protection of such oil or gas field, and the persons employed therein, from fire or other causes likely to be injurious to the properties and operations in such field, and with power and authority to enforce, under the orders of said court, a strict compliance by all persons with all the requirements of the laws of this state governing the boring and operation of oil or gas wells in oil or gas fields; and said courts are authorized and empowered to make from time to time such rules and regulations for the government of such oil and gas fields and the operations carried on therein, and the handling of the oil or gas products, as may, in the discretion of the court, be necessary or requisite for the protection of the several interests in said oil and gas field from fire or other probable injurious cause. The court may require of the persons who apply for the appointment of a superintendent of any oil or gas field or other protective order proper security for the payment of any and all costs of court, including the salaries of any superintendents, or necessary employes under him, as well as for such other costs and expense as may be necessary to be expended in the protection of such oil or gas field and enforcement of the orders of said courts. [Id. sec. 8.]

**Art. 7854. Suits and penalties, how brought.**—Any person or persons, co-partnership, corporation, or association of persons, violating any of the provisions of this chapter, or who shall fail or refuse to obey any order or decree, rule or regulation, made or promulgated by said district courts requiring any act to be done or omitted shall be liable to penalty of not less than five hundred dollars nor more than five thousand dollars, to be ascertained by the verdict of the jury of the court trying the cause; said sum to be recovered with the costs of suit in a civil action brought for that purpose in the name of the state of Texas, in any court of competent jurisdiction, in the county in which the act complained of shall have been committed or omitted; and such suit may be brought at the instance of any resident of the state of Texas, without security or liability for costs; and the amount of said penalty when collected shall be paid into the school fund of the county in which said suit is brought. Such suit may be brought at the instance of either the district attorney or the county attorney of the county in which the act was committed or omitted. [Id. sec. 9.]

**Art. 7854a. Wells to be plugged or shut in, etc.**—If the owner of any such well shall neglect or refuse to cause said well to be plugged or shut in, as herein provided, for a period of twenty days after a written notice to do so, (which notice may be served personally upon such owner, or may be posted in a conspicuous place at or near the well), it shall be lawful for the owner or operator of any adjacent or neighboring lands to enter upon the premises where said well is situate and to cause the same to be plugged if it be an abandoned well, or shut in if not abandoned, pursuant to the provisions hereof; and the reasonable cost and expense incurred in so doing shall be paid by the owner of said well, and may be recovered as debts of like amount are by law recoverable. [Acts 1913, p. 212, sec. 2.]

**Art. 7854b. Petition to restrain waste of gas; duty of district judge.**—Aside from and in addition to the penalties provided in this chapter, it shall be the duty of any district judge, whether in term time or vacation, to hear and determine any petition which may be filed to restrain the waste of natural gas in violation of this Act and to issue such mandatory or restraining orders as may in his judgment, be necessary. Such

petition may be filed by any citizen of the state of Texas and the same need allege no further financial interest than the petitioner possesses in common with all citizens of the state in the natural resources thereof. [Id. sec. 3.]

DECISIONS RELATING TO TITLE IN GENERAL

**Pollution of water on adjoining premises.**—The rule that any use by one of the percolating waters beneath his land may not be complained of by an adjoining landowner does not exempt from liability one who by negligence in construction or maintenance of his pipe lines for conducting oil allows it to get into the percolating waters under his land, whereby it gets into the well of an adjoining landowner. *Texas Co. v. Giddings* (Civ. App.) 148 S. W. 1142.

**Rights and liabilities incident to oil and gas in general.**—See notes under Title 93.

**Rights and liabilities incident to water wells in general.**—See notes under Title 73.



## TITLE 135

## WILLS

[See Estates of Decedents.]

Art.	Art.
7855. Persons competent to make a will.	7868. Term "children" includes descendants.
7856. What may be devised, etc., by will.	7869. Bequests to children, etc., not to lapse.
7857. Requisites of a will.	7870. Bequest to subscribing witness.
7858. Will wholly written by testator.	7871. Will in such cases may be proved, how.
7859. Revocation of written will.	7872. Husband or wife may authorize survivor to manage separate estate.
7860. Nuncupative will.	7873. Original wills, etc., to be deposited with county clerk, etc.
7861. Requisites of.	7874. To be recorded, etc.
7862. Notice and proof.	7875. Foreign wills.
7863. Testimony to be committed to writing, etc.	7876. Prima facie evidence, when.
7864. Wills of soldiers, etc., disposing of chattels.	7877. Shall take effect, etc.
7865. Posthumous children.	7878. Shall operate as notice.
7866. Children born after making of will.	
7867. The same.	

[In addition to the notes under the particular articles, see also notes of decisions relating to topic in general, at end of title.]

**Article 7855. [5333] Persons competent to make a will.**—Every person aged twenty-one years or upward, or who may be or may have been lawfully married, being of sound mind, shall have power to make a last will and testament, under the rules and limitations prescribed by law. [Act Jan. 28, 1840; July 24, 1856. P. D. 5361, 3868.]

See *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

**Mental capacity.**—To set aside a will for want of mental capacity to make it, the incapacity of the testator to give intelligent consent to an act that will bind him in the disposition of his property must be shown. It is not necessary to avoid the will that the testator's mind should have been under the influence of insanity—as the term is described by law writers—in any of its grades. It is sufficient to avoid the will if there is a want of will on the part of the testator accompanying the act, or a want of capacity to understand what he is doing with his property in making the will. To make a valid will the strength of the testator's mind must be equal to the purpose to which it is applied. *Garrison v. Blanton*, 48 T. 299; *Brown v. Mitchell*, 88 T. 350, 31 S. W. 621, 36 L. R. A. 64; *Id.* (Civ. App.) 29 S. W. 927; *Garrison v. Blanton*, 48 T. 301; *Cockrill v. Cox*, 65 T. 669; *Vance v. Upson*, 66 T. 476, 1 S. W. 179; *Brown v. Mitchell*, 87 T. 140, 26 S. W. 1059; *Trezevant v. Rains* (Sup.) 19 S. W. 567.

Rule for determining testamentary capacity stated. *Salinas v. Garcia* (Civ. App.) 135 S. W. 538.

A person possessing mental capacity sufficient to enable him to know and understand the transaction may make a will. *Warren v. Ellis* (Civ. App.) 137 S. W. 1182.

It was proper to define an insane delusion as a belief in a state of facts that did not exist, and which no rational person would believe, and to refuse to charge that it was false belief, arising spontaneously, not founded on evidence or reason, and persistently adhered to as against evidence, reason, or argument. *Lanham v. Lanham* (Civ. App.) 146 S. W. 635.

**Undue influence.**—Where a will is written by one who takes a benefit under it, that is a circumstance to excite stricter scrutiny and require stricter proof, not only of volition and capacity, but that the testator knew the contents of the paper he was signing, and that no fraud, deception or imposition was practiced upon him. *Vickery v. Hobbs*, 21 T. 570, 73 Am. Dec. 238.

Though a testator of sound and disposing memory may devise his entire estate to strangers, yet all authorities agree that such a bequest is a circumstance which should arouse the suspicion and the strict scrutiny of the courts, and especially so when there is no apparent cause for the disinheritance of the decedent's relatives. *Renn v. Samos*, 33 T. 760.

When there is a concurrence of two such circumstances as these, viz.: that the will was written by a principal legatee, and that the estate was devised to strangers without apparent cause, then the suspicions against the validity of the will are so increased as to require undoubted proof of the testator's volition, capacity and knowledge of the contents of the instrument, and also an explanation by proof why he made such a disposition of his estate, and why the legatee was called upon to write the will. *Renn v. Samos*, 33 T. 760; *Brown v. Pridgen*, 56 T. 127; *Trezevant v. Rains*, 85 T. 329, 23 S. W. 890; *Campbell v. Barrera* (Civ. App.) 32 S. W. 724.

Facts held not to show undue influence avoiding a will. *Barry v. Graclette* (Civ. App.) 71 S. W. 309.

A will cannot be set aside for fraud and undue influence, unless such fraudulent conduct was exercised by the other beneficiaries. *Wetz v. Schneider*, 34 C. A. 201, 78 S. W. 394.

Undue influence and fraud on part of husband in procuring will in his favor from wife held not established. *Morrison v. Thoman* (Civ. App.) 86 S. W. 1069.

The nature of undue influence necessary to invalidate a will stated. *Hart v. Hart* (Civ. App.) 110 S. W. 91.

Rule as to nature and scope of proof of fraud or undue influence, connected with the making of a will, by circumstances, stated. *Simon v. Middleton*, 51 C. A. 531, 112 S. W. 441.

The undue influence which invalidates a will is an influence which destroys the free agency of testator, and places him in a position where he is dominated by another, and acts directly on his mind at the very time when he executes the will. *Id.*

The fact that some of testator's children are disinherited and others favored, and the distribution appears unnatural or unreasonable, raises no presumption of undue influence, but that fact may, when taken with others, show undue influence. *Id.*

Evidence that a disinherited son of testator had been excluded from the table with the family and compelled to eat in the kitchen, and that his brothers objected to his eating with them, was not evidence of undue influence by the other members of the family, where it appeared that he was excluded on account of his vile habits and vicious life, and because he was afflicted with a loathsome disease. *Id.*

Unreasonable prejudice or erroneous convictions as to the unworthiness of one who has a natural claim upon testator's bounty, to form a basis for a refusal to probate a will because of fraud or undue influence, must have been nursed or fostered by a beneficiary, and the will procured wholly by his lying or false representations, made with intent to secure its execution. *Id.*

That a daughter of testatrix did not receive as much through the will as she thought she should raises no presumption of undue influence. *Helsley v. Moss*, 52 C. A. 57, 113 S. W. 599.

To show undue influence, the evidence must be direct, or the circumstances showing it must be of a reasonably satisfactory and convincing character. *Id.*

Undue influence is a species of fraud. *Gallagher v. Neilon* (Civ. App.) 121 S. W. 564.

Where testator's mind was so impaired by disease, old age, or mental anguish as to render him an easy dupe to the acts and intrigues of those by whom he was surrounded, and that the will, by which he made a different disposition of the property from what he otherwise would have done, was procured by taking advantage of his condition, the will will not be admitted to probate. *Id.*

Persuasion, entreaty, intercession, and solicitation do not constitute undue influence, unless such as to have overthrown testatrix's will. *Salinas v. Garcia* (Civ. App.) 135 S. W. 588.

Whether or not a will is void for undue influence depends upon whether it was the free and voluntary act of the testator or was the act of another who unduly influenced him. *Warren v. Ellis* (Civ. App.) 137 S. W. 1182.

Undue influence avoiding a will must be such as destroys the liberty or free agency of the testator in the disposition of his property. *Allday v. Cage* (Civ. App.) 148 S. W. 838.

Undue influence is not shown by the fact that testator did not divulge the terms of the will, nor because he gave all his property to one of two children, nor because he received attention and services from a beneficiary in sickness, nor will opportunity to exert undue influence warrant a finding of its exercise. *Berry v. Brown* (Civ. App.) 148 S. W. 1117.

The undue influence which will vitiate a will must be exercised at the time of the making of the will. *Holt v. Guerguin* (Civ. App.) 156 S. W. 581.

Married women.—A married woman may dispose of her property by will subject to the liability of her community property for the payment of community debts. *Brown v. Pridgen*, 56 T. 124.

Infants.—By the act of 1840 a person under the age of twenty-one could not make a will. *Moore v. Moore*, 23 T. 637.

**Art. 7856. [5334] What may be devised, etc., by will.**—Every person competent to make a last will and testament may thereby devise and bequeath all the estate, right, title and interest in possession, reversion or remainder, which he has, or at the time of his death shall have, of, in or to any lands, tenements, hereditaments or rents charged upon or issuing out of them, or shall have of, in, or to any personal property whatever, subject to the limitations prescribed by law. [P. D. 5361, 5362.]

**In general.**—Every person competent to make a will can devise any part of his estate. There is a clear distinction between policies of insurance payable to a designated beneficiary and those payable to the "executors or administrators" of insured. The proceeds of latter become part of estate of insured at his death and may be disposed of by will. *Fletcher v. Williams* (Civ. App.) 66 S. W. 862.

**Probate of will.**—See Arts. 3206, 3250, 3267-3276.

**Directing manner of administration.**—See Arts. 3358, 3362, 3313.

**Appointment of guardian.**—See Arts. 4071, 4104.

**Community property.**—Where a testator disposes of all his estate in general terms, the will does not purport to trench on the community rights of either a deceased or surviving wife. *Parker v. Parker*, 10 T. 88.

While the husband cannot dispose, by will, of his wife's community interest (*Conn v. Davis*, 33 T. 203), yet if he attempts to do so, and she should elect to take under the will, she would be thereby estopped from afterwards asserting her right to the community. The intent to dispose by will, by the husband or wife, of the community interest of the connubial partner, must be evidenced by explicit language. *Moss v. Helsley*, 60 T. 426; *Wells v. Petree*, 39 T. 419.

A married man devised the entire community estate, upon which the homestead was situated, to his wife during her life, and the remainder in fee to one of her children. The widow and immediate beneficiary recognized the will and received the property bequeathed to them, the same being partitioned in accordance with the provisions of the will. Held, that the presumption that would otherwise obtain, that the testator intended to dispose of only his undivided interest, is repelled by the specific bequest which included the entire tract, and by the estate in remainder, and, the widow having elected to take under the will with a knowledge of its provisions, was bound by her election. *Rogers v. Trevathan*, 67 T. 406, 3 S. W. 569.

While the husband cannot devise his wife's share in the community property, and his will should ordinarily be held to affect only his interest in the community, yet where by its terms the will disposes of particular tracts of land of the community, the widow will be put upon her election whether she will take under or against the will. If she elects to take under the will, the rights of her heirs will be determined by it so far as it took effect. *Smith v. Butler*, 85 T. 126, 19 S. W. 1083.

Where the husband has, by will, disposed of separate and community property, the surviving wife must accept its provisions as an entirety, or repudiate it and claim her community rights. *Chace v. Gregg*, 88 T. 552, 32 S. W. 520.

A will of a deceased husband cannot empower his executor to sell the right of his deceased wife in the community property. *Mealy v. Lipp*, 16 C. A. 163, 40 S. W. 824.

**Art. 7857. [5335] Requisites of a will.**—Every last will and testament, except where otherwise provided by law, shall be in writing and signed by the testator or by some other person by his direction and in his presence, and shall, if not wholly written by himself, be attested by two or more credible witnesses above the age of fourteen years, subscribing their names thereto in the presence of the testator. [Act Jan. 28, 1840. P. D. 5361.]

**In general.**—In a proceeding for the probate of a will, evidence held to show that the testator observed the formalities prescribed by this article and Art. 3271. *Warren v. Ellis* (Civ. App.) 137 S. W. 1182.

The steps prescribed by the statute to be taken in executing a will must be shown to have concurred before an instrument of testamentary character will be recognized as a valid will; and an instrument, which is in form a will, is inoperative and void as such, where not attested by two or more credible witnesses. *Belgarde v. Carter* (Civ. App.) 146 S. W. 964.

**Form of instrument.**—A voluntary disposition of property by deed, which is not intended to operate a present transfer, but is only to take effect after the death of the donor, is testamentary. *Millican v. Millican*, 24 T. 426.

Deeds executed in contemplation of death, and forming part of a testamentary disposition, will be construed as part of such will. *Woodall v. Rudd*, 41 T. 375.

The acknowledgment and record of a will does not affect its testamentary character. *Hawes v. Nicholas*, 72 T. 481, 10 S. W. 558, 2 L. R. A. 863.

An instrument in the form of a deed may operate as a will and its construction may be submitted to a jury. *Hannig v. Hannig* (Civ. App.) 24 S. W. 695; *Crain v. Crain*, 17 T. 81; *Ferguson v. Ferguson*, 27 T. 342; *Carlton v. Cameron*, 54 T. 77, 38 Am. Rep. 620; *Hart v. Rust*, 46 T. 566; *Rogers v. Kennard*, 54 T. 33.

Instrument in the form of a deed held not to be a will. *Naugher v. Patterson*, 28 S. W. 582, 9 C. A. 168.

A paper merely declaring the wish of the signer that after her death certain persons shall raise her children is not a will or entitled to probate. *Williams v. Noland*, 10 C. A. 629, 32 S. W. 328.

A deed executed by a grantor, but never delivered, will not, after his death, be treated as a testamentary disposition. *Blackman v. Schierman*, 21 C. A. 517, 51 S. W. 886.

Deed from husband to his wife held to be a will, and revocable at pleasure of grantor. *De Bajligethy v. Johnson*, 23 C. A. 272, 56 S. W. 95.

An instrument conveying real estate but providing that it shall take effect at grantor's death witnessed by only one person cannot be established or probated as a will. Such an instrument is held not to be testamentary but a deed. *McLain v. Garrison*, 39 C. A. 431, 88 S. W. 486, 89 S. W. 284.

Letters written by decedent held to constitute a conditional will. *Dougherty v. Holschelder*, 40 C. A. 31, 88 S. W. 1113.

An instrument executed by a mother and son held testamentary only, evidencing an intention by the mother to will certain property to the son, and not a deed of such property. *Williams v. Claunch*, 44 C. A. 25, 97 S. W. 111.

An instrument, if probated, is a will, where it provides that, if testator's wife should survive him, she should receive the net income and revenue from his estate during her life. *Lindemann v. Dobossy* (Civ. App.) 107 S. W. 111.

Statutory deed held not testamentary because of a clause that it was not to take effect before the grantor's death. *Garrison v. McLain* (Civ. App.) 112 S. W. 773.

A grantor cannot make a deed, not possessing the formalities of a will, and retain its custody and have it operate as a conveyance only at or after his death, nor effect such result by depositing it with a third person, where he reserves the right to recall it. *Phillips v. Henry* (Civ. App.) 135 S. W. 382.

Whether an instrument is a deed or will held to depend on the intention of the testator; and, if the intent is to convey a present interest, the instrument is a deed. *Belgarde v. Carter* (Civ. App.) 146 S. W. 964.

Where an instrument in the form of a will was not acknowledged or attested by witnesses, so that it could not be recorded, a delivery to the scrivener who wrote it, with instructions to have it recorded, held not to render it valid as a deed. *Id.*

Where a dying man sent for a justice to prepare an instrument, disposing of his property, which instrument was in form and substance a will, and mentioned no con-

sideration and expressed an intention to devise rather than to convey, held, that it was a will rather than a deed. *Id.*

Language used in an instrument held not controlling in determining whether it is to be construed as a will or a deed; but the circumstances may be considered. *Id.*

That an instrument in the form of a will, and intended to be a will, was invalid as such for a failure to have it attested by two credible witnesses would not of itself transform it into a deed. *Id.*

**Codicil.**—An objection to a codicil to a will, that it was written with a pencil, not noticed by the court. *Bell County v. Alexander*, 22 T. 350, 73 Am. Dec. 268.

A paper giving property to a daughter found among testatrix's valuable papers held properly probated as a codicil to the will. *Grigsby's Legatees v. Willis' Estate*, 25 C. A. 1, 59 S. W. 574.

A memorandum held to be in the nature of a codicil to a will and to be probated with it. *Simon v. Middleton*, 51 C. A. 531, 112 S. W. 441.

**Incorporation of other instruments by reference.**—An instrument to be incorporated in a will must be identified beyond a reasonable probability of mistake as to the paper referred to. *Allday v. Cage* (Civ. App.) 148 S. W. 838.

A contract reduced to writing, but not signed, may be incorporated by reference as an extraneous writing in a will. *Id.*

An agreement was sufficiently designated in a provision of a will making it a part thereof, where it was identified by a recital of the parties thereto, its date, and by the name of the notary who acknowledged it. *Id.*

**Foreign wills.**—The law of the actual domicile of a testator governs in relation to the execution of his will of his personal property whether such property be situated in the state of his domicile or in a foreign country. With respect to real property the law of the place where the property is situated governs, not only as to capacity of the testator and the extent of his powers to dispose of the property, but also as to forms and solemnities necessary to give the will its due attestation and effect. A will which is not valid to pass the title to personal property, and is not executed according to the law of the testator's domicile, will be valid and effectual to devise real property in this state, if executed according to the laws of this state. *Holman v. Hopkins*, 27 T. 38.

Wills made outside of the United States disposing of real property in this state must be executed with the forms and solemnities prescribed by the law of the state. *Coy v. Gaye* (Civ. App.) 84 S. W. 441.

**Signature of testator.**—A bystander may make the complete signature at the request of the testator who from physical prostration can render no assistance. *Trezevant v. Rains* (Sup.) 19 S. W. 567.

A will wholly in the handwriting of the testator with his name written in the body of the instrument is sufficiently signed within the meaning of the law. *Lawson v. Dawson's Estate*, 21 C. A. 361, 53 S. W. 64.

**Competency of witnesses.**—By "credible" witness is meant a "competent" witness. *Nixon v. Armstrong*, 38 T. 296; *Brown v. Pridgen*, 56 T. 124; *Fowler v. Stagner*, 55 T. 393; *Kennedy v. Upshaw*, 66 T. 442, 1 S. W. 308; *Gamble v. Butchee*, 30 S. W. 861, 87 T. 643.

**Attestation.**—A will and codicil, the last providing for executors only, were both signed at the same time by the testator, both being written on the same piece of paper; the witnesses to the will signed the same as such but once, it being the intention to attest the execution of the whole will, including the codicil. Held, the proceeding being regular in other respects, the codicil was properly executed; and it did not matter on what portion of the will the subscribing witnesses signed their names, if the signatures were affixed after making the codicil, with the purpose to attest the execution of the entire will, including the codicil. *Fowler v. Stagner*, 55 T. 393.

The fact that a county clerk, when called upon by a testator to witness his will, attaches thereto his official certificate of the acknowledgment of the due execution of the will by the testator, does not affect the validity of the clerk's signature to such will as a witness. *Franks v. Chapman*, 64 T. 159.

The witnesses to a will each wrote his name where it occurred in the body of the will and in the concluding sentence thereof, as follows: "And now in the presence of H. L. Harrison, G. W. M. Duck, W. M. Smith, who I have requested to act as witnesses, I declare the writing contained in the foregoing ten pages my last will and testament." Signed: "G. W. Chapman." Held, that the signatures of the witnesses were sufficient. *Id.*

The fact that the name of a witness was written after the death of the testator defeats the instrument. *Nieman, In re* (Sup.) 14 S. W. 25.

**Republication.**—If a will is limited as to its operation by conditions by which it is defeated before the death of the party making it, it can have no effect as a will unless by force of a republication by the testator. When a party making a will under such circumstances recovers from his then sickness, and the will remained in his possession until his death without being destroyed or expressly revoked, such fact does not operate as a republication. *Vickery v. Hobbs*, 21 T. 570, 73 Am. Dec. 238.

The effect of a codicil is to ratify all the provisions of the will not inconsistent with it. *Cliett v. Cliett*, 1 U. C. 407.

The execution of a codicil is a constructive republication of a will and the instrument speaks from its date. *Campbell v. Barrera* (Civ. App.) 32 S. W. 724.

**Necessity for probate.**—An instrument testamentary in its character, not having been admitted to probate, is inoperative. *Naugher v. Patterson*, 28 S. W. 582, 9 C. A. 168.

**Art. 7858. [5336] Will wholly written by testator.**—Where the will is wholly written by the testator the attestation of the subscribing witnesses, as required in the preceding article may be dispensed with. [Id.]

**In general.**—Instruments, testamentary in character, all in the handwriting of a bachelor, giving all his property to two friends in the event of his death, admitted to probate as his will. *Fletcher v. Gates* (Civ. App.) 63 S. W. 937.

**Unsigned attestation clause.**—The fact that a holographic will bore an attestation clause but was not witnessed held not sufficient ground for refusing to admit it to probate. *Ainsworth v. Briggs*, 49 C. A. 344, 108 S. W. 753.

**Art. 7859. [5337] Revocation of written will.**—No will in writing, made in conformity with the preceding articles, nor any clause thereof or devise therein, shall be revoked, except by a subsequent will, codicil or declaration in writing, executed with like formalities, or by the testator destroying, canceling or obliterating the same, or causing it to be done in his presence. [P. D. 5363.]

In general.—No valid written will can be revoked except in one of the modes pointed out by the statute. *Morgan v. Davenport*, 60 T. 230.

The intention of the law expressed in this article is to prevent fraud and perjury and the extortion of declarations after the mind of the testator has been impaired by time. There is the same necessity for the observance of the provisions in disproving the making of a will. The statutory evidence must be had or the intended revocation fails. *Kennedy v. Upshaw*, 64 T. 411.

An instrument by which a mother merely evidenced an intention to will property to her son held revocable at any time prior to her death. *Williams v. Claunch*, 44 C. A. 25, 97 S. W. 111.

No written will can be revoked except by written revocation or destruction by testator or by his order in his presence. *Locust v. Randle*, 46 C. A. 544, 102 S. W. 948.

When an instrument has been executed in such manner as to constitute a valid will it remains such until revoked by the making of a subsequent will, or by the testator's destroying, canceling or obliterating the same, or causing it to be done in his presence. *Ainsworth v. Briggs*, 49 C. A. 344, 108 S. W. 755.

**Subsequent writing.**—A memorandum made after a will held not to revoke the will. *Simon v. Middleton*, 51 C. A. 531, 112 S. W. 441.

**Obliteration.**—The cutting of a clause out of a will by testator revoked the will as to such clause under this article. *Schnable v. Henderson* (Civ. App.) 152 S. W. 231.

**Joint will.**—A will executed by a husband and wife jointly, after the death of the husband (the wife surviving) was admitted to probate as his will; but a will so executed is revocable by either party during the life of both, and by the survivor after the death of the other. *Wyche v. Clapp*, 43 T. 543.

**Acts of testator.**—Taking possession of certain property by a co-owner and the execution of a deed therefor, held a revocation of a testamentary instrument, evidencing an intention to will property to the other co-owner. *Williams v. Claunch*, 44 C. A. 25, 97 S. W. 111.

**Conditional will.**—A will, to become effective only on the happening of a contingency, is a contingent will, and, in case the contingency does not arise, it is revoked. *Dougherty v. Holscheider*, 40 C. A. 31, 88 S. W. 1113.

**Art. 7860. [5338] Nuncupative will.**—Any person who is competent to make a last will and testament, under article 7856 [7855] may dispose of his property by a nuncupative will made under the conditions and limitations hereinafter prescribed. [P. D. 5366.]

**Sufficiency.**—An explanation by the witnesses to a written will, at the time of probating it, by a recital of additional oral instructions given by the testator in respect to his property, cannot be sustained as a nuncupative will. *Hunt v. White*, 24 T. 643.

**Real estate.**—Real estate cannot be devised by nuncupative will. *Lewis v. Aylott*, 45 T. 190; *Watts v. Holland*, 56 T. 54; *Moffett v. Moffett*, 67 T. 642, 4 S. W. 70; *Woodridge v. Hancock*, 70 T. 18, 6 S. W. 818; *Mitchell v. Stanton* (Civ. App.) 139 S. W. 1033.

**Art. 7861. [5339] Requisites of.**—No nuncupative will shall be established, unless it be made in the time of the last sickness of the deceased, at his habitation or where he has resided for ten days next preceding, except when the deceased is taken sick from home and dies before he returns to such habitation; nor when the value exceeds thirty dollars, unless it be proved by three credible witnesses that the testator called on some person to take notice or bear testimony that such is his will, or words of like import. [P. D. 5366.]

Probate.—See ante, Arts. 3251-3254, 3269-3271.

**Art. 7862. [5340] Notice and proof.**—No nuncupative will shall be proved within fourteen days after the death of the testator, nor until those who would have been entitled by inheritance, had there been no will, have been summoned to contest the same, if they desire to do so. [P. D. 5371.]

**Art. 7863. [5341] Testimony to be committed to writing, etc.**—After six months have elapsed from the time of speaking the pretended testamentary words, no testimony shall be received to prove a nuncupative will, unless the testimony, or the substance thereof, shall have been committed to writing within six days after making the will. [P. D. 5367.]

**Art. 7864. [5342] Wills of soldiers, etc., disposing of chattels.**—Any soldier in actual military service, or any mariner or seaman being at sea, may dispose of his chattels without regard to the provisions of this title. [P. D. 5369.]

**Art. 7865. [5343] Posthumous children.**—When a testator shall have children born and his wife enceinte the posthumous child, if unprovided for by settlement and pretermitted by his last will and testament, shall succeed to the same portion of the father's estate as such child would have been entitled to if the father had died intestate; toward which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament. [P. D. 5363.]

See *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

**In general.**—Under Art. 7867, when considered in connection with this article and Art. 7866, the will of a wife, enceinte when executed, which makes a gift of an undivided interest in her estate to persons named, void in case of living issue, born of her body, and which makes no other reference to any after-born child, is void on the birth of the child, who may inherit as though the wife died intestate, for the word "mentioned" means either that provision should be made for the after-born child or that he should be excluded from a participation under the will. *Pearce v. Carrington* (Civ. App.) 124 S. W. 469.

**Marriage subsequent to will.**—As to the revocation of a will by a subsequent marriage and birth of a child, see *Morgan v. Davenport*, 60 T. 230; *Evans v. Opperman*, 76 T. 293, 13 S. W. 312.

**Art. 7866. [5344] Children born after making a will.**—If a testator having a child or children born at the time of making his last will and testament shall, at his death, leave a child or children born after the making of such last will and testament, the child or children so after-born and pretermitted shall, unless provided for by settlement, succeed to the same portion of the father's estate as they would have been entitled to if the father had died intestate; toward raising which portion the devisees and legatees shall contribute proportionately out of the parts devised and bequeathed to them by such last will and testament, in the same manner as is provided in article 7865. [P. D. 5364.]

See *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

**In general.**—Under Art. 7867, when considered in connection with Art. 7865 and this article, the will of a wife, enceinte when executed, which makes a gift of an undivided interest in her estate to persons named, void in case of living issue, born of her body, and which makes no other reference to any after-born child, is void on the birth of the child, who may inherit as though the wife died intestate, for the word "mentioned" means either that provision should be made for the after-born child or that he should be excluded from a participation under the will. *Pearce v. Carrington* (Civ. App.) 124 S. W. 469.

**Construction.**—As to the construction of this and the next article, see *Morgan v. Davenport*, 60 T. 230.

**Art. 7867. [5345] The same.**—Every last will and testament made when the testator had no child living, wherein any child he might have is not provided for or mentioned, if at the time of his death he shall leave a child, or leave his wife enceinte of a child which shall be born, shall have no effect during the life of such after-born child, and shall be void, unless the child die without having been married and before he shall have attained the age of twenty-one years. [P. D. 5363.]

**Common-law rule.**—Under the common law the will of a wife not providing for or excluding an unborn child, held revoked by the birth of the child. *Pearce v. Carrington* (Civ. App.) 124 S. W. 469.

**Mention of after-born child.**—Under this article when considered in connection with Arts. 7865, 7866, the will of a wife, enceinte when executed, which makes a gift of an undivided interest in her estate to persons named, void in case of living issue, born of her body, and which makes no other reference to any after-born child, is void on the birth of the child, who may inherit as though the wife died intestate, for the word "mentioned" means either that provision should be made for the after-born child or that he should be excluded from a participation under the will. *Pearce v. Carrington* (Civ. App.) 124 S. W. 469.

Under this article, whether the unborn child is mentioned in the will is to be determined by construing its language with reference to the circumstances and knowledge of the testator, the word "mentioned" meaning "referred to," rather than designated by name, and the failure to make provision must be accidental to avoid the will; and hence the will of a wife, executed when in an advanced state of pregnancy, which devised the bulk of her realty to her husband, and devised her undivided interest in her

father's homestead to persons named, which devise was to be void in case of living issue born of her body, mentioned the unborn child, for she must have known the practical certainty that a child would be born to her, and the provision that the devise is to be void in case of issue born obviously refers to the expected child. *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

**Art. 7868. [5346] Term "children" includes descendants.**—Under the name of "children," as used in this title, are included descendants of whatever degree they may be, it being understood they are only counted for the child they represent. [P. D. 5373.]

**Art. 7869. [5347] Bequests to children, etc., not to lapse.**—Where a testator shall devise or bequeath an estate or interest of any kind by will to a child or other descendant of such testator, should such devisee or legatee, during the lifetime of the testator, die leaving children or descendants who shall survive such testator, such devise or legacy shall not lapse by reason of such death; but the estate so devised or bequeathed shall vest in the children or descendants of such legatee or devisee in the same manner as if he had survived the testator and died intestate. [P. D. 5365.]

Application of article.—This article applies alone to lineal descendants of the testator, and has no application to devisees whose relationship is collateral. *Watkins v. Blount*, 43 C. A. 460, 94 S. W. 1117.

**Art. 7870. [5348] Bequest to subscribing witness.**—Should any person be subscribing witness to a will, and be also a legatee or devisee therein, if the will can not be otherwise established, such bequest shall be void, and such witness shall be allowed and compelled to appear and give his testimony in like manner as if no such bequest had been made. But, if in such case the witness would have been entitled to a share of the estate of the testator had there been no will, he shall be entitled to so much of such share as shall not exceed the value of the bequest to him in the will. [Act March 15, 1875, p. 179.]

See *Fowler v. Stagner*, 55 T. 393; *Lewis v. Aylott*, 45 T. 190.

In general.—The will so proven is void as to the legacies to the subscribing witnesses. *Nixon v. Armstrong*, 38 T. 296; *Lewis v. Aylott*, 45 T. 190.

A legatee under a nuncupative will is incompetent to prove its execution. *Lewis v. Aylott*, 45 T. 190.

Where there are but two subscribing witnesses to a will, one of whom is by its terms a devisee under it, such party, by the very act of subscribing it as a witness, avoids the bequest; his competency and credibility as a witness to establish the will is the result of the nullity of the bequest to him. *Fowler v. Stagner*, 55 T. 393.

A devisee in a will is a competent witness to prove its execution. *Martin v. McAdams*, 87 T. 225, 27 S. W. 255.

When necessary, devisee or legatee may be required to testify. *Bradshaw v. Roberts* (Civ. App.) 52 S. W. 574.

**Art. 7871. [5349] Will in such case may be proved how.**—In the case provided for in the preceding article, such will may be proved by the evidence of the subscribing witnesses, corroborated by the testimony of one or more other disinterested and credible persons, to the effect that the testimony of such subscribing witnesses necessary to sustain the will is substantially true; in which event the bequest to such subscribing witnesses shall not be void. [Id.]

See notes under Art. 3267 et seq.

**Art. 7872. [5350] Husband or wife may authorize survivor to manage separate estate.**—The husband or wife may, by last will and testament, give to the survivor of the marriage the power to keep his or her separate property together, until each of the several heirs shall become of lawful age, and to manage and control the same under the provisions of law relating to community property, and such other restrictions as may be imposed by such will; provided, the surviving husband or wife is the father or mother, as the case may be, of the minor heirs; and provided, further, that any child or heir entitled to any part of said property shall, at any time upon becoming of age, be entitled to receive his distributive portion of said estate. [Act Aug. 26, 1856, p. 51 sec. 8. P. D. 4653.]

**Art. 7873. [5351] Original wills, etc., to be deposited with county clerk, etc.**—All original wills, together with the probate thereof, shall be deposited in the office of the clerk of the county court of the county wherein the same shall have been probated, and shall there remain, except during such time as they may be removed to some other court, by proper process, for inspection. [P. D. 5372.]

See *Dean v. Furrh* (Civ. App.) 124 S. W. 431.

**Sale by devisee before probate.**—A sale by a devisee of an interest held under a will, but made before the probate of the will, passes the estate, and a subsequent probate gives vitality to such conveyance, except against an innocent purchaser from an heir. *Ryan v. T. P. R. R. Co.*, 64 T. 239.

**Art. 7874. [5352] To be recorded, etc.**—Every such will, together with the probate thereof, shall be recorded by the clerk of the county court in a book to be kept for that purpose; and certified copies of such will and the probate of the same, or of the record thereof, may be recorded in other counties, and may be used in evidence as the original might be. [Id.]

**Sufficiency of record.**—Where a will was duly recorded, it was immaterial to third persons that it was not permitted to remain in the county clerk's office, as provided by P. D. art. 1236. *Hymmer v. Holyfield* (Civ. App.) 87 S. W. 722.

**Persons claiming land under wills of testators who died in 1891, 1894, held not prejudiced by the fact that the wills were not filed in the county where the land is situated until 1900.** *Hunter v. Hodgson* (Civ. App.) 95 S. W. 637.

**Presumptions.**—See notes under Art. 3687, Rule 12.

**Admissibility of record.**—A will is not competent as evidence until it has been probated. *Moursund v. Priess*, 84 T. 554, 19 S. W. 775.

Where title to land is claimed by a devise, evidence of the will of the alleged decedent and the proceeding of the county court admitting it to probate is admissible. *McDoel v. Jordan* (Civ. App.) 151 S. W. 1178.

**Conclusiveness of record.**—Certified copy of will is good as original. *Hickman v. Gillum*, 66 T. 314, 1 S. W. 339.

A will duly probated cannot be attacked in a collateral proceeding. *Halbert v. De Bode* (Civ. App.) 28 S. W. 58; *Dean v. Furrh*, 124 S. W. 431.

— **Bona fide purchasers.**—Purchasers of property from devisee named in will, after rendition of a judgment admitting the will to probate, are purchasers in good faith. *Glover v. Colt*, 36 C. A. 104, 81 S. W. 136.

Purchasers of property from the devisee named in a will, after the same has been probated, will not be regarded as purchasers pendente lite, because the time within which certiorari to remove the probate proceedings to the district court could be brought had not expired at the time of purchase. *Id.*

Attorneys who conduct the proceedings for the probate of a will, and subsequently purchase property devised, have the same right as others to rely on the conclusiveness of the judgment admitting the will to probate. *Id.*

**Art. 7875. [5353] How foreign will may be proved.**—When any will or testament, or testamentary instrument of any character, conveying or in any manner disposing of land in this state, has been duly probated according to the laws of any of the United States or territories, a copy thereof and its probate, attested by the clerk of the court in which such will and testament or testamentary instrument was admitted to probate, and the seal of the court annexed, if there be a seal, together with a certificate from the judge or presiding magistrate of such court that the said attestation is in due form, may be filed and recorded in the register of deeds in any county in which said real estate is situated, in the same manner as deeds and conveyances are required to be recorded, and without further proof or authentication; provided, that, at any time within four years from the date of the record of such will in this state, the validity of such will may be contested in a proceeding instituted for that purpose, as the original might have been. [Acts 1887, p. 38, sec. 1.]

**Purpose of act.**—This article was enacted for the purpose of allowing a person, owning land by virtue of a will duly probated in any other state or territory to fix and preserve a muniment of his title, without the formality of probating the will as required by Art. 3276. The filing and record of a will under this article has no effect except to constitute the will a muniment of title. It does not empower the executor to act as such in Texas. To give the executor power and authority to act under it in Texas it must be probated under Art. 3276. *Mason v. Rodriguez*, 53 C. A. 445, 115 S. W. 869.

This article and Art. 7877 were not intended to fix the time when the title to the property devised should vest; but, when it has been probated, the title of the devisee relates back to and becomes effective from the death of the testator, the same as title under a domestic will. *Long v. Shelton* (Civ. App.) 155 S. W. 945.



**Effect of act.**—As to the effect of the probate of wills in courts without this state, see *Slayton v. Singleton*, 72 T. 209, 9 S. W. 876; *Hurst v. Mellinger*, 73 T. 189, 11 S. W. 184; *Mills v. Herndon*, 60 T. 353; *Green v. Benton*, 3 C. A. 92, 22 S. W. 256.

Prior to the act of March 23, 1887, title could not be acquired to lands situated in this state under a foreign will, unless probate of the will was made here. By this act a foreign will, with its foreign probate, when duly registered, operates as a conveyance of land. *De Zbranikov v. Burnett*, 10 C. A. 442, 31 S. W. 71.

The filing and recording the foreign will place it upon the same footing as a will probated in Texas, and the mode of contesting either is the same. *Dew v. Dew*, 23 C. A. 676, 57 S. W. 927.

**Sufficiency of record.**—Under this article a certified copy from the deed records of an exemplified copy of a will, together with the probate proceedings had on the will, certified to by the clerk of the superior court of the city and county of San Francisco, Cal., where proceedings had been taken pursuant to statute to restore the will and original probate proceedings which had been destroyed in the San Francisco earthquake, was admissible in evidence in an action of trespass to try title. *Gordon v. Lewis* (Civ. App.) 133 S. W. 927.

**Inception of title.**—The record of a will in Texas (which has been probated in another state) is not subject to the objection that the will confers an after-acquired title. The will confers title upon the death of the testator. Its probate in another state and record in Texas are but legal formalities required to evidence and give full effect to the right conferred. *Haney v. Gartin*, 51 C. A. 577, 113 S. W. 168.

**Liability of foreign executor.**—A foreign will when recorded in Texas does not give the authority to sue an executrix named therein who had not qualified in Texas, any more than a will made and probated in Texas would give the authority to sue an executor or executrix named in it, but who had never qualified. *Clarke v. Webster* (Civ. App.) 94 S. W. 1089.

**Art. 7876. [5354] Prima facie evidence, when.**—A copy of such will and testament, or testamentary instrument, and its probate so attested, together with the certificate that said attestation is in due form, as required by the preceding article, shall be prima facie evidence that said will has been duly admitted to probate, according to the laws of the state wherein it has been admitted to probate, and shall be sufficient to authorize the same to be recorded in the proper county or counties in this state. [Id. sec. 2.]

**Art. 7877. [5355] Shall take effect, when.**—Every such will and testament, or testamentary instrument, and its probate, which shall be attested and proven, as provided in article 7875, and delivered to the clerk of the proper court to be recorded, shall take effect and be valid and effectual as a deed of conveyance of said property; and the record thereof shall have the same force and effect as the record of deeds or other conveyances to land from the time when such instrument was delivered to such clerk to be recorded, and from that time only. [Id. sec. 3.]

**Purpose of act.**—Art. 7875 and this article were not intended to fix the time when the title to the property devised should vest; but, when it has been probated, the title of the devisee relates back to and becomes effective from the death of the testator, the same as title under a domestic will. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

**Art. 7878. [5356] Shall operate as notice, etc.**—The record of such will and testament, or testamentary instrument, and its probate, duly attested and proven, as provided in the preceding articles, and duly made in the proper county, shall be taken and held as notice to all persons of the existence of such will and testament, and of the title or titles conferred thereby. [Id. sec. 4.]

#### DECISIONS RELATING TO TOPIC IN GENERAL

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|----------------------------------------------------|--------------------------------------|
| 1. Will defined.                                   | 18. — Jury question.                 |
| 2. Assignment of insurance policy as will.         | 19. Devisees and legatees—Heirs.     |
| 3. Contracts to devise or bequeath.                | 20. — Classes.                       |
| 4. Effect of will containing no devise or bequest. | 21. — Certainty as to beneficiaries. |
| 5. Power to create trust.                          | 22. Designation of executor.         |
| 6. Reasonableness.                                 | 23. Tenure of executor.              |
| 7. Agreement to annul will.                        | 24. Survivorship.                    |
| 8. Validity of bequests in general.                | 25. Description of property.         |
| 9. No beneficiaries capable of taking.             | 26. — Real estate.                   |
| 10. Construction—Power of court.                   | 27. — Community property.            |
| 11. — Law governing.                               | 28. Estates created—Limitation over. |
| 12. — Intention of testator.                       | 29. — Fee simple.                    |
| 13. — Language.                                    | 30. — Rule in Shelley's Case.        |
| 14. — Separate clauses.                            | 31. — Life estate.                   |
| 15. — Instruments construed together.              | 32. Vested and contingent estates.   |
| 16. — Time of speaking.                            | 33. Conditions.                      |
| 17. — Evidence in aid of.                          | 34. — Contest of will.               |
|                                                    | 35. — Restraint of marriage.         |

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|-----------------------------------------------|---------------------------------------------------|
| 36. — Inciting divorce.                       | 49. — Suits to recover property.                  |
| 37. — Restraint on power of alienation.       | 50. — Right to support.                           |
| 38. Testamentary trusts—Creation.             | 51. Specific bequest.                             |
| 39. — Violation of rule against perpetuities. | 52. Lapse of legacy.                              |
| 40. — Construction.                           | 53. Release of beneficiary's interest.            |
| 41. Powers—Sale.                              | 54. Election—Testamentary provisions.             |
| 42. — Mortgage.                               | 55. — Acts constituting.                          |
| 43. — Survival.                               | 56. — Effect.                                     |
| 44. Will as execution of power.               | 57. Legacies charged on estate.                   |
| 45. Interest conveyed by trustee's will.      | 58. Debts of testator.                            |
| 46. Actions for construction.                 | 59. Lapsed devises and bequests.                  |
| 47. Compromise of litigation over will.       | 60. Rights of creditors of legatees and devisees. |
| 48. Rights of devisees and legatees.          |                                                   |

1. **Will defined.**—A will is an instrument by which a person makes a disposition of his property, to take effect after his death, and which, in its own nature, is ambulatory and revocable during his lifetime. *Williams v. Noland*, 10 C. A. 629, 32 S. W. 328.

2. **Assignment of insurance policy as will.**—Assignment of policy held not a testamentary instrument, to take effect only on death of assignor, and hence not to be executed like such instruments. *Bürges v. New York Life Ins. Co.* (Civ. App.) 53 S. W. 602.

3. **Contracts to devise or bequeath.**—In an action for services on breach of a contract to make plaintiff defendant's heir, an instruction authorizing a recovery if defendant failed to adopt plaintiff held not error. *Clark v. West* (Civ. App.) 72 S. W. 100.

Where defendant contracted to make plaintiff his heir, and thereafter defendant's wife disinherited plaintiff by will, and defendant attempted to do the same, such acts constituted a breach of the contract, entitling plaintiff to recover the reasonable value of her services. *Id.*

Contract by which decedent agreed to leave property to plaintiff by will held to entitle plaintiff to specific performance, which was not defeated by will devising the property to another. *Jordan v. Abney*, 97 T. 296, 78 S. W. 486.

A contract between two persons, upon a valuable consideration, that one will, at his death, leave property to the other, is enforceable. *Id.*

One performing services for another on the faith of his parol promise to give at his death his estate as compensation held entitled to sue for the reasonable value of the services on the latter dying without complying with his promise. *Raycraft v. Johnston*, 41 C. A. 466, 93 S. W. 237.

One orally agreeing to perform services for another during his life on the latter's oral promise to give at his death his estate therefor held not bound to abandon the contract, but might perform it and sue on the death of the latter without performance. *Id.*

4. **Effect of will containing no devise or bequest.**—Where will contained no devise or bequest, property held to descend under statute of distribution. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

5. **Power to create trust.**—A testator by his will may create a trust, and stipulate that the trust fund shall be exempt from liability for the debts of the cestui que trust. *Patten v. Herring*, 29 S. W. 388, 9 C. A. 640; *Gamble v. Dabney*, 20 T. 69; *Wallace v. Campbell*, 53 T. 229.

6. **Reasonableness.**—If a devise is not against law or public policy, it will be enforced, if it expresses testator's intention, even if unreasonable or unjust. *Perry v. Rogers*, 52 C. A. 594, 114 S. W. 897.

7. **Agreement to annul will.**—An agreement to annul a will in view of a dispute as to its validity is not contrary to public policy. *Stringfellow v. Early*, 15 C. A. 597, 40 S. W. 871.

8. **Validity of bequests in general.**—A contention that a charitable devise in a will is invalid, because not absolute, held untenable. *Gidley v. Lovenberg*, 35 C. A. 203, 79 S. W. 831.

A certain bequest held valid. *Franklin v. Boone*, 39 C. A. 597, 88 S. W. 262.

9. **No beneficiaries capable of taking.**—A bequest held not void on the theory that there were no beneficiaries capable of taking. *Gidley v. Lovenberg*, 35 C. A. 203, 79 S. W. 831.

10. **Construction—Power of court.**—While a court may declare a will void if in fact it is so, it has no authority to make or amend a will. *Connely v. Putnam*, 51 C. A. 233, 111 S. W. 164.

11. — **Law governing.**—The law of the domicile of the testator held to govern in the construction of a will disposing of personalty. *Lanius v. Fletcher* (Civ. App.) 99 S. W. 169.

A will by a testator domiciled in Illinois disposing of personalty situated in Texas held governed by the law of Illinois. *Id.*

The law of the domicile of the testator governs the construction of his will disposing of personal property, wherever such property may be situated, unless a contrary intention clearly appears. *Lanius v. Fletcher*, 100 T. 550, 101 S. W. 1076.

Evidence examined, and held to show that it was testatrix' intention that the trust created by her will should be executed under and in conformity with the laws of Texas, and not of Illinois, where testatrix was domiciled. *Id.*

12. — **Intention of testator.**—In the construction of a will, the intention of the testator is the primary object of inquiry; and the law will not suffer the intention to be defeated merely because the testator has not clothed his ideas in technical language. *Bell County v. Alexander*, 22 T. 350, 73 Am. Dec. 268; *Brooks v. Evetts*, 33 T. 732.

The court will not indulge in conjecture as to the probable intention of a testator, for the purpose of helping out a bequest; this would be assuming the power of making rather than construing a will. *Philleo v. Holliday*, 24 T. 38.

The creation of a particular estate raises the prima facie presumption that that alone was intended, subject, however, to be rebutted by the manifestation of an intention that the legatee may take a larger estate than that expressly bequeathed, in case of a residue. *Id.*

In construing a will, all of its provisions should be regarded for the purpose of ascertaining the intention of the testator, and the general intent must prevail. *McMurry v. Stanley*, 69 T. 227, 6 S. W. 412.

Where the general intent of a testator can be collected from the whole will, particular terms inconsistent with that intent must be rejected. *Haring v. Shelton* (Civ. App.) 114 S. W. 389.

Testator's intention should control in construing a will, unless to effectuate it would violate the law or public policy. *Perry v. Rogers*, 52 C. A. 594, 114 S. W. 897.

In construing wills the object is to ascertain the intention of the testator, and an intention not inconsistent with the rules of law will govern. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13.

The controlling rule in construing a will is to ascertain testator's intent from the whole instrument. *Autrey v. Stubenrauch* (Civ. App.) 133 S. W. 531.

Intention of testator, determined by language of will, held to control construction. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

All the provisions of a will should be given effect, if it can be done conformably to testator's intention. *Cottrell v. Moreman* (Civ. App.) 136 S. W. 124.

The ultimate test of the proper construction of a will is the intention of testator as disclosed by the whole will. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

The rule that every part of a will must be given effect, if possible, is subordinate to the rule that a devise shall be deemed a fee simple, unless limited by express words. *Id.*

The court in construing a will, must give force and effect to testator's intention when it can be ascertained. *Johnson v. Avery* (Civ. App.) 143 S. W. 1156.

The cardinal rule in the construction of wills is that the intention of the testator, in so far as it is not in conflict with law, should be ascertained and followed. *Hughes v. Mulanax*, 105 T. 576, 153 S. W. 299.

13. — **Language.**—When a will clearly by its terms evidences that a different meaning is intended to be given to the use of words employed in expressing the testator's wish from that which would attach under a technical construction of the terms employed, the technical meaning will be disregarded and the testator's intention prevail. Words used in a will must be considered with reference to the surroundings of the testator when the will was made. This rule will not authorize parol evidence to contradict, add to or explain the contents of a will by showing declarations made by the testator before, at the time, or subsequent to the execution of the will. *Peet v. Railway Co.*, 70 T. 522, 8 S. W. 203.

14. — **Separate clauses.**—Two paragraphs in a will held not to necessarily conflict. *Ellis v. Birkhead*, 30 C. A. 529, 71 S. W. 31.

Where there is inconsistency between a general and a special testamentary provision, the special provision must prevail, regardless of the order in which they stand in the will. *Haring v. Shelton* (Civ. App.) 114 S. W. 389.

A construction of a will which harmonizes all its parts should be preferred to one which renders its terms ambiguous. *Wisdom v. Wilson* (Civ. App.) 127 S. W. 1128.

The habendum clause of a will, not reconcilable with the premises and granting clause, held required to be disregarded. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

15. — **Instruments construed together.**—Two wills made by a husband and wife at the same time, but not referring to each other, held not to be construed together to ascertain the intention of the testator. *St. Paul's Sanitarium v. Freeman* (Civ. App.) 111 S. W. 443.

16. — **Time of speaking.**—A will speaks from the death of the testator. *Connely v. Putnam*, 51 C. A. 233, 111 S. W. 164.

Where a will devised testator's property to plaintiff, but that, if he should die without issue, then over, the devise over would not take effect if plaintiff survived the testator, but died without issue thereafter. *St. Paul's Sanitarium v. Freeman* (Civ. App.) 111 S. W. 443.

The term "die without issue," on which a devise over depended, after the expiration of an intervening estate, held to relate to the death of the devisee without issue without reference to the date of the death of testatrix. *Id.*

An estate by devise takes effect immediately upon the death of the testator, unless otherwise directed. *Long v. Shelton* (Civ. App.) 155 S. W. 945.

17. — **Evidence in aid of.**—See notes under Art. 3687, Rules 20-31.

18. — **Jury question.**—See notes under Art. 1971.

19. **Devisees and legatees—Heirs.**—Where testator had children by two marriages, and provided in the first part of will for children by first marriage, bequests to his "heirs" in subsequent portions of will held to be limited to children by second marriage. *Weller v. Weller*, 22 C. A. 247, 54 S. W. 652.

Words "lawful heirs," in will, held to mean children of testator's son; and son took life estate, with remainder to children. *Lacy v. Floyd* (Civ. App.) 84 S. W. 857.

Where a will does not define whom testator intended to designate by the term "heirs," the statute of descent and distribution may be resorted to in determining who were the heirs of the persons named in the will, but how the heirs when ascertained should take must be determined from the will itself, if possible. *Dunihue v. Hurd*, 50 C. A. 360, 109 S. W. 1145.

Where testators' brother was his only heir and he died leaving a widow, the brother's children, but not his widow, were entitled to take as the testator's heirs at law under a devise to the brother for life and at his death to testator's heirs. *Farrall v. Cogley* (Civ. App.) 146 S. W. 315.

20. — **Classes.**—A direction in a will that property should go "according to law," with exclusion of a sister named, held not a devise to brothers and sisters not named, where, according to law, the property would go to the widow. *McCown v. Owens*, 15 C. A. 346, 40 S. W. 336.

When a fund is bequeathed to children as a class, it becomes payable when the first child becomes entitled to receive his share, and children coming into existence after that period are excluded. *Thornton v. Zea*, 22 C. A. 509, 55 S. W. 798.

A devisee's wife held not entitled to the proceeds of the sale of property, which the will directed to be paid to the children if living, and, if no children, to grandchildren. *Kearney v. Nicholson* (Civ. App.) 67 S. W. 361.

The word "brothers" in a will giving all testator's estate to his brothers and sisters, included brothers of the half blood. *Watkins v. Blount*, 43 C. A. 460, 94 S. W. 1116.

An adopted child held not a "lawful child," within a will giving a devisee only a life estate in case he should die without lawful children. *Cochran v. Cochran*, 43 C. A. 259, 95 S. W. 731.

The intention of testator by a devise to a brother and sister by name, "or their heirs," held to show an intention to deal with the heirs of his brothers and sisters as a class, and not as individuals, so that their heirs take per stirpes, and not per capita. *Dunihue v. Hurd*, 50 C. A. 360, 109 S. W. 1145.

**21. — Certainty as to beneficiaries.**—A bequest of certain stock to support the indigent Israelites residing in a certain city was not invalid on the ground that the beneficiaries were too uncertain. *Gidley v. Lovenberg*, 35 C. A. 203, 79 S. W. 831.

A will devising property to a church for school purposes held not void on account of the uncertainty of the beneficiaries. *Banner v. Rolf*, 43 C. A. 88, 94 S. W. 1125.

A will devising real estate to a church for the benefit of a class designated held not invalid on the theory that the trustees may declare themselves beneficiaries. *Id.*

**22. Designation of executor.**—Where a testator willed that a certain person should take charge of his children, as guardian for them, sell the perishable property, rent out the house, etc., it was held that the person so named was virtually named executor, and entitled to letters testamentary in preference to the next of kin. *Stone v. Brown*, 16 T. 425.

**23. Tenure of executor.**—Will held not to confer power on executor to hold estate as entirety after majority of older children of testatrix for benefit of youngest child. *Buckley v. Herder* (Civ. App.) 133 S. W. 703.

**24. Survivorship.**—Where testator's will gave all his property to his brothers and sisters, children of the brothers whose death preceded the date of the will, were not within its terms. *Watkins v. Blount*, 43 C. A. 460, 94 S. W. 1116.

A will bequeathing testator's property to his wife for life, the remainder, in case of the death of testator and the wife at the same time, to testator's children, held to entitle the children to take under the will on the death of the wife after having survived testator. *Sanger v. Butler*, 45 C. A. 527, 101 S. W. 459.

Where testator provided in his will that in the event of the marriage of his brother, to whom he gave an executory devise, the brother should, if he desired, be permitted by the executors to occupy a certain place "so long as he shall desire to occupy the same," the brother, having died before the property of the estate devised for his benefit had vested in him, the right to occupy the place mentioned terminated, and did not survive to his widow. *Farrell v. Cogley* (Civ. App.) 146 S. W. 315.

**25. Description of property.**—Will construed, and property devised determined. *Slagle v. Payne* (Civ. App.) 50 S. W. 500.

A presumption that testator intends not to die intestate held not to authorize the inclusion of other property that could not be brought within the terms of the will as made by testator. *Coleman v. Jackson* (Civ. App.) 126 S. W. 1178.

**26. — Real estate.**—A will devising all testator's property to his widow held sufficient, without describing the land. *Hymmer v. Holyfield* (Civ. App.) 87 S. W. 722.

A will held to sufficiently describe the real estate owned by testator. *Haney v. Gartin*, 51 C. A. 577, 113 S. W. 166.

**27. — Community property.**—Where a husband makes provision in his will for his children, it will not be presumed that it was in settlement of their community interest. *Arnold v. Hodge*, 20 C. A. 211, 49 S. W. 714.

Will construed, and held to show intent of testator that his property should pass as community property. *Clark v. Cattron*, 23 C. A. 51, 56 S. W. 99.

Devise of community property construed to apply only to the share of testatrix in community estate. *Sutton v. Harvey*, 24 C. A. 26, 57 S. W. 879.

Will held to attempt to dispose of entire community estate owned by testator and his wife, and not merely of his half thereof. *Skaggs v. Deskin* (Civ. App.) 66 S. W. 793.

Where a husband and wife acquired community property, and the wife devises her interest to her husband for life with remainder to her children, a subsequent devise by the husband to each child of his first wife of a specified number of acres "out of the real estate owned by me at the time of the death" of the wife, and disposing of more than half of the community property, and leaving to his second wife the balance of his real estate for life, with remainder over to her grandson, and designating the whole of his property as "my land," "my live stock," "my household and kitchen furniture," disposed of the entire community property, including the rights of beneficiaries under the will of the wife. *Johnson v. Avery* (Civ. App.) 148 S. W. 1156.

**28. Estates created—Limitation over.**—Art. 1106 sweeps away the established rules of construction in respect to the quantity of interest conveyed by wills, etc. *Bell County v. Alexander*, 22 T. 350, 73 Am. Dec. 268.

A devisee held to take a vested estate in an undivided one-half of certain property, subject to the widow's life estate. *Lee v. McFarland*, 19 C. A. 292, 46 S. W. 281.

A will construed, and held that property described in one clause passed under the residuary clause to the beneficiaries therein named, subject to the estate devised in the first clause. *Hinzie v. Hinzie*, 45 C. A. 297, 100 S. W. 803.

**29. — Fee simple.**—By employing the words, "I wish the county in which I die and am buried to have and enjoy, for the benefit of public schools, two-thirds of the land in the county I am buried in," in connection with the words, "my land" and "the land I own," used in the context and other parts of the will, the testator meant to devise an estate in lands; and there being nothing in the will to indicate an intention to give a less estate, the devise must be held to pass an estate in fee. *Bell County v. Alexander*, 22 T. 350, 73 Am. Dec. 268.

Devise, coupled with precatory words, held to vest a fee simple, and not a trust estate. *Weller v. Weller*, 22 C. A. 247, 54 S. W. 652.

A will devising property to the children of M., and thereafter appointing D. trustee to control during the lives of such children the property devised to them, vests the title thereto in the children. *Dulin v. Moore* (Civ. App.) 69 S. W. 94.

Under the terms of a will, a devisee held not to take in fee. *St. Paul's Sanitarium v. Freeman*, 102 T. 376, 117 S. W. 425, 132 Am. St. Rep. 886.

A will held to give testator's wife a fee simple, determinable on her remarriage. *Haring v. Shelton*, 103 T. 10, 122 S. W. 13.

A devisee held upon the birth of a child to have acquired an absolute estate in fee. *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

Under the statute, a devise held a devise in fee. *Winfree v. Winfree* (Civ. App.) 139 S. W. 36.

30. — **Rule in Shelley's Case.**—Under the rule in Shelley's Case, a devise to one for life, with remainder in fee simple to his heirs, passes a fee simple to the legatee. *Brown v. Bryant*, 17 C. A. 454, 44 S. W. 399.

Under a will giving land to one person, and then, on her death, giving it to her child, held, that the rule in Shelley's Case does not apply, though the child is spoken of as the heir of the life tenant. *Kesterson v. Bailey*, 35 C. A. 235, 80 S. W. 97.

Rule in Shelley's Case will not be permitted to override testator's intention as expressed by whole will. *Lacy v. Floyd* (Civ. App.) 84 S. W. 357.

A devisee held to have taken a fee under the rule in Shelley's Case. *Lacey v. Floyd*, 99 T. 112, 87 S. W. 665.

Under a will, a remainderman held to have taken a fee on the death of the testator. *Id.*

The rule in Shelley's Case is in force in Texas. *Seay v. Cockrell*, 102 T. 280, 115 S. W. 1160.

A devise construed, and held within the rule in Shelley's Case, and the devisee takes a fee-simple title. *Id.*

The bodily heirs of testatrix's son held to have acquired the fee in the property devised to them under the rule in Shelley's Case. *Seay v. Cockrell* (Civ. App.) 116 S. W. 652.

A devise held within the rule in Shelley's Case and the beneficiaries take the fee. *Pearce v. Carrington* (Civ. App.) 124 S. W. 469.

A devise held within the rule in Shelley's Case, the beneficiary taking the fee. *Pearce v. Pearce*, 104 T. 73, 134 S. W. 210.

Where testator devised land to his daughter for life and at her death to her children, and in the event she left none, then to the children of her sister, the word "children" was not used in the sense of bodily heirs, and, the rule in Shelley's Case being inapplicable, the daughter took a life estate only. *Bass v. Suris* (Civ. App.) 153 S. W. 914.

31. — **Life estate.**—A testatrix made the following devise: "After all my lawful debts are paid, the residue of my estate, real and personal, I give and bequeath to and dispose of as follows, to wit: To my sister Mary one-third of a league of land." Here followed a description of the property devised, after which the will proceeded thus: "And all the above described property I give and bequeath to the said Mary and her heirs during her natural life." Held, that it was error to construe this as a mere devise for the life of Mary, without remainder to her heirs, and to hold that on her death the estate reverted to the heirs of the testatrix. Held, further, that the devise vested in Mary an estate for life, with a vested remainder in fee to her heirs, who took their estate as purchasers under the will and not by way of inheritance from the tenant for life; and consequently that the tenant for life could alienate no greater estate in the property than for her own life. *Brooks v. Evetts*, 33 T. 732.

A bequest to pay a devisee a yearly income during life takes effect at the date of the death of the testator, and continues during the life of the devisee. *Cleveland v. Cleveland* (Civ. App.) 30 S. W. 825.

A clause which provides that land shall be purchased for M. for his use during his life, to descend on his death to others, held to create only a life estate. *Morris v. Edkins*, 18 C. A. 38, 44 S. W. 203.

Will construed, and held to give a devisee a life estate free from the restrictions as to alienation imposed by the will. *Sprinkle v. Leslie*, 36 C. A. 356, 81 S. W. 1018.

Under a will, one of the devisees held to take only a life estate. *Cochran v. Cochran*, 43 C. A. 259, 95 S. W. 731.

A devise to testator's wife of an estate in land during her widowhood creates a life estate, subject to divestiture by a second marriage. *Haring v. Shelton* (Civ. App.) 114 S. W. 339.

A will construed, and held to create a life estate in testatrix's sons with the remainder on their death to their children then surviving. *Hay v. Hay* (Civ. App.) 120 S. W. 1044.

A testamentary gift to testatrix's husband held to give a life estate only, with remainder over to testatrix's nearest of kin. *Cottrell v. Moreman* (Civ. App.) 136 S. W. 124.

A will construed, and held not to vest an absolute title in a beneficiary except in so far as she may dispose of the property during her life or by will to blood relations. *Flippen v. Robinson* (Civ. App.) 144 S. W. 707.

32. **Vested and contingent estates.**—Where the deceased bequeathed to his wife the lot where she lived, cattle, hogs, etc., during her natural life, and at her death "to become the property of my own children, as well as of Alfred, my wife's son," it was held that the remainder vested at the death of the testator, and that therefore the interests of those of the remaindermen who died before the wife did not lapse, in favor of the survivors, but descended to their heirs. *Bufford v. Holliman*, 10 T. 560, 60 Am. Dec. 223.

A devise for a charitable purpose held not invalid as a contingent remainder, dependent on a condition which had not happened. *Gidley v. Lovenberg*, 35 C. A. 203, 79 S. W. 831.

Under a will, held, that a child born after testator's death took a vested remainder. *Kesterson v. Bailey*, 35 C. A. 235, 80 S. W. 97.

Statement as to when under a will a remainder vested, with the effect thereof. *Greenlaw v. Dillon* (Civ. App.) 108 S. W. 705.

A will construed to vest title in grandchildren of testator when the oldest grandchild became of age. *Walker v. Thornton* (Civ. App.) 124 S. W. 166.

When the time of division of an estate devised is of the substance of the gift, it is contingent, but, when the time is mentioned only as a qualifying clause of payment or division, it is vested. *Id.*

The law favors an early vesting of a future estate created by will, but not where the evident purpose of the testator is that it shall not so vest. *Farrell v. Cogley* (Civ. App.) 146 S. W. 315.

**33. Conditions.**—It is well settled that if it can be collected from the whole will that the act annexed to the vesting of the estate does not necessarily precede, but may accompany or follow it, it is a condition subsequent. *Bell County v. Alexander*, 22 T. 350, 73 Am. Dec. 268.

A will made on the eve of absence, which declares the testator's wish, "should I die while absent," is contingent, and does not take effect if the party die at home, or after his return from the intended absence. *Phelps v. Ashton*, 30 T. 345.

An estate devised upon conditions is forfeited by their breach. *Harrison v. Foote*, 30 S. W. 838, 9 C. A. 576. See *Patten v. Herring*, 29 S. W. 388, 9 C. A. 640, as to spendthrift trust.

Testator held not to have intended that a devisee should accept support in defendant's home, nor that he should be paid a sum of money in monthly installments for his maintenance. *McCreary v. Robinson*, 94 T. 221, 59 S. W. 536.

Provision in a will for purchase, and erection on testator's grave, of a monument, held valid. *McIlvain v. Hockaday*, 36 C. A. 1, 81 S. W. 54.

Where a testator intended to dispose of his property in case of the happening of an event named, the will is conditional. *Dougherty v. Holscheider*, 40 C. A. 31, 88 S. W. 1113.

A provision in a will relative to the effect to be given the same in case the envelope inclosing it should be opened, construed, and held no ground for denying probate. *Ainsworth v. Briggs*, 49 C. A. 344, 108 S. W. 753.

**34. — Contest of will.**—A provision of a will that, if any of the devisees attacked the will or attempted to change it, the interest of all of them should be forfeited, and the property should go to others, is valid, and if some of the devisees attacked the will, those who did not attack it would also be prevented from taking thereunder, and the fact that one of the devisees was a minor did not prevent his interest from being forfeited, if any of the devisees attempted to break the will. *Perry v. Rogers*, 52 C. A. 594, 114 S. W. 897.

A child of testator held to forfeit his rights under the will by making a contest in violation of the provisions of the will. *Massie v. Massie*, 54 C. A. 617, 118 S. W. 219.

**35. — Restraint of marriage.**—Where a husband's will gave his property to his wife, a provision that so much of it as should not have been consumed by her should in case of her marriage vest in his children was valid. *Littler v. Dielmann*, 48 C. A. 392, 106 S. W. 1137.

A devise to testator's wife of an estate in land which is to terminate on her remarriage is not void as in restraint of marriage. *Haring v. Shelton* (Civ. App.) 114 S. W. 389.

**36. — Inciting divorce.**—While it may be readily conceded that conditions in a will manifestly intended to bring about a separation or divorce, are void, yet they should be clearly so before the courts by decree nullify the expressed will and purpose of the testator, for our statutes on the subject as well as sound considerations of public policy dictate that those having testamentary capacity shall have the greatest freedom consistent with public safety in the disposition of their estates by them, and the importance of this right should not be ignored. A will held not to be against public policy, and void, as tending to incite beneficiary therein to procure a divorce. *Ellis v. Birkhead*, 30 C. A. 529, 71 S. W. 31.

**37. — Restraint on power of alienation.**—A provision in a will forbidding the alienation of trust property, except for purposes of reinvestment, held not an illegal restraint on alienation. *Dulin v. Moore*, 96 T. 135, 70 S. W. 742.

A general restraint on the power of alienation, when incorporated in a will otherwise conveying the fee-simple right to the property, is void. *Diamond v. Rotan* (Civ. App.) 124 S. W. 196.

**38. Testamentary trusts—Creation.**—Trusts in general, see notes under Art. 1103. Construction of will. *Weir v. Smith*, 62 T. 1; *McMurry v. Stanley*, 69 T. 227, 6 S. W. 412; *Davis v. Kirksey*, 14 C. A. 330, 37 S. W. 994.

Will construed and held to create a spendthrift trust under which neither the property nor the income thereof was liable for the debts of the beneficiary. *Herring v. Patten*, 18 C. A. 147, 44 S. W. 50.

Will creating trust for maintenance out of profits and rents of devised lands, and also giving beneficiary a cash legacy, construed, and held not to create a spendthrift trust, and hence judgment awarding beneficiary monthly cash allowance was proper. *McCreary v. Robinson* (Civ. App.) 57 S. W. 682.

Where a will devises property in fee simple to certain persons, a subsequent provision appointing D. trustee to control the property during their lives is repugnant to the nature of the estate devised, and is void. *Dulin v. Moore* (Civ. App.) 69 S. W. 94.

Will construed, and held to create testamentary trust with legal title in trustee. *Dulin v. Moore*, 96 T. 135, 70 S. W. 742.

A will construed and held to vest the legal title to the property devised in trustees. *Appel v. Childress*, 53 C. A. 607, 116 S. W. 129.

A will devising real estate to testatrix's sons for life with the remainder over held to give the surviving son the right to the entire real estate, charged with the reasonable value of the rents from one-half thereof to be held in trust for testatrix's grandchildren. *Hay v. Hay* (Civ. App.) 120 S. W. 1044.

Under the provisions of a testamentary trust, legal title to the whole estate held vested in the executors in trust for the purposes named. *Wisdom v. Wilson* (Civ. App.) 127 S. W. 1128.

A bequest of rents and revenues for life held not modified nor lessened by advisory language naming uses. *Autrey v. Stubenrauch* (Civ. App.) 133 S. W. 531.

39. — **Violation of rule against perpetuities.**—Testamentary trust to continue for lives in being held not to violate rule against perpetuities. *Dulin v. Moore*, 96 T. 135, 70 S. W. 742.

40. — **Construction.**—By the terms of a will devising property to an only child, who died before she arrived at the age of twenty-one years, leaving issue, it was provided that the executor named therein should have the possession, management and control of the property until the devisee arrived at the age of twenty-one years. The executor, after the death of the heir, claimed to be entitled to control the estate until the time when the heir would have been twenty-one years old had she lived. Held: (1) It was the intention of the testator to give the executor the control of the heir's property during minority, and not longer. (2) The minority of the heir ceased upon her marriage, and with it ceased the authority of the executor. (3) The executor, after his adverse claim, was not, under the circumstances of this case, a proper executor. *Newman v. Dotson*, 57 T. 117.

A provision of a will that the testator's trustees should conclusively determine all questions of construction without resort to the courts, held to authorize the trustees to determine what property the will applied to. *Couts v. Holland*, 48 C. A. 476, 107 S. W. 913.

Any testamentary trust for the education and support of unmarried children held terminated by their marriage. *Autrey v. Stubenrauch* (Civ. App.) 133 S. W. 531.

41. **Powers—Sale.**—See, also, notes under Art. 3374. A will which authorizes an independent executor to manage estate to best advantage for benefit of creditors empowers him to sell the estate to pay debts thereof. *Carleton et al. v. Hausler et al.*, 20 C. A. 275, 49 S. W. 118.

A devise of a life estate held to empower the life tenant to dispose of the fee. *Liv-ington v. Koenig*, 20 C. A. 398, 50 S. W. 463.

A life tenant, with power to sell, held to have no power to sell fraudulently to defeat residuary legatees. *Gibony v. Hutcheson*, 20 C. A. 581, 50 S. W. 648.

A provision in a will that the wife to whom the property was devised should enjoy the same during her natural life with full power to devise and bequeath the same by will or otherwise to either of her sons, not to become operative, however, until after her death, gave her absolute power to devise or convey the property to either of her sons. *Watson v. Watson*, 21 C. A. 348, 51 S. W. 1105.

A will construed, and held, that the husband of the testatrix, as trustee for her children, was vested with the legal title, with power to alienate. *Wiess v. Goodhue* (Civ. App.) 79 S. W. 873.

A devise, with power of sale and remainder over in the event of no sale, is valid. *Cottrell v. Moreman* (Civ. App.) 136 S. W. 124.

42. — **Mortgage.**—Under a will giving power to sell, devise or exchange land, with a provision that if devisee should die before sale, devise or exchange, it should descend to his heirs, in which is found a further provision that the devisee should have the right to dispose of the land as he pleases during his life; held, that devisee could not mortgage the land. *Quisenberry v. J. B. Watkins Land & Mortgage Co.*, 92 T. 247, 47 S. W. 708.

43. — **Survival.**—A power committed to two or more persons, unless it otherwise appear from the instrument by which it is delegated, is properly executed only by the joint act of all, or all who have accepted the trust. When a trust is executed by one of several joint executors, with the consent and approbation of the others, or when the others subsequently ratify a sale made by one under the trust, the act of the single executor will be regarded, in equity, as binding upon the estate. A deed made by one of several executors, authorized by will to act independent of the control of the probate courts, if authorized by the coexecutors, and approved by them when made, is merely an irregular and imperfect execution of the power which will be aided in equity. The exceptions recognized above are as well settled as the rule that a joint power must be executed by the joint act of the trustees or executors. *Giddings v. Butler*, 47 T. 535.

The power given by will to two executors to sell property, in case of the death of one survives to the other. *Terrell v. McCown*, 91 T. 231, 43 S. W. 2.

44. **Will as execution of power.**—A residuary clause in a will executed by the donee of a power held applied to her interest, and not to the power. *Arnold v. Southern Pine Lumber Co.* (Civ. App.) 123 S. W. 1162.

A general residuary clause in a will may be regarded as sufficient execution of the power, though there is no reference in the will to the power. *Id.*

Where it is doubtful whether a will is in execution of a power, it will not be regarded as an execution thereof. *Id.*

A clause in a will executed by one having an estate for life with power of appointment by will or deed held not to have reference to the power. *Southern Pine Lumber Co. v. Arnold* (Civ. App.) 139 S. W. 917.

45. **Interest conveyed by trustee's will.**—A trustee's will, devising his entire estate to one of the beneficiaries, passes only the interest possessed by the testator. *Arnold v. Southern Pine Lumber Co.* (Civ. App.) 123 S. W. 1162.

46. **Actions for construction.**—A court of equity will correct mistakes in a will, when they are apparent upon its face, or may be made out by a due construction of its terms. *Hunt v. White*, 24 T. 643.

Legatees not acting in good faith in a suit to construe a will, their attorneys held not entitled to compensation out of the estate. *Thornton v. Zea*, 22 C. A. 509, 55 S. W. 798.

The court in a suit involving the construction of a will is without jurisdiction to render a decree in accordance with the construction placed on it where beneficiaries named in the will are not made parties. *Hay v. Hay* (Civ. App.) 120 S. W. 1044.

Where an action to construe a will is an attack upon a former opinion of the appellate court construing the same will, it is not error to refuse to make the plaintiff's attorney's fee a charge upon the fund devised by the will. *Walker v. Thornton* (Civ. App.) 124 S. W. 166.

47. **Compromise of litigation over will.**—The mayor of a city held not authorized to compromise, without a judgment of the court, a litigation involving a will giving to the poor of the city testator's estate; and a compromise entered into by attorneys held not enforceable, because the attorneys had no authority to make the agreement. *Lake v. Hood*, 35 C. A. 32, 79 S. W. 323.

48. **Rights of devisees and legatees.**—One may be made the legatee of the proceeds of a life-insurance policy taken out by the testator on his own life, though having no insurable interest in the life of the testator. *Fletcher v. Williams* (Civ. App.) 66 S. W. 860.

The fact that the possession of a will was intrusted to the legatee of the proceeds of an insurance policy on the testator's life would not invalidate the bequest. *Id.*

A settlement between all the devisees under a will held to have been binding on all the parties thereto. *Ackermann v. Ackermann* (Civ. App.) 99 S. W. 889.

Certain conveyances made under a scheme to defeat the provisions of the will of the husband of one of the parties held invalid. *Littler v. Dielmann*, 48 C. A. 392, 106 S. W. 1137.

A devisee held not entitled to complain of certain payments made by her mother's executor. *Nagle v. Von Rosenberg*, 55 C. A. 354, 119 S. W. 706. See, also, notes under Art. 3235.

49. — **Suits to recover property.**—See, also, notes under Arts. 1886, 3235. In suit by legatee to recover property belonging to the estate, allegation that estate is solvent is insufficient to show that there is no necessity for administration, so as to authorize the suit. *Laas v. Seidel*, 28 C. A. 140, 66 S. W. 871, 68 S. W. 724.

A devisee of \$300 out of a \$500 note, if entitled to sue on the note, should make the devisee of the balance a party defendant, so that the judgment may be complete protection to the maker against further litigation thereon. *Id.*

Suit by legatee of \$300 out of a \$500 note held to be on the note, and not on a promise to pay legatee, made by its maker to the devisee of the balance. *Id.*

An allegation in the petition in an action on a note bequeathed to plaintiff, that testator's estate is solvent, is not equivalent to an allegation that there is no administration pending or necessary. *Laas v. Seidel*, 95 T. 442, 67 S. W. 1015.

The objection, in an action on a note bequeathed to plaintiff, that the petition fails to allege that no administration is pending or necessary held raised by a general demurrer. *Id.*

50. — **Right to support.**—A judgment against trustees under a will requiring them to support a legatee pending an action by him for support held not erroneous, though no refunding bond was required. *McCreary v. Robinson* (Civ. App.) 49 S. W. 933.

Under a will giving a devisee possession of land, and the use of the rents for the support of herself and father, the father is entitled to support from the rents, though he refuses an offer of a home with his daughter. *Id.*

51. **Specific bequest.**—One given legacy of \$250 annually until testator's estate should be wound up held not entitled to the same after partition. *Kosminsky v. Estes*, 27 C. A. 69, 65 S. W. 1108.

52. **Lapse of legacy.**—A will held not to express intent to prevent lapse of a devise and bequest. *Coleman v. Jackson* (Civ. App.) 126 S. W. 1178.

To prevent lapse of a devise from the death of the devisee before testator, there must be an unequivocal designation as to what person testator wishes to take the devise. *Id.*

Where a devisee or legatee dies before testator, the devise or legacy lapses. *Id.*

53. **Release of beneficiary's interest.**—A release by an alleged beneficiary under a will to executors procured by money paid from the estate is no bar to her recovery of any interest to which she was entitled under the will. *Farrell v. Cogley* (Civ. App.) 146 S. W. 315.

54. **Election—Testamentary provisions.**—A widow held required to elect whether to take under the will. *Lee v. McFarland*, 19 C. A. 292, 46 S. W. 281.

A will of the husband held not to put the widow to an election. *Gibony v. Hutcheson*, 20 C. A. 581, 50 S. W. 648.

Construction of will by trustees to require widow to elect held not so obviously erroneous as to warrant its disturbance by a court. *Couts v. Holland*, 48 C. A. 476, 107 S. W. 913.

A testator's widow is not estopped to claim her interest in community property by accepting testamentary provision, unless the will shows intent to dispose of her estate. *Autrey v. Stubenrauch* (Civ. App.) 133 S. W. 531.

A will held to dispose of testator's separate property only so as not to call on his wife, a beneficiary, to elect to take under the will or her own property. *Sauvage v. Wauhop* (Civ. App.) 143 S. W. 259.

To require one to elect whether she will take under the will or as heir testatrix's intention to that effect must be clearly shown in the will or arise from the most necessary implication. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

A devisee who was the only person to whom specific property was devised by the will, the only other devise being "of any and all property that may be mine at the time of my death," was not required to elect whether she would take under the will or as heir of another the specific property which did not belong to testator. *Id.*

A devisee cannot be compelled to elect if the property devised to her would have belonged to her as heir independent of the will. *Id.*

55. — **Acts constituting.**—Some free disposable property must be given to the electing donee which can become compensation for what the testator sought to take away. See facts showing such consideration and an election under the will. *Smith v. Butler*, 35 T. 126, 19 S. W. 1083.

A widow held to have elected to take under the will. *Lee v. McFarland*, 19 C. A. 292, 46 S. W. 281.

A legatee's recognition of the executor named in the will as the executor held not to constitute an election to take under the will, so as to estop the legatee from denying its provisions. *Pryor v. Pendleton*, 92 T. 384, 47 S. W. 706, 49 S. W. 212.

A legatee and devisee held by signing a paper to have elected to accept under the



will, though at the time she did it she was told that it would not affect her rights with reference to the will. *Pryor v. Pendleton* (Civ. App.) 49 S. W. 403.

The execution of a mortgage by a legatee on property bequeathed to him held not an election by him to take under the will. *Williams v. Emberson*, 22 C. A. 522, 55 S. W. 595.

Facts held insufficient to show an election by a surviving wife to take under the will of her deceased husband. *McClary v. Duckworth* (Civ. App.) 57 S. W. 317.

An agreement between the widow and children of a testator in executing a will and dividing the property among them held not to amount to a renunciation by the widow of her interest under the will. *St. Mary's Orphan Asylum of Texas v. Masterson*, 57 C. A. 646, 122 S. W. 587.

One held to have elected to take under a will, so that she was estopped to claim an interest, as heir of another, in lands attempted to be disposed of by the residuary clause and by deeds executed by testatrix at the same time. *Packard v. De Miranda* (Civ. App.) 123 S. W. 710.

An election made by a devisee in ignorance of material facts is not binding upon him. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

**56. — Effect.**—The principle of election is that he who accepts a benefit under a will must adopt the whole contents of the instrument so far as it concerns him, conforming to its provisions and renouncing every right inconsistent with it. *Smith v. Butler*, 85 T. 126, 19 S. W. 1083.

Where a devisee accepts property under a will he can not contest its provisions. *Pryor v. Pendleton*, 92 T. 384, 47 S. W. 706, 49 S. W. 212.

Where there is evidence tending to show that a legatee and devisee has accepted under the will, he will be held to have adopted the whole contents of the will so far as it concerns him. *Pryor v. Pendleton* (Civ. App.) 49 S. W. 403.

A wife accepting the benefits of the will of her husband which devises the community property to another, is estopped from denying the right of the husband to devise such property. *Gilroy v. Richards*, 26 C. A. 355, 63 S. W. 664.

A wife, by accepting rents devised by her husband, held not to be estopped from setting up her claim to community property which the husband had devised to a person who died prior to the husband. *Id.*

Wife, accepting bequest, held estopped to assert community rights in other property disposed of by her husband's will. *Skaggs v. Deskin* (Civ. App.) 66 S. W. 793.

Devisee under a will held estopped to claim that he had not accepted certain property thereunder. *Torno v. Torno*, 43 C. A. 117, 95 S. W. 762.

One who accepts a devise under a will must adopt the whole instrument so far as he is interested therein. *Packard v. De Miranda* (Civ. App.) 146 S. W. 211.

Beneficiaries under a will accepting the benefits thereunder are bound by their election. *Johnson v. Avery* (Civ. App.) 148 S. W. 1156.

**57. Legacies charged on estate.**—A legacy is not chargeable on real estate unless the will clearly exhibits an intent to so charge it. *Cairns v. Smith* (Civ. App.) 49 S. W. 728.

"Charges" which testator directed should be paid out of his real estate held not to include legacies. *Id.*

A will held not to show an intent that general legacies should be chargeable on undevised real estate. *Id.*

Under a will charging the rents of land with the support of a legatee, the court may determine what would be a reasonable sum for such support. *McCreary v. Robinson* (Civ. App.) 49 S. W. 933.

Will construed, and held to charge legacies on the real estate, except the homestead. *Smith v. Cairns*, 92 T. 667, 51 S. W. 498.

A legacy held not to have been a charge on land. *Heyer v. Moerlein* (Civ. App.) 94 S. W. 446.

Under a will, property given a devisee for life held not chargeable with his indebtedness to the estate. *Cochran v. Cochran*, 43 C. A. 259, 95 S. W. 731.

Under a common-law rule in force in Texas, held, that legatees of a will could not subject real estate to the payment of their legacies. *Moerlein v. Heyer*, 100 T. 245, 97 S. W. 1040.

A will construed, and held, that the special legacies therein were a charge on testator's real estate. *Haldeman v. Openheimer* (Civ. App.) 119 S. W. 1158.

Will held to charge payment of legacies on the realty if the personalty was insufficient after the payment of debts. *Haldeman v. Openheimer*, 103 T. 275, 126 S. W. 566.

**58. Debts of testator.**—A testator provided by his will that all his just debts be paid; and first, those to his sister and to his uncle. Held, that the will took the debts to the sister and uncle out of the statute of limitations, and obligated their payment by the executrix, provided there were assets for the purpose. *Bullard v. Thompson*, 35 T. 313.

A clause in a will directing the executor appointed by it "to disregard the statute of limitations as to the principal, but not as to the interest upon indebtedness" of the estate, authorizes the principal of just debts to be allowed and paid by the executor, although barred by limitation. *Campbell v. Shotwell*, 51 T. 27.

To authorize the annulling of an approval of a claim under the discretion vested by such will would require a clear and palpable violation of discretion on the part of the executor in allowing a debt under the will. *Id.*

Property devised held chargeable with payment of debts of testatrix. *Shiner v. Shiner*, 15 C. A. 666, 40 S. W. 439.

A legatee, having possession of a note belonging to the estate, may accept a renewal which inures to the benefit of the executor. *Dark v. Middlebrook* (Civ. App.) 45 S. W. 963.

A devise of lands, though absolute, is subject to the payment of debts of the testator, where the personalty is insufficient. *Hamn v. Hutchins*, 19 C. A. 209, 46 S. W. 873.

In an action against the beneficiary under a will, upon the allegation that the original party liable was dead, and that defendant had from the estate property sufficient to satisfy plaintiff's demand, evidence held insufficient to require the court to charge that

the evidence established the facts contended for by plaintiff. *Webb v. Gregory* (Civ. App.) 129 S. W. 1145.

See, also, notes under Arts. 3235, 3592.

**59. Lapsed devises and bequests.**—A special bequest to one who was dead when the will was made is void. What shall then become of the bequest must be determined from a construction of the entire will. *Moss v. Helsley*, 60 T. 426.

Where a special bequest was made to the son (who was already dead) and to "his heirs and assigns forever," with another clause conveying to the testator's wife "all the remainder of my estate in lands, goods, chattels, credits and rights," but precluding her from disposing of property willed to the children, it was held that the property embraced in the void bequest was subject to the laws of descent and distribution. *Id.*

Where land was devised to a son or his descendants, and he died without descendants, held, that the devise lapsed. *Lee v. McFarland*, 19 C. A. 292, 46 S. W. 281.

The lapse of a devise of real estate charged with payment of a specific legacy by the death of the devisee before testator does not cause the legacy to lapse. *Gilroy v. Richards*, 26 C. A. 355, 63 S. W. 664.

Where real estate is devised to A., with a specific legacy of one year's rent to B., but requiring the latter to pay \$150 thereof to A., and the devise lapses by reason of the death of A. before the testator, the \$150 is held by B. in trust for the heirs of testator. *Id.*

A lapsed legacy goes to the residuary legatees, unless the will shows that testator intended the residuary gift to have only a limited effect. *Lenz v. Sens*, 27 C. A. 442, 66 S. W. 110.

Will construed, and residuary estate held not to include a lapsed legacy of large amount bequeathed to testatrix's niece. *Id.*

When a devise of land fails because of lapse or because it is void ab initio, the property devolves on the heir as intestate real property. *Coleman v. Jackson* (Civ. App.) 126 S. W. 1173.

**60. Rights of creditors of legatees and devisees.**—Property delivered by an executor to the beneficiary of the will as agent of such executor held not liable for the debts of such beneficiary. *Cox v. Patten* (Civ. App.) 66 S. W. 64.

Judgment against executrix in New York held no basis for suit against her as devisee in Texas. *Webster v. Clarke*, 100 T. 333, 99 S. W. 1019, 123 Am. St. Rep. 813.

In a suit to condemn to the satisfaction of plaintiff's debt against a decedent property in the hands of defendant by virtue of decedent's will, defendant could not set up as a defense any rights of other creditors without at least making such other creditors parties and seeking to have the property in his hands properly applied to the payment of all the debts. *Tison v. Gass*, 46 C. A. 163, 102 S. W. 751.

## TITLE 136

## WOOL GROWING INTERESTS

Art.	Art.
7878a. Sale of sheep affected with scab unlawful.	7879. Inspectors of sheep to be appointed in counties, when.
7878b. Scab defined.	7880. Bond.
7878c. Importing sheep affected with scab unlawful.	7881. Duties.
7878d. Moving from one county to another unlawful.	7882. Compensation.
7878e. Moving from one to another part of county unlawful.	7883. Duties and powers; expenses, how recovered; penalty.
7878f. Driving across another's lands unlawful.	7884-7886. [Repealed.]
7878g. Driving on public road unlawful.	7886a. State inspector.
	7886b. Appointment and qualifications; bond; report; salary, etc.
	7886c. Duties.
	7886d. Appropriation.

**Article 7878a. Sale of sheep affected with scab unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to sell or buy any sheep affected with scab. [Acts 1911, p. 7, sec. 1.]

**Art. 7878b. Scab defined.**—Scab in this Act is defined to be a disease or itch caused from a bug or parasite which works itself into the wool and flesh of the sheep, causing a crusted sore, injuring the wool and causing same to fall from the animal. [Id. sec. 1a.]

**Art. 7878c. Importing sheep affected with scab unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to import into this state any sheep affected with scab. [Id. sec. 2.]

**Art. 7878d. Moving from one county to another unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to move from one county to another in this state any sheep affected with scab. [Id. sec. 3.]

**Art. 7878e. Moving from one to another part of county unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to move from one part of any county in this state to any other part of the same county any sheep affected with scab. [Id. sec. 4.]

**Art. 7878f. Driving across another's lands unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to drive or cause to be driven on or across the lands of another any sheep affected with scab. [Id. sec. 5.]

**Art. 7878g. Driving on public road unlawful.**—That from and after the taking effect of this Act it shall be unlawful for any person, firm or corporation to drive along or over a public road any sheep affected with scab. [Id. sec. 6.]

**Note.**—Sections 7 and 8 make violations of the act misdemeanors.

**Art. 7879. [5357] Inspectors of sheep to be appointed in counties, when.**—Whenever it appears from the assessor's rolls of any county that there are as many as two thousand sheep owned and assessed for taxes in any county in this state, it shall be mandatory upon the commissioners court of said county, upon the application of six resident sheep owners in said county, to appoint a competent inspector of sheep, who shall be a resident citizen of such county. Such inspector shall hold his office for two years, or until his successor is appointed and qualified. Such inspector may appoint one or more deputies, who shall take the oath of office prescribed by the constitution, and may perform the same acts as inspector of sheep; and the inspector may require of his deputies

so appointed, bonds, payable to himself, for the faithful performance of their duties as such deputies. [Id. sec. 9.]

**Note.**—Acts 1911, p. 7, sec. 20, repeals Title 111, Rev. St. 1895, and all other laws in conflict. Title 111, Rev. St. 1895, corresponds to Title 136, Rev. St. 1911. By section 19 the act takes effect July 1, 1911.

**Art. 7880. [5358] Bond.**—Said inspector of sheep shall, within twenty days after receiving notice of his appointment, and before entering upon the duties of his office, execute a bond with two or more good and sufficient sureties, in a sum to be fixed by the commissioners court, not less than one thousand nor more than five thousand dollars, payable to the county judge and his successors in office, conditioned that he will faithfully and impartially discharge and perform all the duties incumbent upon him as inspector of sheep. Said bond shall be approved by the commissioners court, and be recorded in the office of the county clerk of the county as other official bonds. [Id. sec. 10.]

**Art. 7881. [5359] Duties.**—It shall be the duty of the inspector of sheep or his deputy to carefully and minutely examine and inspect at any time sheep in his county, or which may be driven into or through the county; and when one or more sheep affected with scab are found in any flock so inspected, the entire flock shall be condemned by said inspector or deputy and considered as affected with said disease. [Id. sec. 11.]

**Art. 7882. [5360] Compensation.**—The inspector provided for in the preceding articles shall be entitled to receive from the county in which he is appointed inspector of sheep, to be paid quarterly by warrant ordered drawn by the commissioners court of said county, upon the county treasurer thereof, the following compensation:

(a) In counties where the tax rolls of said counties show there are as many as two thousand and not more than ten thousand head of sheep rendered for taxes the sum of two hundred dollars per annum. [Id. sec. 12.]

Subdivision b. In counties where the tax rolls of said counties show there is not less than ten thousand and not more than thirty-two thousand head of sheep rendered for taxes the sum of four hundred dollars per annum.

Subdivision c. In counties where the tax rolls of said counties show there are thirty thousand or more sheep rendered for taxes, the sum of one thousand dollars per annum. [Acts 1911, p. 7, sec. 12. Amended Acts 1913, p. 422, sec. 1.]

**Art. 7883. [5361] Duties and powers; expenses, how recovered; penalty.**—It shall be the duty of each inspector of sheep to inspect each and every flock of sheep in his county at least once every three months; and he shall make written report of his findings, stating that he has complied with this provision, to the commissioners court of his county, which report shall be sworn to by him before any officer authorized to administer oaths. And should he find any flock or flocks of sheep in his county affected with scab, he shall notify the owner of such sheep, and demand of such owner that his sheep be cured of scab in thirty days; and should such owner fail or refuse to cure his sheep of scab within that period of time, then the inspector is authorized to take charge of such flock or flocks of sheep and dip the same in lime and sulphur; said preparation of dip to be made up in the proportion of one pound of lime to two pounds of sulphur, boiled and cooked well in ten gallons of water, and to use one gallon of said ooze to ten gallons of water in the vat in which the sheep are dipped; and each one of such sheep so dipped shall be allowed to remain in the dipping vat for a period of three minutes. And if the owner of such flock or flocks of sheep so found to be infected with scab shall fail or refuse to cure the same of scab as above provided, after being notified by the inspector so to do, and the inspector takes

charge of such flock or flocks of sheep and cures the same of scab, the county in which he is inspector shall be entitled to recover of the owner of such flock or flocks of sheep all expenses incurred by the inspector; and in addition to such expense, the sum of two dollars per day for each day so required by the inspector in curing such sheep of scab; and it is hereby made the duty of the commissioners court of such county to enforce and collect of such owner or owners all such expense, as well as the sum of two dollars per day for each day the inspector shall consume in the dipping of such flock or flocks of sheep, by suit brought in the name of the county judge of such county, in any court of said county having jurisdiction of the amount involved. Provided, however, that if the owner or owners of such infected sheep can not be found in the county where the sheep are situated, then the notice herein provided for shall be given to the person or persons in charge of such sheep, and such notice shall be as binding as if given to the owner or owners. And in addition to the recovery by the commissioners court as herein provided, should any owner or any person in charge of such flock or flocks of sheep fail or refuse to cure such sheep of scab when instructed to do so by the inspector, such owner or person in charge of such sheep shall be liable upon conviction therefor to a fine of not less than one hundred dollars nor more than two hundred dollars. [Acts 1911, p. 7, sec. 13.]

**Arts. 7884-7886.**—Repealed. See note under Art. 7879.

**Art. 7886a. State inspector.**—The office of state sheep inspector is hereby created. [Acts 1911, p. 7, sec. 14.]

**Art. 7886b. Appointment and qualifications; bond; report; salary, etc.**—The governor shall appoint to the office of state sheep inspector a person well versed in sheep husbandry and thoroughly conversant with scab in sheep to serve for one year and until appointment and qualification of his successor. Appointee shall qualify by taking official oath prescribed by the constitution and shall give bond in the sum of five thousand dollars for the faithful discharge of his duties, such bond made payable to the governor and approved by the comptroller of the state of Texas, and filed by him in his office; and said sheep inspector shall make his annual report to the governor. He may be discharged at any time by the governor and no warrant for his salary shall issue except on warrant of the governor. He shall be allowed as salary one hundred dollars per month and in addition thereto his traveling expenses, such expenses however, not to exceed in any month fifty dollars; said salary shall be paid to him on order of the governor, by warrant drawn by the comptroller of public accounts upon the state treasurer. And said inspector shall file with the governor at the end of each month his written, verified account of his traveling expenses. Provided, the office of state inspector shall expire at the end of two years. [Acts 1911, p. 7, sec. 15. Amended Acts 1913, p. 422, sec. 2.]

**Art. 7886c. Duties.**—It shall be the duty of the state sheep inspector to zealously ferret out all violations of this Act, and to assist the several district and county attorneys in prosecuting all violations of this Act. And upon request of any sheep owner in those counties having less than 2000 sheep, it shall be the duty of the state inspector to perform those duties of county inspectors as defined in this Act. All county inspectors shall be under his immediate supervision and control. [Acts 1911, p. 7, sec. 16.]

**Note.**—Section 17 provides that the county judge or commissioners' court shall be guilty of a misdemeanor if they fail to discharge the duties imposed on them by this act.

**Art. 7886d. Appropriation.**—The sum of eighteen hundred dollars, or so much thereof as may be necessary is hereby appropriated out of any funds in the state treasury not otherwise appropriated to be used in paying the salary and traveling expenses of state sheep inspector. [Acts 1911, p. 7, sec. 18. Amended Acts 1913, p. 422, sec. 3.]

## TITLE 137

## WRECKS

Chap.  
1. Of Wreck-Masters.

Chap.  
2. Of Cotton Salvage.

## CHAPTER ONE

## OF WRECK-MASTERS

Art.  
7887. Appointment of wreck-master.  
7888. Bond and oath.  
7889. His duties.  
7890. To be controlled by pilot commissioners.

Art.  
7891. To take possession of wrecked property and sell.  
7892. To keep a record, etc.  
7893. Additional record and reports.  
7894. Fees and perquisites.  
7895. Special duty to prosecute.

**Article 7887. [5365] Appointment of wreck-masters.**—The governor shall appoint not less than one and not more than three persons of good character in each maritime county of the state as wreck-masters for such county. [Act April 30, 1846, p. 158, sec. 1. P. D. 5375.]

**Art. 7888. [5366] Bond and oath.**—Each person so appointed shall, before entering upon the duties of his office, give bond, with two or more good and sufficient sureties, in the sum of five thousand dollars, payable to the county judge of the county for which he is appointed, and to be approved by such officer, conditioned that the person so appointed shall faithfully discharge the duties of his office; which bond shall be deposited with the clerk of the county court of such county. The appointee shall also take the oath prescribed by the constitution for all officers; which oath shall be indorsed on said bond before the same is filed. [Id.]

**Art. 7889. [5367] His duties.**—It shall be the duty of each wreck-master so appointed, as soon as he may be apprised of any wreck in his county, or the portion of such county allotted to him, to repair at once to the place where such wreck has occurred, and, if the property so wrecked be found abandoned, to attend to the salvaging thereof, to use his best endeavors for the preservation of the same, and to attend generally to the interests of the owners of such property or whom it may concern; and the wreck-master shall have the command and direction of all persons engaged in saving and preserving such property. [Id. sec. 2. P. D. 5376.]

**Art. 7890. [5368] To be controlled by pilot commissioners.**—Wreck-masters shall be subject to the control and direction of the commissioners of pilots for the principal ports of their counties, if such there be; but, in case there are no such officers in such county, then wreck-masters shall be under the control of the county judge of their county. [Id. sec. 3. P. D. 5377.]

**Art. 7891. [5369] To take possession of wrecked property and sell.**—Each wreck-master shall take into his custody and safely keep all wrecked property salvaged by him, or under his direction, or found wrecked and abandoned in his county, or that portion of the county under his supervision and jurisdiction; and, after the notice required by law, he shall sell the same at public auction for the benefit of the owners or underwriters and the salvers, to all of whom he shall faithfully account. [Id. sec. 5. P. D. 5379.]

**Art. 7892. [5370] To keep a record, etc.**—Each wreck-master shall keep a true account of all property salvaged by him, or under his direction, with the circumstances under which it was salvaged, and the names of the person engaged in salvaging, the time that each was so employed and other circumstances needful for the proper apportionment of salvage. [Id. sec. 4. P. D. 5378.]

**Art. 7893. [5371] Additional record and reports.**—He shall also keep a true account, in a book to be kept for that purpose, of all sales made by him and the proceeds thereof, commissions, expenses, salvage, balance left, and the condition and disposition of the same; and, within one month after each sale, and at other times when required, he shall make an abstract report in writing, signed by him, of the matters and things provided for in this and the preceding article, to the commissioner of pilots or the county judge, as the case may be, and he shall also, when required, report the same, together with all needful information in his possession, to the court or other tribunal before which cases of salvage may be pending. [Id. sec. 4. P. D. 5378.]

**Art. 7894. [5372] Fees and perquisites.**—Wreck-masters shall receive a commission of five per cent upon the amount of all sales made by them, after deducting all expenses, not including salvage, with such reasonable expenses as may be allowed by the authority which may control them, or the court before which the case may come; which expenses may include the wages and mileage of a crier, at a rate to be fixed by such controlling authority. [Id. sec. 5. P. D. 5379.]

**Art. 7895. [5373] Special duty to prosecute.**—It shall be the special duty of each wreck-master to prosecute before the proper tribunal any person who may be guilty of wasting, stealing or embezzling any property coming within the description of wrecked property. [Id. sec. 6. P. D. 5380.]

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## CHAPTER TWO OF COTTON SALVAGE

**Art. 7896.** Wrecked cotton to be advertised.  
**7897.** And delivered to owner, when.  
**7898.** If no owner appear, to be sold.  
**7899.** And proceeds paid into state treasury.

**Art. 7900.** If no wreck-master, county clerk to act.  
**7901.** Warrant to issue for suspected cotton.

**Article 7896. [5374] Wrecked cotton to be advertised.**—It shall be the duty of the person taking up cotton afloat, abandoned in rivers, or in the waters of the gulf of Mexico on the coast of this state, or in the bays or bayous thereof, to place the same in a secure place out of the weather, and give early notice by advertisement, or by other means, at the port to which said cotton was destined, if within this state, and, if without the limits of the state, or its destination be unknown to the finder, then at the nearest port of entry in this state to the locality where it may be taken up, of the finding of the same, giving a description of the marks or brands on said cotton, together with the place of finding and the name of the finder. [Act Aug. 30, 1856, p. 76, sec. 1. P. D. 1030.]

**Art. 7897. [5375] And delivered to owner, when.**—It shall be the duty of the person finding, or other person having said cotton in his possession, to deliver the same to the owner, insurer or consignee thereof, on demand, upon being paid the expense of advertisement, and five dollars upon each bale so saved and delivered. [Id. sec. 2. P. D. 1031.]

**Art. 7898. [5376] If no owner appear, to be sold.**—If no owner, insurer or consignee of the cotton appear within three months after such advertisement, the person finding shall cause the same to be sold at auction by a legal wreck-master of the county in which said cotton is deposited, at public outcry to the highest bidder; and the wreck-master shall, from the proceeds of such sale, pay the necessary expenses attending the storage, advertising and sale of said cotton, and to the finder the salvage of five dollars for each bale as aforesaid. The remainder, less his commissions and other necessary expenses, he shall hold in trust for the benefit of the owner or others concerned. [Id. sec. 3. P. D. 1032.]

**Art. 7899. [5377]. And proceeds paid into state treasury.**—If, at the expiration of one year thereafter, no legal claimant appears therefor, said proceeds shall be paid over by said wreck-master to the treasurer of the county in which the sale took place; and said county treasurer shall immediately pay the same over to the treasurer of the state, who shall pay the same over to the person entitled thereto, on proof being made of the right of the claimant, in the manner provided for the recovery of money paid into the treasury of the state by executors or administrators of estates where no heirs, devisees or legatees of the estate appear to claim the fund of the estate on the final settlement thereof. [Id.]

**Art. 7900. [5378] If no wreck-master, county clerk to act.**—In case there shall be no wreck-master in the county in which the cotton is deposited, then it shall be the duty of the clerk of the county court to perform all the duties required of wreck-masters by the two preceding articles, and such clerk shall be entitled to receive the same compensation for his services as is allowed to wreck-masters under this chapter. [Id. sec. 4. P. D. 1033.]

**Art. 7901. [5379] Warrant to issue for suspected cotton.**—Upon affidavit being made before any justice of the peace that the affiant has good reason to believe, and does believe, that certain cotton within his county has been so found, or having been found without such county has been brought therein, and that reasonable time has elapsed, and that the finder has neglected to comply with the requirements of the foregoing articles, it shall be the duty of such justice of the peace to issue his warrant and cause said cotton, or its proceeds, to be seized by a legal officer and delivered to the wreck-master of said county, to be disposed of according to the provisions of this chapter. [Id. sec. 6. P. D. 1035.]



## FINAL TITLE

## GENERAL PROVISIONS

Sec.	Sec.
2. Revised Civil Statutes, how known and cited.	13. Laws as to reservations for actual settlers and public buildings not repealed.
3. To be liberally construed.	14. Laws for the payment of unpaid school teachers and public libraries not repealed.
4. Repealing clause.	15. Certain laws of a local or private nature still in force.
5. Repeal does not affect, what.	16. Shall be construed as continuation of former laws, etc.
6. Same subject.	17. Laws of the thirty-second legislature not affected.
7. Validating and legalizing statutes not repealed.	18. Not to be printed in pamphlet laws.
8. Laws relating to public debt, etc., not repealed.	19. Take effect, when.
9. Laws relating to university and school funds not repealed.	20. Annotations not part of statute.
10. Laws creating, etc., counties and county seats not repealed.	21. Not to affect acts of thirty-third legislature.
11. Judicial districts and times of holding district courts.	22. Emergency clause.
12. No person, etc., released from any duty, etc.	

**Section 2. Revised Civil Statutes, how known and cited.**—Be it further enacted, that these Revised Civil Statutes of the state of Texas shall be known and may be cited as the "Revised Statutes."

**Sec. 3. To be liberally construed.**—That the rule of the common law that statutes in derogation thereof shall be strictly construed shall have no application to the Revised Statutes; but the said statutes shall constitute the law of this state respecting the subjects to which they relate; and the provisions thereof shall be liberally construed with a view to effect their objects and to promote justice.

*Cited, Slayden-Kirksey Woolen Mill v. Houston & T. C. R. Co. (Civ. App.) 132 S. W. 77; Mecca Fire Ins. Co. of Waco v. Stricker, 136 S. W. 599.*

**In general.**—In the construction of the Revised Statutes the primary rule embraces all of its provisions. None of them are subject to a strict construction. Whether general provisions or exceptions, all alike must be liberally construed with a view to effect the object sought, and to promote justice. *Texas Mexican Ry. Co. v. Locke, 63 T. 623.*

**Derogation of common law.**—The rule that a statute in derogation of the common law is to be strictly construed has been abolished by statute in Texas. *Galveston, H. & S. A. Ry. Co. v. Walker, 48 C. A. 52, 106 S. W. 705.*

**Attachment and garnishment.**—It is said that the statute on garnishment is not entitled to and has never received a liberal construction in favor of the party resorting to the remedy. *Jemison v. Scarborough, 56 T. 353.* The law must be strictly followed. *Scurlock v. G., C. & S. F. Ry. Co., 77 T. 478, 14 S. W. 143.* Courts may refuse to extend aid to the proceeding beyond the plain import of the law. *Seaton v. Brooking, 1 App. C. C. § 1045.*

Under the above section, strictness in attachment proceedings is exacted only so far as to require a substantial compliance with the material provisions of the law. *Lewis v. Stewart, 62 T. 352.* But it is held that all the material requirements of the law must be complied with. *Dunnenbaum v. Schram, 59 T. 281; Espey v. Heidenheimer, 53 T. 662.* The courts will not indulge in presumptions to supply a defect in attachment proceedings, which, if not supplied, prevents the affidavit from coming up to the requirements of the statute. The utmost latitude allowed is to exact only a substantial compliance with the law, or the use of language which necessarily and properly makes the case provided for the issuance of the writ. *City Nat. Bank v. Flippen, 66 T. 610, 1 S. W. 897.*

**Negligent death.**—Though this section provides that the rule that statutes in derogation of the common law shall be construed strictly shall not apply, but the statutes shall be liberally construed to effect their objects, a right of action for negligent death of a servant must be founded on a statute fairly construed. *Farmers' & Mechanics' Nat. Bank v. Hanks, 104 T. 320, 137 S. W. 1120.*

**Mechanics' liens.**—As regards the enforcement of mechanics' liens the rule seems to be that where the lien is given by the constitution, the law giving the remedy is to be construed liberally; in other cases, strictly. *Warner Elevator Mfg. Co. v. Maverick, 88 T. 489, 30 S. W. 437, 31 S. W. 353, 499; Tyler Tap R. Co. v. Driscoll, 52 T. 13; Central M. R. Co. v. Henning, 52 T. 466.*

**Quo warranto.**—In adopting the statute of 9th Anne, on quo warranto, the legislature, in adopting the language of the act, is presumed to have intended it to receive the construction which the courts had uniformly given it. *State v. Smith, 55 T. 447.* This is a general rule of construction (*Morgan v. Davenport, 60 T. 230; Brothers v. Mundell, 60 T. 240*), and applies where a former law is substantially re-enacted (*Moffett v. Moffett, 67 T. 642, 4 S. W. 70*).

**Construction of laws in general.**—See Arts. 5502-5504.

**Sec. 4. Repealing clause.**—That all civil statutes of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed.

**In general.**—When a general revising act expressly repeals all inconsistent acts and parts of acts, this implies that if there are parts of former acts not embraced in the new act, and not inconsistent therewith, they are not repealed. *Buse v. Bartlett*, 1 C. A. 335, 21 S. W. 52.

The effect of this section is to expressly repeal all laws which are not included in the Revised Statutes, or which are not expressly continued in force by the act adopting the revision. *Heil v. Martin* (Civ. App.) 70 S. W. 437.

Though compilers of the Code failed to bring forward provisions of the statute, the original statute may be looked to in construing the Code provisions, though the court cannot bring forward any portion of the statute as it formerly existed. *Runnels v. State*, 45 Cr. R. 446, 77 S. W. 463.

**Special terms of district courts.**—Whatever doubt there may have been on this point previous thereto, under Art. 1720, which provides that a district judge may convene a special term of the district court at any time fixed by him, and this section, which nowhere requires previous notice of the time of such special terms or publication thereof, nor continues in force statutes relative to such notice or publication, such notice and publication are not required. *Mayhew v. State* (Cr. App.) 155 S. W. 191.

**Ejection of passengers between stations.**—Paschal's Dig. art. 4892, prohibiting the ejection of passengers between stations, having been omitted from the revision of the statutes, and not having been re-enacted, is no longer the law of the state. *Gulf, C. & S. F. Ry. Co. v. Green* (Civ. App.) 141 S. W. 341.

**Repeal of laws in general.**—See notes at end of Title 81.

**Sec. 5. Repeal does not affect, what.**—That the repeal of any statute, or any portion thereof, by the preceding section, shall not affect or impair any act done, or right vested or accrued, or any proceeding, suit or prosecution had or commenced in any cause before such repeal shall take effect; but every such act done, or right vested or accrued, or proceeding, suit or prosecution had or commenced shall remain in full force and effect to all intents or purposes as if such statute, or part thereof so repealed, had remained in force, except that where the course of practice or procedure for the enforcement of such right, or the conducting of such proceeding, suit or prosecution shall be changed, the same shall be conducted as near as may be in accordance with the Revised Statutes.

**Retroactive laws in general.**—See, also, notes under Arts. 5502-5504.

Statutes are held to operate prospectively unless the contrary construction is evidently required by their plain and unequivocal language. *Life Insurance Co. v. Ray*, 50 T. 511.

Rights based on contract are as fully protected by section 16, article 1, of the constitution of Texas, as they are by section 10, article 1, of the constitution of the United States. Under the former, no citizen's rights of any character can be affected by a retroactive law. The latter, it has been held, does not prohibit the passage of a retroactive law, even though such a law may divest antecedent vested rights of property, unless such rights be founded on contract. *Mellinger v. Houston*, 68 T. 37, 3 S. W. 249.

That clause of the state constitution which provides that no retroactive law shall be made was intended to impose a broader restriction on legislative power than could exist in its absence. It protects the citizen in every legal right existing before the enactment of any law designed to retroact and deprive him of it; and this whether the right be, strictly speaking, a right to property or not. *Id.*

Amendments to statutes prescribing methods of procedure do not fall within the constitutional inhibition of retroactive law. *Phoenix Ins. Co. v. Shearman*, 17 C. A. 456, 43 S. W. 930.

Statutes will not operate retroactively unless it clearly appears that was the intention. *Texas & N. O. R. Co. v. Wells-Fargo Express Co.* (Civ. App.) 108 S. W. 172.

Statutes cannot be held to have a retroactive or an ex post facto effect, unless their language compels it. *Texas & N. O. R. Co. v. Wells-Fargo Express Co.*, 101 T. 564, 110 S. W. 38; *Gulf, C. & S. F. R. Co. v. Same* (Sup.) 110 S. W. 41.

"Retroactive law" defined *Keith v. Guedry* (Civ. App.) 114 S. W. 392.

By the implied repeal of a statute by a later statute on the same subject, all acts or omissions in violation of the former statute are pardoned, and the penalties incurred thereunder are no longer enforceable. *State v. Texas & N. O. R. Co.* (Civ. App.) 125 S. W. 53.

The legislature may require any act to be done by a retroactive statute which it could have required in the first instance, and may dispense retroactively with any statutory formality which it could have dispensed with in the first instance. *Parker v. Harris County Drainage Dist. No. 2* (Civ. App.) 148 S. W. 351.

As a general rule, statutes operate prospectively; but they may operate retrospectively when it is apparent that such was the intention, provided no impairment of vested rights results. *Cox v. Robison*, 105 T. 426, 150 S. W. 1149.

**Fixed or vested rights.**—There is no vested right in any particular remedy. But in changing the remedy the right must not be affected, and a substantial remedy must be left or provided. *Paschal v. Perez*, 7 T. 348.

A right, in a legal sense, exists when in consequence of given facts the law declares that one person is entitled to enforce against another a claim, or to resist the enforcement of a claim urged by another. *Mellinger v. Houston*, 68 T. 37, 3 S. W. 249.

When by virtue of law a defendant may plead and show an existing state of facts which would defeat the plaintiff's right to recover, then a protecting right against the plaintiff's demand exists; such a right is fixed and vested, and, in view of the constitutional provision against retroactive law, cannot be divested by legislation. The same constitutional provision protects a plaintiff in the enforcement of every right, recognized and fixed by law, against retroactive legislation. *Id.* See *De Cordova v. City of Galveston*, 4 T. 470.

**Rules of evidence.**—An unwritten confession, made before enactment of the law requiring a confession to be in writing, is inadmissible. *Askew v. State*, 59 Cr. R. 152, 127 S. W. 1037.

**Sec. 6. Same subject.**—That no offense committed and no liability, penalty or forfeiture, either civil or criminal, incurred prior to the time when any statute, or part thereof, shall be repealed or altered by the Revised Statutes, shall be discharged or affected by such repeal or alteration; but prosecutions and suits for such offenses, liabilities, penalties or forfeitures shall be instituted and proceeded with in all respects as if such prior statute, or part thereof, had not been repealed or altered, except that where the mode of procedure or matters of practice have been changed by the Revised Statutes the procedure had after the Revised Statutes shall have taken effect in such prosecution or suit shall be, as far as practicable, in accordance with the Revised Statutes.

**Effect of repeal or change of law in general.**—The repeal of an act by virtue of which suits have been brought and are pending at the time of the repeal does not affect such suits, where the same act which makes the repeal contains a substantial re-enactment of the provisions under which the suits were brought. *McMullen v. Guest*, 6 T. 275.

Rules of evidence affect the remedy, the procedure, and the legislature may modify them at pleasure, provided such changes come not within the constitutional inhibition against laws impairing the obligation of contracts. *Paschal v. Perez*, 7 T. 348.

If pending an appeal the penal law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered. *Etter v. M. F. Ry. Co.*, 2 App. C. C. § 60; *G., C. & S. F. R. R. Co. v. Lott*, 2 App. C. C. § 63.

Act 1897, relating to correction of formal defects in special verdicts, applies to actions pending as well as to future actions. *Phoenix Ins. Co. v. Shearman (Civ. App.)* 43 S. W. 1063.

If a statute on which an action is based is repealed expressly or by necessary implication after the action is begun, the suit is abated. *Jessee v. De Shong (Civ. App.)* 105 S. W. 1011.

If a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them. *Stewart v. Latner*, 53 C. A. 330, 116 S. W. 860.

Where a statute giving a special remedy is repealed without a saving clause, a pending suit cannot be prosecuted after the repeal. *Goodrich v. Wallis (Civ. App.)* 143 S. W. 285.

A statute has only a prospective operation, unless its terms show clearly a legislative intention that it shall have a retroactive effect. *Drought v. Story (Civ. App.)* 143 S. W. 361.

**Sec. 7. Validating and legalizing statutes not repealed.**—That no general or special law heretofore enacted validating or legalizing the acts or omissions of any officer, or any law, act or proceeding whatever, shall be affected by the repealing clause of this title; but all such validating or legalizing statutes whatsoever now in force in this state are hereby continued in force, and the same shall be as effectual for all purposes after as before the Revised Statutes go into effect.

**Acts enumerated.**—Statutes of the kind mentioned in this section are numerous, and they cannot be readily located. Very few are to be found in the Revised Statutes.

Acts validating the incorporation of cities and towns, see Arts. 775, 776, 778.

Acts validating defective registrations, see Early Laws, arts. 997 (§§ 20, 21), 2854 (ante, Art. 6855), 3459, 3942 (ante, Art. 6633); Acts 1891, p. 34.

Act for relief of purchasers, and to validate patents. Act March 17, 1874, p. 29; Early Laws, art. 3869.

Act July 5, 1879, S. S., ch. 24, p. 20 (*Sayles' Civ. St. 1897*, p. 1953), validating titles to land reserved from location or patent.

Act April 4, 1881, ch. 91, p. 104 (2 *Sayles' Civ. St. 1889*, art. 3906a; *Sayles' Civ. St. 1897*, p. 1965), validating locations in certain counties prior to April 29, 1875.

Act March 31, 1883, ch. 49, p. 38 (*Sayles' Civ. St. 1897*, p. 1971), confirming certain patents and surveys.

Act Feb. 6, 1884, S. S. ch. 34, p. 71 (*Sayles' Civ. St. 1897*, p. 1983), validating certain purchases of lands by clerks in land office.

Act March 12, 1889, ch. 93, p. 106 (*Sayles' Civ. St. 1897*, p. 1988), validating acts of land board.

Act April 16, 1889, ch. 94, p. 107 (*Sayles' Civ. St. 1897*, p. 1989), validating certain surveys.

Act April 2, 1891, ch. 87, p. 130 (Sayles' Civ. St. 1897, p. 1990), validating acts of land board.

Acts 1897, p. 13, validating an ordinance of the city of Galveston.

Acts 1897, p. 52 (Sayles' Civ. St. 1897, art. 4218lll), validating forfeitures of land.

Acts 1897, p. 108, validating an ordinance of the city of Laredo.

Acts 1897, p. 113, validating patents to land issued to ex-Confederate and other soldiers.

Acts 1897, p. 153 (Sayles' Civ. St. 1897, art. 616d), validating the incorporation of towns and villages for free school purposes.

Acts 1897, p. 160 (Sayles' Civ. St. 1897, art. 4218z), validating sales of land.

Acts 1897, p. 211 (Sayles' Civ. St. 1897, art. 3993c), validating school districts.

Acts 1897, p. 222 (Sayles' Civ. St. 1897, art. 4218dd), confirming certain patents of land.

Acts 1899, p. 102 (Sayles' Civ. St. Supp. 1899-1904, p. 580), validating Arlington independent school district in Tarrant county.

Acts 1899, p. 149 (Sayles' Civ. St. Supp. 1898-1904, p. 435), relating to sale of timber on public lands and validating titles.

Acts 1899, p. 259 (Sayles' Civ. St. Supp. 1898-1904, p. 448), quieting titles to university lands.

Acts 1903, p. 82 (Sayles' Civ. St. Supp. 1898-1904, p. 447), confirming sales and awards of commissioner as to lands.

Acts 1905, p. 303, § 150 (see ante, Art. 2855), validating school districts.

Acts 1907, p. 30 (Sayles' Civ. St. Supp. 1908, p. 296), validating sales of land.

Acts 1907, p. 33 (Sayles' Civ. St. Supp. 1908, p. 454), validating sales of Coleman county lands.

Acts 1907, p. 276 (Sayles' Civ. St. Supp. 1908, p. 454), ratifying and confirming action of board of commissioners in releasing and conveying territory to United States.

Acts 1909, p. 132 (Sayles' Civ. St. Supp. 1910, p. 486), validating sales of Atascosa county land.

Acts 1909, p. 191 (Sayles' Civ. St. Supp. 1910 p. 486), validating patent to school section in El Paso county.

**Acts passed subsequent to the Revision of 1911.**—Acts 1911, p. 27, validating sales of Gaines county land.

Acts 1911, p. 206, validating sales and leases of land.

Acts 1911, Loc. & Sp. Laws, p. 149, ratifying ordinance of the city of Galveston.

Acts 1911, Loc. & Sp. Laws, p. 709, validating organization of Prairie View common school district No. 13 in Uvalde county.

Acts 1911, Loc. & Sp. Laws, p. 731, validating the incorporation of the town of Kosse.

Acts 1911, Loc. & Sp. Laws, p. 828, validating certain acts of the commissioners' court of Mason county.

Acts 1911, Loc. & Sp. Laws, p. 856, validating incorporation of Ferris independent school district in Ellis county.

Acts 1913, p. 100, validating the incorporation of the town of Rusk.

Acts 1913, p. 121, validating the incorporation of the town of Giddings.

**Sec. 8. Laws relating to public debt, etc., not repealed.**—That no law relating to the public debt or the public credit shall be affected by the repealing clause of this title.

**Acts enumerated.**—An act for issuance of land scrip. Acts 1841, p. 160; Early Laws, art. 993.

An act to provide for the liquidation of the public debt of the republic. Acts 1850, p. 198; Early Laws, art. 2073; Acts 1852, p. 38; Early Laws, art. 2234.

Joint resolution. Acts 1856, p. 116; Early Laws, art. 2630, § 6.

An act to provide for the funding of the debt contracted for the protection of the frontier. Acts 1861, p. 24; Early Laws, art. 2916. Repealed, and provision made for liquidating the funded debt. Acts 1862, p. 44; Early Laws, art. 3016.

An act to ascertain the amount of, and adjusting and funding the state debt, and to state any and all accounts between the state and individuals. Acts 1866, p. 122; Early Laws, art. 3334; Sayles' Civ. St. (1889) p. 697.

An act providing for the issuance and sale of the bonds of the state for the purpose of meeting the appropriations made for maintaining ranging companies on the frontier. Acts 1870, S. S., p. 45; 2 Sayles' Civ. St. (1889) p. 698; Early Laws, art. 3435. Supplemental act. Acts 1871, p. 75; Early Laws, art. 3562. Approved August 5, 1870. See, also, Acts 1889, p. 82, post.

An act to provide for the payment of the public debt of the state. Acts 1871, p. 67; Early Laws, art. 3556; 2 Sayles' Civ. St. (1889) p. 699. Supplemental acts. Acts 1871, p. 123; Early Laws, art. 3603; Acts 1871, S. S., p. 25; Early Laws, art. 3656.

An act to authorize the governor to prepare and issue bonds to an amount sufficient to meet any deficiency in the receipts of revenue for the years 1871 and 1872, and also providing for the payment of said bonds and interest thereon. Acts 1871, p. 106; 2 Sayles' Civ. St. (1889) p. 701; Early Laws, art. 3593.

An act authorizing a loan to meet deficiencies in the revenue of the state. Acts 1871, S. S., p. 63; 2 Sayles' Civ. St. (1889) p. 702; Early Laws, art. 3702.

An act to authorize the holders of state warrants to surrender the same to the state treasurer and receive state bonds in lieu thereof. Acts 1873, p. 119; 2 Sayles' Civ. St. (1889) p. 703; Early Laws, art. 3784. Amended. Acts 1874, p. 207; 2 Sayles' Civ. St. (1889) p. 710; Early Laws, art. 3992.

An act to effect a loan to meet deficiencies in the revenue. Acts 1873, p. 151; Early Laws, art. 3793.

An act to provide money to pay the floating indebtedness of the state. Acts 1874, p. 14; Early Laws, art. 3856; 2 Sayles' Civ. St. (1889) p. 705.

An act for the sale of bonds to settle indebtedness with Williams and Guion. Acts 1874, p. 16; Early Laws, art. 3857.

An act to further provide for the sale of bonds to pay the public debt. Acts 1874, p. 90; 2 Sayles' Civ. St. (1889) p. 706; Early Laws, art. 3906. Supplemental act. Acts 1874, p. 152; 2 Sayles' Civ. St. (1889) p. 706; Early Laws, art. 3943.

An act granting pensions to the surviving veterans of the revolution which separated Texas from Mexico, including the Santa Fe and Mier prisoners; the survivors of the company of Captain Dawson, who was massacred near San Antonio in the year 1842; the survivors of those who were captured at the city of San Antonio in the fall of the year 1842, and taken to the castle of Perote and confined therein; and the survivors of Deaf Smith's spy company; and to provide for the liquidation and settlement of all arrears due said veterans under an act of 13th of August, 1870, previous to the 1st of July, 1874. Acts 1874, p. 114; 2 Sayles' Civ. St. (1889) p. 707; Early Laws, 3929. Repealed. Acts 1875, S. S., p. 112; 2 Sayles' Civ. St. (1889) p. 710; Early Laws, art. 4110.

An act to provide for the payment of the bonds of the state of Texas, that will become due, and that are retireable in the years 1876 and 1877, and to make adequate provisions for the floating indebtedness of the state, and to supply deficiencies in the revenue by the sale of the bonds of the state, and to make an appropriation to carry into effect the provisions of the same. Acts 1876, p. 40; 2 Sayles' Civ. St. (1889) p. 711; Early Laws, art. 4183.

For act of February 19, 1885, authorizing the governor to issue bonds to the amount of \$200,000, see Sayles' Civ. St. (1889) art. 3678c.

An act to create a sinking fund for the payment of bonds of the state of Texas held by individuals, maturing in 1890 and 1891, and to provide for its use as a loan to the available school fund until said bonds mature. Acts 1888, S. S., p. 7; Sayles' Civ. St. (Supp.) Art. 3678e.

An act to provide for the issuance of bonds of this state to supply deficiencies in the revenue, and to provide the manner of the sale of such bonds to the board of education for the permanent university fund. Acts 1889, p. 81; Sayles' Civ. St. (Supp.) art. 3678f, § 6. See, also, art. 3859, Sayles' Civ. St. 1897.

An act to provide for the payment of the bonds of the state issued under an act of the legislature, approved August 5, 1870. Acts 1889, p. 82; Sayles' Civ. St. (Supp.) art. 3678d. See, also, Acts 1870, S. S., p. 45, ante.

An act to make all negotiable bonds and coupons held by the state of Texas in trust for its public institutions non-negotiable. Acts 1889, p. 121; Sayles' Civ. St. (Supp.) art. 3678g.

An act to provide for the retirement of the past-due bonds of the state of Texas, for the payment of interest thereon, and the issuance of other bonds at a lower rate of interest in lieu thereof. Acts 1893, p. 99; Sayles' Civ. St. (Supp.) art. 3678f.

Acts 1905, p. 376 (Sayles' Civ. St. Supp. 1906, p. 550), providing for retiring bonds maturing July 1, 1906, and issuing others, etc.

Acts 1909, 4th Extra Sess. p. 19, providing for the retirement of certain bonds and issuance of others.

Acts 1909, p. 437 (Sayles' Civ. St. Supp. 1910, p. 338), providing for refunding a portion of debt.

Acts 1910, 3d Called Sess. p. 19, providing for retiring certain bonds and issuing others.

**Sec. 9. Laws relating to university and school funds, etc., not repealed.**—That no law relating to the university or public school fund, or in relation to the agricultural and mechanical college fund, or the investment of any such funds, or making any reservation in favor of the same, shall be affected or impaired by the repealing clause of this title, except where altered or amended by the Revised Statutes.

Acts enumerated.—Certain lands appropriated for establishing a general system of education. Act Jan. 26, 1839; Early Laws, art. 692; Act Feb. 5, 1840; Early Laws, art. 744. See, also, Act Jan. 16, 1850, p. 37, post.

Additional appropriations of land for educational purposes. Act Jan. 16, 1850, p. 37; Early Laws, art. 1959.

Provisions for surveying a certain quantity of university land. Act Feb. 1, 1850, p. 96; Early Laws, art. 2009.

Survey of unlocated balance. Act Aug. 30, 1856; Early Laws, art. 2605.

Providing for the investment of the special school fund in the bonds of railroad companies. Act Aug. 13, 1856, p. 31; Early Laws, art. 2552. See, also, Early Laws, arts. 2999, 3466, 4051.

Act Aug. 30, 1856, p. 71, supra, amended. Act Nov. 6, 1866, p. 93; Early Laws, art. 3307. Supplement to Act Aug. 30, 1856, p. 71, supra. Act Nov. 12, 1866, p. 191; Early Laws, art. 3364. See Act Nov. 12, 1866, p. 191, supra.

Relief of purchasers under Act Aug. 30, 1856, p. 71, and Act Nov. 12, 1866, p. 191, supra. Act March 4, 1875, p. 60; Early Laws, art. 4061.

Authorizing the disposition and sale of the university lands. Act Aug. 30, 1856, p. 71; Early Laws, art. 2593. See, also, Act Nov. 6, 1866, p. 93, Act Nov. 12, 1866, p. 191, and Act April 8, 1874, p. 72, post.

School lands of Navarro county. Act Aug. 30, 1856, p. 81; Early Laws, art. 2600.

Protection of lands granted for purposes of education. Act Aug. 30, 1856, p. 85; Early Laws, art. 2607.

Act Feb. 11, 1858, p. 148, supra, amended. Act Nov. 12, 1866, p. 185; Early Laws, art. 3360.

Act establishing the university of Texas. Act Feb. 11, 1858, p. 148; Early Laws, art. 2746. See Act Nov. 12, 1866, p. 185, post.

Relief of purchasers. Acts 1863, p. 35; Early Laws, art. 3139; Act Oct. 6, 1866, p. 37; Early Laws, art. 3255.

Authorizing police courts to sell county school lands. Act Nov. 1, 1866, p. 74; Early Laws, art. 3291.

Authorizing the transfer of funds to state revenue account. Act Nov. 6, 1866, p. 95; Early Laws, art. 3310.

Act Nov. 12, 1866, p. 191, *supra*, amended. Act April 8, 1874, p. 72; Early Laws, art. 3900.

Carrying into effect "an ordinance of the late convention" securing the common school and university fund, and for other purposes. Act Nov. 12, 1866, p. 208; Early Laws, art. 3379.

Authorizing investment of school fund in United States bonds. Act Aug. 12, 1870, p. 68; Early Laws, art. 3455.

Providing for the establishment of the agricultural and mechanical college. Act April 17, 1871, p. 36; Early Laws, art. 3534.

An act to invest the principal of the perpetual school fund. Act April 17, 1871, p. 38; Early Laws, art. 3536.

Act for relief of purchasers, and to validate patents. Act March 17, 1874, p. 29; Early Laws, art. 3869.

Providing for the sale of the alternate sections of lands as surveyed by railroad companies and set apart for the benefit of the common school fund. Act April 24, 1874, p. 142; Early Laws, art. 3939.

An act supplemental to and amendatory of the several acts authorizing the sale and disposition of the university lands. Act March 6, 1875, p. 65; Early Laws, art. 4064. See Act Aug. 30, 1856, Act Nov. 6, 1866, Act Nov. 12, 1866, and Act April 8, 1874, *supra*.

Granting lands to certain counties for educational purposes. Act March 13, 1875, p. 104; Early Laws, art. 4099.

Sale of United States bonds and investment of funds. Act June 30, 1876, p. 38; Early Laws, art. 4180.

Preceding act amended. Act July 12, 1876, p. 44; Early Laws, art. 4186.

Act April 8, 1874, p. 72, *supra*, amended. Act July 29, 1876, p. 75; Early Laws, art. 4210.

Same—for colored youths. Act Aug. 14, 1876, p. 136; Early Laws, art. 4233.

Investment of proceeds of sale of university lands. Act Aug. 19, 1876, p. 216; Early Laws, art. 4269.

Investment of interest due on bonds belonging to the agricultural and mechanical college. Act Aug. 21, 1876, p. 233; Early Laws, art. 4302.

Providing for the sale of alternate sections of land, etc., and for the investment of the proceeds, etc. Act July 8, 1879, S. S., ch. 28; R. S. 1879, Appendix, p. 39. Amended April 6, 1881.

For provisions of acts of 1833, 1834, 1835, see 2 Sayles' Civ. St. 1839, arts. 4064-4079.

For acts of 1837 and 1895, as amended and superseded, see ante, Title 79, Chapter 9.

Acts 1897, p. 52 (Sayles' Civ. St. 1897, art. 421877), validating forfeiture of lands.

Acts 1897, p. 148 (Sayles' Civ. St. 1897, 4307a-4307f), providing for survey of lands to be set apart for the branch university for colored people.

Acts 1897, p. 160 (Sayles' Civ. St. 1897, art. 4218z), validating sales of land.

Acts 1899, p. 149 (Sayles' Civ. St. Supp. 1898-1904, p. 435), relating to sale of timber on lands and validating titles.

Acts 1899, p. 310 (Sayles' Civ. St. Supp. 1898-1904, p. 429), providing for patents for lands purchased prior to May 23, 1898.

Acts 1899, p. 235 (Sayles' Civ. St. Supp. 1898-1904, p. 439), providing for the withholding of lands from lease.

Acts 1899, p. 259 (Sayles' Civ. St. Supp. 1898-1904, p. 448), quieting titles to lands.

Acts 1900, p. 28 (Sayles' Civ. St. Supp. 1898-1904, p. 609), extending time of payment for lands.

Acts 1900, 1st Called Sess. p. 29, Acts 1901, p. 253, Acts 1903, pp. 129, 228 (Sayles' Civ. St. Supp. 1898-1904, p. 422), settling account between school fund and state.

Acts 1901, p. 32, Acts 1903, p. 234 (Sayles' Civ. St. Supp. 1898-1904, pp. 448, 459), providing for mineral survey of lands.

Acts 1903, p. 82 (Sayles' Civ. St. Supp. 1898-1904, p. 447), confirming sales and awards of commissioner as to lands.

Acts 1907, p. 30 (Sayles' Civ. St. Supp. 1908, p. 296), validating sales of land.

Acts 1909, p. 191 (Sayles' Civ. St. Supp. 1910, p. 486), validating patent to school section in El Paso county.

Acts passed subsequent to the Revision of 1911.—Acts 1911, p. 32, providing for filing in general land office chains of transfer of titles to lands, etc.

Acts 1911, p. 206, validating sales and leases of land.

Acts 1913, 1st Called Sess. p. 30, authorizing transfer of moneys to permanent school fund.

**Sec. 10. Laws creating, etc., counties and county seats not repealed.**—That no statute, or part of a statute, creating, adding to or organizing any county, or establishing any county seat, in this state shall be affected or impaired by the repealing clause of this title, or by any law relating to the establishment of county boundaries contained in this act. [Acts of 1879, chap. 157.]

Acts creating counties and fixing boundaries.—See Sayles' Early Laws of Texas, vol. 1, pp. 579 to 623.

*Aransas.* Fixing boundaries. Acts 1891, ch. 109, p. 172.

*Brewster.* Fixing boundaries. Acts 1839, ch. 49, p. 44; Acts 1897, ch. 90, p. 115 (Sayles' Civ. St. 1897, p. 1922).

*Buchel.* Fixing boundaries. Acts 1839, ch. 49, p. 44.

*Coke.* Created. Acts 1839, ch. 77, p. 86. Amended. Acts 1891, ch. 43, p. 46.

*Colorado.* Fixing boundaries. Acts 1905, ch. 38, p. 49 (Sayles' Civ. St. Supp. 1906, p. 563).

*Crane.* Attached to Midland county. Acts 1839, ch. 81, p. 92.

*Bctor.* Attached to Midland county. Acts 1839, ch. 81, p. 92.

*Encinal.* Attached to Webb. Acts 1899, p. 10 (Sayles' Civ. St. Supp. 1898-1904, p. 585).

*Foard.* Created Acts 1891, ch. 15, p. 17.

*Foley.* Fixing boundaries. Acts 1889, ch. 49, p. 44.

*Irion.* Created. Acts 1889, ch. 87, p. 99.

*Jeff Davis.* Fixing boundaries. Acts 1889, ch. 49, p. 44.

*Loving.* Attached to Reeves. Acts 1897, ch. 143, p. 205.

*Midland.* Certain counties attached to. Acts 1889, ch. 81, p. 92.

*Reagan.* Created. Acts 1903, ch. 32, p. 44 (Sayles' Civ. St. Supp. 1898-1904, p. 586).

*Reeves.* Loving attached to. Acts 1897, ch. 143, p. 205.

*Sterling.* Created. Acts 1891, ch. 16, p. 18.

*Terrell.* Created. Acts 1905, ch. 70, p. 96 (Sayles' Civ. St. Supp. 1906, p. 564).

*Upton.* Attached to Midland county. Acts 1889, ch. 81, p. 92.

*Webb.* Fixing boundaries. Acts 1899, p. 10 (Sayles' Civ. St. Supp. 1898-1904, p. 585).

Counties created subsequent to Revision of 1911.—See note under Art. 1400.

**Sec. 11. Judicial districts, and times of holding district and other courts.**—That the laws now in force organizing the several district and other courts, and prescribing the times for holding the district courts therein, are continued in force.

The apportionments acts are included in this compilation under Title 5.

Table of special acts relating to county courts.—See Appendix.

Special district courts.—See note under Art. 1730.

**Sec. 12. No person, etc., released from any duty, etc.**—That nothing in the repealing clause of this title shall be construed as releasing any person or corporation from any duty enjoined in the limitation or condition imposed by any law that may be repealed by the repealing clause of this title.

**Sec. 13. Laws as to reservations for actual settlers and public buildings not repealed.**—That no law in reference to land reservations, or setting apart portions of such reservations for the benefit of actual settlers, or for the construction or repairing of the public buildings of the state, nor any law establishing or providing for the maintenance of any public institution, shall be affected or impaired by the repealing clause of this title, unless expressly altered or repealed in some of the preceding articles of the Revised Statutes.

Cited, *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

Act as saved from repeal.—Acts 1884, p. 65, § 1, was not carried into Rev. St. 1895, and it was contended that the act was saved from repeal by Rev. St. 1895, Final Title, § 13, but the contention was not passed upon. *Middleton v. Presidio County* (Civ. App.) 138 S. W. 812.

**Sec. 14. Laws for the payment of unpaid school teachers, etc., and as to public libraries, not repealed.**—That no law providing for the payment of unpaid school teachers in the public schools, or giving authority to cities or towns to establish public libraries, or for like purposes, shall be affected or impaired by the repealing clause herein.

**Sec. 15. Certain local laws not repealed.**—That all laws, civil or criminal, of a local nature operating in particular counties, cities or towns, or of a temporary nature operative when these Statutes go into effect, and all laws of a private nature operating on particular persons or corporations, are not affected by the said repealing clause.

See Appendix for tables of Land Laws, Local Road Laws, and Laws Relating to the County Courts.

**Sec. 16. Shall be construed as continuation of former law, etc.**—That the provisions of the Revised Statutes, so far as they are substantially the same as the statutes of this state in force at the time when the Revised Statutes shall go into effect, or of the common law in force in this state at said time, shall be construed as continuations thereof, and not as new enactments of the same.

See *Moffett v. Moffett*, 67 T. 642, 4 S. W. 70; *McKenzie v. Baker*, 88 T. 669, 32 S. W. 1038.

Continuation of acts.—Including an act in the Revised Statutes was not a re-enactment, but merely a continuation thereof. *Marston v. Yaites* (Civ. App.) 66 S. W. 867.

The rule that a revision shall be taken as only embodying in changed form the statutes previously existing held not conclusive, where the revision was adopted by the legislature and has the force of law. *State v. Burgess*, 101 T. 524, 109 S. W. 922.

Acts 1889, c. 118 (Rev. St. 1895, art. 2369), provided that notice of a sale of real estate under a trust deed should be given "as now required in judicial sales." The

statute as to judicial sales in force at the time when the act of 1889 was enacted did not require personal service of notice on the defendant in execution. The act adopting the Revised Statutes in 1895 (Final Title, § 19), and also the act adopting the Revised Statutes in 1911 (Final Title, § 16), provided that the provisions of the Revised Statutes, so far as they are substantially the same as the statutes in force at the time when the Revised Statutes shall go into effect, shall be construed as continuations thereof, and not as new enactments. The Revised Statutes of 1911 continued as Art. 3759 article 2369 of the Revised Statutes of 1895 in its exact language. Held, that a sale by a trustee in a deed of trust made in 1911 is to be governed by the act of 1889, rather than by a subsequent statute requiring service of notice on the defendant in execution, and hence no service on the mortgagor is necessary, especially in view of Acts 1903, c. 77 (Art. 3757, Rev. Civ. St. 1911), relating to sales under execution, and providing that nothing therein contained shall affect the method of advertising land under powers conferred by any deed of trust or other contract lien. *Corbett v. Sweeney* (Civ. App.) 151 S. W. 858.

**Effect as to construction.**—In construing a revision of statutes, the presumption is that the codifiers and the legislature did not intend to change the laws as they formerly stood. *Braun v. State*, 40 Cr. R. 236, 49 S. W. 620.

This section requires a construction of an act as originally enacted. The act providing for codification did not authorize the codifiers to change or alter the laws, but to comply and embody them in convenient form. *Judd v. State*, 25 C. A. 418, 62 S. W. 545.

**Sec. 17. Laws of the thirty-second legislature not affected.**—That no laws, general or special, enacted by the thirty-second legislature, shall be in any way affected by the repealing clause of this title; but any and all such laws shall continue to be the law of this state, this act of revision to the contrary notwithstanding.

**Sec. 18. Revised Statutes not to be printed in pamphlet laws.**—That the Revised Statutes shall not be printed in the pamphlet laws of the first session of the thirty-second legislature, but shall be printed, published and distributed at such time and in such manner as may be provided by law.

**Sec. 19. When to take effect.**—That these Revised Statutes shall take effect and be in force at twelve o'clock, meridian, on the first day of September, Anno Domini, one thousand nine hundred and eleven.

**Date of approval of act in compilation.**—Date of legislative approval of a compilation of statutes held not to be regarded as the date of approval of an act contained in the compilation. *Beard v. State*, 47 Cr. R. 183, 83 S. W. 824.

**Time of taking effect of laws in general.**—See notes under Art. 5502, § 44.

**Sec. 20. Annotations not part of statute.**—It is provided, however, that the annotations printed under the several articles of these Revised Civil Statutes shall not be construed to be any part of said statutes, but shall be so printed merely for convenience as references.

**Sec. 21. Not to affect acts of thirty-third legislature.**—Nothing in this act shall be construed or held to repeal or in anywise affect the validity of any law or act passed by this legislature in its regular session.

**Sec. 22. Emergency clause.**—The importance and great length of this act, the length of time required for its publication, and the near approach of the end of the present session of the legislature, create an imperative public necessity requiring that the constitutional rule which requires that bills be read on three several days in each house should be and the same is hereby suspended.





# CERTIFICATE TO THE REVISED STATUTES OF 1911

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THE STATE OF TEXAS

DEPARTMENT OF STATE

I, C. C. McDonald, Secretary of State of the State of Texas, do hereby certify that the foregoing act entitled: "An Act to adopt and establish the Revised Civil Statutes of the State of Texas and declaring an emergency" and known as Senate Bill No. 288 of the Regular Session of the Thirty-second Legislature, was submitted to the Governor for his approval on March the 11th, A. D. 1911, and was approved by him on April the 1st, A. D. 1911, and was received and filed in the Department of State on April the 1st, A. D. 1911, and by the terms of said act became effective on September the 1st, A. D. 1911, at 12 o'clock meridian.

I further certify that I have carefully compared the foregoing act with the original copy now on file in this department and the same is true and correct.

IN TESTIMONY WHEREOF I have hereunto signed my name  
officially and caused to be impressed hereon  
[SEAL] the Seal of State at my office in the City of  
Austin, Texas, this 9th day of May, A. D.  
1912.

C. C. McDONALD,  
Secretary of State.



# APPENDIX

- I. County Courts.
- II. Local Road Laws.
- III. Land Laws.
  - (A) A List of Laws Enacted Since 1873, and Not Included in the Revised Statutes or in Sayles' Early Laws.
  - (B) Text of Omitted and Repealed Laws Relating to the Public Lands, as the Same Appeared in Sayles' Civ. St. 1897.
- IV. Laws of the United States Concerning Citizens.
- V. Laws of the United States Concerning Naturalization.
- VI. Laws of the United States Relating to Removal of Causes from State to Federal Courts.
- VII. Laws of the United States Relating to Receivers.
- VIII. Boundaries of Texas.
- IX. Apportionment Act Omitted from Printed Session Laws of Thirty-Second Legislature.

## I. COUNTY COURTS

### AN ALPHABETICAL LIST OF COUNTIES WHOSE COURTS ARE ACTING UNDER SPECIAL LAWS

The acts are arranged in chronological order, so that the last act under any county will show the present condition of things. When it is said that an act relating to a county is the same as another, it is not intended that they are literally the same in all cases, but only substantially—in purport and effect. When the jurisdiction is diminished, the act is usually drawn on the plan of those under Angelina, Bexar and Chambers counties; when the jurisdiction is restored, it is done by an act similar to that under Atascosa county—the purport of the act seems to be to restore to the court the jurisdiction of a county court under the constitution and general laws.

The legislature has power, by local or general law, to increase, diminish or change the civil and criminal jurisdiction of county courts; and in cases of any such change of jurisdiction the legislature must also conform the jurisdiction of the other courts to such change. Const., art. 5, § 22.

If an act be regarded as an attempt to change the jurisdiction of a county court, it will be held inoperative if it fails to conform the jurisdiction of the other courts to such change. *Erwin v. Blanks*, 60 T. 583. The constitutional provision clearly empowers the legislature to take away the jurisdiction of the county court of any particular county, and to confer it upon the district court of such county. The constitutional amendment of 1891 did not restore to county courts the jurisdiction that had been previously taken from them; the provision in question was not changed by the amendment. *Muench v. Oppenheimer*, 86 T. 568, 26 S. W. 496.

The following are the usual forms of statement by which the jurisdiction of the other courts is conformed to the change:

Where the jurisdiction is diminished—"The district court of said county shall have and exercise jurisdiction in all matters and causes, civil and criminal, over which by the general laws of the state, the county court of said county would have jurisdiction, except as provided in section \_\_\_\_\_ of this act." Acts 1897, p. 38, § 2.

Where the jurisdiction is restored—"The district court of \_\_\_\_\_ county shall no longer have jurisdiction in cases in which the county court of said county by the provisions of this act has exclusive original or appellate jurisdiction." Acts 1897, p. 103, § 6.

In some cases, after defining the jurisdiction of the county court, the only provision is as follows: "All causes now pending in the district court of \_\_\_\_\_ county of which the county court of said county has jurisdiction under the provisions of this act, and all laws giving jurisdiction to the county court, shall be transferred to the county court of said county." Acts 1889, p. 82 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 2); Acts 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916); Acts 1893, p. 12 (Sayles' Civ. St. Supp. 1894, p. 919).

**Angelina**—*Jurisdiction diminished*: Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). See Chambers county.

*Restored*: Act March 21, 1893, p. 31 (Sayles' Civ. St. Supp. 1894, p. 913). Same as provisions under Atascosa county.

*Diminished*: Act March 30, 1895, p. 47 (Sayles' Civ. St. 1897, p. 1923).

*Restored*: Acts 1901, ch. 83, p. 216 (Sayles' Civ. St. Supp. 1904, p. 591).

**Armstrong**—For special laws relating to this court, see Chapter 3, Title 36, of Vernon's Sayles' Civ. St.

**Atascosa**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as Act 1897 below.

*Diminished*: Act May 11, 1893, p. 167 (Sayles' Civ. St. Supp. 1894, art. 1172b). See Angelina county.

*Restored*: Act April 6, 1897, p. 110 (Sayles' Civ. St. 1897, p. 1923).

**Bailey**—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**Bandera**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act March 25, 1891, p. 75 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 17). Same as the provision under Atascosa county.

*Diminished*: Act April 12, 1895, p. 156. Same as the provision under Angelina county.

**Bee**—*Jurisdiction increased*: Acts 1903, p. 88 (Sayles' Civ. St. Supp. 1904, p. 593).

**Bexar**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h; Sayles' Civ. St. 1897, p. 1924).

*Restored*: Acts 1899, pp. 18, 20; Amend. Acts 1899, p. 191 (Sayles' Civ. St. Supp. 1904, p. 593).

For other special laws relating to this court, see Chapter 4, Title 36, of Vernon's Sayles' Civ. St.

**Blanco**—*Jurisdiction diminished*: Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county. Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Bosque**—*Jurisdiction diminished*: Act March 26, 1881, p. 64 (Sayles' Civ. St. 1889, art. 1172k). See Chambers county.

*Civil jurisdiction restored*: Act March 15, 1887, p. 22 (Sayles' Civ. St. 1889, art. 1172bb; Sayles' Civ. St. 1897, p. 1925).

**Bowie**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provision under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

**Brazoria**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g).

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

**Brazos**—*Jurisdiction diminished*: Act March 26, 1887, p. 55 (Sayles' Civ. St. 1889, art. 1172aa). Criminal and probate jurisdiction.

*Civil jurisdiction restored*: Act April 3, 1889, p. 82 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 2). Same as the provision under Bosque county.

**Brewster**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Acts 1909, p. 6 (Sayles' Civ. St. Supp. 1910, p. 496).

**Brown**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c); Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

**Burnet**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). Same as provision under Bexar county.

*Restored*: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

**Callahan**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

**Cameron**—*Jurisdiction increased*: Acts 1903, p. 88 (Sayles' Civ. St. Supp. 1904, p. 593).

**Camp**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172d). Same as provision under Atascosa county, not including § 7.

*Diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act April 26, 1895, p. 91. Same as the provisions under Atascosa county.

**Carson**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Act March 25, 1891, p. 75 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 17). Same as the provisions under Atascosa county.

*Diminished*: Acts 1899, p. 260.

**Cass**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

**Castro**—*Jurisdiction diminished*: Act April 26, 1893, p. 74 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 3). Same as provisions under Angelina county.

For other special laws relating to this court, see Chapters 5 and 6, Title 36, of Vernon's Sayles' Civ. St.

**Chambers**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c).

*Amendment of act of 1879*: Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g; Sayles' Civ. St. 1897, p. 1926).

*Restored*: Acts 1905, p. 111 (Sayles' Civ. St. Supp. 1906, p. 567).

**Coke**—*Jurisdiction diminished*: Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 13). See Angelina county.

*Restored*: Act March 21, 1893, p. 31 (Sayles' Civ. St. Supp. 1894, p. 913). Same as provisions under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

*Restored*: Acts 1901, ch. 37, p. 47 (Sayles' Civ. St. Supp. 1904, p. 595).

**Coleman**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as provision under Atascosa county, not including § 7.

**Comal**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

**Comanche**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provision under Atascosa county, not including § 7.

**Concho**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Similar to the provision under Atascosa county.

*Diminished*: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

*Restored*: Acts 1909, p. 268 (Sayles' Civ. St. Supp. 1910, p. 498).

**Coryell**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Crockett**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Diminished*: Acts 1909, p. 351 (Sayles' Civ. St. Supp. 1910, p. 495).

**Dallas**—Has the general jurisdiction of a county court, civil and criminal, original and appellate, and jurisdiction over misdemeanors is withheld from the criminal district court of Dallas county (see Sayles' Civ. St. 1889, art. 1513a). Act May 3, 1893, p. 116 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 4).

For special laws relating to this court, see Arts. 1786-1798 of Vernon's Sayles' Civ. St.

**Deaf Smith**—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**Delta**—*Jurisdiction diminished*: Act April 17, 1893, p. 78 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 5). See Angelina county.

*Restored*: Act March 12, 1895, p. 32. Same as the provision under Atascosa county, not including § 7.

**Dimmitt**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county.

*Diminished*: Act Feb. 27, 1893, p. 7 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 5a). Same as the provision under Angelina county.

*Restored*: Acts 1905, p. 136 (Sayles' Civ. St. Supp. 1906, p. 569).

**Donley**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act March 21, 1889, p. 48 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 8; Sayles' Civ. St. 1897, p. 1928).

**Duval**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act May 11, 1893, p. 152 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 6). Same as the provisions under Atascosa county.

*Diminished*: Acts 1899, p. 2 (Sayles' Civ. St. Supp. 1904, p. 588).

**Eastland**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

**Edwards**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).

*Diminished*: Acts 1909, p. 351 (Sayles' Civ. St. Supp. 1910, p. 495).

**El Paso**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

**Erath**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Substantially the same as the provisions under Atascosa county, not including § 7. The act also confers probate jurisdiction.

**Franklin**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1905, p. 12 (Sayles' Civ. St. Supp. 1906, p. 571).

**Frio**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Acts 1907, p. 40 (Sayles' Civ. St. Supp. 1908, p. 463).

**Gillespie**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Goliad**—*Civil jurisdiction increased*: Act April 15, 1895, p. 57 (Sayles' Civ. St. 1897, art. 1929).

**Gray**—*Jurisdiction diminished*: Acts 1905, p. 3 (Sayles' Civ. St. Supp. 1906, p. 565).

*Restored*: Acts 1907, p. 125 (Sayles' Civ. St. Supp. 1908, p. 464).

**Greer**—*Jurisdiction diminished*: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

*Restored*: Act March 21, 1889, p. 48 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 8). See Donley county.

**Gregg**—*Jurisdiction diminished*: Act May 11, 1893, p. 161 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 7). See Angelina county.

*Restored*: Act Feb. 15, 1895, p. 6. Same as the provisions under Atascosa county, with a provision conferring probate jurisdiction. See Delta county.

**Grimes**—*Jurisdiction diminished*: Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.

*Restored*: Act Feb. 10, 1885, p. 11 (Sayles' Civ. St. 1889, art. 1172s). Substantially the same as the provision under Atascosa county, not including § 7.

**Hamilton**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 13, 1893, p. 22 (Sayles' Civ. St. Supp. 1894, p. 917). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Hansford**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

**Hardin**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 20, 1897, p. 28. Same as the provision under Atascosa county.

**Harris**—For special laws relating to this court, see Chapter 7, Title 36, of Vernon's Sayles' Civ. St.

**Harrison**—For special laws relating to this court, see Chapter 8, Title 36, of Vernon's Sayles' Civ. St.

**Hartley**—*Jurisdiction diminished*: Act April 26, 1893, p. 74 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 3). Same as provisions under Angelina county.

*Restored*: Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).

**Hemphill**—*Jurisdiction diminished*: Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 13). Same as the provision under Angelina county.

**Henderson**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Criminal jurisdiction restored*: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). All the criminal jurisdiction which the court had under the constitution and laws prior to the enactment of the preceding law is restored.

*Civil jurisdiction restored*: Acts 1909, p. 80 (Sayles' Civ. St. Supp. 1910, p. 500).

**Hidalgo**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

*Restored*: Acts 1903, p. 88 (Sayles' Civ. St. Supp. 1904, p. 593).

**Houston**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act April 13, 1883, p. 84 (Sayles' Civ. St. 1889, art. 1172q). Act of March 16, 1883, repealed, so far as it relates to this county.

**Hutchinson**—*Jurisdiction diminished*: Acts 1905, p. 8 (Sayles' Civ. St. Supp. 1906, p. 566).

**Irion**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Acts 1907, p. 170 (Sayles' Civ. St. Supp. 1908, p. 465).

**Jasper**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

For other special laws relating to this court, see Chapter 9, Title 36, of Vernon's Sayles' Civ. St.

**Jefferson**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3; Sayles' Civ. St. 1889, art. 1172g. Same as provisions under Chambers county.

*Restored*: Act March 26, 1897, p. 81. Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

**Karnes**—*Jurisdiction diminished*: Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.

*Restored*: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

*Restored*: Acts 1903, p. 20 (Sayles' Civ. St. Supp. 1904, p. 597).

**Kendall**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.



**Restored:** Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

For other special laws relating to this court, see Chapter 10, Title 36, of Vernon's Sayles' Civ. St.

**Kerr—Jurisdiction diminished:** Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

**Kimble—Jurisdiction diminished:** Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Restored:** Acts 1901, ch. 37, p. 47 (Sayles' Civ. St. Supp. 1904, p. 595).

**Diminished:** Acts 1903, p. 86 (Sayles' Civ. St. Supp. 1904, p. 588).

**King—Jurisdiction diminished:** Act April 27, 1897, p. 155. Same as the provision under Angelina county.

**Restored:** Acts 1903, p. 64 (Sayles' Civ. St. Supp. 1904, p. 596).

**Lamb—**For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**Lampasas—Jurisdiction diminished:** Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Restored:** Act May 7, 1897, p. 181. Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

**La Salle—Jurisdiction diminished:** Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Restored:** Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7.

**Diminished:** Act March 27, 1889, p. 109 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 10). Same as the provision under Chambers county.

**Leon—Jurisdiction diminished:** Act Feb. 6, 1879, p. 5 (Sayles' Civ. St. 1889, art. 1172b). See Angelina county.

**Restored:** Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provision under Atascosa county.

**Jurisdiction diminished:** Act April 8, 1893, p. 54 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 11). See Angelina county.

**Restored:** Act April 3, 1897, p. 103. Same as the provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Liberty—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act April 15, 1895, p. 55. Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Lipscomb—Jurisdiction diminished:** Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

**Restored:** Acts 1907, p. 28 (Sayles' Civ. St. Supp. 1908, p. 467).

**Live Oak—Jurisdiction diminished:** Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

**Restored:** Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Llano—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as provisions under Atascosa county. Act March 30, 1885, p. 69 (Sayles' Civ. St. 1889, art. 1172v). Same as the provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Lubbock—**For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**McCulloch—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act April 13, 1891, p. 93 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 12); Act April 3, 1891, p. 132 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 12a). See Atascosa county.

**Jurisdiction diminished:** Act March 24, 1893, p. 35 (Sayles' Civ. St. Supp. 1894 art. 1172b, § 13). Same as the provision under Angelina county.

**Restored:** Acts 1901, ch. 82, p. 216 (Sayles' Civ. St. Supp. 1904, p. 600).

**McMullen—Jurisdiction diminished:** Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Restored:** Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.

**Marion—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Civil jurisdiction restored:** Act March 9, 1893, p. 18 (Sayles' Civ. St. Supp. 1894, p. 914). Same as provisions under Atascosa county, but by the title it purports to restore only civil jurisdiction.

**Diminished:** Act March 11, 1897, p. 38. Same as the provision under Angelina county.

**Mason—Jurisdiction diminished:** Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as Chambers county.

**Restored:** Act March 30, 1885, p. 69 (Sayles' Civ. St. 1889, art. 1172v). See Atascosa county.

**Diminished:** Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

**Matagorda—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172t). Same as provisions under Atascosa county, not including § 7.

**Diminished:** Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

**Restored:** Acts 1903, p. 5 (Sayles' Civ. St. Supp. 1904, p. 598).

**Medina—Jurisdiction diminished:** Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

**Restored:** Act April 15, 1895, p. 55. Same as provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Menard—Jurisdiction diminished:** Act March 25, 1891, p. 73 (Sayles' Civ. St. Supp. 1894, art. 1272b, § 13). See Angelina county.

**Restored:** Act April 6, 1897, p. 110. See Atascosa county.

**Mills—Jurisdiction diminished:** Act March 27, 1889, p. 109 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 10). Same as the provision under Chambers county.

**Restored:** Acts 1907, p. 199 (Sayles' Civ. St. Supp. 1908, p. 468).

**Montgomery—Jurisdiction diminished:** Act March 15, 1881, p. 33 (Sayles' Civ. St. 1889, art. 1172j). See Angelina county.

**Restored:** Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

**Morris—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). See Atascosa county.

**Diminished:** Act Feb. 9, 1883, p. 6 (Sayles' Civ. St. 1889, art. 1172m). Has criminal and probate jurisdiction.

**Nacogdoches—Jurisdiction diminished:** Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

**Restored:** Act Feb. 16, 1891, p. 6 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 14). Amended. Act March 10, 1891, p. 24 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 14a). Same as provisions under Atascosa county.

**Navarro—Jurisdiction diminished:** Act July 2, 1879, S. S., p. 7 (Sayles' Civ. St. 1889, art. 1172e). Criminal and probate jurisdiction.

**Restored:** Act March 12, 1881, p. 28 (Sayles' Civ. St. 1889, art. 1172i). Act of 1879 repealed, and civil and criminal jurisdiction restored.

**Newton**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1905, p. 312 (Sayles' Civ. St. Supp. 1906, p. 573).

**Nueces**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.

**Ochiltree**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Act 1909, p. 115 (Sayles' Civ. St. Supp. 1910, p. 501).

**Oldham**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

For other special laws relating to this court, see Chapter 11, Title 36, of Vernon's Sayles' Civ. St.

**Orange**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Civil jurisdiction restored*: Act March 31, 1885, p. 94 (Sayles' Civ. St. 1889, art. 1172w). The civil jurisdiction prior to the act of 1879 restored.

*Jurisdiction diminished*: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

*Criminal jurisdiction restored*: Act March 31, 1897, p. 92. The ordinary provision conferring criminal jurisdiction. See Atascosa county, §§ 4, 5.

*Civil jurisdiction restored*: Acts 1903, p. 41 (Sayles' Civ. St. Supp. 1898–1904, p. 600).

**Palo Pinto**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

**Panola**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Parker**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). Act of 1881 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

**Parmer**—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**Pecos**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provision under Atascosa county, not including § 7.

**Polk**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1903, p. 46 (Sayles' Civ. St. Supp. 1904, p. 601).

**Presidio**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

**Randall**—For special laws relating to this court, see Chapter 6, Title 36, of Vernon's Sayles' Civ. St.

**Red River**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1879 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

**Roberts**—*Jurisdiction diminished*: Act Feb. 21, 1891, p. 12 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 9). Same as the provision under Angelina county.

*Restored*: Acts 1905, p. 111 (Sayles' Civ. St. Supp. 1906, p. 567).

**Sabine**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1905, p. 146 (Sayles' Civ. St. Supp. 1906, p. 574).

**San Augustine**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1909, p. 71 (Sayles' Civ. St. Supp. 1910, p. 503).

**San Jacinto**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1907, p. 56 (Sayles' Civ. St. Supp. 1908, p. 469).

**San Patricio**—*Jurisdiction diminished*: Act March 26, 1881, p. 64 (Sayles' Civ. St. 1889, art. 1172k). Same as Chambers county.

*Diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act March 13, 1893, p. 19 (Sayles' Civ. St. Supp. 1894, p. 916). Act of 1881 repealed.

*Restored*: Act April 28, 1893, p. 85 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 15). Same as the provision under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

**San Saba**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 13, 1897, p. 120. Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

*Restored*: Acts 1903, p. 51 (Sayles' Civ. St. Supp. 1904, p. 603).

**Shelby**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 21, 1893, p. 31 (Sayles' Civ. St. Supp. 1894, p. 913). Same as provisions under Atascosa county; also a provision conferring probate jurisdiction. See Delta county.

*Diminished*: Acts 1899, p. 82 (Sayles' Civ. St. Supp. 1904, p. 589).

*Restored*: Acts 1909, p. 14 (Sayles' Civ. St. Supp. 1910, p. 505).

**Starr**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1881 repealed so far as it relates to this county. Civil and criminal jurisdiction restored.

*Restored*: Acts 1903, p. 88 (Sayles' Civ. St. Supp. 1904, p. 593).

**Stephens**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provision under Atascosa county, not including § 7.

**Stonewall**—*Jurisdiction diminished*: Act April 27, 1897, p. 155. Same as the provision under Angelina county.

*Restored*: Acts 1901, ch. 7, p. 5 (Sayles' Civ. St. Supp. 1904, p. 604).

For other special laws relating to this court, see Chapter 12, Title 36, of Vernon's Sayles' Civ. St.

**Sutton**—*Jurisdiction diminished*: Acts 1903, p. 30 (Sayles' Civ. St. Supp. 1904, p. 589).

**Tarrant**—For special laws relating to this court, see Chapter 2, Title 36, of Vernon's Sayles' Civ. St.

**Taylor**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 30, 1881, p. 74 (Sayles' Civ. St. 1889, art. 1172l). Same as the provisions under Atascosa county, not including § 7.

**Throckmorton**—*Jurisdiction diminished*: Act July 8, 1879, S. S., p. 21 (Sayles' Civ. St. 1889, art. 1172f). Same as provisions under Angelina county.

*Restored*: Act March 27, 1887, p. 47 (Sayles' Civ. St. 1889, art. 1172y). Same as provisions under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Titus**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 13, 1883, p. 91 (Sayles' Civ. St. 1889, art. 1172r). See Atascosa county, §§ 4, 5.

*Restored*: Acts 1901, ch. 78, p. 201 (Sayles' Civ. St. Supp. 1904, p. 606).

*Civil jurisdiction restored*: Acts 1905, p. 56 (Sayles' Civ. St. Supp. 1906, p. 576).

**Tom Green**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act April 9, 1883, p. 55 (Sayles' Civ. St. 1889, art. 1172p). Same as the provisions under Atascosa county, not including § 7.

**Travis**—*Civil jurisdiction diminished*: Act April 3, 1889, p. 139 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 16). Criminal and probate jurisdiction.

*Restored*: Act March 25, 1891, p. 75 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 17). Same as the provision under Atascosa county.

**Trinity**—*Jurisdiction diminished*: Act March 27, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Act April 5, 1879, p. 77 (Sayles' Civ. St. 1889, art. 1172d). Amendment of act of March 27, 1879. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Acts 1905, p. 5 (Sayles' Civ. St. Supp. 1906, p. 578).

**Tyler**—*Jurisdiction diminished*: Act July 24, 1879, p. 68 (Sayles' Civ. St. 1889, art. 1172c). Amended. Act Feb. 9, 1881, p. 3 (Sayles' Civ. St. 1889, art. 1172g). Same as provisions under Chambers county.

*Restored*: Act March 31, 1885, p. 103 (Sayles' Civ. St. 1889, art. 1172x). Similar to the provisions under Atascosa county.

*Diminished*: Act March 26, 1887, p. 54 (Sayles' Civ. St. 1889, art. 1172z). Same as the provision under Chambers county.

*Restored*: Act March 8, 1893, p. 12 (Sayles' Civ. St. Supp. 1894, p. 919). Same as provisions under Atascosa county, not including § 7.

**Uvalde**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act Feb. 3, 1883, p. 14 (Sayles' Civ. St. 1889, art. 1172n). The act of 1881 repealed, so far as it relates to this county. Civil and criminal jurisdiction restored.

**Webb**—*Jurisdiction diminished*: Act Feb. 11, 1893, p. 5 (Sayles' Civ. St. Supp. 1894, art. 1172b, § 18). Same as the provision under Angelina county.

**Wharton**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Restored*: Act March 13, 1893, p. 22 (Sayles' Civ. St. Supp. 1894, p. 917). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Wheeler**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

For other special laws relating to this court, see Chapter 13, Title 36, of Vernon's Sayles' Civ. St.

**Wilson**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act March 16, 1889, p. 41 (Sayles' Civ. St. 1889, art. 1172b, § 19). Same as the provision under Atascosa county, not including § 7; also a provision conferring probate jurisdiction. See Delta county.

**Young**—*Jurisdiction diminished*: Act March 16, 1883, p. 24 (Sayles' Civ. St. 1889, art. 1172o). Same as the provision under Chambers county.

*Restored*: Act March 24, 1885, p. 47 (Sayles' Civ. St. 1889, art. 1172t). Same as the provisions under Atascosa county, not including § 7.

**Zapata**—*Jurisdiction diminished*: Act Feb. 25, 1881, p. 13 (Sayles' Civ. St. 1889, art. 1172h). See Bexar county.

*Criminal jurisdiction restored*: Act March 28, 1885, p. 60 (Sayles' Civ. St. 1889, art. 1172u; Sayles' Civ. St. 1897, p. 1937).

*Diminished*: Acts 1903, p. 19 (Sayles' Civ. St. Supp. 1904, p. 590).

For other special laws relating to this court, see Chapter 14, Title 36, of Vernon's Sayles' Civ. St.

## II. LOCAL ROAD LAWS

**Anderson**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Sp. Acts 1909, p. 54; Sp. Acts 1911, p. 840.

**Aransas**—Sp. Acts 1913, pp. 276, 424.

**Archer**—Sp. Acts 1905, p. 1; Sp. Acts 1909, p. 408; Sp. Acts 1913, p. 509.

**Atascosa**—Sp. Acts 1913, p. 44.

**Bandera**—Sp. Acts 1913, p. 556.

**Bastrop**—Sp. Acts 1905, p. 396; Sp. Acts 1909, p. 412; Sp. Acts 1911, p. 179; Sp. Acts 1911, 1 S. S., p. 155; Sp. Acts 1913, p. 306.

**Baylor**—Sp. Acts 1913, p. 539.

**Bee**—Acts 1895, p. 218; Acts 1899, p. 160; Acts 1901, pp. 96, 310; Sp. Acts 1905, p. 316; Sp. Acts 1911, p. 716.

**Bell**—Acts 1893, p. 106 (Sayles' Civ. St. Supp. 1894, art. 4456c); Acts 1897, p. 47; Acts 1899, p. 90; Sp. Acts 1907, p. 505; Sp. Acts 1909, p. 388.

**Bexar**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Sp. Acts 1909, p. 152; Sp. Acts 1911, p. 170; Sp. Acts 1913, p. 296.

**Blanco**—Sp. Acts 1911, 1 S. S., p. 156.

**Bosque**—Sp. Acts 1913, pp. 72, 101.

**Bowie**—Acts 1899, p. 239; Sp. Acts 1905, p. 440; Sp. Acts 1907, pp. 751, 755; Sp. Acts 1913, p. 390.

**Brazoria**—Acts 1901, p. 181; Sp. Acts 1907, p. 766; Sp. Acts 1911, p. 839; Sp. Acts 1913, p. 214.

**Brazos**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1901, p. 87; Sp. Acts 1911, p. 202.

**Brown**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1901, p. 202; Sp. Acts 1909, p. 401; Sp. Acts 1911, pp. 774, 867.

**Burleson**—Sp. Acts 1907, p. 546.

**Burnet**—Sp. Acts 1907, p. 525; Sp. Acts 1909, p. 546; Sp. Acts 1911, p. 194.

**Caldwell**—Acts 1893, p. 14 (Sayles' Civ. St. Supp. 1894, p. 922); Sp. Acts 1905, pp. 123, 128; Sp. Acts 1907, p. 15; Sp. Acts 1911, p. 50.

**Calhoun**—Acts 1897, p. 174; Acts 1899, p. 305; Acts 1901, p. 310.

**Callahan**—Sp. Acts 1913, p. 590.

**Cameron**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Sp. Acts 1913, p. 388.

**Camp**—Sp. Acts 1905, p. 223; Sp. Acts 1907, pp. 732, 775; Sp. Acts 1909, p. 164; Sp. Acts 1911, p. 763.

**Cass**—Acts 1899, pp. 22, 213; Acts 1901, 1 S. S., p. 35; Sp. Acts 1905, p. 292; Sp. Acts 1907, p. 695; Sp. Acts 1913, p. 61.

**Cherokee**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Acts 1901, p. 163; Sp. Acts 1905, p. 12; Sp. Acts 1907, p. 517; Sp. Acts 1909, pp. 165, 753; Sp. Acts 1911, p. 157; Sp. Acts 1913, p. 56.

**Childress**—Sp. Acts 1907, p. 721; Sp. Acts 1913, p. 89.

**Clay**—Acts 1901, p. 163; Sp. Acts 1911, p. 728; Sp. Acts 1913, p. 86.

**Coleman**—Sp. Acts 1905, p. 461; Sp. Acts 1907, p. 763.

**Collin**—Acts 1891, p. 66 (Sayles' Civ. St. Supp. 1894, art. 4456b); Acts 1893, p. 106 (Sayles' Civ. St. Supp. 1894, art. 4456c); Acts 1897, p. 47 (see art. 4785a, Sayles' Civ. St. 1897); Sp. Acts 1911, p. 807; Sp. Acts 1913, p. 399.

**Colorado**—Acts 1901, p. 211; Sp. Acts 1905, p. 117.

**Comal**—Sp. Acts 1905, p. 122.

**Comanche**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Sp. Acts 1905, p. 171; Sp. Acts 1907, p. 725; Sp. Acts 1911, p. 147; Sp. Acts 1913, p. 383.

**Cooke**—Acts 1895, p. 218; Acts 1901, p. 96; Sp. Acts 1905, pp. 193, 316; Sp. Acts 1909, p. 382.

**Coryell**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1901, p. 60; Sp. Acts 1907, p. 468; Sp. Acts 1909, p. 214; Sp. Acts 1913, p. 384.

**Dallas**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1895, p. 213; 1897, pp. 107, 178 (see art. 4785a, Sayles' Civ. St. 1897); Sp. Acts 1905, p. 320; Sp. Acts 1907, p. 820; Sp. Acts 1911, p. 172; Sp. Acts 1913, 1 S. S., p. 235.

**Delta**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Sp. Acts 1909, p. 467.

**Denton**—Acts 1899, p. 35; Sp. Acts 1905, p. 279; Sp. Acts 1913, p. 345.

**DeWitt**—Acts 1899, p. 52; Sp. Acts 1913, p. 344.

**Dimmit**—Sp. Acts 1913, p. 406.

**Eastland**—Sp. Acts 1909, p. 409; Sp. Acts 1911, p. 217.

**Ellis**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1897, p. 150; Sp. Acts 1905, p. 262; Sp. Acts 1909, p. 162; Sp. Acts 1911, p. 95.

**El Paso**—Sp. Acts 1911, p. 833.

**Erath**—Acts 1901, p. 191; Sp. Acts 1907, p. 444; Sp. Acts 1909, p. 404; Sp. Acts 1913, p. 1.

**Falls**—Acts 1901, p. 96; Sp. Acts 1905, p. 316; Sp. Acts 1911, p. 888; Sp. Acts 1913, p. 464.

**Fannin**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1895, p. 203; Sp. Acts 1913, p. 171.

**Fayette**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1901, p. 96; Sp. Acts 1907, p. 725; Sp. Acts 1909, p. 405; Sp. Acts 1913, pp. 44, 576.

**Fisher**—Sp. Acts 1911, p. 212.

**Franklin**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Sp. Acts 1913, p. 346.

**Freestone**—Sp. Acts 1913, p. 253.

**Frio**—Acts 1901, p. 96; Sp. Acts 1907, p. 725; Sp. Acts 1909, p. 405; Sp. Acts 1913, p. 44.

**Galveston**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Sp. Acts 1909, 3 S. S., p. 51; Sp. Acts 1913, 1 S. S., p. 226.

**Gillespie**—Sp. Acts 1907, p. 669; Sp. Acts 1911, p. 713.

**Goliad**—Sp. Acts 1913, p. 249.

**Gonzales**—Sp. Acts 1913, pp. 54, 487.

**Grayson**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1893, p. 106 (Sayles' Civ. St. Supp. 1894, art. 4456c); Acts 1897, p. 47; Acts 1901, p. 187; Acts 1901, 1 S. S., p. 41; Sp. Acts 1907, p. 545; Sp. Acts 1909, p. 743; Sp. Acts 1913, p. 568.

**Gregg**—Acts 1897, p. 121; Sp. Acts 1911, p. 150; Sp. Acts 1913, p. 26.

**Grimes**—Acts 1895, p. 218; Acts 1901, p. 96; Sp. Acts 1905, p. 316.

**Guadalupe**—Acts 1893, p. 80 (Sayles' Civ. St. Supp. 1894, art. 4456e); Acts 1895, p. 217; Sp. Acts 1911, p. 50.

**Hall**—Sp. Acts 1913, 1 S. S., p. 203.

**Hamilton**—Sp. Acts 1909, p. 496; Sp. Acts 1911, p. 216; Sp. Acts 1913, p. 82.

**Hardin**—Sp. Acts 1911, p. 724.

**Harris**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Acts 1901, p. 218; Sp. Acts 1905, p. 304; Sp. Acts 1913, p. 64.

**Harrison**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Acts 1897, p. 121; Sp. Acts 1905, p. 465.

**Haskell**—Sp. Acts 1909, p. 218; Sp. Acts 1911, p. 827.

**Hemphill**—Sp. Acts 1913, p. 295.

**Henderson**—Sp. Acts 1905, p. 92; Sp. Acts 1907, p. 169; Sp. Acts 1913, p. 497.

**Hill**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1895, p. 218; Acts 1899, p. 160; Acts 1901, p. 96; Sp. Acts 1905, p. 316; Sp. Acts 1913, p. 286.

- Hood**—Acts 1901, p. 49; Sp. Acts 1907, p. 449.
- Hopkins**—Acts 1897, p. 87; Sp. Acts 1913, pp. 110, 111; Sp. Acts 1913, 1 S. S., p. 229.
- Houston**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Acts 1901, p. 106; Sp. Acts 1909, p. 427; Sp. Acts 1911, p. 871; Sp. Acts 1911, 1 S. S., p. 123.
- Howard**—Sp. Acts 1913, p. 510.
- Hunt**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1895, p. 218; Acts 1899, p. 160; Acts 1901, p. 96; Sp. Acts 1905, p. 316; Sp. Acts 1909, p. 419; Sp. Acts 1911, p. 748; Sp. Acts 1913, pp. 190, 487.
- Jack**—Sp. Acts 1911, p. 829.
- Jackson**—Acts 1895, p. 218; Acts 1899, p. 160; Acts 1901, p. 96; Sp. Acts 1905, p. 316; Sp. Acts 1913, p. 407.
- Jasper**—Sp. Acts 1907, p. 741; Sp. Acts 1909, p. 720; Sp. Acts 1913, pp. 278, 406.
- Jefferson**—Acts 1901, p. 310; Sp. Acts 1905, p. 474; Sp. Acts 1911, p. 167.
- Johnson**—Sp. Acts 1905, p. 7; Sp. Acts 1911, p. 178.
- Jones**—Sp. Acts 1909, p. 218; Sp. Acts 1911, p. 827.
- Karnes**—Acts 1901, p. 173; Sp. Acts 1907, p. 508; Sp. Acts 1909, p. 217; Sp. Acts 1913, p. 473.
- Kaufman**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1895, p. 203; Sp. Acts 1905, p. 25; Sp. Acts 1909, p. 203; Sp. Acts 1913, p. 120; Sp. Acts 1913, 1 S. S., p. 236.
- Kendall**—Sp. Acts 1909, p. 476.
- Kerr**—Acts 1901, p. 206.
- Knox**—Sp. Acts 1913, p. 426.
- Lamar**—Acts 1893, p. 106 (Sayles' Civ. St. Supp. 1894, art. 4456c); Acts 1895, p. 213; 1897, pp. 47, 107, 178; Acts 1899, p. 156; Sp. Acts 1905, p. 178; Sp. Acts 1907, p. 678; Sp. Acts 1909, pp. 446, 457; Sp. Acts 1909, 3 S. S., p. 55; Sp. Acts 1911, 1 S. S., p. 157; Sp. Acts 1913, p. 96.
- Lampasas**—Sp. Acts 1909, p. 180.
- Lavaca**—Acts 1891, p. 174 (Sayles' Civ. St. Supp. 1894, art. 4456f); Acts 1899, p. 117; Acts 1901, p. 284; Sp. Acts 1907, p. 170; Sp. Acts 1909, p. 146.
- Lee**—Sp. Acts 1907, p. 692; Sp. Acts 1909, p. 448; Sp. Acts 1911, p. 186; Sp. Acts 1913, p. 165.
- Leon**—Acts 1901, p. 56; Sp. Acts 1907, p. 521; Sp. Acts 1911, p. 756; Sp. Acts 1913, p. 382.
- Liberty**—Acts 1899, p. 232; Acts 1901, p. 135; Sp. Acts 1913, p. 476; Sp. Acts 1913, 1 S. S., p. 253.
- Limestone**—Sp. Acts 1913, p. 331.
- Live Oak**—Sp. Acts 1911, p. 162.
- Llano**—Acts 1901, p. 140; Sp. Acts 1913, p. 71.
- McLennan**—Acts 1897, p. 60; Sp. Acts 1909, p. 383; Sp. Acts 1913, p. 132.
- McMullen**—Sp. Acts 1913, p. 44.
- Madison**—Acts 1901, p. 176; Sp. Acts 1913, p. 457.
- Marion**—Acts 1897, p. 172.
- Mason**—Sp. Acts 1911, p. 733; Sp. Acts 1913, 1 S. S., p. 249.
- Matagorda**—Acts 1901, p. 81; Sp. Acts 1911, p. 854; Sp. Acts 1913, p. 148.
- Medina**—Acts 1895, p. 213; 1897, p. 107; Sp. Acts 1907, p. 310.
- Milam**—Acts 1897, p. 162; Acts 1901, p. 195.
- Mills**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Sp. Acts 1907, p. 450; Sp. Acts 1909, p. 495.
- Montague**—Acts 1897, p. 77; Acts 1899, p. 179; Sp. Acts 1909, p. 543; Sp. Acts 1913, p. 586; Sp. Acts 1913, 1 S. S., p. 228.
- Montgomery**—Acts 1901, p. 76; Sp. Acts 1913, p. 169.
- Morris**—Sp. Acts 1905, p. 239; Sp. Acts 1911, p. 785.
- Nacogdoches**—Acts 1893, p. 93 (Sayles' Civ. St. Supp. 1894, art. 4456h); Acts 1899, p. 125; Acts 1901, p. 145; Sp. Acts 1913, pp. 86, 100, 570.
- Navarro**—Acts 1899, p. 145; Sp. Acts 1913, p. 372.
- Newton**—Sp. Acts 1907, p. 741; Sp. Acts 1909, p. 489; Sp. Acts 1913, p. 328.



- Nolan**—Sp. Acts 1911, p. 817.
- Nueces**—Sp. Acts 1911, p. 217; Sp. Acts 1913, pp. 152, 609.
- Palo Pinto**—Sp. Acts 1913, p. 72.
- Panola**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Acts 1901, p. 140; Sp. Acts 1913, p. 71.
- Parker**—Acts 1895, p. 208; 1897, p. 227; Acts 1899, p. 51; Sp. Acts 1907, p. 531; Sp. Acts 1909, p. 500.
- Polk**—Sp. Acts 1909, p. 207; Sp. Acts 1913, p. 77.
- Rains**—Acts 1897, p. 32; Acts 1901, p. 95; Sp. Acts 1905, p. 115.
- Red River**—Acts 1897, p. 77; Acts 1899, p. 179; Acts 1901, p. 159; Sp. Acts 1913, p. 204.
- Refugio**—Sp. Acts 1913, p. 343.
- Robertson**—Acts 1895, p. 203; Acts 1899, p. 59; Sp. Acts 1905, p. 333; Sp. Acts 1907, p. 555; Sp. Acts 1911, 1 S. S., p. 146; Sp. Acts 1913, p. 304.
- Rockwall**—Acts 1893, p. 94 (Sayles' Civ. St. Supp. 1894, art. 4456g); Sp. Acts 1913, p. 325.
- Runnels**—Sp. Acts 1909, p. 469.
- Rusk**—Acts 1895, p. 212; Acts 1901, p. 87; Sp. Acts 1907, p. 457; Sp. Acts 1909, p. 481; Sp. Acts 1911, p. 703.
- Sabine**—Sp. Acts 1907, p. 741; Sp. Acts 1909, p. 489; Sp. Acts 1913, p. 524.
- San Augustine**—Sp. Acts 1913, p. 366.
- San Jacinto**—Sp. Acts 1913, p. 19.
- San Patricio**—Sp. Acts 1913, p. 222; Sp. Acts 1913, 1 S. S., p. 238.
- San Saba**—Sp. Acts 1905, p. 481; Sp. Acts 1911, p. 714.
- Scurry**—Sp. Acts 1911, p. 182.
- Shelby**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Sp. Acts 1907, p. 4; Sp. Acts 1909, p. 156; Sp. Acts 1911, p. 51; Sp. Acts 1913, p. 2.
- Smith**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; Sp. Acts 1905, p. 17; Sp. Acts 1907, p. 697; Sp. Acts 1911, p. 893; Sp. Acts 1913, p. 262; Sp. Acts 1913, 1 S. S., p. 203.
- Stephens**—Sp. Acts 1913, p. 599.
- Tarrant**—Sp. Acts 1911, 1 S. S., p. 168; Sp. Acts 1913, p. 527.
- Taylor**—Sp. Acts 1909, p. 218; Sp. Acts 1911, p. 827.
- Terrell**—Sp. Acts 1911, p. 756.
- Titus**—Sp. Acts 1905, p. 183; Sp. Acts 1909, p. 393; Sp. Acts 1913, p. 408.
- Tom Green**—Sp. Acts 1913, p. 155.
- Travis**—Acts 1891, p. 69 (Sayles' Civ. St. Supp. 1894, art. 4456a); Acts 1897, p. 20; Sp. Acts 1913, p. 337.
- Trinity**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212.
- Tyler**—Sp. Acts 1905, p. 487; Sp. Acts 1909, p. 69; Sp. Acts 1911, p. 811.
- Upshur**—Acts 1893, p. 60 (Sayles' Civ. St. Supp. 1894, art. 4456d); Acts 1895, pp. 207, 212; 1897, p. 121; Sp. Acts 1905, p. 223; Sp. Acts 1911, p. 775; Sp. Acts 1913, p. 435.
- Uvalde**—Acts 1901, p. 96; Sp. Acts 1907, p. 725; Sp. Acts 1909, p. 405; Sp. Acts 1913, p. 44.
- Val Verde**—Sp. Acts 1909, p. 397.
- Van Zandt**—Acts 1901, p. 169; Sp. Acts 1907, p. 556; Sp. Acts 1909, 3 S. S., p. 65; Sp. Acts 1913, p. 350.
- Victoria**—Acts 1895, p. 218; Acts 1899, pp. 160, 305; Acts 1901, pp. 96, 310; Sp. Acts 1905, p. 316.
- Walker**—Sp. Acts 1913, p. 514.
- Washington**—Sp. Acts 1907, p. 374; Sp. Acts 1911, p. 177; Sp. Acts 1913, p. 149.
- Wharton**—Acts 1899, p. 117; Acts 1901, p. 284; Sp. Acts 1907, p. 170; Sp. Acts 1913, p. 418.
- Wichita**—Acts 1897, p. 77; Acts 1899, p. 179; Sp. Acts 1911, 1 S. S., p. 114; Sp. Acts 1913, p. 159.

**Wilbarger**—Sp. Acts 1907, p. 553; Sp. Acts 1913, p. 419.

**Williamson**—Acts 1893, p. 106 (Sayles' Civ. St. Supp. 1894, art. 4456c); Acts 1897, p. 47; Sp. Acts 1907, p. 325; Sp. Acts 1909, p. 187; Sp. Acts 1911, p. 176; Sp. Acts 1913, pp. 606, 607.

**Wise**—Acts 1897, p. 54; Acts 1901, p. 157; Sp. Acts 1911, p. 801.

**Wood**—Acts 1899, p. 131; Sp. Acts 1907, p. 160; Sp. Acts 1909, p. 860; Sp. Acts 1911, pp. 50, 208; Sp. Acts 1913, p. 302; Sp. Acts 1913, 1 S. S., p. 222.

**Zavala**—Sp. Acts 1913, p. 446.

NOTE.—No local road laws were enacted by the Twenty-Eighth Legislature.

### III. LAND LAWS

#### (A) A LIST OF LAWS ENACTED SINCE 1873, AND NOT INCLUDED IN THE REVISED STATUTES OR IN SAYLES' EARLY LAWS

An act to adjust and define the rights of the Texas and Pacific Railway Company within the state of Texas, in order to encourage the speedy construction of a railway through the state to the Pacific Ocean. Act May 2, 1873, p. 318, Special Laws. Sayles' Civ. St. 1897, p. 1939.

See *H. & Tex. Cent. Ry. Co. v. Tex. & Pac. Ry. Co.*, 70 T. 649, 8 S. W. 498; *Jumbo Cattle Co. v. Bacon*, 79 T. 5, 14 S. W. 840.

An act for the relief of the International Railroad Company, now consolidated with the Houston and Great Northern Railroad Company, under the name of the International and Great Northern Railroad Company. Act March 10, 1875, Special Laws, ch. 49, p. 69. Sayles' Civ. St. 1897, p. 1945.

An act to provide for designating, surveying and sale of three million and fifty thousand acres of the unappropriated public domain for the erection of a new state capitol, and other necessary public buildings, at the seat of government, and to provide a fund to pay for surveying said lands. Act Feb. 20, 1879, ch. 13, p. 9. Sayles' Civ. St. 1897, p. 1947.

Joint resolution in regard to Pelican Island. March 8, 1879, p. 190. Sayles' Civ. St. 1897, p. 1952.

An act to protect the rights of pre-emption settlers who have heretofore or may hereafter enlist in the frontier battalion or other military forces of the state. Act April 7, 1879, ch. 72, p. 82. Sayles' Civ. St. 1897, p. 1949.

An act to require persons enclosing public free school lands to pay an annual rent therefor. Act April 17, 1879, ch. 92, p. 101.

Published as article 509, Penal Code of 1895.

An act to provide for building a new state capitol. Act April 18, 1879, ch. 106, p. 111. Sayles' Civ. St. 1897, p. 1950.

An act to require the governor of the state to countersign certificates for land hereafter issued from the general land office in certain cases. Act April 19, 1879, ch. 107, p. 115. Sayles' Civ. St. 1897, p. 1950.

An act for the relief of actual occupants of the public lands. Act April 24, 1879, ch. 145, p. 160. Sayles' Civ. St. 1897, p. 1951. ✓

An act granting a land certificate of six hundred and forty acres to each of the indigent veterans who was engaged in the struggle for Texas independence prior to and at the battle of San Jacinto, enrolled under the act approved July 28, 1876. Act April 26, 1879, ch. 156, p. 175. Sayles' Civ. St. 1897, p. 1951.

An act to validate the titles to land reserved from location or patent at the time titles issued thereto. Act July 5, 1879, S. S., ch. 24, p. 20. Sayles' Civ. St. 1897, p. 1953.

An act to provide for the sale of the alternate sections of land in organized counties, as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith. Act July 8, 1879, S. S., ch. 28, p. 23. Sayles' Civ. St. 1897, p. 1953.

See *Martin v. Brown*, 62 T. 467; *State v. Thompson*, 64 T. 690; *Canales v. Perez*, 65 T. 291; *Wilson v. Hampton*, 2 U. C. 426; *State v. Rhomberg*, 69 T. 212, 7 S. W. 195; *Schilling v. State*, 2 C. A. 573, 22 S. W. 233.

An act to provide for the sale of a portion of the unappropriated public lands of the state of Texas, and the investment of the proceeds of such sale. Act July 14, 1879, S. S., ch. 52, p. 48. Sayles' Civ. St. 1897, p. 1957.

See *Gammage v. Powell*, 61 T. 629; *Campbell v. Blanchard*, 2 U. C. 321; *Looney v. Bagley* (Sup.) 7 S. W. 360; *Garrett v. Weaver*, 70 T. 463, 7 S. W. 766; *Cattle Co. v. Bacon*, 79 T. 5, 14 S. W. 840; *Sanborn v. Gunter*, 84 T. 273, 17 S. W. 117, 20 S. W. 72; *White v. Martin*, 66 T. 340, 17 S. W. 727; *Bacon v. State*, 2 C. A. 692, 21 S. W. 149; *Teague v. Green*, 7 C. A. 368, 26 S. W. 518; *Thompson v. Langdon*, 87 T. 254, 28 S. W. 931; *Jones v. Crane* (Civ. App.) 28 S. W. 1041; *Snyder v. Compton*, 87 T. 374, 28 S. W. 1061; *Rogers v. Concho Cattle Co.*, 90 T. 555, 39 S. W. 1081, reversing (Civ. App.) 38 S. W. 656.

An act to amend sections one and six of "An act to provide for the sale of a portion of the unappropriated public lands of the state of Texas, and the investment of the proceeds of such sale," passed at the special session of the sixteenth legislature. Act March 11, 1881, ch. 33, p. 24. Sayles' Civ. St. 1897, p. 1960.

An act to amend article 3971, chapter 11, of the Revised Civil Statutes, providing for the disposal of certain lands known as the Indian reservations, and to repeal articles 3972, 3973, 3974, 3975 and 3976 of the Revised Statutes upon the same subject. Act March 11, 1881, ch. 35, p. 27. Sayles' Civ. St. 1897, p. 1960.

An act granting a land certificate of twelve hundred and eighty (1280) acres to each of the surviving soldiers of the Texas revolution, and the surviving signers of the declaration of Texas independence, and to the surviving widows of such soldiers and signers, and to the widows of those who fell at the Dawson massacre; and to repeal an act, approved April 26, 1879, entitled "An act granting a land certificate of six hundred and forty acres to each of the indigent veterans who was engaged in the struggle for Texas independence prior to and at the battle of San Jacinto, enrolled under the act approved July 28, 1876." Act March 15, 1881, ch. 45, p. 35. Sayles' Civ. St. 1897, p. 1960.

See *Day L. & C. Co. v. State*, 68 T. 526, 4 S. W. 865; *Teague v. Green*, 7 C. A. 368, 26 S. W. 518.

An act authorizing and requiring owners of lands between the Nueces and Rio Grande rivers, under grants or titles thereto from the former governments, which were recorded in the respective counties before the adoption of the present constitution, to deposit and archive the same in the general land office. Act March 16, 1881, ch. 46, p. 37.

See Art. 82, subd. 6, of this compilation of the Revised Civil Statutes.

An act to provide for designating and setting apart three hundred leagues of land out of the unappropriated public domain for the benefit of the unorganized counties of the state, and to provide for the survey and location of the same. Act March 26, 1881, ch. 61, p. 65. Sayles' Civ. St. 1897, p. 1963.

See Sayles' Civ. St. 1897, art. 4280. The reference in that article to an act "approved March 16, 1882," is probably an error. The preamble to the act is as follows:

"Whereas, the commissioner and the contractor under an act entitled 'An act to provide for designating and setting apart three hundred leagues of land out of the unappropriated public domain for the benefit of the unorganized counties, and to provide for the survey and location of the same,' approved March 26, 1881, have surveyed three hundred and twenty-five leagues. And whereas, some of the four leagues of land surveyed for some of the unorganized counties of this state have been located in conflict with older surveys; and whereas, other instances of this kind may arise, therefore," etc. See Acts 1883, p. 45.

An act to validate certain locations and surveys upon lands situated in the counties of Hardeman, Cottle, Archer, Baylor, Wilbarger and Knox. Act April 4, 1881, ch. 91, p. 104. Sayles' Civ. St. 1897, p. 1965.

See *Blum v. H. & T. C. Ry. Co.*, 10 C. A. 312, 31 S. W. 526.

An act to authorize and require the issue of patents to lands situated between the Rio Grande and Nueces rivers, the titles to which have been confirmed under the act of February 11, 1860. Act April 4, 1881, ch. 92, p. 105. Sayles' Civ. St. 1897, p. 1965.

See *Snyder v. Nunn*, 66 T. 255, 18 S. W. 340.

An act to amend the caption and sections 1, 2, 3, 4, 5, 6, 7 and 8 of an act entitled "An act to provide for the sale of alternate sections of lands in organized counties as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith," approved July 8, 1879, and to provide for the sale of such lands in unorganized counties. Act April 6, 1881, ch. 105, p. 119. Sayles' Civ. St. 1897, p. 1966.

See *Martin v. Brown*, 62 T. 467; *Canales v. Perez*, 65 T. 292; *Kentucky Cattle Raising Co. v. Bruce*, 78 T. 269, 14 S. W. 619; *Snyder v. Nunn*, 66 T. 255, 18 S. W. 340; *Chaney v. State*, 11 C. A. 397, 32 S. W. 830.

An act granting to persons who have been permanently disabled by reason of wounds received while in the service of this state, or of the Confederate States, a land certificate for twelve hundred and eighty acres of land. Act April 9, 1881, ch. 106, p. 122. Sayles' Civ. St. 1897, p. 1969.

This act, and the repealing act of February 2, 1883, were published as a note to Sayles' Civ. St. 1897, art. 4218cc.

See Day Land & Cattle Co. v. State, 68 T. 526, 4 S. W. 865; Von Rosenberg v. Cuellar, 80 T. 249, 16 S. W. 58; Dawson v. McLeary (Civ. App.) 25 S. W. 705; Smith v. McGaughey, 87 T. 61, 26 S. W. 1073.

An act to repeal all laws granting lands or land certificates to any person, firm, corporation or company for the construction of railroads, canals and ditches. Act April 22, 1882, S. S., ch. 6, p. 3. Sayles' Civ. St. 1897, p. 1970.

An act to amend section eight of an act to amend the caption and sections one, two, three, four, five, six, seven and eight of an act entitled "An act to provide for the sale of alternate sections of lands in organized counties, as surveyed by railroad companies and other works of internal improvements, and set apart for the benefit of the common school fund; to provide for the investment of the proceeds, and to repeal all laws in conflict therewith," approved July 8, 1879, and to provide for the sale of such land in unorganized counties. Act May 6, 1882, S. S., ch. 27, p. 36. Sayles' Civ. St. 1897, p. 1970.

An act to repeal an act entitled "An act granting to persons who have been permanently disabled by wounds received while in the service of this state or of the Confederate States, a land certificate for 1280 acres of land." Act Feb. 2, 1883, ch. 25, p. 13.

This and Act April 9, 1881, ch. 106, p. 122, were published as a note to Sayles' Civ. St. 1897, art. 4218cc.

An act to withdraw from sale all the school, university and asylum lands, heretofore by any law of this state authorized to be sold. Act Feb. 3, 1883, ch. 6, p. 3. Sayles' Civ. St. 1897, p. 1971.

An act confirming patents and surveys by virtue of headright and bounty warrants issued under special laws enacted after March 31st, 1870, and prior to April 17th, 1876. Act March 31, 1883, ch. 49, p. 38. Sayles' Civ. St. 1897, p. 1971.

See Bates v. Bacon, 66 T. 348, 1 S. W. 256; Blum v. Looney, 69 T. 1, 4 S. W. 857; White v. Martin, 66 T. 340, 17 S. W. 727; Ralston v. Skerrett, 82 T. 486, 17 S. W. 843.

An act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb and orphan asylum funds. Act April 12, 1883, ch. 88, p. 85. Sayles' Civ. St. 1897, p. 1972.

See Taylor v. Burke, 66 T. 643, 1 S. W. 910; Barker v. Torrey, 69 T. 7, 4 S. W. 646; Smisson v. State, 71 T. 222, 9 S. W. 112; State v. Day L. & C. Co., 71 T. 252, 9 S. W. 130; Nobles v. Cattle Co., 69 T. 434, 9 S. W. 448; Neville v. State, 73 T. 629, 11 S. W. 868; Cunningham v. State (Sup.) 11 S. W. 871; Luckie v. Watt, 77 T. 262, 13 S. W. 1035; King v. Jones, 78 T. 285, 14 S. W. 571; State v. Stone Cattle Co., 66 T. 363, 17 S. W. 735; State v. Snyder, 66 T. 689, 18 S. W. 106; Snyder v. Nunn, 66 T. 255, 18 S. W. 340; Chancey v. State, 84 T. 529, 19 S. W. 706; Paffrath v. State, 2 C. A. 137, 21 S. W. 159; Harris v. Byrd, 3 C. A. 677, 22 S. W. 659; State v. Pendleton, 5 C. A. 40, 23 S. W. 923; State v. Palin (Civ. App.) 25 S. W. 820; Same v. Strain, 25 S. W. 1003; Collyns v. Cain, 9 C. A. 193, 28 S. W. 544; Norman v. McCleary, 10 C. A. 311, 30 S. W. 712; McCown v. McCafferty, 14 C. A. 77, 36 S. W. 517; Cuba v. Island City Sav. Bank (Civ. App.) 41 S. W. 532.

An act to create a land board with authority to investigate alleged land frauds and to authorize the institution of suits in the name of the state; to annul purchases in certain cases illegally and improperly made under an act to provide for the sale of alternate sections of land in organized counties as surveyed by railroad companies and other works of internal improvement and set apart for the benefit of the common school fund approved July 8, 1879, and an act amendatory thereof approved April 6, 1881, and to authorize the confirmation and validation of other purchases made under said acts; and with power to investigate the operations of the general land office and other matters relating to the John Gibson certificates and to make an appropriation therefor. Act April 14, 1883, ch. 104, p. 106. Sayles' Civ. St. 1897, p. 1978.

See State v. Rhomberg, 69 T. 212, 7 S. W. 195; Randolph v. State, 73 T. 485, 11 S. W. 487; Kentucky Cattle Raising Co. v. Bruce, 78 T. 269, 14 S. W. 619; State v. Stone Cattle Co., 66 T. 363, 17 S. W. 735; Same v. Snyder, 66 T. 689, 18 S. W. 106.

An act to provide for leasing the unorganized county school leagues. Act Feb. 6, 1884, S. S., ch. 26, p. 57. Sayles' Civ. St. 1897, p. 1981.

An act to validate certain purchases of public school lands made by clerks in the general land office. Act Feb. 6, 1884, S. S., ch. 34, p. 71. Sayles' Civ. St. 1897, p. 1983.

An act making certain reservations for public roads out of lands hereafter disposed of by the state. Act Feb. 7, 1884, S. S., ch. 30, p. 65. Sayles' Civ. St. 1897, p. 1982.

An act to prohibit the unlawful fencing or enclosing, or keeping enclosed, of the lands of another, and of the public school, public, university and asylum lands of the state of Texas, and to prevent the herding, or loose herding or detention of stock upon the lands of the state, the public schools, university and asylums, and to provide penalties for the violation of this act. Act Feb. 7, 1884, S. S., ch. 33, p. 68.

See Penal Code of 1895, p. 94; *State v. Goodnight*, 70 T. 682, 11 S. W. 119.

An act to amend sections 9 and 10 of an act entitled "An act to provide for the classification, sale and lease of the lands heretofore or hereafter surveyed and set apart for the benefit of the common school, university, the lunatic, blind, deaf and dumb, and orphan asylum funds." Act Feb. 16, 1885, ch. 12, p. 13. Sayles' Civ. St. 1897, p. 1983.

See *Canales v. Perez*, 65 T. 291; *Barker v. Torrey*, 69 T. 7, 4 S. W. 646.

An act to prevent the forfeiture of the rights of purchasers of public free school, university or asylum land. Act Feb. 23, 1885, ch. 17, p. 18. Sayles' Civ. St. 1897, p. 1984.

See *Patterson v. O'Docherty*, 4 C. A. 462, 23 S. W. 293; *Anderson v. Waco State Bank*, 86 T. 618, 28 S. W. 344; *Capps v. Garvey* (Civ. App.) 41 S. W. 379; *Cuba v. Island City Sav. Bank* (Civ. App.) 41 S. W. 532.

An act to protect persons in the settlement of the common school, university, the lunatic, blind, deaf and dumb and orphan asylum lands, and to prescribe penalties for an interference with their legal rights. Act March 31, 1885, ch. 89, p. 83.

See Penal Code of 1895, art. 972.

An act to repeal chapter forty-five of the general laws of the state of Texas passed by the seventeenth legislature of the state of Texas, and approved March 15, A. D. 1881. Act Feb. 15, 1887, ch. 7, p. 6. Sayles' Civ. St. 1897, p. 1985.

An act extending for ten years the payment of the principal of the purchase-money for lands purchased under the two acts of the legislature herein named. Act Feb. 25, 1887, ch. 11, p. 7. Sayles' Civ. St. 1897, p. 1985.

An act to authorize the holders and owners of patents issued to lands in Greer county and other reservations to surrender their patents for cancellation, and to authorize the commissioner to issue new certificates in such cases. Act April 1, 1887, ch. 107, p. 101. Sayles' Civ. St. 1897, p. 1986.

See *Schley v. Maddox* (Civ. App.) 22 S. W. 998.

An act extending for ten years the payment of the principal of the purchase-money for lands purchased under the two acts of the legislature herein named. Act March 5, 1889, ch. 92, p. 105. Sayles' Civ. St. 1897, p. 1987.

An act for the relief of settlers upon the Milam county school lands located in Hood county, and to make an appropriation therefor. Act March 6, 1889, ch. 96, p. 108. Sayles' Civ. St. 1897, p. 1989.

An act to repeal chapter 8 and articles Nos. 3924, 3925, 3926, 3927, 3928, 3929, 3930, 3931, 3932, 3933, 3934, 3935, and 3936, of title 79, of the Revised Statutes of Texas. Act March 7, 1889, ch. 20, p. 16. Sayles' Civ. St. 1897, p. 1987.

An act to make valid and to confirm certain contracts of sale made by the land board of the state of Texas with divers persons for the sale of certain of the free school, university, and asylum lands of the state of Texas, sold under the act of the legislature of the state of Texas, approved April 12, 1883. Act March 12, 1889, ch. 93, p. 106. Sayles' Civ. St. 1897, p. 1988.

See *Flannagan v. Nasworthy*, 1 C. A. 470, 20 S. W. 839.

An act to validate certain surveys which for any reason might be deemed invalid, and to authorize the commissioner of the general land office to issue patents therefor. Act April 16, 1889, ch. 94, p. 107.

For the act of April 1, 1887 (chapter 99, p. 83, Acts 20th Leg.), and the act of April 4, 1895 (chapter 47, p. 63, Acts 24th Leg.), and the amendments thereto, providing for the sale and lease of public free school university and asylum lands, see chapter 12a, title 87, and chapter 3, title 89, of Sayles' Civ. St. 1897.

By chapter 18, Acts 24th Legislature, the management of the university lands is vested in the board of regents. See Acts 1895, p. 19; Sayles' Civ. St. 1897, arts. 4263a to 4263c.

An act to make valid and confirm contracts of sale made by the land board of the state of Texas, with divers persons for the sale of the free school, university and asylum lands of the state of Texas sold under the act of the legislature of the

state of Texas, approved April 12, 1883. Act April 2, 1891, ch. 87, p. 130. Sayles' Civ. St. 1897, p. 1990.

See State v. Strain (Civ. App.) 25 S. W. 1003; Collyns v. Cain, 87 T. 612, 30 S. W. 858.

(B) TEXT OF OMITTED AND REPEALED LAWS RELATING TO THE PUBLIC LANDS, AS THE SAME APPEARED IN SAYLES' CIV. ST. 1897

The numbers and catchwording of those articles which were carried into the revision of 1911 are set forth with references to the appropriate articles in Vernon's Sayles' Civ. St. Text supplanted by a later act relating to the same subject-matter carries a reference to the corresponding article in Vernon's Sayles' Civ. St.

TITLE 87—THE PUBLIC LANDS

Chap.	Chap.
1. Public Domain.	9. Patents.
2. General Land Office.	10. Land Reservations.
3. Land Districts.	11. Sale of Vacant and Unappropriated Lands.
4. County and District Surveyors.	12. General Provisions.
5. Land Certificates.	12a. Sale and Lease of Public Free School, Asylum and Public Lands.
6. Entries and Locations.	13. Title to Certain Lands Quieted.
7. Surveys and the Field-Notes Thereof.	
8. Homestead Donations.	

**Preliminary explanatory notes.**—This title was title 79 of the Revised Statutes of 1879. Many and important changes and omissions were introduced by the revival of 1895, so that it became difficult to ascertain with certainty under what particular laws rights in land had vested, and whether there were not laws remaining in full force which were not included in the Revised Statutes of 1895.

The pre-emption laws were repealed by chapter 20 of the Acts of 1889. This accounts for the omission from the Revised Statutes of 1895 of old articles 3924 to 3936, inclusive.

The provisions of the Final Title in Revised Statutes 1895 bearing upon the subject were as follows:

"Sec. 4. That all civil statutes, of a general nature, in force when the Revised Statutes take effect, and which are not included herein, or which are not hereby expressly continued in force, are hereby repealed.

"Sec. 5. That the repeal of any statute, or any portion thereof by the preceding section, shall not affect or impair any act done or right vested or accrued, or any proceeding, suit or prosecution had or commenced in any cause before such repeal shall take effect; but every such act done or right vested or accrued, or proceeding, suit or prosecution had or commenced shall remain in full force and effect to all intents or purposes as if such statute or part thereof so repealed had remained in force, except that where the course of practice or procedure for the enforcement of such right or the conducting of such proceeding, suit or prosecution, shall be changed, the same shall be conducted as near as may be in accordance with the Revised Statutes."

"Sec. 9. That no law relating to the university or public school fund, or in relation to the agricultural and mechanical college fund, or the investment of any such funds, or making any reservation in favor of the same, shall be affected or impaired by the repealing clause of this title, except where altered or amended by the Revised Statutes."

"Sec. 13. That no law in reference to land reservations, or setting apart portions of such reservations for the benefit of actual settlers, or for the construction or repairing of the public buildings of the state shall be affected or impaired by the repealing clause of this title, unless expressly altered or repealed in some of the preceding articles of the Revised Statutes."

"Sec. 16. That all laws of a local nature operating in particular counties, cities or towns, and all laws of a private nature, operating on particular persons, are not affected by the said repealing clause.

"Sec. 17. That the repealing clause of this title shall not affect any law concerning pre-emption settlers further than such law may be amended or changed by the Revised Statutes."

Section 20 continues all laws of the twenty-third and twenty-fourth legislatures (1893 and 1895) in full force.

CHAPTER 1—PUBLIC DOMAIN

**Article 4035. [3794] Vacant lands belong to state.**—All the vacant lands are the property of the state and subject alone to the disposition of the proper authorities thereof. [Act Dec. 14, 1837; H. D. 44—6.]

For boundaries of Texas, see post, in this Appendix.

For annotations, see notes for Art. 5279, Vernon's Sayles' Civ. St.

Section 6, article 10, of the constitution of 1869, reads as follows: "The legislature shall not hereafter grant lands to any person or persons, nor shall any certificates for land be sold at the land office, except to actual settlers upon the same, and in lots not exceeding one hundred and sixty acres." It prohibited not only the direct grant of land, but also every step which could ultimate in a grant, to other than an actual settler. Bacon v. Russell, 57 T. 409; White v. Martin, 66 T. 340, 17 S. W. 727.

**Art. 4036. [3795] All public lands retained at annexation.**

See Art. 5279, Vernon's Sayles' Civ. St.

**Art. 4037. [3796] No reservation shall be made.**—No reservation of any part of the public domain for the purpose of satisfying a grant of lands to any railway company in this state, shall ever be made. [Const. art. 14, § 3.]

**Art. 4038. [3797] Forfeiture on failure to comply, etc.**—No land certificate shall be issued to such railway company until it shall have equipped, constructed and in running order, at least ten miles of road, and on the failure of such company to comply with the terms of its charter or alienate its land at a period to be fixed by law, in no event to exceed twelve years from the issuance of the patent, all said land shall be forfeited to the state and become a portion of the public domain, and liable to location and survey. [Id.]

**Art. 4039. [3798] Same.**—All lands heretofore or hereafter granted to railway companies, where the charter or law required or shall hereafter require their alienation within a certain period on pain of forfeiture, or is silent on the subject of forfeiture, and which lands have not been or shall not hereafter be alienated, in conformity with the terms of their charters and the laws under which the grants were made, are hereby declared forfeited to the state and subject to pre-emption, location and survey as other vacant lands. [Id. § 5.]

**Art. 4040. [3799] Proceedings to forfeit land donations.**—All lands heretofore granted to said railroad companies to which no forfeiture was attached on their failure to alienate, are not included in the foregoing clause, but in all such last-named cases it shall be the duty of the attorney-general, in every instance where alienations have been or hereafter may be made, to inquire into the same, and if such alienation has been made in fraud of the rights of the state, and is colorable only, the real and beneficial interest being still in such corporation, to institute legal proceedings, in the county where the seat of government is situated, to forfeit such lands to the state, and if such alienation be judicially ascertained to be fraudulent and colorable as aforesaid, such lands shall be forfeited to the state and become a part of the vacant public domain, liable to pre-emption, location and survey. [Id.]

**Art. 4041. [3800] Title to mines, etc., released.**—The state of Texas hereby releases to the owner or owners of the soil all mines or minerals that may be on the same, subject to taxation as other property. [Id. § 7.]

For the acts of April 14, 1883, and April 30, 1895, regulating the sale of minerals in public lands and the working of mines, see Title 93, Vernon's Sayles' Civ. St.

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CHAPTER 2—GENERAL LAND OFFICE

**Articles 4042-4045.**

See Vernon's Sayles' Civ. St. Arts. 5280-5284.

**Art. 4046. [3805] Indorsement of filing papers.**—Any paper or document required or permitted by law to be filed in the general land office shall be indorsed by the commissioner, or in his absence by the chief clerk, with ink, "filed," with the date of filing and file number, and signed by the clerk filing the same; and on the wrapper or cover containing said paper or file shall be indorsed a list with the corresponding numbers of the papers contained in said wrapper or cover, and signed by the clerk making the same, and if several papers constitute a single file they shall be numbered consecutively. [Id. § 2; P. D. 7099II.]

**Art. 4047. [3806] Clerk to be detailed, etc., when.**—When an examination is desired by any person other than an employé of the office, the clerk detailed for such examination, before he shall permit such person to handle such papers or files, shall indorse as required by the preceding article on the cover or wrapper of said papers, numbering them as herein required, and sign his name to said list. [Id.; P. D. 7099II.]

**Arts. 4048-4053.**

See Vernon's Sayles' Civ. St. Arts. 5285-5290.

**Art. 4054. [3809] Original certificate shall remain on file.**—When the commissioner cancels a patent or permits the floating of certificates he shall not deliver the original certificate, but it shall remain in its original file. [Id. § 5; P. D. 7099oo.]

**Art. 4055. [3810] Certificate for unlocated balance to issue, when.**—Where a certificate has been located in part the original shall not be withdrawn from the general land office, but the commissioner shall deliver to the interested party a certificate for the unlocated balance, stating whether said certificate can be further divided. [Id. § 6; P. D. 7099pp.]

**Art. 4056. [3811] Certificate to be indorsed when patented.**—When a certificate has been patented the commissioner shall write in ink across the face of said certificate “patented,” and sign his name thereto. [Id. § 7; P. D. 7099qq.]

**Art. 4057. [3812] Notice to be given of forfeited survey.**—When a survey has become forfeited and void from any cause, so soon as such forfeiture is discovered the commissioner shall notify the party interested in such survey or location, in writing by mail, directed to such party at his postoffice address, if known, and if not known, directed to him at the county seat of the county in which the land is situated, of such forfeiture; and no new file or location shall be made on the land covered by such forfeited survey or location, except by the owner of such forfeited survey or location, for a period of ninety days after the mailing of such notice; and the commissioner shall keep a record of the date said notice was mailed and the name of the party to whom the notice was mailed and the name of the postoffice to which said notice was addressed; and the record of such entries shall be prima facie evidence of the facts therein stated, and the absence of such entries shall be prima facie evidence that the notice required above had not been given. [Acts 1881, p. 6.]

*Note.*—This article does not confer title upon the holder of the lapsed survey; it only preserves the right to relocate for ninety days after notice of the default. *De La Garza v. Cassin*, 72 T. 440, 10 S. W. 539.

**Art. 4058. [3813] Certificate to be delivered only to owner.**—A certificate for an unlocated balance shall be delivered only to the owner, or his agent or attorney; and when the same is delivered to the agent or attorney, the legal authority to receive the same shall be filed with the commissioner. [Id. § 8; P. D. 7099rr.]

**Art. 4059. [3814] Before delivery to assignee, evidence of title to be filed.**—If the assignee of the original grantee apply for the delivery of any paper, certificate or copy of certificate, if the evidence of title to the assignee is not already on file in the land office, it shall be filed before delivering the same; and the owner shall, by himself or his lawful agent or attorney, file with his other proof of title an affidavit that the party claiming delivery is a bona fide owner. [Id.]

**Art. 4060. [3815] When commissioner is in doubt, proof, how made.**—When the commissioner has doubts as to the identity of parties, or genuineness of any transfer or power of attorney, he shall not deliver such instrument to the party claiming until such doubtful matters are made clear by such additional proof as he may deem just and reasonable, which proof shall be by affidavits filed with the commissioner. [Id.]

**Arts. 4061, 4062.**

See *Vernon's Sayles' Civ. St. Arts.* 5291, 5292.

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### CHAPTER 3—LAND DISTRICTS

**Articles 4063-4067a.**

See *Vernon's Sayles' Civ. St. Arts.* 5293-5298.

**Art. 4067b. Counties attached.**—The land districts composed of more than one county are defined and the unorganized counties are attached for surveying purposes as follows: [Id.]

1. The counties of Armstrong, Carson and Randall are attached to Donley county. [Act 1883.]

2. The counties of Andrews and Gaines are attached to Martin county. [Act 1887.]

3. The counties of Bailey, Cochran and Hockley are attached to Crosby county. [Id.]

4. The counties of Borden, Dawson, Lynn, Yoakum, Terry and Glasscock are attached to Howard county. [Acts 1883, 1889.]



5. The counties of Greer, Collingsworth, Hutchinson, Hansford, Ochiltree, Roberts, Hemphill and Lipscomb are attached to Wheeler county. [Act 1883.]
6. The counties of Crane, Ector and Upton are attached to Midland county. [Act 1889.]
7. The county of Lamb is attached to Baylor county. [Act 1881.]
8. The county of La Salle is attached to Nueces county. [Act 1874.]
9. The counties of Loving, Ward and Winkler are attached to Reeves county.\* [Act 1877.]
10. The county of Stonewall is attached to Young county. [Act 1876.]
11. The county of Schleicher is attached to Menard county. [Act 1887.]
12. The counties of Crockett and Edwards are attached to Bexar county. [R. S. 1879, art. 3833.]
13. The counties of Dallam, Moore, Parmer, Potter and Sherman are attached to Oldham county. [Act 1883.]
14. The county of Encinal is attached to Webb county. [Act 1885.]
15. The counties of Foley and Buchel are attached to Brewster county.\* [Act 1889.]
16. The counties of Garza and Kent are attached to Scurry county. [Act 1887.]
17. The counties of Irion and Sterling are attached to Tom Green county.
18. The county of Jeff Davis is attached to Presidio county.
19. The county of King is attached to Knox county. [Act 1887.]

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CHAPTER 4—COUNTY AND DISTRICT SURVEYORS

**Articles 4068-4095.**

See Vernon's Sayles' Civ. St. Arts. 5300-5327.

**Art. 4096. [3860] Authority to survey.**—Any certificate of claim to land, which has been or may be obtained in the manner and form prescribed by law, shall be sufficient evidence to authorize any lawful surveyor to survey for any person holding such certificate any lands which he may point out agreeably to all the laws which do now or may hereafter exist on that subject; provided, that where more than one application is made for the same tract of land to be surveyed, the settler or occupant shall have the preference if their claims be otherwise equal. [Act Dec. 14, 1837.]

**Art. 4097. [3861] Conflicting claims settled by jury.**—In all cases where there is more than one claimant to the same location, or in case there be more occupant claimants than one, the conflicting claims shall be summarily tried by the nearest justice of the peace, and six disinterested jurors summoned for that purpose, who shall in all cases give preference to the oldest occupant and settler; and upon their decision the surveyor shall grant to the successful party the field-notes of the tract of land. [Id.]

**Art. 4098. Right to examine books, etc.**

See Vernon's Sayles' Civ. St. Art. 5328.

**Art. 4099. [3863] Right to demand statement, when.**—Whenever an applicant calls upon a district, county, deputy or special surveyor to make an entry for location on his books, and shall be informed that the land indicated by the applicant has already been located, or located and surveyed, the applicant may demand of the surveyor a certificate in writing, setting forth the time at which the entry, location and survey, or either, was made, at whose instance, upon what certificate or warrant, and all the facts in the case, which certificate shall be held good evidence in law and equity against such surveyor in any suit brought against him to test the truth of the certificate and recover damages by the applicant; and any surveyor refusing any examination of his books and archives, or to give the certificates as herein provided, shall be subject to a fine of five hundred dollars for each offense, to be recovered before the district court by the party injured. [Act Jan. 26, 1858; P. D. 1086.]

**Arts. 4100-4105.**

See Vernon's Sayles' Civ. St. Arts. 5329-5334.

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\* The county of Loving is disorganized by chapter 143 of the Acts of 1897, and is attached to Reeves county "for judicial and other purposes." The unorganized counties of Buchel and Foley were abolished by chapter 90, Acts of 1897, and their territory was incorporated in the county of Brewster. The act defines the boundaries of Brewster county.

## CHAPTER 5—LAND CERTIFICATES

[For annotations applicable to this chapter, see notes following Art. 5279, Vernon's Sayles' Civ. St.]

**Articles 4106-4118. Articles repealed.**—All laws and parts of laws granting lands or land certificates to any person, firm, corporation or company for the construction of railroads, canals and ditches, are repealed. [Sen. Jour. 1895, p. 482; *Id.*]

This article repealed original article 4106 (3871), and articles 4107 (3872), 4108 (3873), 4109 (3874), 4110 (3875), 4111 (3876), 4112 (3877), 4113 (3878), 4114 (3879), 4115, 4116, 4117, and 4118 (3882). Articles 3871 to 3879 classified and described the various land certificates, including bounty warrants, donation warrants and land scrip. Articles 3880 to 3882 read as follows:

"Art. 3880. All unsatisfied genuine land certificates barred by article 10, section 4, of the constitution of 1869, by reason of the holders or owners thereof failing to have them surveyed and returned to the land office by the first day of January, 1875, are declared to have been revived on the eighteenth day of April, 1876.

"Art. 3881. All unsatisfied genuine land certificates in existence on the eighteenth day of April, 1876, shall be surveyed and returned to the general land office within five years thereafter, and on failure thereof shall be forever barred.

"Art. 3882. All genuine land certificates issued by the state after the eighteenth day of April, 1876, shall be surveyed and returned to the general land office within five years after issuance, and on failure thereof shall be forever barred." [See R. S. 1879; 2 Sayles' Civ. Stats. 1889.]

For "the veteran 1280 acre land certificate acts," of 1879 and 1881, and their repeal, see 2 Sayles' Civ. Stats. (1889) pp. 319-321. For the act of 1881, granting land to permanently disabled soldiers, and its repeal, see Art. 4218d, post, note.

**Art. 4119. [3883] Duplicate certificates may be issued, when.**—Whenever any headright certificate, soldier's discharge, bounty warrant, donation warrant or any other land certificate described in this chapter shall have been lost or destroyed a duplicate thereof may be issued by the commissioner of the general land office as hereinafter provided. [Act May 11, 1846; P. D. 4122.]

See notes following Art. 5279, Vernon's Sayles' Civ. St.

**Art. 4120. [3884] Notice to be published for eight weeks.**—Whenever any of the above-mentioned certificates or evidence of claim to land may have been lost or destroyed the owner thereof, or his agent or legal representative, shall cause a notice of such loss or destruction to be published for eight successive weeks in some weekly newspaper published in the county where such person, his agent or legal representative resides, or in the nearest county if none be so published, and such notice shall describe substantially, or as near as can be, the certificate or paper lost, and shall further state that unless intelligence of the same is received by him, or by the commissioner of the general land office, within three months of the date of said publication, he will apply to the proper officer for a duplicate of the certificate or paper so lost or destroyed. [Act Jan. 14, 1840; P. D. 4123.]

**Art. 4121. [3885] Proofs to be made.**—When any person shall apply for a duplicate of any such certificate or claim against the government, he shall be required to prove by the affidavit of the printer or publisher, duly made before some officer authorized to administer oaths, that the notice has been published as required in the preceding article; and he or his agent shall take and subscribe an oath before some officer, authorized as aforesaid, to the following effect: That he is the just owner of the said certificate or claim [describing it]; that he has not sold, alienated nor transferred the same in any manner; that it has been lost [or destroyed, as the case may be], and that since lost [or destroyed] he has not known or heard of the existence of the same. And he shall file said proof and affidavit in the general land office; and when the assignee of the original grantee applies for such duplicate, the evidence of this [his?] title shall be filed in the general land office, if not already on file; whereupon, if it shall appear to the commissioner of the general land office that the certificate or claim so lost or destroyed is a genuine and subsisting claim against the government, and that the provisions of this article have been fully complied with, no intelligence of said certificate or claim having been received by him, it shall be his duty to issue to the claimant, in the name of the original grantee, a duplicate certificate under his hand and the seal of his office, entitling him to the same quantity of land as was conferred by the original; provided, that administrators and the legal representatives of deceased owners shall not be required to take the oath above prescribed; and provided further, that when an agent or attorney applies for such duplicate, his legal authority to receive and receipt for the same be filed before delivery. [*Id.*; P. D. 4124.]

**Art. 4122. [3886] Joint owners may join or sever in affidavit.**—When any certificate or evidence of claim to land mentioned in this chapter shall be owned by two or more parties, and the same shall be lost or destroyed, the parties owning the same may jointly or severally make the affidavit required of such owner. [Act Feb. 7, 1852; P. D. 4127.]

**Art. 4123. [3887] When unlocated balance certificate may be issued.**—When two or more surveys have been made by virtue of any legal claim to lands and patents obtained therefor, if it shall appear by the district or county maps in the general land office, or by a plat or sketch giving a connection of the adjacent surveys certified to by the district or county surveyor and returned to said office, that the survey last made is so circumscribed by other surveys that no more vacant land can be obtained in that place, and the survey or surveys already made do not satisfy the claim, the commissioner of the general land office shall issue, on demand, to the owner or holder of said claim, a certificate for the unlocated balance thereof, which may be located, surveyed and patented as other certificates. [Act Jan. 10, 1850.]

**Art. 4124. [3888] When location in conflict, may be changed.**—Whenever the field-notes of a survey have been returned to the general land office, and upon examination the same are found to be in conflict with previous claims, it shall be lawful for the rightful claimant of the certificate so located in conflict to file his affidavit with the commissioner, setting forth that the certificate was not intentionally so located in conflict, but that he believed at the date of such location that the land covered thereby was vacant and unappropriated public domain; to abandon said survey and surrender all claim thereto by reason of the file, entry and survey made by him, and to receive from the commissioner a copy of the certificate on which the same was based, if such certificate be valid and genuine; and it shall be the duty of the commissioner to indorse upon the said copy that the original certificate is floated, and the county where the land is situated which is covered by such floated certificate, and that the copy is given in lieu of the original, but without any prejudice to the rights of any person by virtue of said certificate, and that the said copy may be located upon any unappropriated or vacant land. [Acts 1879, p. 20, S. S.]

**Note.**—The original article reads as follows:

“Whenever the field-notes of a survey have been returned to the general land office, and, upon examination, the same are found to be in conflict with previous claims, it shall be lawful for the rightful claimant of the certificate so located in conflict to file his affidavit with the commissioner, setting forth that the certificate was not intentionally so located in conflict, but that he believed, at the date of such location, that the land covered thereby was vacant and unappropriated public domain; to abandon said survey and surrender all claim thereto, by reason of the file, entry and survey made by him; and to receive from the commissioner a copy of the certificate on which the same was based, if such certificate be valid and genuine; and it shall be the duty of the commissioner to indorse upon the said copy that the original certificate is floated, and the county where the land is situated which is covered by such floated certificate; and that the copy is given in lieu of the original, but without any prejudice to the rights of any person by virtue of said certificate, and that the said copy may be located upon any unappropriated or vacant land.” [Act Nov. 25, 1871; 12th Leg., S. S., p. 41; June 2, 1873; 13th Leg., p. 180; P. D. 7095, 7099<sup>00</sup>.]

**Art. 4125. [3889] When patent canceled, a duplicate certificate may issue.**—Whenever any patent to land has been canceled according to law, it shall be the duty of the commissioner of the general land office to issue to the owner, his agent or legal representative, on his demand, a duplicate of the original certificate, or a certificate for the unlocated balance of said certificate, as the case may be, which may be located and surveyed and patented upon as in other cases; and the commissioner shall certify upon such certificate that the original patent has been canceled, the county where the land is situated, and that the duplicate or certificate is given in lieu of the original, but without any prejudice to the rights of any person. [Act Feb. 3, 1854; Act June 2, 1873, p. 180, § 5; P. D. 4301-2; P. D. 7099<sup>00</sup>.]

See annotations following Art. 5279, Vernon's Sayles' Civ. St.

**Art. 4126. [3890] Where surveyed in part, certificate for unlocated balance to issue.**—Whenever any genuine land certificate has been located and surveyed in part, and the same, with the field-notes, has been returned to and filed in the general land office, it shall be the duty of the commissioner of the general land office to issue to the owner thereof, his agent or legal representative, on demand, a certificate for the unlocated balance of said original, stating thereon the number and amount of locations made on the original, and the same may be located, surveyed and patented as in other cases. [Act June 2, 1873, p. 180, § 6; P. D. 7099pp.]

**Art. 4127. [3891] Triplicate certificate, when obtained.**—When any person may have applied for and obtained a duplicate land warrant, headright or other land certificate, or certificate for unlocated balance, under the provisions of this chapter, and the same may have been lost or destroyed, such person shall be entitled to demand and receive a triplicate thereof, or other certificate of unlocated balance, by complying with the provisions hereof in reference to obtaining duplicate certificates or certificate of unlocated balance. [Act Nov. 27, 1861; P. D. 4153.]

**Art. 4128. [3892] Certificates issued by supreme and district courts validated.**—All certificates heretofore or that may be hereafter issued by the supreme or district courts, in accordance with the provisions of an act passed by the Fifth congress of the republic of Texas, approved February 4, 1841, shall be as valid and legal as if issued by any other legal authority. [Act March 28, 1848; P. D. 4237.]

**Art. 4129. [3893] Commissioner authorized to issue certificate.**—The commissioner of the general land office is hereby authorized to issue to all persons and corporations such land certificates as they may be entitled to under any general or special law. [Act March 6, 1863, p. 23, § 1.]

For act of April 19, 1879, directing the commissioner to act on the advice of the governor in issuing certificates in certain cases, see Sayles' Civ. Stat. (1889) art. 3893a.

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CHAPTER 6—ENTRIES AND LOCATIONS

[For annotations applicable to this chapter, see notes following Art. 5279, Vernon's Sayles' Civ. St.]

**Article 4130. [3894] Surveyor shall keep a register of entries.**—Each county, district and special deputy surveyor shall keep in his office a well-bound book as a register of entries, in which he shall register all entries or applications for land in his county or district. [Act Aug. 30, 1856; P. D. 4573.]

**Art. 4131. [3895] Entry, etc., how made.**—An entry or application shall be in writing, and be dated and signed by the applicant. It shall particularly describe the claim to be surveyed and the land applied for; which entry or application, together with the land certificate or scrip, or other legal evidence of title to be surveyed, shall be filed in the office of the county or district surveyor in which the land is situated; and where the said claim to be surveyed shall remain until returned, together with the field-notes, to the general land office. [Id.]

**Art. 4132. [3896] Survey, how made.**—The survey shall be made by a copy of the entry or application, and strictly in accordance with the same; and hereafter no survey shall be made until after entry or application, as provided in the preceding article. [Id.]

**Art. 4133. [3897] Shall confer a preference right.**—Every entry or application, made according to the two preceding articles, shall confer a preference right of location or survey over any subsequent entry or application.

**Art. 4134. [3898] Certificate not to be lifted after entry.**—It shall not be lawful for such surveyor to allow the holder of any land certificate or scrip, or other legal evidence of title to land, to lift or float the same after entry, location, file or survey, when the same is not made upon land previously appropriated. But when a conflict of entries, files, locations or surveys occur, upon a proper showing of the facts, which may be by the certificate of one of his deputies or from his knowledge, he shall allow the party having his entry, file, location or survey of subsequent date, to lift so much thereof as shall be affected by such conflict. [Id. § 2; P. D. 4574.]

**Art. 4135. [3899] Effect of location on a valid title, etc.**—Whenever an entry is made by virtue of a genuine certificate, upon any land which appears to be appropriated, deeded or patented, by the books of the proper surveyor's office, or records of the county court or general land office, the party making such entry shall abide by the same. And in the event that judgment final shall be rendered against the right of the party making such entry to hold such land, he shall not have the right to lift or re-enter said certificate. But the same shall be forfeited, and so declared to be by the judgment of the court. [Id.; P. D. 4575.]

**Art. 4136. [3900] Certificate may be relocated on same land, when.**—Any person holding a genuine certificate or other legal evidence of right to land under the republic or state of Texas, and having a survey made by virtue of the

same, the field-notes of which may not have been returned to the general land office before the period prescribed by law, shall have the right to relocate the same certificate or other evidence of legal right to land, upon the same survey, but without being compelled to have the same resurveyed; provided, said survey shall not have been previously located by some other person by right of a genuine land claim. [Act Feb. 10, 1852; P. D. 4563.]

**Art. 4137. [3901] Relocation, how made, etc.**—Any person wishing to avail himself of the privilege of relocating the same land claim upon the same land, as permitted by the preceding article, shall present his land claim, or cause the same to be done for that purpose, to the district or county surveyor, as the case may be, of the district or county where the field-notes were first recorded, who shall duly enter such relocation upon the record of field-notes of the office, and duly certify the same to the commissioner of the general land office, which shall be sufficient authority for him to issue the patent for the land so relocated as in other cases. [Id.; P. D. 4564.]

**Art. 4138. [3902] Surveys shall be made within twelve months.**—All lands which may be located by entry or application, as aforesaid, shall be surveyed within twelve months from the date of entry or the same shall be null and void and the lands be subject to relocation and survey; but such lands shall not in any case be subject to relocation at any time by the same certificate. [Id.; P. D. 4568.]

**Art. 4139. [3903] May be made in more than two places.**—Locations of land by entry or application may be made in more than two places by virtue of any genuine land certificate, bounty warrant or other legal evidence of claim to land; provided, such other places be bounded by previous surveys and shall be enough to satisfy only a part of said claim. [Id.; P. D. 4532.]

**Art. 4140. [3904] Where land lies in two or more districts, may be located in either.**—Whenever it appears that an entry or location is made on the boundary of any county or land district, and a part of the land so entered or located upon is in the adjoining county or land district, the same shall be as valid and legal as if the land were situated entirely within the county or land district in which such entry or location was made; and it shall be the duty of the county or district surveyor to make out a certified copy of such entry or location and forward the same to the county or district surveyor of the county or district affected thereby.

**Art. 4141. [3905] Surveyor to record such location.**—It shall be the duty of the county or district surveyor receiving the entry or location mentioned in the preceding article, and which purports to locate part of the land within his district or county, to record the same as if such entry or location had been made in his own district or county.

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#### CHAPTER 7—SURVEYS AND THE FIELD-NOTES THEREOF

**Article 4142. [3906] What authorizes a survey.**—All surveys shall be made by authority of law, or under or by virtue of some genuine land certificate which is at the time on file in the county or district surveyor's office where the land is situated, and by a county, district or deputy surveyor duly appointed or elected and qualified.

See Art. 5335, Vernon's Sayles' Civ. St.

Act April 4, 1881, validated locations in certain counties prior to April 29, 1875. See 2 Sayles' Civ. Stats. (1889) art. 3906a.

**Art. 4143. [3907].**

Omitted as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. The repealed article reads as follows:

"Art. 3907. It shall not be lawful for any county, district or deputy surveyor to locate any certificate for land issued prior to May 1, 1840, or to survey any land for any person holding such certificate, unless the same be certified under the hand and seal of the commissioner of the general land office, that the same has been reported by the commissioners appointed under an act of congress to detect fraudulent land certificates, etc., passed January, 1840, as a genuine and legal claim against the government of Texas; and any survey made contrary to the meaning and intent hereof shall be null and void." [Act Feb. 5, 1840; P. D. 4537.]

The following act, "to validate certain surveys," etc., is chapter 94 of the Acts of 1889:

"Section 1. In all cases where parties resurveyed or relocated lands by virtue of any valid land certificates previously surveyed and on file in the general land office,

without having taken out certified copies thereof, and thereby failed to comply strictly with the law, such last-named survey, which in law might be deemed a relocation, shall be valid and the owner shall hold thereunder thereby abandoning all other surveys previously made, and the commissioner of the general land office is authorized to issue patents therefor.

"Sec. 2. All surveys heretofore made by any county or district surveyor, which would otherwise be valid, shall not be called in question on account of said surveys having been made outside of the proper county or district, but said surveys shall be valid the same as if the said surveyor had jurisdiction in the territory embracing the same.

"Sec. 3. The provisions of this act shall not apply to nor affect the rights of third persons heretofore acquired by virtue of any purchase from the state location or surveys made in accordance with the laws in force at the time of such location and survey."

**Art. 4144. Field-notes shall describe what.**

See Vernon's Sayles' Civ. St. Art. 5336.

**Art. 4145. [3909] Surveys to be returned in twelve months.**—The field-notes of all surveys shall be returned to and filed in the general land office within twelve months from the date of survey. [Act Feb. 10, 1852; P. D. 4566.]

See notes following Art. 5279, Vernon's Sayles' Civ. St.

**Arts. 4146-4148.**

See Vernon's Sayles' Civ. St. Arts. 5337-5339.

**Art. 4149. [3913] Two or more surveys permitted, when.**—Two surveys may be made under any genuine land certificate, and more than two surveys may be made thereunder, provided the land to be located be bounded by previous surveys, and shall be enough to satisfy only a part of said claim, which fact shall be specially certified to by the surveyor making the survey. [Act Feb. 10, 1854; P. D. 4532.]

**Arts. 4150-4156.**

See Vernon's Sayles' Civ. St. Arts. 5340-5346.

**Art. 4157. [3921].**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. The repealed article reads as follows:

"Art. 3921. All surveys properly made by virtue of genuine or valid land certificates, which surveys, together with the certificates by virtue of which they were made, have been returned and are now on file in the general land office, or were so on file on the twenty-fifth of April, 1871, and not in conflict with any other valid land claim, shall be deemed valid, and the commissioner of the general land office is hereby authorized and required to issue patents for the same." [Act April 25, 1871, p. 60, § 2; P. D. 7089.]

**Art. 4158. [3922] Field-notes withdrawn to be returned, when.**—In all cases where field-notes shall be withdrawn from the general land office the same shall be returned thereto within twelve months from the date of withdrawal, or such survey or surveys shall be null and void. [Act Nov. 29, 1871, p. 45, § 3; P. D. 7098.]

**Art. 4159. [3923] Locations on the line and within two districts may be surveyed by either.**—An entry or location made by virtue of a genuine land certificate upon any vacant and unappropriated land which lies partly in one and partly in another land district or county shall be surveyed by the surveyor of the district or county in which the entry or location was made; and the field-notes thereof shall be recorded in both districts or counties before they are returned to the general land office.

**Art. 4159a. To relieve actual occupants.**—Whenever the commissioner of the general land office shall find by inspection of the whole body of the application that it was made for the purpose of having a survey made of a portion of the unappropriated public domain for the homestead of the applicant, under "An act for the benefit of actual occupants of the public lands," approved May 26, 1873, and acts amendatory thereof, and upon which application the surveyor did make the survey as required by law, even though his field-notes were not returned to the land office within twelve months, and shall also find that the proof of occupancy as required by law is fully and properly made, from all of which it shall be manifestly clear to the commissioner that the applicant had in good faith endeavored to comply with the law hereinbefore recited, but was misled through the omission or ignorance of the officers charged by law to perform their duties in the premises, he shall issue and sign the patent, notwithstanding the application may not have been sworn to, or not signed if sworn to, or shall not have the seal of the officer before whom the affidavit was made attached thereto, and notwithstanding the application may contain a recital of articles 3926 and 3927 of the Revised Civil Statutes of Texas, "An act for the relief of actual occupants of the public lands," approved April 24, 1879, when it shall be manifest from all the

papers on file in the land office that such recital was erroneously made. [Acts 1895, p. 149.]

See Early Laws, arts. 3774, 4257.

The articles referred to in this article, being parts of the act of May 26, 1873, do not appear to have been codified by the commission of 1893, nor to have been considered by the legislature in revising same. Articles 3926 and 3927 were a part of the chapter on Pre-emptions (arts. 3924-3936, R. S. 1879). The chapter is omitted from the revision of 1895 without note or comment other than is found in the above note. It was repealed by chapter 20 of the Acts of 1889.

**Art. 4159b. Law not to apply, when.**—Nothing in this law shall be construed to allow any applicant to obtain a patent in any case where subsequent settlers have, by reason of any of the failures or delays recited in this law, themselves settled upon any of such lands in good faith as a home, nor thus defeat such subsequent applicant. [Id. § 2.]

**Art. 4159c. Land purchase-money refunded, when.**

See Art. 5404, Vernon's Sayles' Civ. St.

#### CHAPTER 8—HOMESTEAD DONATIONS

[For annotations applicable to this chapter, see notes following Art. 5279, Vernon's Sayles' Civ. St.]

**Article 4160. [3937] Who is entitled to one hundred and sixty acres.**—Every person who is the head of a family and without a homestead shall be entitled to receive a donation from the state of Texas of one hundred and sixty acres of vacant and unappropriated public land, upon the conditions and under the stipulations hereinafter provided. [Const. art. 14, § 6.]

**Art. 4161. [3938] Who is entitled to eighty acres.**—Every single man of the age of eighteen years or upward shall be entitled to receive a donation from the state of Texas of eighty acres of vacant and unappropriated public land, upon the conditions and under the stipulations hereinafter provided. [Id.]

**Art. 4162. [3939] Shall present application in writing.**—Any person desiring to acquire any portion of the public domain as a homestead donation, and who is entitled to apply for the same under the provisions of this chapter, shall present to the surveyor of the district or county in which the land is situated his application in writing, designating the land which he claims, and stating that he claims the same for himself, in good faith, under the laws granting homestead donations; that he is without any homestead of his own, and that he has actually settled upon the land which he claims, and that he believes the same to be vacant and unappropriated public domain.

**Art. 4163. [3940] Shall be sworn to, filed and recorded.**—Said application shall be made at the time of settlement or occupancy of the land, or within thirty days thereafter, and shall be sworn to before some officer authorized to administer oaths, and shall be filed with the said surveyor and recorded by him in a well-bound book kept for recording pre-emption and homestead applications; and the said surveyor shall give a receipt therefor, if desired.

**Art. 4164. [3941].**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. The article read as follows:

"Art. 3941. It shall be the duty of the surveyor of the proper district or county to survey the land described in the application aforesaid, as soon as practicable and within twelve months after the date of said application, and the field-notes thereof shall be certified to, recorded and mapped as required by law in other cases, the applicant paying all legal surveyors' fees."

**Art. 4165. [3942] Preference right to survey and patent.**—Any applicant for a homestead donation, after having settled upon the public land he claims, and having made his application in writing for a survey, as required by the provisions of this chapter, and continuing his said occupation, shall have a preference right over all subsequent locations or settlements to have the same surveyed, for a period of twelve months from the date of his application, and to secure a patent for the same under the provisions of this chapter. [Act Aug. 19, 1876, p. 197.]

**Art. 4166. [3943] Field-notes to be returned to general land office in twelve months.**—The field-notes of every survey made under the provisions

of this chapter, after being duly certified, mapped and recorded, shall be returned to and filed in the general land office within twelve months after the date of the survey aforesaid. [Act May 26, 1873, p. 197.]

**Art. 4167. [3944] Entitled to patent after three years' residence.**—Whenever the field-notes of a homestead donation survey shall have been returned to the general land office according to the provisions of the preceding article, and when proof shall be made to the satisfaction of the commissioner of the general land office that the original applicant for a homestead donation has by himself, or in case the claim has been transferred, that he and his assignee have together in good faith resided upon, occupied and improved the land so claimed by him for a period of three consecutive years from the date of the application, it shall be the duty of said commissioner to issue a patent therefor to the original applicant or his assignee, as the case may be, upon payment of all the office and patent fees.

**Art. 4168. [3945] Proof shall be by affidavit, etc.**—The proof required in the preceding article shall be by an affidavit of the claimant to the effect that such original applicant has by himself, or in case the claim has been transferred, that he and his assignee have together in good faith resided upon, occupied and improved said land for three consecutive years from the date of his application for a homestead donation; which affidavit shall be corroborated by the affidavit of two disinterested and credible citizens of the county or surveyor's district in which the land is situated, which affidavits shall be subscribed and sworn to before some officer authorized to administer oaths, who shall certify to the same and to the credibility of said witnesses under his hand and seal of his office. [Act Aug. 19, 1876, p. 197.]

**Art. 4169. [3946] Patents shall issue to the heirs, when.**—When the original occupant or his assignee is dead, the patent shall issue to his heirs on application of the surviving widow, one of the heirs or his legal representative. [Act March 24, 1871, p. 16; P. D. 7053.]

**Art. 4170. [3947] No assignment valid unless by deed, etc.**—No assignment of the homestead donation right by the occupant or settler before the patent has been obtained shall be good and valid in law, unless the same be by deed duly authenticated as required by law. [Id.; P. D. 7053.]

**Art. 4171. [3948] Shall forfeit right and title, when.**—Should any person claiming a homestead donation fail to make the written application as provided in this chapter, or should he fail to have the survey made and to have the field-notes thereof (duly certified to and recorded) returned to and filed in the general land office within twelve months after the date of his application, or should he or his assignor fail to make satisfactory proof that he had resided upon, occupied and improved the land claimed by him for three years after the date of his application, as provided in this chapter, he shall in either event forfeit all right and title to said land, and the same shall become subject to entry or location as other vacant and unappropriated public land.

**Art. 4172. [3949] Land certificate may be applied, etc., at any time.**—Any person who shall have filed his application for a homestead donation, according to the provisions of this chapter, or the vendee of such person, shall have the right and privilege at any time to locate upon his said claim or survey any genuine and unsatisfied land certificate, which shall have been duly transferred to him; and after returning the said certificate to and filing it in the general land office, he shall be entitled to receive a patent for the land in the same manner as if the certificate had been originally located upon it; provided, that the field-notes of the survey shall have been returned to the general land office within twelve months, as hereinbefore provided, and the homestead donation claim has not been forfeited under the preceding article.

**Art. 4173. [3950] Temporary abandonment, when not computed.**—If any person shall be driven from the land claimed or occupied by him as a homestead donation by hostile Indians or other public enemies, or having reasonable grounds to fear violence from such Indians or enemies to himself or family, shall temporarily abandon his said land and shall return to and occupy the same as soon as it shall appear reasonably safe for him to do so, he shall not forfeit or lose any right by reason thereof, and proof of the same may be made by the affidavit of the party and the certificate of the county or district surveyor. [Act March 13, 1875, p. 107.]



**Art. 4174. [3951] Homestead donations on titled lands prohibited.**

—No person shall settle upon or occupy, nor shall any survey be made or patented under the provisions of this chapter upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land office, or when the appropriation is evidenced by the occupation of the owner or of some person holding for him. [Const. art. 14, § 2.]

## CHAPTER 9—PATENTS

**Articles 4175–4187.**

See Vernon's Sayles' Civ. St. Arts. 5361–5373.

**Art. 4188. [3964].**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. The article reads as follows:

"Art. 3964. All genuine headright certificates, or genuine Toby or Bryan scrip, and all genuine certificates of any district or supreme court of this state establishing headrights that have been legally issued and properly reported to the proper officers, that have not been presented to the court of claims within the time prescribed by law, shall be recognized and patented the same as though they had been presented and approved by the commissioner of claims. The commissioner of the general land office may also patent in the same manner all certificates or warrants issued by the commissioner of claims or comptroller, acting commissioner of claims, but should any fraudulent certificate for land, by accident, inadvertence or design, be perfected into a patent under this article, said patent shall be void and no title shall vest." [Acts 1859, p. 10; P. D. 1148.]

**Arts. 4189–4196.**

See Vernon's Sayles' Civ. St. Arts. 5374–5382.

## CHAPTER 10—LAND RESERVATIONS

**Article 4197.**

By the report of the joint committee on amendments to the Revised Civil Code (No. 68, Sen. Jour., 1895, p. 482), article 4197 is renumbered 4198 and amended to include the words "under chapter 8, title LXXXVII, Revised Civil Statutes," and the article which follows and numbered by the codifiers of 1893 as 4198 (3969), is omitted as repealed.—Codifiers of 1895.

For the acts of February 20, 1879, and April 18, 1879, reserving public lands for the purpose of building a state capitol, see Sayles' Civ. Stat. (1889) art. 3968a.

For act of July 5, 1879, confirming titles to lands patented within reservations, see Sayles' Civ. Stat. (1889) art. 3968b.

Articles 3969 and 3970 of the Revised Statutes of 1879 (Act August 17, 1876; Act March 31, 1885) reserved lapsed reservations from location, except by pre-emption and homestead settlers. Sayles' Civ. Stat. (1889) arts. 3969, 3970. Article 3971 (Act January 25, 1875; Act July 1, 1881) appropriated what was known as the Indian reservations to the common free school fund, and articles 3972 to 3976 made provision for the protection of titles of settlers. Articles 3972 to 3976 were repealed by act of March 11, 1881. See Sayles' Civ. Stat. (1889) arts. 3971–3976.

Old article 3968 declared the Mississippi & Pacific Railroad reservation open, and subject to location, sale and settlement, on and after the 1st day of January, 1857. Sayles' Civ. Stat. (1889) art. 3968. The act of December 21, 1853, by which the reservation was created, did not affect any right of location, or of entry, pre-emption right or survey theretofore acquired in the district of country reserved and set apart for the use of the road. Tucker v. Murphy, 66 T. 355, 1 S. W. 76.

**Art. 4198. Severed from public domain.**—All reservations of the public domain for the benefit of any railroad or railroad company heretofore made by law, and the right to which reservation has lapsed since January 1, 1872, or may hereafter lapse, are hereby declared then to have been severed from the mass of the public domain; and, in event of forfeiture to the state, are expressly reserved from location except by actual settlers under chapter 8, title LXXXVII, Revised Civil Statutes. [Acts 1885, p. 104; Amend. 1895, No. 68, Sen. Jour. p. 482].

**Art. 4199. Reservation surrendered, how.**—Any railroad company in whose favor a reservation from the public domain may heretofore have been created by any law, general or special, may surrender its exclusive right to further locate lands within said reservation; and whenever any such railroad company shall file in the office of the secretary of state an instrument in writing, approved as to form by the attorney-general, relinquishing or surrendering its claim to such reservation, said relinquishment shall, upon the payment of all costs of suit, if one has been instituted, be accepted by the state, instead of a judicial forfeiture of the reservation, and shall be deemed a satisfaction of said suit; and it is especially

provided that the lands so relinquished shall be subject to location only under the provisions of law embraced in this chapter. The surrender is not to affect the right of the company to construct its road in accordance with its charter, nor its relation to the laws regulating railroads and granting land subsidies to aid in their construction. Any action taken by any railroad company under the provisions of this chapter is to be held to be a complete acceptance of all the provisions of the constitution applicable to railroads, and of the laws of the state regulating railroads. [Acts 1879, p. 175.]

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CHAPTER 11—SALE OF VACANT AND UNAPPROPRIATED LANDS

[See annotations following Art. 5279, Vernon's Sayles' Civ. St.]

**Article 4200. Subject to location, how; effect of surrender; certain land withdrawn from sale.**—All the public lands heretofore authorized to be sold under the act entitled "An act to provide for the sale of the unappropriated public land of the state of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, are withdrawn from sale; provided, that nothing contained in this article shall be construed to return the land reserved by an act entitled "An act to provide for the sale of a portion of the unappropriated public lands of the state of Texas, and the investment of the proceeds of such sale," approved July 14, 1879, and the act amendatory of such act, approved March 11, 1881, to the mass of the public domain, but the same shall be construed to be reserved for the purposes for which said land was originally set apart and designated by said act until the legislature shall otherwise provide. [Acts 1883, p. 2.]

The acts referred to in this article may be found in 2 Sayles' Civ. Stat. (1889) pp. 351-353. See arts. 4253, 4307d, post.

**Art. 4201. Manner of purchasing public domain in amounts less than six hundred and forty acres.**—Any person desiring to purchase any of such appropriated public lands situated in organized counties of the state of Texas as contain not more than six hundred and forty acres, appropriated by an act to provide for the investment of the proceeds of such sale, approved July 14, 1879, may do so by causing the tract or tracts which such person may desire to purchase to be surveyed by the authorized public surveyor of the county in which such land is situated. The provisions of this article shall not be so construed as to prohibit the right of acquiring any of said lands under the homestead donation law, within the bounds of the reservation here made; but any person shall have the same right of acquiring a homestead within this reservation, under the homestead donation laws of this state, as he may have had prior to April, 1889; provided, where it is ascertained that any of such lands as contain not more than six hundred and forty acres are situated within the inclosed lands of any actual bona fide settler and resident of the state, such settler shall have the preference right for six months from the time that the same shall have been declared by the commissioner of the general land office to be vacant and subject to sale, to purchase as much of said land as may be embraced within his inclosure; provided, that said preference right shall not be given to any person who has inclosed any vacant land knowing the same to be vacant at the time of inclosing same. [Acts 1889, p. 48.]

**Art. 4202. Application, how made.**—The person desiring to purchase any of said lands shall make application therefor in writing, describing the lands by reference to the surrounding surveys. [Acts 1887, p. 61, § 2.]

**Art. 4203. Lands to be surveyed.**—It shall be the duty of the surveyor to survey the lands designated in said application within three months from the date thereof, and within sixty days after said survey to certify to, record and map the field-notes of said survey; and he shall also within the said sixty days return to and file the same in the general land office, together with the applications for the purchase thereof, as required by law in other cases. [Id. § 3.]

**Art. 4204. Surveyor's fees.**—Surveyors shall be entitled to receive from applicants for the purchase of lands under the authority of this chapter all legal surveyor's fees for work done by them. [Id. § 4.]

**Art. 4205. Patent to issue, when.**—Within ninety days after the return to and filing in the general land office of the surveyor's certificate, map and field-notes of the land desired to be purchased, it shall be the right of the person who has had the same surveyed to pay or cause to be paid into the treasury of the state of Texas the purchase-money therefor at two dollars per acre; and upon the pres-

entation to the commissioner of the general land office of the receipt of the state treasurer for such purchase-money, said commissioner shall issue to said person a patent for the tract or tracts of land so surveyed and paid for. [Id. § 5.]

**Art. 4206. Failure to pay to work forfeiture.**—Should any applicant for the purchase of public land fail, refuse or neglect to pay for the same within the time prescribed in article 4205 he shall forfeit all rights thereto, and shall not thereafter be allowed to purchase the same, but such land so surveyed may be sold as if no survey had been made. [Id. § 6.]

**Art. 4207. Reservations not to be disturbed.**—Nothing in this title shall be so construed as to operate as a repeal of the reservations and donations of the lands referred to in this title to the free school and public debt funds made by former laws, but such reservations and donations shall be preserved intact, and the proceeds arising from the sale of the same under the provisions of this chapter shall go one-half to the permanent free school fund and the other half to the public debt. [Id. § 7.]

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CHAPTER 12—GENERAL PROVISIONS

**Article 4208. [3977] Certificates shall not be located, etc., on titled land.**—All genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land office, or when the appropriation is evidenced by the occupation of the owner, or of some person holding for him. [Const. art. 14, § 2.]

See art. 4174.

**Arts. 4209 [3978], 4210 [3981].**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. Articles 3978 to 3981 are as follows:

"Art. 3978. The territory known as Fisher & Miller's colony is hereby declared to have been opened for location since the twenty-seventh day of February, 1875, as other vacant lands, in accordance with the laws governing locations; and it is further declared that all patents which were issued by the commissioner of the general land office, either to preëmptors or to owners of certificates, prior to the date aforesaid, or which have been issued since that date, are legal and valid; provided, that this article shall not be construed so as to affect any rights which had vested or accrued prior to the twenty-seventh day of February, 1875, under pre-existing laws." [Act Feb. 27, 1875, p. 193.]

For boundaries of Fisher & Miller's colony, see 1 Early Laws, p. 579; P. D. 256. For other laws on the subject, see 2 Early Laws, arts. 1873, 2372-2374, 2860, 2994. For the preamble to article 3978, see 3 Early Laws, art. 4141, § 8.

"Art. 3979. All patents for lands issued by the republic of Texas which have been sealed with the original seal of the general land office, having for device thereon a buffalo under a live oak tree, or which have been sealed with the other seal of said office, having for device thereon a cotton plant, plow, scythe, sheaf of wheat, and meridian sun, shall be as valid as though both of said seals had been devised and adopted by law." [Act April 29, 1846; P. D. 4088.]

"Art. 3980. All certified copies heretofore made of deeds, patents, books, records and papers belonging to the general land office, under the signature of the commissioner or chief clerk of said office, and sealed with either of the seals described, shall be as valid and shall have the same force and effect as if both of said seals had been devised and adopted by law." [Ib.; P. D. 4088; 2 Early Laws, art. 1605.]

The seal now in use is prescribed by section 6 of the act of May 12, 1846 (art. 2867, ante; 2 Early Laws, art. 1715).

"Art. 3981. Whenever the records of any surveyor's office shall have been destroyed by fire or otherwise, it shall be the duty of the commissioner of the general land office, upon application of the county court, to furnish said surveyor's office with copies of all surveys and field-notes thereof that may properly belong to said county; provided, the county shall pay for such records at the rate of ten cents per one hundred words." [Act April 29, 1874, p. 168.]

**Art. 4211. [3982] No officer shall be interested in public land, etc.**

See Vernon's Sayles' Civ. St. Art. 5388.

**Arts. 4212 [3983], 4213 [3984], 4214 [3985].**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code of 1895. Article 3983 reads as follows:

"Art. 3983. The commissioner of the general land office shall make out and return to the comptroller of public accounts, as soon as practicable, an abstract of all the titled, patented and located lands in the state of Texas, which may have been patented or titled, or which have been located and surveyed, and the certificates and field-notes returned to the general land office up to September 1, 1875, which abstract shall designate the grantee and patentee, the amount of the grant, the class to which it belongs, whether headright, bounty, donation, special grant, or pre-emption, date and number of patent, number of certificate, name of grantee of certificate, or name of pre-emption

locator, and name of the county in which situated; an abstract number shall also be affixed, but the numbers of the present official abstracts shall be preserved." [Act March 9, 1875, p. 71, § 1.]

Article 3984 provided for the employment of a draftsman and two clerks to complete the abstract mentioned in article 3983, and article 3985 made provision for their compensation.

**Arts. 4215-4218a.**

See Vernon's Sayles' Civ. St. Arts. 5389-5393.

**CHAPTER 12a—SALE AND LEASE OF PUBLIC FREE SCHOOL, ASYLUM AND PUBLIC LANDS**

**Preliminary notes.**—This act, passed in 1895, appears to be a copy, substantially, of the act of 1887, with the exception of the omission of the university lands. The act of 1887, with its amendments, is inserted by the codifiers of 1895 as chapter 3 of Title 89.

The title of the act of 1895 is as follows:

"An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools and the several asylums, and the lease of such lands and of the public lands of the state, and the patenting of any part of said lands for church, cemetery or school-house sites; and to prevent the free use, occupancy, unlawful inclosure or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor."

The title of the act of 1887 is as follows:

"An act to provide for the sale of all lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the university, and the several asylums, and the lease of such lands and of the public lands of the state, and to prevent the free use, occupancy, unlawful inclosure, or unlawful appropriation of such lands, and to prescribe and provide adequate penalties therefor."

This act was amended in 1889, 1891 and 1893. See Acts 1889, p. 50; Acts 1891, p. 180; Acts 1893, p. 30.

The act of 1895 repeals all conflicting laws, and another act, passed in 1895 (Acts 1895, p. 19), entitled "An act to invest the board of regents of the university of Texas with the management and control of the university lands," vests in said board the sole and exclusive management and control of said lands, with the right to sell, lease, etc. This act appears as articles 4263a-4263c of the Revised Statutes.

The legislature, by the amendments of 1897, recognize this chapter as in force, to the exclusion of the other.

**Articles 4218b, 4218c.**

See Vernon's Sayles' Civ. St. Arts. 5405, 5406.

**Art. 4218d. Lands to be classified and valued.**—The commissioner of the general land office shall from time to time, as the public interest may require, cause any or all of the lands belonging to the several funds mentioned in this chapter to be carefully and skilfully classified and valued that have not heretofore been classified, and for this purpose he may appoint, with the approval of the governor, such number of competent agents, who shall be citizens of the county or district where such land is situated, as may be necessary, or may determine and declare the classification and valuation without the aid of such agents, and upon such facts as may be satisfactory to the commissioner. Such agents shall receive for their work a reasonable compensation, to be fixed by the commissioner of the general land office, and not to exceed the sum of three dollars per section; and no such expense shall be incurred in the absence of an appropriation by law to cover such expenditure, and the state shall not be liable for any expenditure of this character incurred in excess of current appropriations. [Acts 1895, p. 63, § 3. Repealed by Chapter 129, Acts 1897.]

**Art. 4218e. Commissioner may classify and reclassify.**—The commissioner of the general land office may, from time to time, as the public interest may require, classify any or all of the lands belonging to the several funds mentioned in this chapter that have not been heretofore classified, upon such facts as may be satisfactory to him, designating the same as agricultural, grazing or timbered land, according to the fact in the particular case; and he may prescribe such regulations in relation thereto as he may deem necessary to secure a correct classification. He may also reclassify any lands heretofore erroneously classified, upon the official certificate of the commissioners' court of the county in which said land is situated, or of the county to which such county is attached for judicial purposes, certifying what the proper classification should be, said certificate to be signed by the entire commissioners' court, including the county judge, or upon such other evidence as may be satisfactory to the commissioner. [Acts 1895, p. 63, § 4; amended Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4218f. Classified lands subject to sale to actual settlers.**—When any portion of said land has been classified to the satisfaction of the commissioner

of the general land office, under the provisions of this chapter or former laws, such land shall be subject to sale, but to actual settlers only, except where otherwise provided by law, and in quantities of not less than eighty acres or multiples thereof, nor more than four sections containing six hundred and forty acres, more or less; provided, that the purchaser shall not include in his purchase more than two sections of agricultural land; and provided, that where there is a fraction less than eighty acres of any section left unsold, such fraction may be sold. Any bona fide purchaser who has heretofore purchased or who may hereafter purchase any lands as provided herein shall have the right to purchase other lands in addition thereto; provided, that the total of his purchases shall not exceed four sections, and that it shall not include more than two sections of agricultural land, upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof. And if he or his vendor has already resided upon his home section for three years, or when he or his vendor, or both together, shall have resided upon it for three years, the additional lands purchased may be patented at any time. In all cases where a settler purchases more than one section the lands in excess of one section so purchased must be situated within a radius of five miles of the land occupied by him. Where any of the lands referred to in this act have been sold prior to July 30, 1895, in quantities greater or less than forty acres or multiples thereof, and are in good standing as to interest payments, they may be patented in such quantities. In any cases where lands have been forfeited to the state for the nonpayment of interest, the purchasers or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. [Id. § 5; amended Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Art. 5410.

**Art. 4218ff. Forfeiture of land on which purchaser settles.**—When any purchaser buys and settles upon a section or part of a section of school lands, and buys, either at the same time or subsequently, other lands in addition thereto, a forfeiture for any legal cause of the part on which he resides, at any time before the three years' residence thereon has been completed, shall work a forfeiture of the entire purchase, except such part thereof as he may have previously sold to another. But after the three years' residence has been completed, a forfeiture of the home tract shall not of itself work a forfeiture of the other tract or tracts. In case of sale of any of said tracts before the three years' residence has been completed, the vendee must reside thereon until he has completed the three years' occupancy from the date of the original purchase, and a failure to do so shall subject his land to forfeiture; but in case of sale of any of said tracts after the completion of the three years' residence, the vendee shall be exempt from the condition of settlement and occupancy. [Acts 1897, p. 184.]

See Art. 5426, Vernon's Sayles' Civ. St.

**Art. 4218fff. Owner of land may buy contiguous lands; provision as to occupancy.**—Any actual, bona fide owner of and resident upon any other lands contiguous to said lands, or within a radius of five miles thereof, may also buy any of the aforesaid lands, but in such case a failure to reside upon either his other lands or upon a part of the additional lands so purchased by him, so as to make his ownership and occupancy thereof continuous for three years, shall work a forfeiture of such additional lands so bought from the state, unless he shall have sold his land to another who may and does complete a three years' continuous ownership and occupancy of and residence upon his said lands as above stated and as is herein required of actual settlers. [Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Arts. 5410, 5416.

**Art. 4218g. Commissioner of land office to notify county clerks.**—It shall be the duty of the commissioner of the general land office to notify in writing the county clerk of each county of the valuation fixed upon each section of land in his county, and in each county attached to it for judicial purposes, which he offers for sale, which notification shall be kept by the clerk in his office and recorded in a well bound book, which shall be open to public inspection. [Acts 1895, p. 63, § 6.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4218h. Price of public free school and asylum lands.**—All agricultural lands belonging to the public free school and the several asylum funds shall be sold at not less than one dollar and fifty cents per acre; and all grazing lands

shall be sold at not less than one dollar per acre; and all timbered lands shall be sold at not less than five dollars per acre. By timbered lands is meant lands valuable chiefly for the timber thereon. Provided, that the owner of land which is in fact agricultural, purchased under former laws, and which land is not subject to forfeiture at the time this law goes into effect, shall not be permitted, in case said land is forfeited, to purchase said forfeited land from the state for a less price per acre than the contract price under the former sale. [Id. § 7; amended Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4218i. Prior right reserved to existing actual settler.**—Any bona fide actual settler who may reside on any part of the lands the sale of which is authorized by this chapter at the time this chapter may go into effect, shall have the prior right for a period of ninety days after this chapter goes into effect, or after said land shall have been placed upon the market, to purchase such quantity of land as may be limited by this chapter, to include his improvements, upon complying with the provisions of this chapter regulating sales as in other cases, and such land shall be appraised without reference to the improvements thereon. Any bona fide settler who has heretofore purchased or who may hereafter purchase not exceeding one section of agricultural land, shall have the right to purchase three strictly pastoral sections, upon his making oath that he is not acting in collusion with others for the purpose of buying for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same. [Acts 1895, p. 63, § 8. Repealed by Chapter 129, Acts 1897.]

**Art. 4218j. Commissioner to make all sales; conditions of same; status of vendee of original purchaser; sales after forfeiture; payments, etc.**—All sales shall be made by the commissioner of the general land office, or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon as a home the land purchased by them for three consecutive years next succeeding the date of their purchase, except when otherwise provided. Such regulations shall require the purchaser to reside upon the land for three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the commissioner of the general land office within two years next after the expiration of said three years, by his affidavit, corroborated by the affidavits of three disinterested and credible persons, to be certified by some officer authorized to administer oaths, and on making such proof the commissioner shall issue to the purchaser, his heirs and assigns, a certificate showing that fact.

If, however, any purchaser has sold his purchase, or any part thereof, his vendee shall be permitted to compute the time of the occupancy of his vendor as a part of his own occupancy; and if any person has sold the whole or any part of his purchase under this or any former law, his vendee, or if he refuses to do so, the vendor himself, may make proof of occupancy as provided herein.

Any person desiring to purchase land in accordance with the provisions of this chapter shall forward his application to the commissioner, describing the land sought to be purchased, which application shall be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon, except where otherwise provided herein, and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase thereof.

Any owner of land heretofore purchased, and which land has been or may be forfeited for non-payment of interest, shall have ninety days prior right after this chapter goes into effect, or after the land is again placed upon the market, to purchase said land without the condition of settlement and occupancy, in case it has been occupied for three consecutive years as required by law; but if not, then he shall reside thereon until the occupancy under the first and last purchase shall together amount to said term of three years; provided, that when any forfeiture has been made the commissioner of the general land office shall add to the appraised value of such land the amount of interest due thereon at the time of forfeiture, which shall be paid in cash with the first payment of one-fortieth of the appraised value of the land when purchased under the preference right to purchase given herein.

Any original purchaser or his vendee of any of the lands the sale of which is provided for in this chapter, who has improved such land as a home, and who has been forced to temporarily abandon same on account of drouth, and who shall in good faith re-occupy the same, either by themselves or vendees, within six months

after this chapter goes into effect, shall not have the forfeiture declared against them under the law providing for the forfeiture of such lands for non-occupancy; provided, that they shall make affidavit, supported by the affidavit of three disinterested witnesses, that they have re-occupied the land as a home in good faith, and that they had abandoned the same since their purchase on account of the drouth and not otherwise; and such absence shall not be deducted from the three years' occupancy required by law in making final proof of occupancy; and provided further, that any purchasers or their vendees of such lands who have failed to make proof of occupancy as required by the law regulating such purchases shall have six months after this chapter shall take effect to make such proof of occupancy as required by the provisions of this chapter.

The purchaser shall transmit to the treasurer of the state one-fortieth of the aggregate purchase-money for the particular tract of land, and send to the commissioner his obligation to the state, duly executed, binding the purchaser to pay to the state on the first day of November of each year thereafter, until the whole purchase-money is paid, one-fortieth of the aggregate price, with interest at the rate of three per cent. per annum on the whole unpaid purchase-money, which interest shall also be payable on the first day of November of each year; and upon receipt of one-fortieth of the purchase-money by the treasurer, and the affidavit and obligation aforesaid by the commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the general land office; provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase-money at the time of his purchase. [Id. § 9.]

See Vernon's Sayles' Civ. St. Arts. 5406, 5409, 5410, 5419, 5423, 5435.

**Art. 4218k. Optional payments; original purchasers may sell, etc.**

See Vernon's Sayles' Civ. St. Art. 5436.

**Art. 4218l. Forfeiture of purchase by non-payment of interest, etc.—**

If upon the first day of November of any year the interest due on any obligation remains unpaid, the commissioner of the general land office shall indorse on such obligation "Land forfeited," and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall thereby be forfeited to the state without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter or any future law; provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death, and shall be absolved and exempt from the requirement of settlement and residence thereon. And if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and all payments made thereon to the state, in the same manner as for non-payment of interest, and such land shall be again for sale as if no such sale and forfeiture had occurred; provided, that all necessary and temporary absence from such land of such purchaser, for the time of not more than six months in any one year, for the purpose of earning money with which to pay for the land, or for the purpose of schooling his children, shall not work a forfeiture of his title; provided, further, that nothing in this article contained shall be construed to inhibit the state from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the state at the time such forfeiture occurred, or to protect any other right to such land, which suits may be instituted by the attorney-general or under his discretion, [direction] in the proper court of the county in which the land lies or of the county to which such county is attached for judicial purposes; provided, this article shall be printed on the back of receipt. [Id. § 11.]

See Vernon's Sayles' Civ. St. Art. 5423.

For act of February 23, 1885, waiving forfeitures, and act of February 25, 1887, extending time of payment, see 2 Sayles' Civ. Stat. (1889) Arts. 4079, 4080.

**Art. 4218ll. Same; includes all lands heretofore sold, etc.—**If upon the first day of November of any year any portion of the interest due by any person to the state of Texas for lands heretofore sold by the state of Texas, whether said lands be a part of the public domain or shall have been heretofore set apart for the public schools, university, or any of the other various state institutions, has not been paid, it shall be the duty of the land commissioner to indorse on the obligation for said lands, "Lands forfeited," and shall cause an entry to that effect to be made on the account kept with such purchaser, and thereupon said land shall thereby be forfeited to the state, without the necessity of re-entry or judicial ascertainment,

and shall revert to the particular fund to which it originally belonged, and be re-sold under the provisions of the existing law, or any future law; provided, the purchaser of said land shall have the right, at any time within six months after such indorsement of "Lands forfeited," to institute a suit in district court of Travis county, Texas, against the commissioner of the general land office, for the purpose of contesting such forfeiture and setting aside the same, upon the ground that the facts did not exist, authorizing such forfeiture, but if no such suit has been instituted as above provided, such forfeiture of the commissioner of the general land office shall then become fixed and conclusive; provided, that if any purchaser shall die, or shall have died, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death.

This article is cumulative, and is not intended to deny to the state the right to institute any legal proceedings that may be deemed necessary to secure the purchase-money or possession of the land so sold. And this article is intended to be applicable to all purchases heretofore made under any or all of the various acts of the legislature under which land may have been sold by the state. [Acts 1897, p. 39.]

See art. 4307e post, and see Vernon's Sayles' Civ. St. Art. 5423.

**Art. 4218III. Office forfeitures validated.**—All forfeitures of public land, university land, public school land, or land set apart to any of the various state institutions, which have been heretofore sold under any of the various acts of the legislature, and the forfeitures made by the commissioner of the general land office for non-payment of any part of the interest due thereon, and without judicial ascertainment, shall be and the same are hereby in all things made valid; provided, that such purchaser shall have the right at any time within six months after the passage of this article, and not afterward, to institute suit in the district court of Travis county against the commissioner of the general land office to set aside such forfeiture upon the ground that the facts did not exist authorizing such forfeiture, and such forfeiture shall be a full liquidation of all claims of the state against such purchaser. [Acts 1897, p. 52.]

**Art. 4218m. Coupling occupancy under second purchase to cure defects of first.**—In all cases where persons have purchased or may hereafter purchase state, school or asylum lands under any act of the legislature authorizing the sale thereof and requiring a residence of three years thereon, and said persons have so resided upon said land or may hereafter reside thereon for the period of three years as required by law, and their files have been or may hereafter be canceled and purchases annulled by the commissioner of the general land office on account of conflict with other surveys, said persons shall have the right to purchase other lands of the classes mentioned in this article without being required to reside thereon. Persons desiring to avail themselves of the benefits of this provision shall make satisfactory proof to the commissioner of the three years' residence under their first purchase. [Acts 1895, p. 63, § 12.]

**Arts. 4218n-4218p.**

See Vernon's Sayles' Civ. St. Arts. 5447-5449.

**Art. 4218q. Sale of timber on timbered lands, etc.**—The commissioner of the general land office shall adopt such regulations for the sale of timber on the timbered lands as may be deemed necessary and judicious. Such timber shall not be sold for less than five dollars per acre, cash, except in such cases as the commissioner may ascertain by definite examinations by an approved agent appointed by him for that purpose, to be paid by the purchaser, to be sparsely timbered or containing timber of but little value, in which case he may sell the timber on such sections or part of sections at its proper value; provided, such timber is sold at not less than two dollars per acre. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall thereby be forfeited to the state without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold as agricultural or grazing lands, according to classifications to be made by the land commissioner; provided, that the purchaser or his vendees of any such timber shall have the right to purchase the land upon which such timber so purchased is situated at two dollars per acre, cash, at any time before the expiration of five years from date of purchase of timber under the provisions of this chapter. [Id. § 16.]

See Vernon's Sayles' Civ. St. Arts. 5429-5431.

**Art. 4218r. Lands to be leased; terms, conditions, etc.**—The public lands and all lands referred to in the several funds mentioned in this chapter shall be



leased by the commissioner of the general land office under the provisions of this chapter, at not less than three cents per acre. All lands classified as agricultural and all lands containing permanent water thereon shall be leased for a term of five years or less, and all lands classified as pastoral or dry grazing lands shall be leased for a term of not more than ten years, and the rental shall be paid yearly in advance, the first payment to be made at the time the lease contract is entered into. If at the termination of any lease the lands covered thereby are still for lease, the lessee thereof shall have the preference right to again lease such lands theretofore leased by him upon the terms and at the price then fixed by law.

All leases shall be executed under the hand and seal of the land commissioner and delivered to the lessee or his duly authorized agent, and such lease shall not take effect until the first annual rental is paid and such lease thereof duly filed for record in the clerk's office of the proper county, and it shall not be necessary for the commissioner to acknowledge such lease contract so signed and delivered; and all leases under the provisions of this chapter may be advertised by the commissioner in such manner as he may think best, and let to the highest responsible bidder in such quantities and under such regulations as he may think to the best interest of the state not inconsistent with the equities of the occupant. All bids and offers to lease may be rejected by him prior to signing the lease contract, for fraud or collusion or other good and sufficient cause. [Id. § 17; amended Acts 1895, p. 75.]

See Vernon's Sayles' Civ. St. Arts. 5405, 5406, 5450-5452.

**Art. 4218s. Same; lands subject to sale; termination of lease; restrictions as to number of animals to ten acres.**—Any person desiring to lease any portion of the lands belonging to any of the funds mentioned in this chapter, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease, and thereupon, the commissioner, if satisfied that the lands applied for are not in immediate demand for purposes of actual settlement, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute to the lessee in the name and by the authority of the state of Texas a lease of said land for such time as may be agreed upon, and when satisfied that the lessee has paid to the treasurer of the state the rent for one year in advance, shall deliver said lease to the clerk of the county court of the county in which the land is situated or of the county to which said county is attached for judicial purposes, and it shall be the duty of the clerk to record in a well-bound book, to be kept in his office, open to public inspection, a memorandum or abstract of said lease, showing the number of the survey or surveys leased, the name of the original grantee, the amount leased, the name of the lessee, the date of the lease, and the number of years it has to run; and for entering said memorandum the clerk shall be entitled to a fee of twenty-five cents. Upon the payment of said fee, the clerk shall deliver the lease to the lessee; and no other record of leases hereafter made shall be required, except said memorandum.

All lease contracts heretofore made and not recorded, shall be filed for record with the clerk of the proper county, within three months after this article takes effect, and if any lessee shall fail to have his unrecorded lease so filed for record within said time, the commissioner of the general land office shall disregard said lease, and award the land to any other applicant accompanying his application with the certificate of the clerk that no lease of said land is of record in his office. When any of such leases are filed for record, the clerk shall make the memorandum or abstract above provided for.

All lands which may be leased shall be subject to sale at any time except where otherwise provided herein. This provision in regard to the sale of leased lands shall apply to leases heretofore made, as well as to those hereafter to be made. Any section or part of a section which may be leased, shall not be sold, nor shall the lessee be disturbed in his possession thereof during the term of his lease, in the following cases:

1. When the lessee has actually settled upon such section, or part of a section, and erected thereon his residence and substantial improvements for permanent settlement.
2. When he has placed on such section or part of a section improvements of the value of two hundred dollars.
3. When the aggregate of the land owned by a settler and leased by him does not exceed one section.

Any lands which may be leased south and west of the line herein designated shall not be sold during the term of the lease until otherwise provided by law; provided, the sections leased by any one party are not so selected as to detach sec-

tions which are thereby left unleased. Said line begins at the northwest corner of Yoakum county; thence east, to the northeast corner of Kent county; thence south, to the north line of Fisher county; thence west, to the northeast corner of Scurry county; thence south, to the north line of Coke county; thence east, to the northwest corner of Runnels county; thence south, to the southwest corner of Runnels county; thence east, to the northwest corner of Concho county; thence south, to the southwest corner of Concho county; thence east, to the southeast corner of Concho county; thence south, to the southwest corner of McCulloch county; thence east, to the southeast corner of McCulloch county; thence south to the southwest corner of San Saba county; thence east, to the northwest corner of Llano county; thence south, to the southeast corner of Mason county; thence west, to the northwest corner of Gillespie county; thence south, to the southwest corner of Gillespie county; thence east, to the northeast corner of Kerr county; thence south, to the southeast corner of Bandera county; thence west, to the northeast corner of Uvalde county; thence south, to the southwest corner of Medina county; thence east, to the northeast corner of Frio county; thence south, to the northeast corner of La Salle county; thence east, to the northeast corner of McMullen county; thence south, to the southeast corner of McMullen county; thence east, to the Nueces river; thence down said stream to its mouth: Except in that portion of the state south and west of the above delineated line, any actual settler shall have the right to lease within a radius of five miles of the land occupied by him, not exceeding three sections of the land held by a leaseholder who is leasing more than ten sections from the state, but shall not be allowed thereby to reduce the large leasehold to less than ten sections.

In all cases where the lease is terminated under any of the provisions of this chapter before the expiration of the term of lease, the lessee shall have a pro rata credit upon his next year's rent, or the money refunded to him by the treasurer, as he may elect. On the expiration of his lease, or its termination under any provision of law, the lessee shall have the right for the period of sixty days to remove any or all improvements he shall have placed upon the leased premises.

No purchaser or other person than the lessee shall be permitted to turn loose within such lessee's inclosure more than one head of horses, mules or cattle, or in lieu thereof four head of sheep or goats, for every ten acres of land so purchased, owned, or controlled by him and uninclosed. Each violation of the provisions of this chapter, which restrict the number of stock which may be turned loose in such inclosure, shall be an offense, and the offender, on conviction, shall be punished by a fine of one dollar for each head of stock he may so turn loose, and each thirty days' violation of the provisions of this article shall constitute a separate offense. [Id. § 18; amended Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Arts. 5452-5454.

**Art. 4218t.**

See Vernon's Sayles' Civ. St. Art. 5455.

**Art. 4218u. Payment of rents, how made.**—All lessees shall pay the annual rents due for leased lands directly to the treasurer of the state, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and the other transmitted to the commissioner of the general land office. The treasurer shall cause to be kept an accurate account with each lessee, and the commissioner of the general land office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office. [Id. § 21.]

**Art. 4218v. Leases, how canceled for non-payment of rents.**—If any lessee shall fail to pay the annual rent due in advance for any year within sixty days after such rents shall become due, the commissioner of the general land office may declare such lease canceled by a writing under his hand and seal of office, which writing shall be filed with the other papers relating to such lease, and thereupon such lease shall immediately terminate, and the lands so leased shall become subject to purchase or lease under the provisions of this chapter. Such lease shall not be made to original lessees until all arrears are fully paid. During the continuance of all leases, and after forfeiture, the state shall have a lien upon all property owned by the lessee upon the leased premises to secure the payment of all rents due, which lien shall be superior to all other liens whatsoever; and it shall not be essential to the preservation or validity of such lien that it shall be reserved in the instrument of lease. [Id. § 22.]

See Vernon's Sayles' Civ. St. Art. 5456.

**Art. 4218w. Lessees privileged to purchase; personal property in improvements.**—Lessees shall have the right at any time to purchase their leased lands, subject to the limitations as to quantity provided by this chapter, and at the price and on the conditions herein provided, without reference to any improvements made on such lands by such lessees; and all improvements made by lessees on lands leased by them are hereby declared to be personal property, which may be removed by such lessees on the expiration of their lease contracts; and they shall have sixty days after such expiration in which to remove the same. [Id. § 23.]

See Vernon's Sayles' Civ. St. Art. 5452.

**Art. 4218x. Suits to recover lands illegally occupied.**—If the governor shall at any time be credibly informed that any portion of the public lands or the lands belonging to any of the several funds named in this chapter have been inclosed or that fences have been erected thereon without authority of law, he is authorized in his discretion to direct the attorney general to institute suit in the name of the state for the recovery of such lands and damages, and a fee of not less than ten dollars for the attorney when the sum recovered is less than one hundred dollars, and when it is over that sum the fee shall be ten per cent., to be paid by the defendant for the use and occupancy of the same, and the removal of such inclosures and fences; and such damages shall not be for a less sum than the amount of all the leases due during such occupancy.

For the recovery by the state of all lands sold under the provisions of this or former laws which have been or may hereafter be forfeited to the state for any reason, and for the recovery of any money due the states [state?] on leases made under this or former laws, and for the recovery of damages for the unlawful use and occupancy of such lands, as provided in this article, or any former laws, jurisdiction is expressly conferred on the courts of Travis county having jurisdiction thereof under the constitution concurrently with courts of the districts in which the land is situated, and all such suits shall be instituted by the attorney general or under his direction.

In suits provided for in this article, the court shall issue a writ of sequestration directed to any sheriff of the state, commanding and requiring such officer to take such land and all property thereon belonging to the person or persons so unlawfully occupying said lands into his actual custody, and hold the same subject to further orders of the court, and the state shall not be required to give bond. Such writ of sequestration may be executed by any sheriff of the state into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ.

The defendant in such suit may replevy as in ordinary cases by giving bond as prescribed by law, and such cases shall have precedence on the docket and stand for trial before all other cases; and in case judgment is recovered by the state in such suit the court shall order such inclosure or fences to be removed, and shall tax the costs of the suit against the defendant, and all property found upon the land belonging to the defendant, not exempt from execution, shall be liable to the payment of such costs and damages in addition to the personal liability of the defendant.

Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the state shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases.

If any person shall make a lease contract, and after the same is inclosed by fence shall for any cause decide not to continue payment of his lease, either in whole or in part, he shall give public notice by publication in any local paper having the largest circulation, for at least sixty days before the time in which his next annual payment shall become due, that he will not continue his lease after the year for which payment is made, and shall also state the number and block of the land which he will not lease inside his inclosure, if he only intends to surrender a part of his lease, and shall post and shall keep posted for said sixty days notice on all gates of his pasture of such intention; then, and then only, he shall not be subject to the suit nor liable for the damages provided for in this article. [Id. § 24; amended Acts 1895, p. 75.]

See Vernon's Sayles' Civ. St. Arts. 5460-5474.

**Art. 4218y. Certain lands withheld from lease.**—The commissioner of the general land office may withhold from lease any agricultural lands necessary for the purpose of settlement, and no agricultural lands shall be leased, if, in the judgment of the commissioner, they may be in immediate demand for settlement, but such lands shall be held for settlement, and sold to actual sellers only, under

the provisions of this chapter; and all sections and fractions of sections, in all counties organized prior to the first day of January, 1875, except El Paso, Presidio and Pecos counties, which sections are isolated and detached from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at one dollar per acre, upon the same terms as other public lands are sold under the provisions of this chapter. [Id. § 26; amended Acts 1897, p. 184.]

See Vernon's Sayles' Civ. St. Art. 5450.

**Art. 4218z. Certain illegal sales made valid.**—All sales of public school, university, and the several asylum lands which were sold as isolated and detached lands under section 22, chapter 99 of the acts of the legislature of the state of Texas of 1887, and amendments thereto, which were in fact not isolated and detached, as construed by the supreme court, where the original sales have not been canceled and the lands resold, be and the same are in all things hereby legalized and made valid in all cases where such sales would have been valid if the lands so sold had in fact been isolated and detached; provided, that when applications have been made for the purchase of any such lands, in advance of placing of the same on the market again, it shall not have the effect of a sale of such lands, nor of requiring the commissioner of the general land office to award such lands to such applicants. [Acts 1897, p. 160.]

The section referred to is article 4301, post, the chapter in which it is found having been superseded, it seems, by this chapter. Notice that article 4218y contains the amendments referred to, and is substantially the same as article 4301. (See note at head of this chapter.)

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CHAPTER 13—TITLE TO CERTAIN LANDS QUIETED

**Article 4218aa. Patents on certificates issued to disabled soldiers under act of 1881.**—All patents issued by the state upon locations or surveys of land made by virtue of any certificate issued under the provisions of an act of the legislature of the state of Texas entitled "An act granting to persons who have been permanently disabled by reason of wounds received while in the service of this state or of the Confederate States, a land certificate for twelve hundred and eighty acres of land," approved April 9th, 1881, be and are hereby validated, and the fact that the school and individual sections, or surveys made by virtue of any such certificate, may not have been made contiguous or adjacent to each other shall not be held to invalidate the patent issued on such survey, nor to invalidate the right of the public free school fund to the land located or surveyed for the benefit thereof by virtue of any such certificate. [Acts 1897, p. 113, § 1.]

**Art. 4218bb. Locations and surveys made valid, etc.**—All locations and surveys of land made by virtue of land certificates under said act of April 9th, 1881, entitled "An act granting to persons who have been permanently disabled by reason of wounds received while in the service of this state or of the Confederate States, a land certificate for twelve hundred and eighty acres of land," for which surveys the field-notes and certificates have been returned to the land office within the time required by law and located upon lands subject to location by certificates, are hereby validated, and where patents have been withheld for no other reason than that the school land required by said act to be located is not located adjacent to the individual land, the commissioner of the general land office is hereby authorized and required to issue patents to the persons to whom said certificates were issued, or to his or her assignee; provided, that said commissioner shall not be authorized or required to issue to any person to whom such certificate may have been issued, or to his or her assignee, a patent for any greater amount of land than may have been surveyed by virtue of such certificate for the benefit of the public free school fund. [Id. § 2.]

**Art. 4218cc. Exceptions.**—This chapter shall not be construed to affect or validate any of said patents or surveys mentioned in the two preceding articles that would be invalid for other reasons than that the school and individual sections were not located contiguous to each other; provided, that this chapter shall not be construed to validate any of the above lands obtained by fraud. [Id. § 3.]

The act of 1881, referred to above, and the repealing act, are as follows:

"An Act granting to persons who have been permanently disabled by reason of wounds received while in the service of this state, or of the Confederate States, a land certificate for twelve hundred and eighty acres of land.

"§ 1. That all persons who are now bona fide residents of this state, and who were resident citizens of this state, and as such citizens enlisted in the military service of

this state or of the Confederate States in the late war between the states of the United States, as soldiers or as servants attending such soldiers, and while engaged in such military service, by reason of wounds received while in actual service, are permanently disabled, so as to seriously impair their ability to perform bodily labor, or earn a living for themselves and families, and the widows of soldiers who were residents as aforesaid and enlisted in the service as aforesaid, who died or were killed in actual service under such enlistment, who have remained widows and are now citizens of this state, and who show that they have not property of the value of one thousand dollars, are hereby declared to be entitled to a land certificate for twelve hundred and eighty acres of land; provided, no person shall be entitled to the benefit of this act unless they show that they have not property of the value of one thousand dollars." [Act April 9, July 1, 1881; 17th Leg., p. 122; Sayles' Civ. Stat. 1889, vol. 2, p. 321.]

"§ 2. Any person desiring to obtain the benefit of this act shall prove to the satisfaction of the commissioners' court of the county of his residence, by at least two credible persons, that he is entitled to said land certificate under the provisions of this act, and upon the certificate of said commissioners' court under its seal that said applicant is entitled to said land certificate, the commissioner of the general land office is authorized and required to issue to said person a certificate for twelve hundred and eighty acres of land.

"§ 3. The certificate granted under the provisions of this act shall be located as follows: The locator shall also locate a like amount of land for the benefit of the permanent school fund before either shall be patented, and such location shall be made on any of the public domain of Texas not reserved by law from location."

"An Act to repeal an act entitled 'An act granting to persons who have been permanently disabled by wounds received while in the service of this state or of the Confederate States, a land certificate for 1280 acres of land.'

"An act entitled 'An act granting to persons who have been permanently disabled by wounds received while in the service of this state or of the Confederate States, a land certificate for 1280 acres of land,' approved April 9, 1881, is hereby repealed." [Act Feb. 2, 1883; 18th Leg., p. 13.]

**Art. 4218dd. Certain patents confirmed and title relinquished.**—The land patents numbered three hundred and eighty-eight (388), five hundred and eighty-three (583) and five hundred and eighty-four (584), Vol. No. four (4) (of the records of the general land office of the state of Texas), and issued to Thomas M. Joseph and Henry M. Truehart on the 20th day of December, A. D. 1859, and the 23d day of August, A. D. 1860, covering certain lands in Galveston county, state of Texas, be, and the same are hereby confirmed, and that all right and title of the state of Texas to the lands therein named, be, and the same are hereby relinquished to the parties to whom the said patents were issued, and sale made in accordance with an act approved on the 20th day of February, A. D. 1858, and an act amendatory of the same, approved on the 1st day of February, A. D. 1860, as also by a special act of the legislature of the state of Texas, approved July 29th, A. D. 1870. [Acts 1897, p. 222.]

For act of February 2, 1856, granting Pelican Island to the corporation of Galveston, and the joint resolution of March 8, 1879, in confirmation thereof, see 2 Sayles' Civ. Stat. (1889) art. 3961a.

For act of March 31, 1883, confirming "surveys and patents by virtue of headright or bounty warrants issued under special laws enacted after March 31, 1870, and prior to April 11, 1876," see Sayles' Civ. Stat. (1889) art. 3964a.

For act of April 4, 1881, directing the commissioner to issue patents for lands between the Rio Grande and Nueces rivers, see Sayles' Civ. Stat. (1889) art. 3964b. By act of March 16, 1881, owners of lands between those rivers were directed to archive their titles in the general land office. See Vernon's Sayles' Civ. St. Art. 82, subd. 6.

#### TITLE 89—PUBLIC SCHOOL, ASYLUM AND UNIVERSITY LANDS

Chap.

1. University and Asylum Lands.
2. The Public Free School and County School Lands.

Chap.

3. Sale and Lease of Public School, University and Asylum Lands.
4. Branch University for Colored People—Permanent Endowment.

#### CHAPTER 1—UNIVERSITY AND ASYLUM LANDS

**Article 4251. [4022] The fifty leagues appropriation.**—The fifty leagues of land set apart and appropriated for the establishment and maintenance of the "University of Texas," by an act of congress of the republic of Texas, entitled "An act appropriating certain lands for the establishment of a general system of education," approved January 26, 1839, shall continue and remain as a part of the permanent university fund. [Const. art. 7, § 11; Act Jan. 26, 1839, p. 120; P. D. 3550.]

**Art. 4252. [4023] The one million acres appropriation.**—In addition to the lands heretofore granted to the University of Texas, there is hereby set apart and appropriated for the endowment, maintenance and support of said uni-

versity and its branches one million acres of the unappropriated public domain, to be designated and surveyed as hereinafter provided. [Const. art. 7, § 15.]

**Art. 4253. One-half of public domain added to permanent fund, etc.**  
See Vernon's Sayles' Civ. St. Art. 5386. See, also, art. 4200, ante, and Arts. 4268, 4307c, 4307d, post.

**Art. 4254. [4024] The asylum lands.**

See Vernon's Sayles' Civ. St. Art. 5387. See, also, Early Laws, art. 2595.

**Art. 4255. [4025] Such lands to be surveyed if necessary.**—In case any of the lands appropriated and set apart by the provisions of the four preceding articles have not been surveyed, and the field-notes thereof returned to the general land office in accordance with law, the commissioner of the general land office shall, as soon as may be practicable, appoint one or more competent surveyors to survey such lands out of any vacant and unappropriated public lands. [Act Jan. 26, 1839, p. 120; P. D. 3550.]

**Art. 4256. [4026] Surveys, how made and returned.**—Such surveys shall be made in sections of six hundred and forty acres each, so far as the same may be practicable; and the surveyor shall locate and survey said lands under the direction of the commissioner of the general land office, and return the field-notes and maps thereof to the general land office within such time as may be prescribed by the commissioner, verified by his affidavit, in substance as follows: "I, A B, do solemnly swear [or affirm] that I have well and truly discharged my duties as surveyor of university [or asylum] lands to the best of my skill and ability; that in the performance of such duties I have selected and surveyed the most valuable unappropriated lands ascertainable by me in the locality designated by the commissioner of the general land office for my operations; and that the field-notes, maps and description of the lands herewith returned are as correct as I can make them, so help me God." [P. D. 3551.]

**Art. 4257. [4027] Locations prohibited, when.**—At the time of appointment of any surveyor for the purposes indicated in this chapter the commissioner of the general land office shall designate the general limits of the territory in which such surveyor shall operate, and notify the district surveyor having jurisdiction over such territory of such appointment and designation, and thereafter no locations shall be permitted within such limits until after receipt by the district surveyor of a certified copy of the maps and field-notes as provided in the succeeding article.

**Art. 4258. [4028] Copies of field-notes, etc., forwarded to district surveyors.**—After the return of the field-notes and maps to the general land office by the surveyor appointed to make any such locations the commissioner of the general land office shall cause certified copies thereof to be forwarded to the district or county surveyor of any district or county in which any such lands are situated, who shall record the same in their respective offices as in other cases.

**Art. 4259. [4029] Surveyors to continue until, etc.**—Appointments of surveyors for the purpose indicated in the preceding article may be renewed or continued by the commissioner of the general land office, and additional surveys made until the whole amount of lands appropriated for the university or asylums are finally designated and surveyed.

**Art. 4260. [4030] Surveyors, how paid.**—The expenses of surveys made under the provisions of this chapter shall be paid out of the university fund of this state, or the fund of the proper asylum, upon the sworn account of the surveyor, approved by the commissioner of the general land office, and filed with the comptroller of public accounts.

**Art. 4261. Commissioner to have surveys made, when.**

See Vernon's Sayles' Civ. St. Art. 5347.

**Art. 4262. Bond, etc.**

See Vernon's Sayles' Civ. St. Art. 5348.

**Art. 4263. May have lands surveyed, when.**

See Vernon's Sayles' Civ. St. Art. 5349.

**Art. 4263a. Control of university lands confided to regents.**

See Vernon's Sayles' Civ. St. Art. 2633. See, also, art. 4307c, post.

**Art. 4263b. Duty of commissioner of land office.**

See Vernon's Sayles' Civ. St. Art. 2635.

**Art. 4263c. Custody of records and funds.**—All records and accounts of transactions in university lands, and of moneys paid thereon, shall be kept in the

general land office and in office of the treasurer, as heretofore, and all patents shall be signed and issued as heretofore, and all moneys received on the sales or leases of said lands shall be paid to the treasurer of the state. [Id. § 3.]

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CHAPTER 2—THE PUBLIC FREE SCHOOL AND COUNTY SCHOOL LANDS

**Article 4264. [4031] The public school lands.**—All the alternate sections of land reserved by the state out of grants heretofore made, or that may hereafter be made to railroads or other corporations of any nature whatever, one-half of the public domain, and all other lands heretofore set apart or that may hereafter be set apart for the benefit of public free schools shall constitute a part of the perpetual public free school fund. [Const. art. 7, § 2.]

**Art. 4265. Locations validated.**

See Vernon's Sayles' Civ. St. Art. 5383.

**Art. 4266. Lands sold for taxes to state, etc.**

See Vernon's Sayles' Civ. St. Art. 5384.

**Art. 4267. Greer county lands.**—All the vacant and unappropriated public domain embraced in the territorial limits of the county of Greer is appropriated, one-half thereof for [the] public free schools for the education of children in Texas without reference to race or color, and the other half for the payment of the state debt; and said lands shall be surveyed and disposed of for the purpose of carrying out the provisions of this article in such manner as may hereafter be provided by law. [Acts 1879, p. 16.]

See art. 4282a, post. United States v. Texas, 162 U. S. 1.

**Art. 4268. One-half of unsold public domain to permanent fund.**—

After the payments of the amounts due from the state to the common free school fund, out of the proceeds of the sales heretofore made, or hereafter to be made, of that portion of the public lands set aside for the payment of the public debt, by an act approved July 14, 1879, and an act amendatory thereof, approved March 11, 1881, and the payment directed to be made to the common school and university funds by an act approved February 23, 1883, the remainder of said land, not to exceed two million of acres, contained in the counties and territory specially mentioned in said acts, or the proceeds thereof, set aside by said acts for the payment of the public debt, heretofore or hereafter to be received by the state, shall one-half thereof constitute a permanent endowment fund for the common free schools of this state. [Acts 1883, p. 71.]

See arts. 4253, ante, and arts. 4307c, 4307d, post.

**Art. 4269. Surveys validated.**—The surveys of all county school lands heretofore made, either actually on the ground or by protraction, and returned into the general land office, according to law, and upon which patents have issued, are hereby declared valid surveys, and the titles to the lands included within the lines of said surveys, as returned to the general land office, are hereby vested in the counties for which the same were made; and in all such surveys the calls for distance shall have precedence and control calls for rivers or natural objects when the calls for distance will give the quantity of land intended to be included in the survey and the calls for natural objects or rivers will not; provided, this law shall not divest any vested right. [Acts 1883, p. 28.]

**Art. 4270. [4035] Such lands belong to the counties.**—All lands granted to counties for educational purposes, under the provisions of this chapter or any former law, shall belong to such counties respectively, and the titles thereto shall be fully vested in said counties; and no adverse possession or limitation shall ever be available against the title of any county to such lands. [Const. art. 7, § 6.]

**Art. 4271. [4036] Land, how sold and proceeds invested.**

See Vernon's Sayles' Civ. St. Art. 5402.

**Art. 4272. [4037] Actual settlers to have preference.**

See Vernon's Sayles' Civ. St. Art. 5403.

**Art. 4273.**

Omitted, as repealed by report of the joint committee on amendments to the Revised Civil Code 1895.

**Art. 4274. Surplus segregated from public domain, when.**

See Vernon's Sayles' Civ. St. Art. 5396.

**Art. 4275. Belong to public free school fund.**

See Vernon's Sayles' Civ. St. Art. 5397.

**Art. 4276. Excess to be added.**

See Vernon's Sayles' Civ. St. Art. 5398.

**Art. 4277. Shall not affect rights.**

See Vernon's Sayles' Civ. St. Art. 5399.

**Art. 4278. Conflicts.**

See Vernon's Sayles' Civ. St. Art. 5400.

**Art. 4279. Even-numbered surveys in conflict, etc.**

See Vernon's Sayles' Civ. St. Art. 5401.

**Art. 4280. Unorganized county school land.**—The three hundred and twenty-five leagues of land heretofore surveyed under the provisions of an act entitled "An act to provide for designating and setting apart three hundred leagues of land out of the unappropriated public domain, for the benefit of the unorganized counties of the state, and to provide for the survey and location of the same," approved March 16, 1882, is set apart and shall constitute a reservation out of which each of the unorganized counties of this state, as it may be organized, shall be entitled to receive four leagues of land for free school purposes, and out of which such organized counties of this state as may have located their certificate for four leagues of school land in conflict with or upon land already appropriated by valid prior location and survey, or which from any cause have failed to get title to their four leagues of school land, shall be entitled to receive so much of said land as may be necessary to secure to any such county the number of acres it may be entitled to from any cause, or that may be declared to be in conflict by the commissioner of the general land office. [Acts 1883, p. 45.]

**Art. 4281. Shall be numbered, etc.**—Each of said leagues of land shall be numbered by the commissioner of the general land office, in the order in which it was surveyed by the contractor or contractors, beginning at number one and extending to three hundred and twenty-five, and as each of the unorganized counties in this state shall be organized such county shall be entitled to the first four leagues out of the reservation authorized by the foregoing provisions, which shall not have been patented to other counties for free school purposes. Upon the payment to the treasurer of the state the actual cost of surveying fees and legal interest thereon from time of payment by the state, and upon the payment of such costs and interest, the commissioner of the general land office is required to issue patents to said county for four leagues of land as above provided, but said counties shall not be required to pay patent fees for said patents. [Id. § 2.]

**Art. 4282. Lands, how obtained by counties.**—Any organized county in this state shall, in like manner as provided in the preceding articles, be entitled to receive so much of said land, not exceeding four leagues, as shall be necessary to secure to any such county the number of acres of land heretofore located by such county, and which shall be declared to be in conflict with prior locations and surveys by the commissioner of the general land office or by the decree or judgment of any court having jurisdiction of the subject-matter. And it shall be the duty of the commissioner of the general land office, upon the written application of the county judge and any two of the county commissioners, accompanied by the decision of the commissioner of the land office, or a certified copy of such decree or judgment, to issue patents to such county upon the same conditions and in like manner as is provided for unorganized counties; provided, if any such county should be entitled to receive a quantity less than one league such land shall be surveyed at the expense of such county, in a square figure with at least two lines thereof (where more than one line is run) commencing on lines of original survey as may be selected by the county judge of the county that is entitled to the survey. [Id. § 3.]

**Art. 4282a. Setting apart the four leagues granted to Greer county.**—

The four leagues of land heretofore patented to what is known as the territory of Greer county for free school purposes, under the provisions of an act entitled, "An act to reserve and set apart three hundred and twenty-five leagues of land heretofore surveyed for the benefit of the unorganized counties of the state, and such organized counties as may have located their four leagues of school land, or any part thereof in conflict with valid prior locations or surveys, or which from any cause fail to get title to the four leagues of land they are entitled to under the law," approved April 7th, 1883, be and the same is hereby set apart and appro-



provided for the support and maintenance of the public free schools of this state. [Acts 1897, p. 86, § 1.]

**Art. 4282b. Attorney-general to institute proceedings.**—The attorney-general of the state of Texas is hereby authorized to institute such proceedings as he deems necessary to recover said land against all adverse claims. [Id. § 2.]

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CHAPTER 3—SALE AND LEASE OF PUBLIC SCHOOL, UNIVERSITY AND ASYLUM LANDS

**Article 4283. Lands to be sold or leased.**—All lands heretofore or hereafter surveyed and set apart for the benefit of the public free schools, the university, the lunatic asylum, the blind asylum, the deaf and dumb asylum, and the orphan asylum, shall be sold and leased under the provisions of this chapter. [Acts 1887, p. 83, § 1.]

See art. 4218z, ante, and Art. 5405, Vernon's Sayles' Civ. St.

**Art. 4284. Commissioner to carry into effect, etc.**—The commissioner of the general land office is hereby vested with all the power and authority necessary to carry into effect the provisions of this chapter, and shall have full charge and direction of all matters pertaining to the sale and lease of said lands, and their protection from free use and occupancy, and from unlawful inclosure, with such exceptions and under such restrictions as may be imposed by the provisions of this chapter, or by the constitution of the state. He shall, as soon as practicable, adopt such regulations not inconsistent with the constitution or this chapter as may be deemed necessary for carrying into effect the provisions of this chapter, and may from time to time alter or amend such regulations so as to protect the public interest, but all regulations shall be submitted to the governor for his approval before adoption or promulgation. He shall adopt all necessary forms of applications for sales or leases, and all other forms necessary or proper for the transaction of business imposed upon him by this chapter, including the forms of leases, receipts and acquittances, and may from time to time call upon the attorney-general to prepare such forms, and it shall be the duty of that officer to furnish the commissioner of the general land office with such advice and legal assistance as may be requisite for the due execution of the provisions of this chapter; and it shall be the duty of such commissioner to call upon the attorney-general for advice whenever there is any doubt as to the meaning of this chapter or any provisions thereof. [Id. § 2.]

See Vernon's Sayles' Civ. St. Art. 5406.

**Art. 4285. Commissioner shall have classified and valued.**—The commissioner of the general land office shall cause all the lands belonging to the several funds named in this chapter which may be in demand for immediate settlement, to be carefully and skilfully classified and valued; and for this purpose he may appoint, with the approval of the governor, such number of competent state agents as may be necessary to effect such classification and valuation; and he shall cause such classification and valuation to be made of the remainder of such lands from time to time as the same may come into demand for actual settlement; and with the approval of the governor he may allow such compensation to said state agents as may be just and proper, not to exceed the sum of one hundred and fifty dollars per month and necessary expenses for subsistence. He may also appoint such other assistants as may be found necessary to accomplish such classification and appraisal and the sale or lease of the lands; but no state agents or other appointments shall be made in the absence of an appropriation by law to cover such expenditure, and the state shall not be liable for any expenditure of this character incurred in excess of the current appropriations. [Id. § 3.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4286. Agents to be appointed, how, etc.**—It shall be the duty of such state agents as may be appointed under the provisions of this chapter, under such regulations and instructions as may be prescribed by the commissioner of the general land office, to classify all the lands belonging to the several funds mentioned in this law, as prescribed in article 4285, lying in the particular territory to which such agent may be assigned, into agricultural, pasture and timber lands; and for this purpose they shall carefully examine the same, and after such examination they shall prepare an accurate plat of each section, showing the relative proportions of timber and open land on such section, and their situation, also

the quality of the soil, the topography of the land and the quality and kind of timber, and the streams and other sources of water supply, and their location, noting such streams as may be permanent water, and such other facts as may be important; and from time to time, as may be prescribed by the commissioner of the general land office, such agent shall prepare and forward to the commissioner, with such plats, a tabulated statement of all the lands in any particular locality, with the value of each section; and such plats and reports shall be filed in the general land office as a part of the records of said office; but nothing in this article contained shall be construed to require a classification of lands already classified under former laws, if such classification is satisfactory to the commissioner. [Id. § 4.]

See Vernon's Sayles' Civ. St. Art. 5410.

**Art. 4287. To be sold to actual settlers only; conditions.**—When any portion of said land has been classified to the satisfaction of the commissioner under the provisions of this chapter or former laws, such land shall be subject to sale, but to actual settlers only, and in quantities of not less than eighty acres and in multiples thereof, nor more than one section containing six hundred and forty acres, more or less; provided, that when there is a fraction less than eighty acres of any section left such fraction may be sold; but lands classified as purely pasture lands and without permanent water thereon may be sold in quantities not to exceed four sections to the same settler; and in no event shall sale be made to a corporation, either foreign or domestic, and all sales to a settler shall be upon the express condition that any sale or transfer of such land to any corporation, directly or indirectly, before patent is issued thereon, shall ipso facto terminate the title of the purchaser or owner, and such land shall be forfeited to the state without re-entry and become again a part of the particular fund to which it formerly belonged. [Id. § 5; amended Acts 1889, p. 50.]

See Vernon's Sayles' Civ. St. Arts. 5407, 5410, 5420.

**Art. 4288. County clerk to be notified of valuations.**—It shall be the duty of the commissioner of the general land office to notify in writing the county clerk of each county of the valuation fixed upon each section of land in his county, and in each county attached to it for judicial purposes, which he offers for sale, which notification shall be kept by the clerk in his office and recorded in a well-bound book, which shall be open to public inspection. [Id. § 6.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4289. Prices.**—All lands belonging to the public free schools, university and the several asylum funds, shall be sold at not less than two dollars per acre. All sections of land having permanent water on, or bordering thereon, shall be sold at not less than three dollars per acre, and no less than one hundred and sixty acres shall be sold, except in cases where a fractional part of a section less than one hundred and sixty acres is unsold, in which case the entire fractional part of such survey shall be sold; provided, that no watered portion of any section shall be sold unless there is permanent water on, or bordering on, the part of said section remaining unsold; and all timber land shall be sold at not less than five dollars per acre. By timber lands here used is meant lands valuable chiefly for the timber thereon. [Id. § 7.]

See Vernon's Sayles' Civ. St. Art. 5407.

**Art. 4290. Purchase, how made.**—Any *bona fide* actual settler who may reside on any part of the lands the sale of which is authorized by this chapter shall have the right, for a period of six months after the same shall have been appraised, to purchase such quantity of land as may be limited by this chapter, to include his improvements, upon complying with the provisions of this chapter regulating sales as in other cases, and such land shall be appraised without reference to the improvements thereon; provided, that any *bona fide* settler who has heretofore purchased or may hereafter purchase one section of agricultural or watered land, and no more, shall have the right to purchase three dry and strictly pastoral sections upon his making oath that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is directly or indirectly interested in the purchase of the same. [Id. § 8; amended Acts 1889, p. 50.]

See Vernon's Sayles' Civ. St. Arts. 5416, 5420, 5426, 5435.

**Art. 4291. Sales, how made.**—All sales shall be made by the commissioner of the general land office or under his direction, and he shall prescribe suitable regulations whereby all purchasers shall be required to reside upon, as a home.

the land purchased by them for three consecutive years next succeeding the date of their purchase. Such regulations shall require the purchaser to reside upon the land for the three consecutive years herein mentioned, and to make proper proof of such residence and occupancy to the commissioner of the general land office within one year next after the expiration of said three years by his affidavit, corroborated by the affidavits of three disinterested and credible citizens of the county, to be certified to by some officer of the county wherein the land is situated authorized to administer oaths. Any person desiring to purchase land in accordance with the provisions of this law shall forward his application to the commissioner, particularly describing the land sought to be purchased, which application shall in all cases, be accompanied with the affidavit of the applicant, in effect that he desires to purchase the land for a home, and has in good faith settled thereon; and he shall also swear that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase save himself. The purchaser shall transmit to the treasurer of the state one-fortieth of the aggregate purchase-money for the particular tract of land and send to the commissioner his obligation to the state duly executed, and binding the purchaser to pay to the state on the first day of August of each year thereafter until the whole purchase-money is paid, one-fortieth of the aggregate price with interest thereon from date at the rate of five per cent. per annum on the whole unpaid purchase-money, which interest shall also be payable on the first day of August of each year; and upon receipt of one-fortieth of the purchase-money by the treasurer, and the affidavit and obligation aforesaid by the commissioner, the sale shall be deemed and held effective from the date the affidavit and obligation are filed in the general land office; provided, that if the land applied for be timbered land, then the purchaser shall be required to pay the full amount of the purchase-money at the time of his purchase. [Id. § 9.]

See Vernon's Sayles' Civ. St. Arts. 5406, 5409-5411.

**Art. 4292. Option of purchaser to pay, when.**—All purchasers shall have the option of paying the purchase-money for their lands in full at any time after they have occupied the same for three consecutive years; and when they have made such payment in full, together with the proof that they have occupied the land and homestead for three consecutive years, they shall be entitled to receive patents for the same upon payment of the patent fees prescribed by law. Purchasers may also sell their land at any time after sale is effected under this law, and in such cases the vendee, or any subsequent vendee, may file his own obligation with the commissioner of the general land office, together with the duly authenticated conveyance, or transfer, from the original purchaser, and the intermediate vendee's conveyance or transfer, if any there be, duly recorded in the county where the land lies, or to which it may be attached for judicial purposes, together with his affidavit stating that he desires to purchase the land for a home, and that he has in good faith settled thereon, and that he is not acting in collusion with others for the purpose of buying the land for any other person or corporation, and that no other person or corporation is interested in the purchase save himself; and thereupon the original obligation may be surrendered or canceled, and the vendee shall become the purchaser direct from the state, and be subject to all the obligations and penalties prescribed by this law, and the original purchaser shall be absolved from further liability thereon; provided, that whenever a town shall be located and established upon any land sold under this or any former law, the purchaser or his vendee shall be permitted to pay the entire balance of principal and interest due the state upon such land, and obtain a patent therefor at any time; but no such payment shall be permitted or patent issue until such purchaser or owner of such land shall file in the general land office a certified plat of such town, made by the proper surveyor of the county, which shall be accompanied by the affidavit of the owner of such land, corroborated by the affidavit of five disinterested and credible citizens of the county, to the effect that a town, giving its name, has been located and established upon the land, and that there has been erected therein, and being occupied by *bona fide* citizens, twenty business and residence houses, or either or both. [Id. § 10.]

See Vernon's Sayles' Civ. St. Arts. 5436, 5438.

**Art. 4293. Time in which interest may be paid.**—If, upon the first day of November of any year, the interest due for the year next preceding on any obligation remains unpaid, the commissioner of the general land office shall indorse on such obligation "land forfeited," and shall cause an entry to that effect to be

made on the account kept with the purchaser, and thereupon said land shall be forfeited to the state, without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this chapter, or any future law; provided, if any purchaser shall die, his heirs or legal representatives shall have one year in which to make payment after the first day of November next after such death; and if any purchaser shall fail to reside upon and improve in good faith the land purchased by him, he shall forfeit said land and payment thereon made, to the state, in the same manner as for non-payment of interest, and such land shall again be for sale, as if no such sale or forfeiture had occurred; or, if he shall fail to make the proof of occupancy within the time and in the manner prescribed by the regulations of the commissioner of the general land office, as provided for in article 4291, he shall in like manner forfeit the land and all payments thereon to the state; provided further, that nothing in this section contained shall be construed to inhibit the state from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to protect any other right to such land; which suits may be instituted by the attorney-general under the direction of the governor, in the proper court of the county in which the land lies; provided, this article shall be printed on the back of the receipt. [Id. § 11; amended Acts 1889, p. 50; Acts 1891, p. 180; Acts 1893, p. 30.]

See Vernon's Sayles' Civ. St. Art. 5423.

**Art. 4294. Applications, etc., to remain on file in land office.**—The commissioner of the general land office shall retain in his custody as records of his office all applications, affidavits, obligations and all other papers relating to the sales of said lands, and shall cause to be kept accurate accounts with each purchaser. All purchase-money due upon lands, as well as accrued interest and all other moneys arising from the sales or leases of said lands, shall be paid by the purchaser or lessee direct to the treasurer of the state, and who shall execute duplicate receipts for all sums of money paid to him under the provisions of this law, one of which receipts shall be delivered to the purchaser or his agent and the other transmitted to the commissioner of the general land office. [Id. § 12.]

See Vernon's Sayles' Civ. St. Arts. 5414, 5449.

**Art. 4295. Sales of timber.**—The commissioner of the general land office shall adopt such regulations for the sale of the timber on timbered lands as may be deemed necessary and judicious, such regulations to be subject to the approval of the governor. Such timber shall not be sold for less than five dollars per acre cash, except in such cases as the commissioner may ascertain by definite examination of a state agent that any particular section is sparsely timbered or contains timber of but little value, in which case he shall be authorized to sell the timber on said section at the best price, on the best terms practicable; provided, such timber is sold at not less than two dollars per acre. And in no case shall less than one section of timbered land be sold to any purchaser, except in cases of fractional sections, which may be sold under the provisions of this chapter. The purchaser shall have five years from the date of his purchase within which to remove the timber therefrom, and in case of failure to do so, such timber shall be forfeited to the state without judicial ascertainment; provided, that all timbered lands from which the timber has been cut and taken off may be placed on the market and sold for not less than two dollars per acre, as other lands are sold under the provisions of this chapter. [Id. § 13; amended Acts 1889, p. 50.]

See Vernon's Sayles' Civ. St. Arts. 5429, 5430.

All persons who have heretofore purchased timber on the school lands in this state under the provisions of the act of April 1, 1887, and the acts amendatory thereof, and who have not when this act takes effect removed the timber purchased by them from said land, and all persons claiming under said purchaser, shall have two years in addition to the time specified in their several contracts of purchase in which they may remove the timber on said lands so purchased by them; provided, that such purchaser or purchasers, or those claiming under them, shall for the two years' extension herein provided for annually pay in advance to the state treasurer for the use of the available school fund, six per cent. interest on the purchase-money so paid for such timber so purchased by them respectively. [Acts 1895, p. 14.]

**Art. 4296. Terms of leases.**—The public lands, and all lands belonging to the public free schools, asylums, or university fund, shall be leased by the commissioner of the general land office under the provisions of this chapter. All of such lands lying west of the Pecos river, and all of such lands lying south of the Texas and Pacific railroad, except in the counties of Concho, McCulloch, Coke, Sterling, Glasscock, Midland, Ector, Tom Green, Howard and Martin, and all university lands, shall be leased for a period of not longer than ten years; and all other

such lands lying north of the Colorado river and north of the Texas and Pacific railroad, and the counties hereinbefore excepted from the ten years' lease, shall be leased for a period not longer than five years, and the lessee shall pay an annual rental of four cents per acre for all lands leased; provided, that the university lands may be leased at three cents per acre per annum; which rental shall be paid each year in advance, the first payment to be made at the time the lease is executed; and if at the termination of any lease any of such lands are not in demand for actual settlement they may be again leased for another five years, and the lessee thereof whose term of lease has expired shall have the refusal of such land as he has been leasing on the terms and at the price that may be fixed therefor by the commissioner of the general land office, and all leases shall be executed under the hand and seal of the commissioner of the general land office, and shall be delivered to the lessee or his duly authorized agent, and such leases shall not take effect until the first payment of annual rent is paid and the lease duly filed for record in the county where the land lies, or to which it may be attached for judicial purposes, and it shall not be necessary for the commissioner to acknowledge such lease before the same is placed on record. [Id. § 14; amended Acts 1889, p. 50; Acts 1891, p. 180.]

See Vernon's Sayles' Civ. St. Arts. 5452, 5453.

**Art. 4297. Application, etc., how made.**—Any person desiring to lease any portion of the public lands belonging to any of the funds mentioned in this chapter the sale and lease of which is not provided for by any other law, shall make application in writing to the commissioner of the general land office, specifying and describing the particular lands he desires to lease; thereupon the commissioner, if satisfied the lands are not in demand for purposes of actual settlement, and that such lands can be leased without detriment to the public interest, shall notify the applicant in writing that his proposition to lease is accepted, and thereupon he shall execute and deliver to the lessee in the name of the state a lease of said land for such terms as may be agreed upon, not longer than the period of time fixed by this chapter, according to its location, and deliver the same to such lessee when satisfied that the lessee has paid to the treasurer of the state the rental for one year in advance. No lands which are now or which may hereafter be classified as grazing lands within the territory where ten years lease is authorized, as set forth in the preceding article, shall be subject to sale during the term of the lease contract thereof, and the possession of the lessee shall not be disturbed during the term of his lease. [Id. § 15; amended Acts 1889, p. 50; Acts 1891, p. 180.]

See Vernon's Sayles' Civ. St. Art. 5452.

**Art. 4298. Rent to be paid, how.**—All lessees shall pay the annual rent due for leased lands directly to the treasurer of the state, who shall execute receipts in duplicate for each payment made by any lessee, one of which receipts shall be delivered to the lessee and the other transmitted to the commissioner of the general land office. The treasurer shall cause to be kept an accurate account with each lessee, and the commissioner of the general land office shall file in his office all applications and other papers relating to leases, and keep a record of all leases made, which papers shall constitute a part of the records of his office. [Id. § 16.]

**Art. 4299. Lease canceled, when.**—If any lessee shall fail to pay the annual rent due in advance for any year, within sixty days after such rent shall become due, the commissioner of the general land office may declare such lease canceled, by a writing under his hand and seal of office, which writing shall be filed with the papers relating to such lease, and thereupon said lease shall immediately terminate, and the lands so leased shall become subject to purchase or lease, as the commissioner may determine for the best interest of the state. And during the continuance of all leases, and after forfeiture, the state shall have a lien upon all the property upon the leased premises to secure the payment of all rents due, which lien shall be prior and superior to all other liens whatsoever, and it shall not be essential to the preservation or validity of such lien that it shall be reserved in the instrument of lease. [Id. § 17.]

See Vernon's Sayles' Civ. St. Art. 5456.

**Art. 4300. Land inclosed or used without authority.**—If the governor is informed at any time, upon the affidavit of some credible person, that any portion of the public lands, or lands belonging to the public free school, asylum or university funds, have been inclosed, or that fences have been erected thereon

without authority of law, he is authorized, in his discretion, to direct the attorney-general to institute suit in the name of the state for the recovery of such land and damages for the use and occupation of such land and the removal of such inclosures and fences. Such suit may be instituted in the district court of any county where the land, or a portion thereof, is situated, or in the district court of Travis county; and upon application of the attorney-general, and without affidavit or bond, the clerk of the court in which suit is instituted shall issue a writ of sequestration, directed to any sheriff of the state of Texas, commanding and requiring such officer to take such land and all property thereon into his actual custody, and the same hold subject to the further orders of the court. Such writ of sequestration may be executed by any sheriff of the state into whose hands it may be delivered, and it shall be the duty of any sheriff into whose hands it may come to proceed and execute such writ, and the governor is required, in his discretion, to furnish such sheriff with the necessary force of volunteer militia or other military force of the state to accomplish the purposes of the writ and to execute the process of the court. The defendant in such writ may replevy, as in ordinary cases, by giving bond as prescribed by law, and such cases shall have precedence on the docket and stand for trial before all other causes; and in case judgment is recovered by the state in such suit the court shall order such inclosures or fences to be removed, and shall tax the costs of the suit, including the cost of the military force, if any, against the defendant; and all property found upon the land belonging to the defendant shall be liable for such costs and damages in addition to the personal liability of the defendant. Appeals may be prosecuted from all judgments in such cases as in ordinary cases, except that the state shall not be required to give bond to perfect its appeal, and such cases on appeal shall have precedence over all other cases. [Id. § 20.]

See Vernon's Sayles' Civ. St. Art. 5467.

**Art. 4301. Lands may be withheld from lease, when.**—The commissioner of the general land office, under the direction of the governor, may withhold from lease any agricultural lands necessary for purposes of settlement, and no agricultural lands shall be leased if in the judgment of the commissioner they may be in immediate demand for settlement, but such lands shall be held for settlement and sold to actual settlers only, under the provisions of this law, and all sections or fraction of sections in all counties organized prior to the first day of January, 1875, except El Paso, Pecos and Presidio counties, which sections are detached and isolated from other public lands, may be sold to any purchaser, except to a corporation, without actual settlement, at not less than two dollars per acre, upon such terms as the commissioner of the general land office may prescribe. [Id. § 22; amended Acts 1889, p. 50.]

See Vernon's Sayles' Civ. St. Art. 5450. See, also, arts. 4218y, 4218z, ante.

**Art. 4302. Exempt from taxation.**—Leaseholds created under the provisions of this chapter shall be exempt from all taxation. [Id. § 24.]

**Art. 4303. Vested rights not to be disturbed.**—Nothing in this law shall be construed to impair, interfere with or in any manner affect any lease or sale, or the rights growing out of the same, made under former laws, of the lands herein referred to; provided, that any person or persons who have heretofore leased lands from this state at prices fixed by the land board, and whose leases have not yet expired, shall have their rental for the remainder of their unexpired term reduced to the prices charged under this law for the lease of similar lands. [Id. § 25.]

**Art. 4304. Regulations for issuance of patents.**—The commissioner of the general land office is authorized and required to issue patents to all parties purchasing university lands in accordance with the original subdivisions as made under the provisions of "An act authorizing the disposition and sale of university lands," approved August 30, 1856, where said subdivisions have been made and field-notes filed in the general land office in accordance with said act; and if it should appear from actual survey on the ground, conforming to the lines and corners of said original subdivisions, that there is any subdivision more or less than one hundred and sixty acres, the commissioner of the general land office shall issue patents for the number of acres contained in said subdivisions upon the purchaser paying into the state treasury the amount per acre that the subdivision may have been appraised at; provided, that this article shall not affect any rights heretofore acquired under existing laws relative to university lands. [Acts 1879, p. 39.]

**Art. 4305.**

Omitted, as repealed by the report of the joint committee on amendments to the Revised Civil Code, No. 79; Sen. Jour., 1895, p. 482.—Codifiers of 1895.

**Art. 4306. Lease of unorganized county school lands.**—The commissioner of the general land office is hereby authorized to lease for a term of not exceeding ten years, at a price not less than two cents per acre, the three hundred and twenty leagues of land set apart and surveyed in the year 1882 for the unorganized counties of the state, situated in the counties of Hockley, Cochran, Bailey, Lamb, Andrews, Martin, Dawson and Gaines, under the same rules and upon the same terms as are prescribed by law for the lease of the university lands. The proceeds of such lease shall be paid into the state treasury and become a part of the available school fund of the state. [Acts 1889, p. 108, § 1.]

**Art. 4307. Control to vest in county, when.**—Whenever any county entitled to said lands shall be organized, the control of said lands belonging to such county shall vest in the commissioners' court of such county, and any lease money thereafter becoming due shall be payable to such county, but all leases executed before such organization of the county shall be binding for the full term thereof. [Id. § 2.]

## CHAPTER 4—BRANCH UNIVERSITY FOR COLORED PEOPLE—PERMANENT ENDOWMENT

**Article 4307a. Appointment and bond of surveyor.**—The governor and commissioner of the general land office be and they are hereby authorized to contract with and appoint a competent surveyor to survey and return to the general land office plats and field-notes of one hundred thousand acres of land, to be surveyed out of any of the vacant public and unsurveyed lands of this state in the manner hereinafter provided. They shall contract with such competent surveyor at the lowest price consistent with competency and efficiency in discharging the duties of surveyor. If they deem it necessary they may advertise for bids from surveyors. The surveyor so appointed shall enter into a good and sufficient bond in a sum of not less than double the contract price of the surveys, conditioned that he will faithfully comply with the requirements of this chapter, which bond shall be payable to the governor of the state, and be approved by him. [Acts 1897, p. 148, § 1.]

**Art. 4307b. Surveys; record and return of field-notes.**—The commissioner of the general land office shall furnish the surveyor appointed under authority of this chapter with sketches showing connections with any existing and established corners from which he may begin the surveys. He shall survey the lands into sections of six hundred and forty acres and in blocks after the manner of the railway surveys now existing in this state, and shall make plats of each block and survey, numbering the blocks in numerical order, beginning with number one, and shall also number each section in each block in the same manner, beginning with number one in each block. In all cases he shall mark and establish two corners on the ground for each survey, and the lines between which, if in timber, shall be distinctly marked. Said corners shall be made with at least two bearings, if in timber, and if in prairie, by earth mounds six feet in diameter and three feet high, or with a pile of rocks not less than two feet high. He shall actually survey each section on the ground and sign the field-notes, himself, of each survey separately and have his chain carriers to attest the field-notes of each survey by their own signatures. The surveyor shall then certify that he actually surveyed the land embraced in the field-notes, on the ground, and that the field-notes correctly described the land. He shall have the field-notes of each survey and plat recorded in the surveyor's record of the county or counties in which the lands surveyed are situated or in the county to which such county may be attached for surveying purposes in the manner now required by law. He shall, however, first forward the field-notes of all surveys made in any county to the commissioner of the land office for examination both as to correctness and as to conflicts with older valid surveys, and upon their return to the surveyor, after being approved by the commissioner, they shall be recorded as above required. After the field-notes are recorded the said surveyor shall make a plat of each block of surveys according to the field-notes so made by him, and return same, together with the original field-notes, recorded, to the general land office. All the lands surveyed as required by this chapter shall thereafter be mapped in the land office and shall

be known and designated as the branch university surveys for the colored people. [Id. § 2.]

**Art. 4307c. Alternate sections to belong to university and free schools respectively; sales and leases.**—It shall be the duty of the commissioner to have the sections carefully numbered on the map in accordance with the field-notes of the surveys and blocks so returned by the surveyor. The odd-numbered surveys [sections?] shall thereafter be set apart and constitute a permanent endowment for a branch university for the colored people, and the even-numbered sections shall thereafter be set apart and constitute a permanent endowment for the public free schools of the state.

None of the odd-numbered lands surveyed, as required by this chapter, shall be put on the market and disposed of by the commissioner of the land office, but shall be under the control of the board of regents for the university of Texas, and held by the board in trust for the benefit of the said branch university for the colored people. All the funds received by said board for leases or sale of said lands shall be held sacred for the benefits and uses herein designated.

The commissioner shall not sell the even-numbered sections set apart herein for the public free school fund, but may lease the same to such persons only as may lease from the board of regents the odd numbers. Whenever the board may desire to sell said lands, they may contract for its [their] sale, and the purchaser, upon exhibiting to the commissioner of the land office such contract and depositing with him a duplicate copy of the same, [?] the commissioner may also sell the school sections corresponding with such odd numbers on the same terms and at the same price per acre as that embraced in the contract; provided, it shall not be sold for less than one dollar per acre: The proceeds to be paid into the treasury of the state, as now provided by law. [Id. § 3.]

See Arts. 4236a-4236c, ante.

**Art. 4307d. Certain vacant and unsurveyed public domain may be surveyed.**—Any of the vacant and unsurveyed public domain situated in any of the counties embraced in chapter XXXIII, approved March 11, 1881, may be surveyed for the purposes set out in this chapter, notwithstanding any reservation therein or elsewhere. [Id. § 4.]

All vacant and unappropriated land, situated in the following-named counties, viz.: Noland, Mitchell, Howard, Martin, Andrews, Gaines, Dawson, Borden, Scurry, Fisher, Stonewall, Kent, Garza, Lynn, Terry, Yoakum, Cochran, Hockley, Lubbock, Crosby, Dickens, King, Cottle, Motley, Floyd, Hale, Lamb, Bailey, Farmer, Castro, Swisher, Briscoe, Hall, Childress, Collingsworth, Donley, Armstrong, Randall, Deaf Smith, Oldham, Potter, Carson, Gray, Wheeler, Hemphill, Roberts, Hutchinson, Moore, Hartley, Sherman, Hansford, Ochiltree and Lipscomb be and the same is hereby appropriated and set apart for sale, together with all the unappropriated lands situated and being within and included in the Pacific reservation, and together with such separate tracts of unappropriated public lands situated in organized counties of this state, as contain not more than six hundred and forty acres; provided, that the three million and fifty thousand acres heretofore appropriated for the building of a state capitol shall have a preference right of location in the counties heretofore reserved for that purpose. The provisions of this act shall not be so construed as to prohibit the right of pre-empting within the bounds of the reservation here made, but any party shall have the same right of acquiring a homestead within this reservation under the pre-emption laws of this state as he may have had prior to the passage of this act. [Act March 11, 1881, p. 24, amending Act July 14, 1879.]

Compare Arts. 4200, 4253, 4268, ante.

**Art. 4307e. Forfeiture of contract.**—If any sale shall be made of the school lands herein as provided in article 4307d, and any payment of principal or interest shall not be made according to the contract of sale, it shall be the duty of the commissioner of the general land office to forfeit the contract without judicial ascertainment, as now provided by law, and the contract shall contain a stipulation authorizing such forfeiture which shall be signed by the purchaser. [Id. § 5.]

The act read "section 4 of this act." Section 3 (Art. 4307c) was probably intended. As to forfeitures, see Arts. 4218I-4218III, ante.

**Art. 4307f. Compensation of surveyor.**—The surveyor shall be paid by a warrant of the comptroller drawn on the treasurer of the state out of the general revenue upon the presentation to the comptroller of the certificate of the commissioner of the general land office certifying that the lands have been surveyed and field-notes and plats have been properly returned to the land office. He shall also reimburse in the same manner the contractor [surveyor] for any sum of money for fees which he may have paid to the county surveyor for recording field-notes and plats, not in excess of the fees now provided by law for such recording. [Id. § 6.]



## IV. LAWS OF THE UNITED STATES CONCERNING CITIZENS

(Being Title XXV of the Revised Statutes of the United States.)

**Sec. 1992. Who are citizens.**—All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States.

Act April 9, 1866, c. 31, § 1, 14 Stat. 27.

**Sec. 1993. Citizenship of children of citizens born abroad.**—All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.

Act April 14, 1802, c. 28, § 4, 2 Stat. 155. Act Feb. 10, 1855, c. 71, § 1, 10 Stat. 604.

**Sec. 1994. Citizenship of married women.**—Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen.

Act Feb. 10, 1855, c. 71, § 2, 10 Stat. 604.

**Sec. 1995. Of persons born in Oregon.**—All persons born in the district of country formerly known as the Territory of Oregon, and subject to the jurisdiction of the United States on the 18th May, 1872, are citizens in the same manner as if born elsewhere in the United States.

Act May 18, 1872, c. 172, § 3, 17 Stat. 134.

**Sec. 1996. Rights as citizens forfeited for desertion, etc.**—All persons who deserted the military or naval service of the United States and did not return thereto or report themselves to a provost-marshal within sixty days after the issuance of the proclamation by the President, dated the 11th day of March, 1865, are deemed to have voluntarily relinquished and forfeited their rights of citizenship, as well as their right to become citizens; and such deserters shall be forever incapable of holding any office of trust or profit under the United States, or of exercising any rights of citizens thereof.

Act March 3, 1865, c. 79, § 21, 13 Stat. 490.

**Sec. 1997. Certain soldiers and sailors not to incur the forfeitures of the last section.**—No soldier or sailor, however, who faithfully served according to his enlistment until the 19th day of April, 1865, and who, without proper authority or leave first obtained, quit his command or refused to serve after that date, shall be held to be a deserter from the Army or Navy; but this section shall be construed solely as a removal of any disability such soldier or sailor may have incurred, under the preceding section, by the loss of citizenship and of the right to hold office, in consequence of his desertion.

Act July 19, 1867, c. 28, 15 Stat. 14.

**Sec. 1998. Avoiding the draft.**—Every person who hereafter deserts the military or naval service of the United States, or who, being duly enrolled, departs the jurisdiction of the district in which he is enrolled, or goes beyond the limits of the United States, with intent to avoid any draft into the military or naval service, lawfully ordered, shall be liable to all the penalties and forfeitures of section nineteen hundred and ninety-six.

Act March 3, 1865, c. 79, § 21, 13 Stat. 490.

**Sec. 1999. Right of expatriation declared.**—Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs,

or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic.

Act July 27, 1868, c. 249, § 1, 15 Stat. 223.

**Sec. 2000. Protection to naturalized citizens in foreign states.**—All naturalized citizens of the United States, while in foreign countries, are entitled to and shall receive from this Government the same protection of persons and property which is accorded to native-born citizens.

Act July 27, 1868, c. 249, § 2, 15 Stat. 224.

Provisions for naturalization of aliens are contained in Title XXX, "Naturalization."

**Sec. 2001. Release of citizens imprisoned by foreign governments to be demanded.**—Whenever it is made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign government, it shall be the duty of the President forthwith to demand of that government the reasons of such imprisonment; and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen, and if the release so demanded is unreasonably delayed or refused, the President shall use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate the release; and all the facts and proceedings relative thereto shall as soon as practicable be communicated by the President to Congress.

Act July 27, 1868, c. 249, § 3, 15 Stat. 224.

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## V. LAWS OF THE UNITED STATES CONCERNING NATURALIZATION

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(Being Title XXX of the Revised Statutes of the United States, as Amended and Added to.)

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### **R. S. Sec. 2165.**

Repealed. Act June 29, 1906, c. 3592, § 26.

This section is expressly repealed by Act June 29, 1906, c. 3592, § 26, set forth below, and different provisions relating to the same subject are made by other sections of that act, also set forth below.

### **Act Feb. 1, 1876, c. 5.**

Superseded. Act June 29, 1906, c. 3592.

This act has become inoperative by the repeal of Rev. St. § 2165, mentioned therein, by Act June 29, 1906, c. 3592, § 26, set forth below.

### **R. S. Sec. 2166. Aliens honorably discharged from military service.**

Any alien of the age of twenty-one years and upwards, who has enlisted or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall in addition to such proof of residence and good moral character as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States. (Act July 17, 1862, c. 200, § 21, 12 Stat. 597.)

### **Act July 26, 1894, c. 165. Aliens honorably discharged from service in Navy or Marine Corps.**

\* \* \* Any alien of the age of twenty-one years and upwards who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to become such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps: \* \* \* (Act July 26, 1894, c. 165, 28 Stat. 124.)

This is a provision of the naval appropriation act for the fiscal year ending June 30, 1895, cited above.

**R. S. Secs. 2167, 2168.**

Repealed. Act June 29, 1906, c. 3592, § 26.

These sections are expressly repealed by Act June 29, 1906, c. 3592, § 26, set forth below, and different provisions relating to the same subjects are made by other sections of that act, also set forth below.

**R. S. Sec. 2169. Aliens of African nativity and descent.**

The provisions of this title shall apply to aliens, being free white persons, and to aliens of African nativity and to persons of African descent. (Act July 14, 1870, c. 254, § 7, 16 Stat. 256; Feb. 18, 1875, c. 80, 18 Stat. 318.)

This section is amended by Act Feb. 18, 1875, c. 80, cited above, by inserting after the words "The provisions of this Title shall apply to aliens" the words "being free white persons, and to aliens," as set forth here.

**Act May 6, 1882, c. 126, § 14. Chinese not to be naturalized.**

That hereafter no state court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed. (Act May 6, 1882, c. 126, § 14, 22 Stat. 61.)

**R. S. Sec. 2170. Residence of five years in United States.**

No alien shall be admitted to become a citizen, who has not for the continued term of five years next preceding his admission, resided within the United States. (Act March 3, 1813, c. 42, § 1, 2 Stat. 81.)

**R. S. Sec. 2171. Alien enemies not admitted.**

No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States; but persons resident within the United States, or the Territories thereof, on the eighteenth day of June, in the year one thousand eight hundred and twelve, who had before that day made a declaration, according to law, of their intention to become citizens of the United States, or who were on that day entitled to become citizens without making such declaration, may be admitted to become citizens thereof, notwithstanding they were alien enemies at the time and in the manner prescribed by the laws heretofore passed on that subject; nor shall anything herein contained be taken or construed to interfere with or prevent the apprehension and removal, agreeably to law, of any alien enemy at any time previous to the actual naturalization of such alien. (Act April 14, 1802, c. 28, § 1, 2 Stat. 153; July 30, 1813, c. 36, 3 Stat. 53.)

**R. S. Sec. 2172. Children of persons naturalized under certain laws to be citizens.**

The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any State, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen, without the consent of the Legislature of the State in which such person was proscribed. (Act April 14, 1802, c. 28, § 2, 2 Stat. 155.)

**R. S. Sec. 2173.**

Repealed. Act June 29, 1906, c. 3592, § 26.

This section is expressly repealed by Act June 29, 1906, c. 3592, § 26, set forth below. The courts on which jurisdiction to naturalize aliens is conferred are specified in section 3 of that act, also set forth below.

**R. S. Sec. 2174. Naturalization of seamen.**

Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any Act of Congress notwithstanding; but such seaman

shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen. (Act June 7, 1872, c. 322, § 29, 17 Stat. 268.)

**ACT JUNE 29, 1906, c. 3592.** [H. R. 15442.] [*As amended* 1910. H. R. 16871.]  
**Sec. 3. Exclusive jurisdiction to naturalize aliens conferred on courts specified; jurisdiction restricted to residents within judicial district; blank forms to be furnished; numbering and printing of certificates of naturalization.**

That exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts:

United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified, State, Territorial and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of Immigration and Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said Bureau. (Act June 29, 1906, c. 3592, § 3, 34 Stat. 596.)

Section 1 of this act changes the designation of the Bureau of Immigration in the Department of Commerce and Labor, to "Bureau of Immigration and Naturalization," and gives it charge of all matters concerning naturalization of aliens, and provides for registry of alien immigrants. Section 2 provides for furnishing offices, etc., and for additional assistants, clerks, and other employes for the Bureau of Immigration and Naturalization, for the discharge of the duties imposed upon it by this act.

**Sec. 4. Proceedings for naturalization.**

That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

**Declaration of intention; requisites and contents; prior declarations.**

First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

**Petition for admission to citizenship; requisites and contents; verification by witnesses; filing certificate of arrival in United States and declaration of intention.**

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time

of the filing of his petition: Provided, That if he has filed his declaration before the passage of this Act he shall not be required to sign the petition in his own handwriting.

Provided further, That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

**Declaration on oath in open court to support Constitution and laws of United States, and renunciation of other allegiance.**

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

**Evidence of residence, character, etc.; witnesses.**

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts

of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

**Renunciation of hereditary title, order of nobility, etc.**

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

**Naturalization of widows and minor children of aliens dying after declaration of intention before being actually naturalized.**

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this Act, be naturalized without making any declaration of intention. (Act June 29, 1906, c. 3592, § 4, 34 Stat. 596; June 25, 1910, c. 401, § 3, 36 Stat. 830.)

The amendment of this section by Act June 25, 1910, c. 401, § 3, cited above, consists in the addition to subdivision second thereof, after the proviso "That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting," of the further proviso inserted in said subdivision second as set forth here.

Previous provisions relating to the same subject as those of this section were contained in Rev. St. §§ 2165, 2167, 2168, repealed by section 26 of this act, set forth below.

Forms of declaration of intention, of petition for naturalization, and of affidavit of witnesses, required by this section, and of the certificate of citizenship to be issued thereon and the stub of such certificate, are prescribed by section 27 of this act, set forth below.

The mode of proof of residence required, in the petition and at the hearing thereon, is prescribed by section 10 of this act, set forth below.

When an alien, after declaration of intention, becomes insane before he is actually naturalized, and his wife thereafter makes a homestead entry under the land laws, she and their minor children may be naturalized without making declaration of intention, by Act Feb. 24, 1911, c. 151, set forth below.

The issue of passports to persons who have made declaration of intention to become citizens, and who have resided in the United States three years, is authorized by Act March 2, 1907, c. 2534, § 1.

**Sec. 5. Notice of filing of petition, hearing thereon, etc.; subpoenas for witnesses.**

That the clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpoena for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned. (Act June 29, 1906, c. 3592, § 5, 34 Stat. 598.)

**Sec. 6. Time for filing petition and for final action thereon; change of name of alien on his naturalization.**

That petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith. (Act June 29, 1906, c. 3592, § 6, 34 Stat. 598.)

**Sec. 7. Persons disbelieving or opposed to organized government, etc., or advocating, etc., the unlawful assaulting or killing of officers of government, or polygamists, not to be naturalized.**

That no person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches

the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States. (Act June 29, 1906, c. 3592, § 7, 34 Stat. 598.)

Previous provisions similar to those of this section were contained in Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222, repealed by section 26 of this act, set forth below.

Persons such as those described in and excluded from naturalization by this section, other than polygamists, are not to be permitted to enter the United States, and aiding or assisting any such person unlawfully to do so is punishable by Act Feb. 20, 1907, c. 1134, § 38.

**Sec. 8. Persons who cannot speak English language not to be naturalized; physical inability; prior declarations of intention; aliens making homestead entries on public lands.**

That no alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, That the requirements of this section shall not apply to any alien who has prior to the passage of this Act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands. (Act June 29, 1906, c. 3592, § 8, 34 Stat. 599.)

**Sec. 9. Final hearing on petition in open court; record of final order; examination of applicant and witnesses.**

That every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court. (Act June 29, 1906, c. 3592, § 9, 34 Stat. 599.)

**Sec. 10. Evidence of residence in petition and at hearing.**

That in case the petitioner has not resided in the State, Territory, or district for a period of five years continuously and immediately preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside. (Act June 29, 1906, c. 3592, § 10, 34 Stat. 599.)

**Sec. 11. Appearance by United States and proceedings in opposition to granting of petition.**

That the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings. (Act June 29, 1906, c. 3592, § 11, 34 Stat. 599.)

**Sec. 12. Duties of clerks of courts; duplicates, etc., of declarations, certificates, petitions, etc.; penalty for failure to comply with provisions; responsibility for blank certificates of citizenship.**

That it is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this Act to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of Immigration and Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the

court, the name of each and every alien who shall be denied naturalization, and to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of Immigration and Naturalization, and shall account for the same to the said Bureau whenever required so to do by such Bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said Bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said Bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned. (Act June 29, 1906, c. 3592, § 12, 34 Stat. 599.)

Possession of blank certificates of citizenship with intent unlawfully to use the same is punishable, under section 19 of this act, set forth below.

**Sec. 13. Fees of clerks of courts; disposition of fees collected; deposit by petitioner for expenses and fees of witnesses; compensation from fees for additional clerical force required.**

That the clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of Immigration and Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of Commerce and Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpoenaing and paying the legal fees of any witnesses for whom he may request a subpoena, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the Secretary of Commerce and Labor may allow salaries,



for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary the naturalization business of such clerk warrants further additional assistance: Provided, That in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: Provided further, That when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the Secretary of Commerce and Labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the Secretary of Commerce and Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this Act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of Commerce and Labor may prescribe. (Act June 29, 1906, c. 3592, § 13, 34 Stat. 600; June 25, 1910, c. 401, § 1, 36 Stat. 829.)

The amendment of this section by Act June 25, 1910, c. 401, § 1, cited above, consists in striking out the last sentence of the section as originally enacted, which read as follows: "And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance," and inserting in lieu thereof the provision beginning "And in case the clerk of any court exercising naturalization jurisdiction," etc., to and including the two provisos following, to the end of the section as set forth here.

A provision of Act March 4, 1909, c. 299, § 1, 35 Stat. 983, limiting the compensation for additional clerical assistance and providing for regulation of expenditures therefor, is superseded by said amendment of this section.

Provisions for payment for such additional clerical assistance employed during the period from Sept. 27, 1906, to June 30, 1907, were contained in section 2 of said amendatory act, Act June 25, 1910, c. 401, § 2, 36 Stat. 830.

Any clerk or other officer willfully neglecting to account for moneys received by him for naturalization proceedings, or to pay over any balance thereof due, is to be deemed guilty of embezzlement, and punishable therefor, by section 20 of this act, set forth below.

The demand, etc., or receipt by a clerk, etc., of other or additional fees or moneys in naturalization proceedings save those specified herein is a misdemeanor and punishable under section 21 of this act, set forth below.

**Sec. 14. Binding declaration of intention and petitions for naturalization as records of court; reference in certificate of naturalization to record of petition and stub of certificate.**

That the declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the volume number and page number of the stub of such certificate. (Act June 29, 1906, c. 3592, § 14, 34 Stat. 601.)

**Sec. 15. Cancellation of certificates fraudulently or illegally procured, or of certificates of persons taking permanent residence in foreign country; proceedings, order and judgment, records, etc.; certificates issued under prior laws.**

That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of Immigration and Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to notify the Bureau of Immigration and Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. (Act June 29, 1906, c. 3592, § 15, 34 Stat. 601.)

On conviction of any person of knowingly procuring naturalization in violation of the provisions of this act, the order admitting such person to citizenship is to be adjudged void, by section 23 of this act, set forth below.

A naturalized citizen who resides for two years in the foreign state from which he came, or for five years in any other foreign state, is to be presumed to have ceased to be an American citizen, by Act March 2, 1907, c. 2534, § 2.

**Secs. 16, 17.** Repealed. Act March 4, 1909, c. 321, § 341.

These sections, which made punishable forging, etc., certificates of citizenship, and engraving, etc., plates for counterfeiting such certificates, and other offenses in connection therewith, are incorporated in the act to codify, etc., the penal laws, Act March 4, 1909, c. 321, in chapter 4, §§ 74, 75, thereof, and are expressly repealed by chapter 15, § 341, of said act, taking effect January 1, 1910. These sections are set forth below, immediately following this act.

**Sec. 18. Issuance of certificate of citizenship contrary to provisions of act, a felony; punishment.**

That it is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this Act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court. (Act June 29, 1906, c. 3592, § 18, 34 Stat. 602.)

**Sec. 19.** Repealed. Act March 4, 1909, c. 321, § 341.

This section, which made punishable the having possession of any blank certificate of citizenship with intent unlawfully to use the same, is incorporated in the act to codify, etc., the penal laws, Act March 4, 1909, c. 321, in chapter 4, § 77, thereof, and is expressly repealed by chapter 15, § 341, of said act, taking effect January 1, 1910.

**Sec. 20. Neglect of clerk or other officer to account for or pay over balance of moneys received for naturalization proceedings, embezzlement; punishment.**

That any clerk or other officer of a court having power under this Act to naturalize aliens, who willfully neglects to render true accounts of moneys received by him for naturalization proceedings or who willfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprison-

ment for not more than five years, or by a fine of not more than five thousand dollars, or both. (Act June 29, 1906, c. 3592, § 20, 34 Stat. 602.)

**Sec. 21. Demand, etc., or receipt by clerk, etc., of fees or moneys other than those specified in act, a misdemeanor; punishment.**

That it shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, or to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. (Act June 29, 1906, c. 3592, § 21, 34 Stat. 602.)

**Sec. 22. False certification by clerk, etc., of appearance, oath, acknowledgment, etc., punishable.**

That the clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this Act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this Act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years. (Act June 29, 1906, c. 3592, § 22, 34 Stat. 603.)

**Sec. 23. Procuring naturalization illegally punishable, and on conviction thereof, order admitting to citizenship to be adjudged void; aiding, etc., unauthorized proceedings for naturalization, or procuring or giving false testimony, etc., therein punishable.**

That any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. (Act June 29, 1906, c. 3592, § 23, 34 Stat. 603.)

**Sec. 24. Limitation of prosecutions for crimes arising under provisions of act.**

That no person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime. (Act June 29, 1906, c. 3592, § 24, 34 Stat. 603.)

**Sec. 25. Prosecution of prior offenses under previously existing naturalization laws.**

That for the purpose of the prosecution of all crimes and offenses against the naturalization laws of the United States which may have been committed prior to the date when this Act shall go into effect, the existing naturalization law shall remain in full force and effect. (Act June 29, 1906, c. 3592, § 25, 34 Stat. 603.)

**Sec. 26. Repeal.**

That sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three, of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed. (Act June 29, 1906, c. 3592, § 26, 34 Stat. 603.)

**Sec. 27. Forms; declaration of intention; petition for naturalization; affidavit of witnesses; certificate of naturalization; stub of certificate.**

That substantially the following forms shall be used in the proceedings to which they relate:

Declaration of Intention.

(Invalid for all purposes seven years after the date hereof.)

\_\_\_\_\_, ss:

I, \_\_\_\_\_, aged \_\_\_\_\_ years, occupation \_\_\_\_\_, do declare on oath (affirm) that my personal description is: Color \_\_\_\_\_, complexion \_\_\_\_\_, height \_\_\_\_\_, weight \_\_\_\_\_, color of hair \_\_\_\_\_, color of eyes \_\_\_\_\_, other visible distinctive marks \_\_\_\_\_; I was born in \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, anno Domini \_\_\_\_\_; I now reside at \_\_\_\_\_; I emigrated to the United States of America from \_\_\_\_\_ on the vessel \_\_\_\_\_; my last foreign residence was \_\_\_\_\_. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to \_\_\_\_\_, of which I am now a citizen (subject); I arrived at the (port) of \_\_\_\_\_, in the State (Territory or District) of \_\_\_\_\_ on or about the \_\_\_\_\_ day of \_\_\_\_\_ anno Domini \_\_\_\_\_; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant) \_\_\_\_\_.

Subscribed and sworn to (affirmed) before me this \_\_\_\_\_ day of \_\_\_\_\_, anno Domini \_\_\_\_\_.

[L. S.] \_\_\_\_\_.

(Official character of attestor.)

Petition for Naturalization.

\_\_\_\_\_ Court of \_\_\_\_\_.

In the matter of the petition of \_\_\_\_\_ to be admitted as a citizen of the United States of America.

To the \_\_\_\_\_ Court:

The petition of \_\_\_\_\_ respectfully shows:

First. My full name is \_\_\_\_\_.

Second. My place of residence is number \_\_\_\_\_ street, city of \_\_\_\_\_, State (Territory or District) of \_\_\_\_\_.

Third. My occupation is \_\_\_\_\_.

Fourth. I was born on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_.

Fifth. I emigrated to the United States from \_\_\_\_\_, on or about the \_\_\_\_\_ day of \_\_\_\_\_, anno Domini \_\_\_\_\_, and arrived at the port of \_\_\_\_\_, in the United States, on the vessel \_\_\_\_\_.

Sixth. I declared my intention to become a citizen of the United States on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_, in the \_\_\_\_\_ court of \_\_\_\_\_.

Seventh. I am \_\_\_\_\_ married. My wife's name is \_\_\_\_\_. She was born in \_\_\_\_\_ and now resides at \_\_\_\_\_. I have \_\_\_\_\_ children, and the name, date, and place of birth and place of residence of each of said children is as follows: \_\_\_\_\_; \_\_\_\_\_; \_\_\_\_\_.

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to \_\_\_\_\_, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since \_\_\_\_\_, anno Domini \_\_\_\_\_, and in the State (Territory or District) of \_\_\_\_\_ for one year at least next preceding the date of this petition, to wit, since \_\_\_\_\_ day of \_\_\_\_\_, anno Domini \_\_\_\_\_.

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the \_\_\_\_\_ court of \_\_\_\_\_ at \_\_\_\_\_, and the said petition was denied by the said court for the following reasons and causes, to wit, \_\_\_\_\_, and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of inten-

tion to become a citizen of the United States and the certificate from the Department of Commerce and Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated \_\_\_\_\_.

(Signature of petitioner) \_\_\_\_\_.

\_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, anno Domini \_\_\_\_\_.

[L. S.]

\_\_\_\_\_,  
Clerk of the \_\_\_\_\_ Court.

Affidavit of Witnesses.

\_\_\_\_\_ Court of \_\_\_\_\_.

In the matter of the petition of \_\_\_\_\_ to be admitted a citizen of the United States of America.

\_\_\_\_\_, ss:

\_\_\_\_\_, occupation \_\_\_\_\_, residing at \_\_\_\_\_, and \_\_\_\_\_, occupation \_\_\_\_\_, residing at \_\_\_\_\_, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known \_\_\_\_\_, the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of \_\_\_\_\_ years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, nineteen hundred and \_\_\_\_\_.

[L. S.]

\_\_\_\_\_,  
(Official character of attestor).

Certificate of Naturalization.

Number \_\_\_\_\_.

Petition, volume \_\_\_\_\_, page \_\_\_\_\_.

Stub, volume \_\_\_\_\_, page \_\_\_\_\_.

(Signature of holder) \_\_\_\_\_.

Description of holder: Age, \_\_\_\_\_; height, \_\_\_\_\_; color, \_\_\_\_\_; complexion, \_\_\_\_\_; color of eyes, \_\_\_\_\_; color of hair, \_\_\_\_\_; visible distinguishing marks, \_\_\_\_\_. Name, age, and place of residence of wife, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_. Names, ages, and places of residence of minor children, \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_; \_\_\_\_\_, \_\_\_\_\_; \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_, ss:

Be it remembered, that at a \_\_\_\_\_ term of the \_\_\_\_\_ court of \_\_\_\_\_, held at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord nineteen hundred and \_\_\_\_\_, \_\_\_\_\_, who previous to his (her) naturalization was a citizen or subject of \_\_\_\_\_, at present residing at number \_\_\_\_\_ street, \_\_\_\_\_ city (town), \_\_\_\_\_ State (Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that —he was entitled to be so admitted, it was thereupon ordered by the said court that —he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord nineteen hundred and \_\_\_\_\_, and of our independence the \_\_\_\_\_.

[L. S.]

\_\_\_\_\_,  
(Official character of attestor.)



of citizenship; or whoever shall sell any such plate, or shall bring into the United States from any foreign place any such plate, except under the direction of the Secretary of Commerce and Labor or other proper officer; or whoever shall have in his control, custody, or possession any metallic plate engraved after the similitude of any plate from which any such certificate has been printed, with intent to use or to suffer such plate to be used in forging or counterfeiting any such certificate or any part thereof; or whoever shall print, photograph, or in any manner cause to be printed, photographed, made, or executed, any print or impression in the likeness of any such certificate, or any part thereof; or whoever shall sell any such certificate, or shall bring the same into the United States from any foreign place, except by direction of some proper officer of the United States; or whoever shall have in his possession a distinctive paper which has been adopted by the proper officer of the United States for the printing of such certificate, with intent unlawfully to use the same, shall be fined not more than ten thousand dollars, or imprisoned not more than ten years, or both. (Act March 4, 1909, c. 321, § 75, 35 Stat. 1102.)

**Sec. 76. False personation, etc., in procuring naturalization; punishment for.**

Whoever, when applying to be admitted a citizen, or when appearing as a witness for any such person, shall knowingly personate any person other than himself, or shall falsely appear in the name of a deceased person, or in an assumed or fictitious name; or whoever shall falsely make, forge, or counterfeit any oath, notice, affidavit, certificate, order, record, signature, or other instrument, paper, or proceeding required or authorized by any law relating to or providing for the naturalization of aliens; or whoever shall utter, sell, dispose of, or shall use as true or genuine, for any unlawful purpose, any false, forged, antedated, or counterfeit oath, notice, certificate, order, record, signature, instrument, paper, or proceeding above specified; or whoever shall sell or dispose of to any person other than the person for whom it was originally issued any certificate of citizenship or certificate showing any person to be admitted a citizen, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. (Act March 4, 1909, c. 321, § 76, 35 Stat. 1102.)

**Sec. 77. Using false certificate of citizenship; citizenship blanks; denying citizenship; punishment for.**

Whoever shall use or attempt to use, or shall aid, assist, or participate in the use of any certificate of citizenship, knowing the same to be forged, counterfeit, or antedated, or knowing the same to have been procured by fraud or otherwise unlawfully obtained; or whoever, without lawful excuse, shall knowingly possess any false, forged, antedated, or counterfeit certificate of citizenship purporting to have been issued under any law of the United States relating to naturalization, knowing such certificate to be false, forged, antedated, or counterfeit, with the intent unlawfully to use the same; or whoever shall obtain, accept, or receive any certificate of citizenship, knowing the same to have been procured by fraud or by the use or means of any false name or statement given or made with the intent to procure, or to aid in procuring, the issuance of such certificate, or knowing the same to have been fraudulently altered or antedated; or whoever, without lawful excuse, shall have in his possession any blank certificate of citizenship provided by the Bureau of Immigration and Naturalization with the intent unlawfully to use the same; or whoever, after having been admitted to be a citizen, shall, on oath or by affidavit, knowingly deny that he has been so admitted, with the intent to evade or avoid any duty or liability imposed or required by law, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. (Act March 4, 1909, c. 321, § 77, 35 Stat. 1102.)

**Sec. 78. Attempting to vote, etc., on false certificate; punishment for.**

Whoever shall in any manner use, for the purpose of registering as a voter, or as evidence of a right to vote, or otherwise unlawfully, any order, certificate of citizenship, or certificate, judgment, or exemplification, showing any person to be admitted to be a citizen, whether heretofore or hereafter issued or made, knowing that such order, certificate, judgment, or exemplification has been unlawfully issued or made; or whoever shall unlawfully use, or attempt to use, any such order or certificate, issued to or in the name of any other person, or in a fictitious name, or the name of a deceased person, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. (Act March 4, 1909, c. 321, § 78, 35 Stat. 1103.)

**Sec. 79. Falsely claiming citizenship; punishment for.**

Whoever shall knowingly use any certificate of naturalization heretofore or which hereafter may be granted by any court, which has been or may be procured through fraud or by false evidence, or which has been or may hereafter be issued by the clerk or any other officer of the court without any appearance and hearing of the applicant in court and without lawful authority; or whoever, for any fraudulent purpose whatever, shall falsely represent himself to be a citizen of the United States without having been duly admitted to citizenship, shall be fined not more than one thousand dollars, or imprisoned not more than two years, or both. (Act March 4, 1909, c. 321, § 79, 35 Stat. 1103.)

**Sec. 80. Falsely swearing in naturalization cases; punishment for.**

Whoever, in any proceeding under or by virtue of any law relating to the naturalization of aliens, shall knowingly swear falsely in any case where an oath is made or affidavit taken, shall be fined not more than one thousand dollars and imprisoned not more than five years. (Act March 4, 1909, c. 321, § 80, 35 Stat. 1103.)

**Sec. 81. Provisions applicable to all courts of naturalization.**

The provisions of the five sections last preceding shall apply to all proceedings had or taken, or attempted to be had or taken, before any court in which any proceeding for naturalization may be commenced or attempted to be commenced, and whether such court was vested by law with jurisdiction in naturalization proceedings or not. (Act March 4, 1909, c. 321, § 81, 35 Stat. 1103.)

**ACT JUNE 29, 1906, c. 3624. [H. R. 18713.]****Sec. 1. Naturalization certificates failing to show compliance with requirements of Act March 3, 1903, c. 1012, § 39, to be valid upon compliance therewith.**

Be it enacted, &c., That naturalization certificates issued after the Act approved March third, nineteen hundred and three, entitled "An Act to regulate the immigration of aliens into the United States," went into effect, which fail to show that the courts issuing said certificates complied with the requirements of section thirty-nine of said Act, but which were otherwise lawfully issued, are hereby declared to be as valid as though said certificates complied with said section: Provided, That in all such cases applications shall be made for new naturalization certificates, and when the same are granted, upon compliance with the provisions of said Act of nineteen hundred and three, they shall relate back to the defective certificates, and citizenship shall be deemed to have been perfected at the date of the defective certificate. (Act June 29, 1906, c. 3624, § 1, 34 Stat. 630.)

Act March 3, 1903, c. 1012, § 39, mentioned in this section, was not to be enforced, by a provision contained therein, until 90 days after the approval of the act. It is repealed by Act June 29, 1906, c. 3592, § 26, set forth above. It was as follows: "Sec. 39. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who has violated any of the provisions of this Act, shall be naturalized or be made a citizen of the United States. All courts and tribunals and all judges and officers thereof having jurisdiction of naturalization proceedings or duties to perform in regard thereto shall, on the final application for naturalization, make careful inquiry into such matters, and before issuing the final order or certificate of naturalization cause to be entered of record the affidavit of the applicant and of his witnesses so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization. All final orders and certificates of naturalization hereafter made shall show on their face specifically that said affidavits were duly made and recorded, and all orders and certificates that fail to show such facts shall be null and void. That any person who purposely procures naturalization in violation of the provisions of this section shall be fined not more than five thousand dollars, or shall be imprisoned not less than one nor more than ten years, or both, and the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication. That any person who knowingly aids, advises, or encourages any such person to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars or imprisoned not less than one nor more than ten years, or both. The foregoing provisions concerning naturalization shall not be enforced until ninety days after the approval hereof." Section 2 of this act validates certain proceedings in the criminal court of Cook county, Ill.



ACT FEB. 24, 1911, c. 151. [S. 9443.]

**Sec. 1. Naturalization of wife making homestead entry and minor children of aliens becoming insane after declaration of intention before being actually naturalized.**

Be it enacted, &c., That when any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws be naturalized without making any declaration of intention. (Act Feb. 24, 1911, c. 151, 36 Stat. 929.)

A similar provision in case of death of an alien after declaration of intention is contained in Act June 29, 1906, c. 3592, § 4, subd. 6, set forth above.

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## VI. LAWS OF THE UNITED STATES RELATING TO REMOVAL OF CAUSES FROM STATE TO FEDERAL COURTS

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(Being Chapter Three of the Federal Judicial Code.)

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**Sec. 28. Removal of suits from State to United States district courts.**

—Any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the district courts of the United States are given original jurisdiction by this title, which may now be pending or which may hereafter be brought, in any State court, may be removed by the defendant or defendants therein to the district court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the district courts of the United States are given jurisdiction by this title, and which are now pending or which may hereafter be brought, in any State court, may be removed into the district court of the United States for the proper district by the defendant or defendants therein, being nonresidents of that State. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different States, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the district court of the United States for the proper district. And where a suit is now pending, or may hereafter be brought, in any State court, in which there is a controversy between a citizen of the State in which the suit is brought and a citizen of another State, any defendant, being such citizen of another State, may remove such suit into the district court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said district court that from prejudice or local influence he will not be able to obtain justice in such State court, or in any other State court to which the said defendant may, under the laws of the State, have the right, on account of such prejudice or local influence, to remove said cause: Provided, That if it further appear that said suit can be fully and justly determined as to the other defendants in the State court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said district court may direct the suit to be remanded, so far as relates to such other defendants, to the State court, to be proceeded with therein. At any time before the trial of any suit which is now pending in any district court, or may hereafter be entered therein, and which has been removed to said court from a State court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said State court, the district court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof, and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in said State court, it shall cause the same to be remanded thereto. Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly

removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed: Provided, That no case arising under an Act entitled "An Act relating to the liability of common carriers by railroad to their employés in certain cases," approved April twenty-second, nineteen hundred and eight, or any amendment thereto, and brought in any State court of competent jurisdiction shall be removed to any court of the United States.

Act March 3, 1911, c. 231, § 28, 36 Stat. 1094.  
See Act March 3, 1875, c. 137, § 2, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, 25 Stat. 433.

**Sec. 29. Procedure for removal.**—Whenever any party entitled to remove any suit mentioned in the last preceding section, except suits removable on the ground of prejudice or local influence, may desire to remove such suit from a State court to the district court of the United States, he may make and file a petition, duly verified, in such suit in such State court at the time, or any time before the defendant is required by the laws of the State or the rule of the State court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the district court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such district court, within thirty days from the date of filing said petition, a certified copy of the record in such suit, and for paying all costs that may be awarded by the said district court if said district court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the State court to accept said petition and bond and proceed no further in such suit. Written notice of said petition and bond for removal shall be given the adverse party or parties prior to filing the same. The said copy being entered within said thirty days as aforesaid in said district court of the United States, the parties so removing the said cause shall, within thirty days thereafter, plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if it had been originally commenced in the said district court.

Act March 3, 1911, c. 231, § 29, 36 Stat. 1095.  
See Act March 3, 1875, c. 137, § 3, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433.

**Sec. 30. Suits under grants of land from different States.**—If in any action commenced in a State court the title of land be concerned, and the parties are citizens of the same State and the matter in dispute exceeds the sum or value of three thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim, and shall rely upon, a right or title to the land under a grant from a State, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other State, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial. If he or they inform the court that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this chapter, remove the cause for trial to the district court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim.

Act March 3, 1911, c. 231, § 30, 36 Stat. 1096.  
See Rev. St. § 647, Comp. St. 1901, p. 524; Act March 3, 1875, c. 137, § 3, 18 Stat. 470; Act March 3, 1887, c. 373, § 1, 24 Stat. 552; Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433.

**Sec. 31. Removal of causes against persons denied any civil rights, etc.**—When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or can not enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal

rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the State court to furnish such defendant, petitioning for a removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the district court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process; and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the case in the district court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause; and, in case of his default, may order a nonsuit, and dismiss the case at the costs of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the district court, as herein provided, a certificate, under the seal of the district court, stating such failure, shall be given, and upon the production thereof in said State court the cause shall proceed therein as if no petition for removal had been filed.

Act March 3, 1911, c. 231, § 31, 36 Stat. 1096.  
See Rev. St. § 641.

**Sec. 32. When petitioner is in actual custody of State court.**—When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said district court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of said writ, to take the body of the defendant into his custody, to be dealt with in said district court according to law and the orders of said court, or, in vacation, of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ.

Act March 3, 1911, c. 231, § 32, 36 Stat. 1097.  
See Rev. St. § 642.

**Sec. 33. Suits and prosecutions against revenue officers, etc.**—When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law; or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law; or when any suit is commenced against any person for on account of anything done by him while an officer of either House of Congress in the discharge of his official duty, in executing any order of such House, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the district court next to be holden in the district where the same is pending, upon the petition of such defendant to said district court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit, and, together with a certificate signed by an attorney or counselor at law of some court of record of the State where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court, if in session, or if it be not, to the clerk thereof at his office, and shall be filed in said office. The cause shall thereupon be entered on the docket of the district court, and shall proceed as a cause originally commenced in that court; but all bail and other security given upon such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. When the suit is commenced in the State court by summons, subpoena, petition, or other process except *capias*, the

clerk of the district court shall issue a writ of certiorari to the State court, requiring it to send to the district court the record and proceedings in the cause. When it is commenced by *caus* or by any other similar form or proceeding by which a personal arrest is ordered, he shall issue a writ of habeas corpus cum causa, a duplicate of which shall be delivered to the clerk of the State court, or left at his office, by the marshal of the district or his deputy, or by some person duly authorized thereto; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be held to be removed to the district court, and any further proceedings, trial, or judgment therein in the State court shall be void. If the defendant in the suit or prosecution be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the cause according to law and the order of the district court, or, in vacation, of any judge thereof; and if, upon the removal of such suit or prosecution, it is made to appear to the district court that no copy of the record and proceedings therein in the State court can be obtained, the district court may allow and require the plaintiff to proceed *de novo* and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said district court. On failure of the plaintiff so to proceed, judgment of non *prosequitur* may be rendered against him, with costs for the defendant.

Act March 3, 1911, c. 231, § 33, 36 Stat. 1097.

See Rev. St. § 643; Act March 3, 1875, c. 130, § 8, 18 Stat. 401; Act Feb. 8, 1894, c. 25, § 1, 28 Stat. 36.

**Sec. 34. Removal of suits by aliens.**—Whenever a personal action has been or shall be brought in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States, being a non-resident of that State wherein jurisdiction is obtained by the State court, by personal service of process, such action may be removed into the district court of the United States in and for the district in which the defendant shall have been served with the process, in the same manner as now provided for the removal of an action brought in a State court by the provisions of the preceding section.

Act March 3, 1911, c. 231, § 34, 36 Stat. 1098.

See Rev. St. § 644.

**Sec. 35. When copies of records are refused by clerk of State court.**—In any case where a party is entitled to copies of the records and proceedings in any suit or prosecution in a State court, to be used in any court of the United States, if the clerk of said State court, upon demand, and the payment or tender of the legal fees, refuses or neglects to deliver to him certified copies of such records and proceedings, the court of the United States in which such records and proceedings are needed may, on proof by affidavit that the clerk of said State court has refused or neglected to deliver copies thereof, on demand as aforesaid, direct such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such records and proceedings had been regularly before the said court.

Act March 3, 1911, c. 231, § 35, 36 Stat. 1098.

See Rev. St. § 645.

**Sec. 36. Previous attachment bonds, orders, etc., remain valid.**—When any suit shall be removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the State court shall hold the goods or estate so attached or sequestered, to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which said suit was commenced. All bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

Act March 3, 1911, c. 231, § 36, 36 Stat. 1098.

See Rev. St. § 646; Act March 3, 1875, c. 137, § 4.

**Sec. 37. Suits improperly in district court may be dismissed or remanded.**—If in any suit commenced in a district court, or removed from a State

court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just.

Act March 3, 1911, c. 231, § 37, 36 Stat. 1098.

See Act March 3, 1875, c. 137, § 5, 18 Stat. 472; Act March 3, 1887, c. 373, § 6, 24 Stat. 555; Act Aug. 13, 1888, c. 866, § 6, 25 Stat. 436.

**Sec. 38. Proceedings in suits removed.**—The district court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said district court, and the same proceedings had been taken in such suit in said district court as shall have been had therein in said State court prior to its removal.

Act March 3, 1911, c. 231, § 38, 36 Stat. 1098.

See Act March 3, 1875, c. 137, § 6.

**Sec. 39. Time for filing record; return of record, how enforced.**—In all causes removable under this chapter, if the clerk of the State court in which any such cause shall be pending shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall, on conviction thereof in the district court of the United States to which said action or proceeding was removed, be fined not more than one thousand dollars, or imprisoned not more than one year, or both. The district court to which any cause shall be removable under this chapter shall have power to issue a writ of certiorari to said State court commanding said State court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this chapter for the removal of the same, and enforce said writ according to law. If it shall be impossible for the parties or persons removing any cause under this chapter, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said State court refuses to furnish a copy, on payment of legal fees, or for any other reason, the district court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty, as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said district court shall require the other party to plead, and said action or proceeding shall proceed to final judgment. The said district court may make an order requiring the parties thereto to plead de novo; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

Act March 3, 1911, c. 231, § 39, 36 Stat. 1099.

See Act March 3, 1875, c. 137, § 7.

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## VII. LAWS OF THE UNITED STATES RELATING TO RECEIVERS

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(Being sections 65 to 68 of chapter 4 of the Federal Judicial Code.)

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**Sec. 65. Receivers to manage property according to State laws.**—Whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the State in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver

or manager who shall willfully violate any provision of this section shall be fined not more than three thousand dollars, or imprisoned not more than one year, or both.

Act March 3, 1911, c. 231, § 65, 36 Stat. 1104.  
See Act March 3, 1887, c. 373, § 2.

**Sec. 66. Suits against receiver.**—Every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such manager or receiver was appointed so far as the same may be necessary to the ends of justice.

Act March 3, 1911, c. 231, § 66, 36 Stat. 1104.  
See Act March 3, 1887, c. 373, § 3.

**Sec. 67. Certain persons not to be appointed or employed as officers of courts.**—No person shall be appointed to or employed in any office or duty in any court who is related by affinity or consanguinity within the degree of first cousin to the judge of such court.

Act March 3, 1911, c. 231, § 67, 36 Stat. 1105.  
See Act March 3, 1887, c. 373, § 7, 24 Stat. 555; Act Aug. 13, 1888, c. 366, § 7, 25 Stat. 437.

**Sec. 68. Certain persons not to be masters or receivers.**—No clerk of a district court of the United States or his deputy shall be appointed a receiver or master in any case, except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment.

Act March 3, 1911, c. 231, § 68, 36 Stat. 1105.  
See Act March 3, 1879, c. 133.

## VIII. BOUNDARIES OF TEXAS

**Eastern and Northern Boundary.** TREATY OF LIMITS WITH MEXICO CONCLUDED AT MEXICO JANUARY 12, 1828; RATIFICATION ADVISED BY SENATE APRIL 4, 1832; RATIFIED BY PRESIDENT; RATIFICATIONS EXCHANGED AT WASHINGTON APRIL 5, 1832; PROCLAIMED APRIL 5, 1832:

The limits of the United States of America with the bordering territories of Mexico have been fixed and designated by a solemn treaty, concluded and signed at Washington on the twenty-second day of February, in the year of our Lord one thousand eight hundred and nineteen, between the respective plenipotentiaries of the government of the United States of America on the one part, and that of Spain on the other; and whereas the said treaty having been sanctioned at a period when Mexico constituted a part of the Spanish monarchy, it is deemed necessary now to confirm the validity of the aforesaid treaty of limits, regarding it as still in force and binding between the United States of America and the United Mexican States. With this intention, the president of the United States of America has appointed Joel Roberts Poinsett their plenipotentiary, and the president of the United Mexican States their excellencies Sebastian Camacho and Jose Ygnacio Esteva; and the said plenipotentiaries, having exchanged their full powers, have agreed upon and concluded the following articles:

Article 1. The dividing limits of the respective bordering territories of the United States of America and of the United Mexican States being the same as were agreed and fixed upon by the above mentioned treaty of Washington, concluded and signed on the twenty-second day of February, in the year one thousand eight hundred and nineteen, the two high contracting parties will proceed forthwith to carry into full effect the third and fourth articles of said treaty, which are herein recited as follows:

Article 2. The boundary line between the two countries west of the Mississippi shall begin on the Gulf of Mexico, at the mouth of the river Sabine, in the sea, continuing north along the western bank of that river to the thirty-second degree of latitude; thence by a line due north to the degree of latitude where it strikes the Rio Roxo, of Natchitoches, or Red river; then following the course of the Rio Roxo westward to the degree of longitude one hundred west from London and twenty-three from Washington; then crossing the said Red river, and running thence by a line due north to the river Arkansas; thence, following the course of the

southern bank of the Arkansas to its source, in latitude forty-two north; and thence by that parallel of latitude to the South Sea; the whole being as laid down in Mellish's map of the United States, published at Philadelphia, improved to the first of January, one thousand eight hundred and eighteen. But if the source of the Arkansas river shall be found to fall north or south of latitude forty-two, then the line shall run from the said source due south or north, as the case may be, till it meets the said parallel of latitude forty-two, and thence along the said parallel to the South Sea, all the islands in the Sabine, and the said Red and Arkansas rivers, throughout the course thus described, to belong to the United States of America; but the use of the waters and the navigation of the Sabine to the sea, and of the said rivers Roxo and Arkansas, throughout the extent of the said boundary on their respective banks, shall be common to the respective inhabitants of both nations. The two high contracting parties agree to cede and renounce all their rights, claims, and pretensions to the territories described by the said line; that is to say, the United States hereby cede to his Catholic Majesty, and renounce forever, all their rights, claims, and pretensions to the territories lying west and south of the above described lines; and, in like manner, his Catholic Majesty cedes to the said United States all his rights, claims, and pretensions to any territories east and north of the said line; and, for himself, his heirs, and successors, renounces all claim to the said territories forever.

Article 3. To fix this line with more precision and to place the landmarks which shall designate exactly the limits of both nations, each of the contracting parties shall appoint a commissioner and a surveyor, who shall meet before the termination of one year from the date of the ratification of this treaty, at Natchitoches, on the Red river, and proceed to run and mark the said line, from the mouth of the Sabine to the Red river, and from the Red river to the river Arkansas, and to ascertain the latitude of the source of the said river Arkansas, in conformity to what is above agreed upon and stipulated, and the line of latitude forty-two to the South Sea. They shall make out plans and keep journals of their proceedings; and the result agreed upon by them shall be considered as part of this treaty, and shall have the same force as if it were inserted therein. The two governments will amicably agree respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary. [U. S. Revised Statutes, part 2, p. 474.]

**Eastern Boundary.** CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF TEXAS RELATIVE TO BOUNDARY, CONCLUDED AT WASHINGTON APRIL 25, 1838; RATIFICATION ADVISED BY SENATE MAY 10, 1838; RATIFIED BY PRESIDENT OCTOBER 4, 1838; RATIFICATIONS EXCHANGED AT WASHINGTON OCTOBER 12, 1838; PROCLAIMED OCTOBER 13, 1838.

Whereas, the treaty of limits made and concluded on the twelfth day of January, in the year of our Lord one thousand eight hundred and twenty-eight, between the United States of America on the one part and the United Mexican States on the other, is binding upon the Republic of Texas, the same having been entered into at a time when Texas formed a part of the said United Mexican States; and, whereas, it is deemed proper and expedient, in order to prevent future disputes and collisions between the United States and Texas in regard to the boundary between the two countries as designated by the said treaty, that a portion of the same should be run and marked without unnecessary delay. The president of the United States has appointed John Forsyth their plenipotentiary, and the president of the Republic of Texas has appointed Memucan Hunt its plenipotentiary; and the said plenipotentiaries, having exchanged their full powers, have agreed upon and concluded the following articles:

Article 1. Each of the contracting parties shall appoint a commissioner and surveyor, who shall meet, before the termination of twelve months from the exchange of the ratifications of this convention, at New Orleans, and proceed to run and mark that portion of the said boundary which extends from the mouth of the Sabine, where that river enters the Gulf of Mexico, to the Red river. They shall make out plans and keep journals of their proceedings, and the result agreed upon by them shall be considered as part of this convention, and shall have the same force as if it were inserted therein. The two governments will amicably agree respecting the necessary articles to be furnished to those persons, and also as to their respective escorts, should such be deemed necessary.

Article 2. And it is agreed that until this line shall be marked out, as is provided for in the foregoing article, each of the contracting parties shall continue to exercise jurisdiction in all territory over which its jurisdiction has hitherto been

exercised; and that the remaining portion of the said boundary line shall be run and marked at such time hereafter as may suit the convenience of both the contracting parties, until which time each of the said parties shall exercise, without the interference of the other, within the territory of which the boundary shall not have been so marked and run, jurisdiction to the same extent to which it has been heretofore usually exercised. [U. S. Revised Statutes, part 2, p. 754.]

**Eastern Boundary.** By the Act of Dec. 19, 1836, the boundaries of the state of Texas are defined as follows: Beginning at the mouth of the Sabine river, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande; thence up the principal stream of said river to its source; thence due north to the forty-second degree of north latitude; thence along the boundary line as defined in the treaty between the United States and Spain, to the beginning; and that the president be, and is hereby authorized and required to open a negotiation with the government of the United States of America, as soon as in his opinion the public interest requires it, to ascertain and define the boundary line as agreed upon in said treaty. [1 Cong. p. 133.]

By the Act of Nov. 24, 1849, the eastern boundary of the state is defined as follows: In accordance with the consent of the congress of the United States, given by an act of said congress, approved July 5, 1848, the eastern boundary of the state of Texas be, and the same is hereby extended so as to include within the limits of the state of Texas, the western half of Sabine pass, Sabine lake and Sabine river from its mouth as far north as the thirty-second degree of north latitude; and that the several counties of this state, bounded by said Sabine pass, Sabine lake and Sabine river from its mouth as far north as the thirty-second degree of north latitude, shall have and exercise jurisdiction over such portions of the western half of said pass, lake and river as are opposite to said counties respectively; and this act shall take effect from and after its passage. [3 Leg. p. 4.]

**Western Boundary.** The boundary line between Mexico and Texas, as defined in the treaty between the United States and Mexico, Feb. 2, July 4, 1848, U. S. Revised Statutes, p. 494, is as follows: The boundary line between the two republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called the Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico.

By the treaty between the United States and Mexico, Dec. 30, 1853, June 30, 1854, R. S. p. 503, the boundary line is established as follows, so far as it relates to Texas: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo, thence as defined in the said article, up the middle of that river to the point where the parallel of 31° 47' north latitude crosses the same.

By the joint resolution of Feb. 11, 1850, it was declared: That all territory which lies east of the Rio Grande and a line running north from the source of the Rio Grande to the forty-second degree of north latitude, and south of the forty-second degree of north latitude, and west and south of the line designated in the treaty between the United States and the late Republic of Texas, of right belongs to the state of Texas, is included within her rightful civil and political jurisdiction, and the state of Texas will maintain the integrity of her territory. [3 Leg. p. 207.]

**Northwestern Boundary.** By the Act of Nov. 25, 1850, the northwestern boundary of Texas was defined as follows: The state of Texas will agree that her boundary on the north shall commence at the point at which the meridian of 100° west from Greenwich is intersected by the parallel of 36° 30' north latitude, and shall run from said point due west to the meridian of 103° west from Greenwich; thence her boundary shall run due south to the 32d degree of north latitude; thence on the said parallel of 32° of north latitude to the Rio Bravo del Norte; and thence with the channel of said river to the Gulf of Mexico.

The state of Texas cedes to the United States all her claim to territory exterior to the limits and boundaries which she agrees to establish by the first article of this agreement. [3 Leg. S. S. p. 4.]

**Western Boundary.** CONVENTION BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF MEXICO, TOUCHING THE BOUNDARY LINE BETWEEN THE TWO COUNTRIES WHERE IT FOLLOWS THE BED OF THE RIO GRANDE AND THE RIO COLORADO. RATIFIED SEPTEMBER 13, 1886. STATUTES SECOND SESSION, 49 CONG. TREATIES, ETC., P. 37.



Whereas in virtue of the 5th article of the treaty of Guadalupe Hidalgo between the United States of America and the United States of Mexico, concluded February 2, 1848, and of the first article of that of December 30, 1853, certain parts of the dividing line between the two countries follow the middle of the channel of the Rio Grande and the Rio Colorado, to avoid difficulties which may arise through the changes of channel to which those rivers are subject, through the operation of natural forces, the government of the United States of America and the government of the United States of Mexico have resolved to conclude a convention \* \* \* as follows:

Article 1. The dividing line shall forever be that described in the aforesaid treaty and follow the centre of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

Article 2. Any other change, wrought by the force of the current, whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

Article 3. No artificial change in the navigable course of the river, by building jetties, piers or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the aforesaid commissions in 1852 or as determined by article 1 hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

Article 4. If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention.

Article 5. Rights of property in respect of lands which may have become separated through the creation of new channels as defined in article 2 hereof, shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged. In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of article 7 of the aforesaid treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice throughout the actually navigable main channels of the said rivers, from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of said rivers through the changes herein provided against, may be comprised within the territory of one of the two nations.

ACT MAY 2, 1882 (17 Leg. S. S. p. 5).

**Sec. 1. Boundary shall be run and marked by a joint commission.** The governor of this state be and he is hereby authorized and empowered to appoint a suitable person, or persons, who, in conjunction with such person, or persons, as may be appointed by, or on behalf of, the United States, for the same purpose, shall run and mark the boundary lines between the territories of the United States and the state of Texas, as follows: Beginning at a point where a line drawn north from the intersection of the thirty-second degree of north latitude with the western bank of the Sabine river, crosses Red river and thence following the course of said river westwardly to the degree of longitude one hundred west from London, and twenty-three degrees west from Washington, as said line was laid down in Melish's map of the United States, published at Philadelphia, improved to the first of January, 1818, and designated in the treaty between the United States and Spain, made February 22, A. D. 1819.

**Sec. 2. Line to be located by actual surveys, etc.** Said joint commission will report their survey, made in accordance with the foregoing section of this act, together with all necessary notes, maps, and other papers, in order that in fixing that part of the boundary between the territories of the United States and the state of Texas the question may be definitely settled as to the true location of the one-hundredth degree of longitude west from London, and whether the north fork of Red river, or the Prairie Dog fork of said river, is the true Red river designated in the treaty between the United States and Spain made February 22, 1819; and in locating said line said commissioners shall be guided by actual surveys and measurements, together with such well established marks, natural and artificial, as may be found, and such well authenticated maps as may throw light upon the subject.

**Sec. 3. Survey made, when; corner established.** Such commissioner, or commissioners, on the part of Texas, shall attempt to have said survey, herein provided for by the joint commission, made and performed between the first day of July and the first day of October of the year in which said survey is made, when the ordinary stage of water in each fork of said Red river may be observed; and when the main or principal Red river is ascertained as agreed upon in said treaty of 1819, and the point is fully designated where the one-hundredth degree of longitude west from London, and twenty-third degree of longitude west from Washington, crosses said Red river, the same shall be plainly marked and defined as a corner in said boundary, and said commissioner shall establish such other permanent monuments as may be necessary to mark their work.

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## IX. APPORTIONMENT ACT OMITTED FROM PRINTED SESSION LAWS OF THIRTY- SECOND LEGISLATURE

**Section 1.** That the seventh supreme judicial district of the state of Texas be and the same is hereby created, and the same shall be composed of the following counties to-wit: Dallam, Sherman, Hansford, Ochiltree, Lipscomb, Hartley, Moore, Hutchinson, Roberts, Hemphill, Oldham, Potter, Carson, Gray, Wheeler, Deaf Smith, Randal, Armstrong, Donley, Collingsworth, Farmer, Castro, Swisher, Brisco, Hall, Childress, Bailey, Lamb, Hale, Floyd, Motley, Cottle, Foard, Hardeman, Wilbarger, King, Dickens, Crosby, Lubbock, Hockley, Cochran, Yoakum, Terry, Lynn, Garza, Kent, Scurry, Borden, Dawson and Gaines, and the courts shall be held therein in the city of Amarillo, in Potter county; provided, the citizens of said city of Amarillo shall furnish and properly equip, without cost or expense to the state a suitable room for holding the sessions of said court, a library room, and such other rooms as shall be necessary for the use of the judges, clerk and other officers and employes of said court, and shall also furnish the necessary, reasonable and proper law library for the use of said court.

**Sec. 2.** The governor shall as soon as practicable after this Act takes effect, by and with the advice and consent of the senate, if in session, appoint one chief justice and two associate justices, each of whom shall be a bona fide resident within the territorial limits of the seventh supreme judicial district and shall possess the qualifications required by law for such judges, who shall hold their respective offices until the next general election, and shall constitute the court of civil appeals within and for the said seventh supreme judicial district, and thereafter the judges of said court shall be elected and qualified as required by law.

**Sec. 3.** The court of civil appeals of the seventh supreme judicial district shall hold its sessions at the city of Amarillo in Potter county, and its regular terms shall begin on the first Monday in October of each year and shall remain in session until the first Monday in July of each succeeding year; provided, however, that should it be in term time when the judges of said court are appointed and qualified, as herein provided, then the said judges shall, within thirty days after their appointment and qualification, appoint a suitable person, resident of said district, as clerk of said court, and such other officers, stenographer and employes as may be necessary for said court of civil appeals, which appointed officers shall take the oath of office and execute the bonds required by law for such officers. And within thirty days thereafter the said court shall be convened and proceed with

the transaction of business for the remainder of the term, after which the regular terms shall be held as above provided.

**Sec. 4.** That the clerk of the court of civil appeals of the second supreme judicial district shall, after this Act takes effect, forthwith prepare and certify transcripts of all orders in cases then pending in said second court of civil appeals taken there by appeal or writ of error from the courts of any of the counties named in the first section of this Act, which cases have not theretofore been submitted to said second court of civil appeals, and shall likewise prepare and certify a bill of all costs accrued in said court in such cases, including express charges, and transfer said cases by express to the clerk of the court of civil appeals of the seventh supreme judicial district, who shall enter the same upon the docket of said seventh court of civil appeals in the order of their filings in the second court of civil appeals, and he shall, when collected, promptly remit to the clerk of the second court of civil appeals all such costs as shall have accrued in said last named court; provided, nevertheless that said second court of civil appeals shall have jurisdiction and authority to finally dispose of all cases, from any of said counties, submitted to it before the taking effect of this Act, the same as if this Act had never passed.

**Sec. 5.** That all laws and parts of laws in conflict with this Act be and the same are hereby repealed.

*Note.*—The above act was passed by the 32d legislature and was sent to the governor on March 11, 1911, the day of adjournment. The governor vetoed the bill on April 3, 1911, and the act was not included in the printed session laws. It was held in *Southern Pac. Co. v. Sorey*, 140 S. W. 334, that the veto was ineffectual, as it occurred more than 20 days after adjournment of the legislature, and that the act of March 11, 1911, creating the seventh supreme judicial district, being the later expression of the legislature, superseded Acts 1911, p. 269, creating the seventh and eighth districts, in so far as the two acts were in conflict. The result is that Dawson and Scurry counties are transferred from the second district to the seventh, and Gaines and Borden are transferred from the eighth to the seventh district. Acts 1913, p. 7, however, restores Gaines and Borden to the eighth district. The apportionment table is therefore correct, except that Dawson and Scurry should be ascribed to the seventh district.

The decision of the supreme court also affects Fisher county. That county was placed in the second district by the Revised Statutes of 1911. Acts 1911, p. 269, transfers this county to the seventh district. The act of March 11, 1911, makes no mention of Fisher county. The court holds that the two bills passed at the 32d legislature are to be construed as a single act, and that, so construed, Fisher county remains in the seventh district.